McGILL LAW JOURNAL
Montreal
Vol. 22 1976 *No. 4*

The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law

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Introduction

The following discussion will examine Newfoundland's claims to the territorial sea and the continental shelf. The Canadian constitutional ambiguity concerning offshore issues has been reflected in other federal coastal countries. The Supreme Court of Canada, in the recent case of *Re: Offshore Mineral Rights,* faced with this constitutional ambiguity, invoked provincial history in an attempt to resolve the conflicting claims. Newfoundland's claims must therefore be put in an historical perspective; we will examine the relevant pre-Confederation statutes and case law of Newfoundland, and to a lesser extent, of Nova Scotia, New Brunswick, and Prince Edward Island. But there are considerations other than constitutional ones; the Newfoundland offshore arguments must be assessed in light of the international law of the continental shelf, especially as developed in Australia.

1. Problems of offshore federalism

Following the September 1975 elections in Newfoundland, a confrontation was anticipated between St. John's and the federal government over Newfoundland offshore gas and oil, which is claimed both by the province and Ottawa. Newfoundland at that time was pre-

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paring to bring its case before the Supreme Court.[1] The incentive was obvious; exploration had only begun, but the amount of petroleum hidden beneath the Labrador Sea seemed to be vast.[2] The newly re-elected Premier, Frank Moores, declared:

> 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 and gas to satisfy the needs of our small population, but we want the first shot at what we have.[3]

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[1] See "Newfoundland: Last Harrumph" *Time Canada,* Sept. 29, 1975, 11, 13. The Hon. T. Alex Hickman, Minister of Justice, Newfoundland, expects a Reference to be made sometime during 1977. See G. Halverson, "Newfoundland — how to exploit its riches", *The Christian Science Monitor,* October 18, 1976, at p.20:

> "Some analysts here [St John's, Newfoundland] believe there will be a federal-provincial struggle over Newfoundland oil and gas — with Ottawa interested in using the oil and gas to light Toronto and Montreal homes, and Newfoundland seeking to use the energy sources for its own industrial development."

and G. Halverson, "Would undersea oil wealth spoil Newfoundland?", *The Christian Science Monitor,* October 19, 1976, at p.11:

> "The Federal Government of Canada covets eventual jurisdiction over any oil find here with Newfoundland arguing instead for "provincial" control. Indeed, complaints here [St John's, Newfoundland] are mounting that Newfoundland may have made a mistake in not seeking a negotiated share of eventual revenues with the federal government. Other maritime Canadian provinces, for their part, have negotiated for a 75 percent share of offshore oil and gas revenues.
>
> In any event, the federal-Newfoundland impasse is expected to be resolved by the Supreme Court of Canada within the next several years.
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> In the meantime, according to Brian Peckford, Minister of Mining, Newfoundland may be able to reach a compromise with Ottawa between now and the time of a court decision."

[2] *Time Canada, ibid.* In 1976, Newfoundland's Assistant Deputy Minister for Energy, Steven M. Millan, estimated a substantial offshore oil discovery over the 1976-1981 period to have a probability of some 70 per cent. Jean Louis Corgnet, operations manager for Eastcan, Ltd, declared in late 1976 that about $100 million had been invested in oil-gas exploration. (In October 1976 three exploratory rigs were being operated by B.P. Exploration Canada, Ltd, and by Eastcan.) Sufficient gas and oil was thought present off the Newfoundland-Labrador coast to have led to 52 drilling projects by October 1976, including 10 on the Labrador shelf, 11 in the east Newfoundland-Avalon Uplift area, and 31 in the Grand Banks region. Three gas finds (including one that implied oil deposits) had been established by that point in time. See Halverson, Oct. 18, Oct. 19, *ibid.*

[3] "Moores: If Necessary We Will Secede", *Time Canada, ibid.,* 13. As late as the autumn of 1976 the population of Newfoundland approximated only one-half million: Halverson, Oct. 18, Oct. 19, *ibid.*

The story is a familiar one. Canada and other English-speaking federal states have not been alone in facing federal offshore controversies. Malaysia too has encountered federal offshore disputes.[4] Sarawak and Sabah at one point issued continental shelf exploration permits. Malaysia, however, after an agreement was reached in Kuala Lumpur with Indonesia on the division of the shelf, asserted that it enjoyed exclusive competence respecting the seabed regions adjacent to Sarawak and Sabah.[5]

Federal offshore problems have been encountered also by the Federal Republic of Germany.[6] Under West German municipal law doubts arose at least as early as a decade ago about offshore resources rights: Did they belong to the federation's coastal states or to the federal government?[7] The issue of the continental shelf became acute in the Federal Republic of Germany following the discovery of oil at the Ems River mouth and of natural gas basins close to the coast of the Netherlands.[8] Canada parallels West Germany in that the offshore issue became salient to the federal government only after riches were uncovered.[9] As represented by a joint Superior Mining Authority, the Mines Office of Clausthal-Zellersfeld, the four coastal Länder (states) of Lower Saxony, Schleswig-Holstein, Bremen and Hamburg as of 1963 gave, under certain terms, a concession to the German North Sea Consortium (a minimum of four foreign-controlled firms included) to prospect for and exploit continental shelf resources.[10] The Länder prudently granted that concession only to the extent to which they were empowered by international as well as municipal law.[11]

The 1958 Geneva Convention on the Continental Shelf[12] came into effect in June 1964, yet as late as 1967 Bonn had failed to recognize the validity of the Mines Office concession. It was not until

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[4] J. Prescott, *The Political Geography of the Oceans* (1975), 170.

[5] D.P. O'Connell, *The Federal Problem Concerning the Maritime Domain in Commonwealth Countries* (1970) 1 J. of Maritime L. & Commerce 389, 411, citing (1969) 66 Far Eastern Econ. Rev. 277.

[6] *Supra*, note 4, 170.

[7] R. Young, *Offshore Claims and Problems in the North Sea* (1965) 59 A.J.I.L. 505, 513, citing von Münch, *Die Ausnutzung des Festlandsockels von der deutschen Nordseeküste* (1964) 11 Archiv des Völkerrechts 393.

[8] J. Brossard, *Les Pouvoirs Extérieurs du Québec* (1967), 331.

[9] "Only in recent years has more extensive exploitation of the resources of the bed of the sea become practicable and the question of the ownership of these resources acquired importance." G. LaForest, *Natural Resources and Public Property Under the Canadian Constitution* (1969), 104.

[10] *Supra*, note 8, 331; D.P. O'Connell, *Problems of Australian Coastal Jurisdiction* (1968) 42 Australian L.J. 39, 45.

[11] *Supra*, note 8, 331.

[12] 499 U.N.T.S. 311; T.I.A.S. No.5578; reprinted in (1958) 52 A.J.I.L. 858.

the 1958 Geneva Convention came into operation that Bonn hurried to proclaim for itself the sovereign and exclusive right to the German shelf, and to forbid prospecting or development embarked upon without its authority.[13] A federal proclamation of January 20, 1964 announced that:

> To remove legal uncertainties, which could originate in the present situation until the effective date of the Geneva Convention on the Continental Shelf and until its ratification by the Federal Republic of Germany, the Federal Government holds it necessary to determine at present as follows:
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> 1. On the basis of general international law, as it is expressed in the more recent practice of states and especially in the Geneva Convention on the Continental Shelf, the Federal Government regards as an exclusive sovereign right of the Federal Republic of Germany the exploration and exploitation of the natural resources of the seabed and subsoil of the submarine zone adjacent to the German sea coast beyond German territorial waters to a depth of 200 meters, and beyond this depth so far as the depth of the waters above permits the exploitation of the natural resources. In particular, the delimitation of the German continental shelf in relation to the continental shelf of foreign states is reserved for agreements with these states.
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> 2. The Federal Government regards as inadmissible all actions which may be done on the German continental shelf for the purpose of exploration and exploitation of its natural resources without the express consent of the proper German authorities. If necessary, it will institute suitable measures against such actions.[14]

But in July 1965 the federal parliament, at least provisionally, authorized the Mines Office to grant limited duration concessions, although the federal parliament itself set the concession development rules concerning continental shelf mining.[15]

The issue of the division of the continental shelf between Germany and Denmark, unresolved until after the February 20, 1969 International Court of Justice decision in the *North Sea Continental Shelf Cases*,[16] postponed the solution of the West German problem of Bund-Länder relations.[17] As the January 20, 1964 federal proclamation suggests, in West Germany the federal question of continental shelf rights was seen as "governed by theoretical considerations concerning the shelf as much as by the constitutional relations between the Bund and the Länder".[18]

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[13] *Supra*, note 8, 331.

[14] *Supra*, note 7, 513, citing Bundesgesetzblatt II (1964), 104; (1964) 11 Archiv des Völkerrechts 488.

[15] *Supra*, note 8, 332.

[16] [1969] I.C.J. 3.

[17] O'Connell, *supra*, note 10, 45.

[18] *Ibid.*, 45, citing Seidl-Hohenveldern, "Der deutsche Festlandsockel und die Bundesländer" in *Festschrift für Hermann Jahrreis* (1964).

The controversy over the exploitation of offshore mineral wealth experienced in Malaysia, West Germany and certain English-speaking federal states could have been avoided had their constitutions expressly addressed the matter.

The constitution of the United Mexican States declares:

> In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands ... In the Nation is likewise vested the ownership of the waters of the territorial seas, within the limits and terms fixed by international law ... 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.[19]

Canada of course enjoyed no such easy resolution of her difficulty:

> Unfortunately, that much-maligned document, the British North America Act, does not provide a clear-out solution to the problem although the Act does give the provinces sole jurisdiction over all resources located *within their boundaries*.[20]

2. The British Columbia precedent

The leading Canadian decision concerning the offshore region is *Re: Offshore Mineral Rights of British Columbia*,[21] heard on reference from the Governor in Council.[22]

The inquiry dealt with the seabed and subsoil extending seaward from the low-water mark of the British Columbia coast (excluding inland water regions) to the outer limit of Canada's territorial sea. It was asked whether such lands were the property of Canada or of British Columbia, whether Canada or British Columbia had the right to explore and exploit such lands, and whether Canada or British Columbia had legislative jurisdiction over them.[23] As well, the ownership of the seabed and subsoil resources beyond Canada's territorial sea, as between Canada and British Columbia was put into question. Had Canada or British Columbia the right to exploit such resources, and had Canada or British Columbia legislative jurisdiction over the resources?[24]

The Supreme Court, in assessing the pre-Confederation claim of British Columbia in 1871 to the territorial sea, regarded of major

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[19] Constitution of Mexico 1917 as am. 1972, art.27, para.4, 5 and art.48.

[20] R. Logan, "Parting the Waters — Canadian Style" in R. Gentilcore (ed.), *Geographical Approaches to Canadian Problems* (1971), 199 (italics in original).

[21] [1967] S.C.R. 792.

[22] *Ibid.*, 796.

[23] *Ibid.*

[24] *Ibid.*

significance the 1876 decision in *R.* v. *Keyn*.[25] The facts in *Keyn* were that 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 passing through English territorial waters with a destination other than England.[26] A plea of jurisdiction was entered by the accused, who asserted that inasmuch as the offence was committed outside the United Kingdom, aboard a foreign ship, by a foreigner, the offense was not within the English Criminal Court's jurisdiction.[27]

The Canadian Supreme Court understood that the *Keyn* transaction would have been within the jurisdiction of the English Criminal Courts had it transpired within an English county; whether the county encompassed the territorial sea was directly in question in *Keyn*. The Court of Crown Cases Reserved held that English territory ended at low-water mark, the English Criminal Courts, therefore, having no jurisdiction.[28]

Considering its reliance on *Keyn*, it was understandable that the Supreme Court of Canada held that the territorial sea lay outside the limits of British Columbia in 1871 and did not become part of the Province of British Columbia following union with Canada. It also held that British Columbia acquired no jurisdiction over either territorial sea or the continental shelf following union with Canada, thus answering all the questions put to it in favour of the federal government.[29]

The Supreme Court of Canada looked at the historical factors involved in the British Columbia controversy:

> British Columbia can only succeed on this branch of the case if it is found that the solum was situate in British Columbia in 1871 at the time of British Columbia's entry into Confederation...[30]
>
> The sovereign state which has the property in the bed of the territorial sea is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands.[30a]

The decision was based on the unique historical situation of British Columbia and not upon any abstract legal principle:

> We have already said that, in our opinion, in 1871 the Province of British Columbia did not have ownership or property in the territorial sea and

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[25] (1876-77) 2 Ex.D. 63.
[26] [1967] S.C.R. 796, 803.
[27] *Ibid.*, 803-04.
[28] *Ibid.*, 804.
[29] *Ibid.*, 814, 821-22.
[30] *Ibid.*, 800.
[30a] *Ibid.*, 816.

> that the province had not, since entering into confederation, acquired such ownership or property. We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the colony rights to which the British Crown was entitled under international law but the historical record of the colony does not disclose any such action.[31]

In appraising the prospects of Newfoundland and of other coastal provinces successfully claiming their respective territorial seas and continental shelves an examination of provincial history is therefore necessary.

In making this examination reference will be made to the December 17, 1975 opinion of the High Court of Australia in the case of *New South Wales* v. *Commonwealth*,[32] in which it was held that the boundaries of the states of the Australian Commonwealth end at the low-water mark on the coast.

In the *New South Wales* decision (as in *Re: Offshore Mineral Rights*) the Court looked to the colonial offshore during the Imperial period and saw it as attaching directly to the United Kingdom, and not to the colony. As Chief Justice Barwick of the High Court explained:

> If one had in the days of Empire to describe the Imperial territorial waters which were adjacent to an Imperial colony, one would not unnaturally speak of the waters as the colonial territorial waters, not in the sense that the colony itself had dominion over these waters but in the sense that it was a colony with a littoral, thus attracting to Great Britain as the nation state the international concession of dominion over them: the expression described the location of those territorial waters which washed the shores of the Imperial colonial territory. The dominion over those waters was, in my opinion, exercisable in the case of the British Empire by the Imperial executive or Imperial legislature.[33]

But in following the Canadian pro-federal government precedent the High Court of Australia echoed the language of the Supreme Court of Canada, leaving open the door for the Newfoundland offshore claim.

Compare the passage from *Re: Offshore Mineral Rights*[34] (admitting that the British Crown might have bestowed upon her colony the offshore rights to which the British Crown was entitled under international law) with this passage from the 1975 opinion of Chief Justice Barwick:

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[31] *Ibid.*, 808.

[32] (1975) 8 A.L.R. 1.

[33] *Ibid.*, 7-8. *Ibid.*, 89, *per* Mason J: "The territorial sea surrounding the Australian colonies was, in the eye of international law, British territorial waters."

[34] *Supra*, pp.546-547.

> Suffice it to say that the Imperial Crown, as representing the Empire, had at all relevant times dominion according to international law over the Imperial territorial seas. Had the Imperial authorities been minded to do so, they could have placed such part of these territorial waters as washed the shores of a colony within the control of the government of that colony as representing the Imperial Executive and Legislature. But Great Britain as the nation state must have remained responsible internationally for the performance of the obligations associated with the territorial sea. The Imperial Parliament could have authorized the executive to place the colonial territorial seas under the control of the appropriate colony: but no statute of the Imperial Parliament did so.[35]

Newfoundland can argue that just such control of the colonial territorial sea *was* conferred prior to her pre-1949 assumption of provincial status.

To be sure, the Barwick language of representation and of control over the colonial offshore may relate only to the potential for a colony to enjoy as agent, without being sovereign. But if Chief Justice Barwick would have been influenced by the existence of an agency relationship in deciding the 1975 offshore claims, how much more persuasive might he have found a pre-union history entailing the *actual* sovereignty of a member state which had enjoyed dominion status prior to union? If a mere agency control over the offshore during the pre-federal period would have strengthened Australian state claims, actual sovereignty during the pre-federal period would seem all the more greatly to strengthen Newfoundland claims.

The 1949 Terms of Union uniting Newfoundland and Canada directed that the British North America Acts, 1867 to 1946, should apply to Newfoundland in the same way and to the same extent as they applied to the provinces (*e.g.*, British Columbia) already in Confederation, as if Newfoundland had been one of the original provinces (except insofar as varied by those 1949 Terms).[36] The 1949 Terms provide that as a province Newfoundland should comprise the same territory as at the date of Union, including "the island of Newfoundland and the islands adjacent thereto, the Coast of Labrador . . ., and the islands adjacent to the said Coast of Labrador".[36a]

Whether the coast and islands encompassed offshore regions might be clarified by Newfoundland's 1949 rights under international law. The 1949 Terms of Union provide that:

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[35] (1975) 8 A.L.R.1, 12.

[36] Schedule of Terms of Union Newfoundland with Canada, *British North America Act, 1949*, 12-13 Geo. VI, c.22, s.3.

[36a] 12-13 Geo. VI, c.22, s.2.

> Subject to these Terms, all laws in force in Newfoundland at or immediately prior to the date of Union shall continue therein as if the Union had not been made, subject nevertheless to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the British North America Acts, 1867 to 1946, and all orders, rules, and regulations made under any such laws shall likewise continue, subject to be revoked or amended by the body or person that made such orders, rules, or regulations or the body or person that has power to make such order, rules, regulations after the date of Union, according to their respective authority under the British North America Acts, 1867 to 1946.[36b]

Perhaps Newfoundland had, arguably (thanks to international law) offshore rights, such enforceable offshore claims amounting to "laws in force in Newfoundland" as of 1949. Admittedly, the word "arguably" is *à propos* here; "laws in force" generally are understood to mean statutes and statutory regulations.

3. Newfoundland statutory law

Newfoundland began in 1893 to enact hovering legislation[37] exercising jurisdiction in at least a three-mile offshore belt. The *Foreign Fishing Vessels Act* of that year for example provided, in part, that any foreign fishing vessel hovering in British waters within three marine miles of any of the coasts or bays of the island might be boarded by any Justice of the Peace, Sub-Collector, Preventive Officer, Fishing Warden or Constable.[38] Any one of these officers was empowered to bring the foreign vessel into port, search her cargo and examine her master under oath.[39] These same powers were delineated in the *Foreign Fishing Vessels Act* of 1905[40] and again in the *Foreign Fishing Vessels Act* of 1906.[41]

This Newfoundland hovering legislation, and the pre-Confederation hovering legislation of other coastal provinces, is especially instructive. The Supreme Court of Canada found the 1867 federal hovering legislation inconsistent with the theory that British Columbia possessed as part of its territory the *solum* of the territorial sea.[42] If the converse were true, pre-Confederation colonial hovering

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[36b] 12-13 Geo. VI, c.22, s.18(1).

[37] *Supra*, note 9, 101.

[38] *An Act respecting Foreign Fishing Vessels*, 1893, 56 Vict. c.6, s.2 (Nfld).

[39] 56 Vict., c.6, s.3.

[40] *An Act respecting Foreign Fishing Vessels*, 1905, 5 Edw. VII, c.4, s.1 (Nfld).

[41] *An Act respecting Foreign Vessels*, 1906, 6 Edw. VII, c.1 (Nfld).

[42] *Re: Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792, 806, citing *The Customs Act 1867*, 31 Vict. c.6, s.83.

legislation would help to establish that a colony may have possessed as part of its territory the *solum* of the territorial sea. Newfoundland and other coastal provinces could only benefit.

The *Customs Act* of March 30, 1898[43] was a device whereby Newfoundland exercised jurisdiction in the three mile offshore region; one provision of that Act stated that Customs officers might board any vessel at any time or place.[44] The *Crown Lands Act, 1930* related to applications for the licenses of mining locations covered by the sea or public tidal waters[45] and to "the holder of a lease or grant of a mining location which is covered by the sea or public tidal waters . . .".[46]

The *Oyster Fisheries Act* of 1916[47] provided that the Governor in Council might "issue leases or free grants of [and promulgate rules for] any coves, creeks, parts of the coast, lakes, rivers, or banks of this Colony".[48] Gerard V. LaForest in referring to the Newfoundland territorial sea/continental shelf claim calls attention[49] to the statute's use of the word "banks". Mr LaForest obviously refers to the definition of that word meaning an elevation beneath the sea (a shelf, shoal, or shallow).

While this surely is the plainest meaning of the word in this context, one might parenthetically note that virtually all of the numerous usages of the term relative to water in *Black's Law Dictionary*, for instance, pertain to a flowing stream.[49a] Some imaginative federal advocate might attempt to argue that the relationship of the 1916 *Oyster Fisheries Act* to the offshore issue would be somewhat ambiguous.

Newfoundland prior to her entry into Confederation, in at least two statutes used terminology that arguably enunciated her right to seabed jurisdiction even beyond the three-mile limit, the *Oyster Fisheries Act* of 1916[50] pertaining to the "banks" of Newfoundland, and the *Crown Lands Act, 1930*[51] regulating mining sites beneath the sea or public tidal waters.

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[43] *The Customs Act*, 1898, 61 Vict., c.13 (Nfld).
[44] *Ibid.*, s.152.
[45] *The Crown Lands Act, 1930*, 21 Geo. V, c.15, s.168 (Nfld).
[46] *Ibid.*, s.170.
[47] *Of the Propagation and Protection of Oysters*, C.S.N. 1916, c.165.
[48] *Ibid.*, s.1-2.
[49] *Supra*, note 9, 102, 107.
[49a] *Black's Law Dictionary* 4th Rev. (1968), 183.
[50] *Supra*, note 47.
[51] *Supra*, note 45.

4. Newfoundland judicial opinions

Pre-Confederation Newfoundland judicial decisions lend some weight to her offshore claims. The judgment in the 1875 case of *Anglo-American Telegraph Co.* v. *Direct United States Cable Co.*[52] was written by Chief Justice Hoyles of the Newfoundland Supreme Court and thereafter reviewed and affirmed by the full court. A telegraph cable had been laid for a distance of approximately thirty miles within the headlands of Conception Bay in Newfoundland, a bay about twenty miles wide at its mouth. The cable was laid farther than three miles from the inner shores of the bay.[53] Chief Justice Hoyles determined that the laying of this cable by the defendants violated an Act of the Newfoundland legislature prohibiting any but the Newfoundland Company from extending, entering upon or touching any part of Newfoundland or the coast thereof, or of the islands or places within the jurisdiction of Newfoundland with any telegraph cable from any other place whatsoever.[54]

The defendants contended that due to its location the cable failed to fall within the jurisdiction of Newfoundland, both the Imperial and Newfoundland jurisdictions being restricted to three miles from the inner shore of the bay. The defendants added that even if the Imperial jurisdiction reached to three miles from the outer coast, that of Newfoundland was limited by the inner line, and that the floor of Conception Bay constituted neither a part of Newfoundland nor a coast thereof, nor was it an island or place within the meaning of the statute.

The Chief Justice replied:

> I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to headland of the bay, [citations omitted], that the local government being the Queen's government, representing and exercising within the limits of the Governor's commission, which contains nothing restrictive upon this point, her authority and jurisdiction is, in this respect, the same with the Imperial government; that this authority and jurisdiction existed in the local government prior to the grant of representative institutions to the colony; that such grant, while it enlarged the powers, neither added to nor lessened the territorial jurisdiction of the local government, and that, subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have effect and operation to the full extent of that territorial jurisdiction.[55]

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[52] (1875) 6 Nfld. L.R. 28.
[53] *Ibid.*, 32.
[54] *Ibid.*, 32-33.
[55] *Ibid.*, 33.

Upon appeal to the Privy Council, the dictum of Chief Justice Hoyles that the jurisdiction of the Newfoundland government reaches three miles beyond a line drawn from headland to headland of Conception Bay went unremarked.[56] Admittedly, the Privy Council stated that it had no need to discuss the questions that had been raised in the case of *R.* v. *Keyn.* It found Conception Bay to be a bay within Newfoundland[57] if only for historical reasons.[58]

The Newfoundland Supreme Court judgment in the 1888 case of *Rhodes* v. *Fairweather*[59] related to the slaughter of seals, allegedly in violation of Newfoundland statute. All of the seals killed were beyond the three-mile limit.[60] Chief Justice Carter held that the application of the Newfoundland law more than three miles off the coast was beyond the jurisdiction of Newfoundland.[61] But in defining the territorial jurisdiction of the courts of Newfoundland the Chief Justice quoted with approval the passage from *Anglo-American Telegraph Company.*[62] Justice Little (in a separate opinion) agreed with the Chief Justice that the statute was beyond the compass of Newfoundland's jurisdiction.[63] Justice Pinsent (dissenting) offered a territorial sea dictum consistent with those of Hoyles and Carter: "I take it to be a sound doctrine as a general proposition that the limits of colonial jurisdiction extend to only three miles from the shore . . .".[64]

Following the decision in *Rhodes* the Colonial Office solicited the assessment of the Law Officers, who on December 27, 1888 responded:

> We are of opinion that, unless specially authorized by Imperial legislation, it is not within the power of the Colonial Legislature to legislate generally for the regulation of fisheries *outside* the three mile limit. [italics added].
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> The Colonial Legislature could make laws for the peace, order and good government of the Newfoundland fisheries, and, under that power, might control the crews of ships engaged in such fisheries, even though they might be registered elsewhere than in the colony. Indirectly the colony might thus obtain jurisdiction, in respect of acts done outside the territorial waters of Newfoundland, in the case of ships which had come within

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[56] *Ibid.*, Appendix, i.
[57] *Ibid.*, xix.
[58] *Ibid.*, xviii.
[59] (1888) 7 Nfld. L.R. 321.
[60] *Ibid.*, 323.
[61] *Ibid.*, 325-26.
[62] *Ibid.*, 324.
[63] *Ibid.*, 338-48 (Little J., concurring).
[64] *Ibid.*, at 333 (Pinsent J., dissenting).

> the provisions of the Colonial Statute, as, for instance, by taking without a licence.[65]

In this backhanded fashion the Law Officers implicitly recognized the role of the Newfoundland legislature in exercising jurisdiction *inside* the three mile limit.

On the other hand, consider this sceptical appraisal of the Law Officers' opinions in the Australian offshore context by Chief Justice Barwick in the *New South Wales* case:

> A large number of opinions of law officers of the Imperial Crown were pressed upon us in an endeavour to establish the proposition that the colonies possessed, as it were in their own right, territorial seas. Of course, however persuasive in some circumstances, and however eminent such law officers were or proved to be, their opinions are not precedents nor, in any sense, binding. Their opinions speak of the territorial seas of the colony, a description which, though involving a degree of ambiguity, I am prepared to assume meant, without being convinced that it did mean, that such seas were under the control of the colony. But I have no doubt that these law officers, who did not have to put their minds to the question now before this court, could quite easily speak of the territorial seas of the colony and conclude that a law was good because, though plainly connected with the colony's affairs, it operated in the territorial sea. Yet it seems to me that if they meant that such seas were either colonial "property" or under colonial dominion, they were under a basic misconception. The territorial seas in themselves were not, in my opinion, source or subject of colonial power or authority. The colonial laws which those officers supported in their opinions all touched and concerned the colony and its welfare and in later times would be accepted as valid extra-territorially operating laws.[65a]

Mr Justice Mason added:

> There is, ... no basis on which the suggestion sometimes made in the British law officers' opinions in the nineteenth century that territorial waters formed part of the territory of the colonies can be supported. The persuasive effect of these opinions is in any event diminished by the contrariety of view which they express.[65b]

These comments, of course, would tend to undermine any argument based upon the *Rhodes* case and the 1888 assessment of the Law Officers.

The Newfoundland Supreme Court judgment in the 1889 case of *The Queen* v. *Delepine*[66] related to convictions for violation of the

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[65] Quoted by D.P. O'Connell, "Australian Coastal Jurisdiction" in D.P. O'Connell (ed.), *International Law in Australia* (1966), 246, 277, citing C.O. Law Officers' Opinions, vol.iv, no.134.

[65a] 8 A.L.R. 1, 14.

[65b] 8 A.L.R. 1, 89 *per* Mason J. Justice Jacobs' examination of the advice of the Law Officers concluded similarly: 8 A.L.R. 1, 111.

[66] (1889) 7 Nfld. L.R. 378.

Newfoundland Bait Act, the appellants having been seized while outside the three mile limit. In handing down the opinion of the Court, Justice Little again quoted the same passage from *Anglo-American Telegraph Company* that had been quoted in *Rhodes*.[67] Justice Little recalled that the former case had been affirmed by the Privy Council on appeal,[68] and immediately after quoting the by now familiar words of Justice Hoyles he offered a dictum of his own:

> There should, then, be no question as to the liability and amenability of any foreign ships for offences committed by the crews thereof within the territorial waters of this colony, contrary to the public laws of the legislature made for the protection of our revenues, fisheries, or other public interests.[69]

With this, Justice Little joined Carter and Pinsent in providing territorial sea dicta affirming the jurisdiction of Newfoundland. Carter, Pinsent and Little JJ. (all of whom sat simultaneously) appear to have constituted the entire Court, and their views, therefore, could reflect a unanimity of thinking on the matter.

Of course, this entire "line of authority" stems from the single dictum of a colonial Chief Justice, upon which the Privy Council studiously avoided any comment. Yet the insistent repetition of dicta affirming Newfoundland jurisdiction must be considered in order to understand the contemporary Newfoundland point of view.

But in any event, the mere exercise in the offshore region of colonial authority as reflected in statutory and case law does not in itself demonstrate a blanket jurisdiction over the offshore area. As Justice Mason wrote in the *New South Wales* case:

> This power and jurisdiction were exercisable in an appropriate case by a colonial legislature possessing power to legislate for the peace, order and good government of the colony. The power to make laws for the peace order and good government of a colony was wide enough to enact laws applying to territorial waters and beyond.[69a]

The language chosen by the Law Officers in 1888 tied the power of the colonial legislature to legislate for the offshore to the peace, order and good government of the colony itself, but did not necessarily see the offshore as itself a portion of the colony.

5. The other Atlantic Provinces

The British Columbia *Re: Offshore Mineral Rights* case affected the claims of all the maritime provinces. Nova Scotia offshore claims

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[67] *Ibid.*, 385-86.
[68] *Ibid.*, 385.
[69] *Ibid.*, 386.
[69a] 8 A.L.R. 1, 90 *per* Mason J.

rested upon various statutory and other pieces of evidence. In the early commissions to the governors of both Nova Scotia and New Brunswick each province was so defined as to include all islands within a certain distance from the coast and "all the rights, members and appurtenances thereunto belonging".[70] In the Royal Commission to Lord Elgin of September 1, 1846 the boundaries of Nova Scotia were described thus:

> Our said Province of Nova Scotia in America, the said Province being bounded on the westward by a line drawn from Cape Sable across the entrance to the centre of the Bay of Fundy; on the northward by a line drawn along the centre of the said Bay to the mouth of the Musquat River by the said river to its source, and from thence by a due East line across the Isthmus into the Bay of Verte; on the Eastward by the said Bay of Verte and the Gulf of St. Lawrence to the Cape of Promontory called Cape Breton in the Island of that name, including the said Island, and also including all Islands within six Leagues of the Coast, and on the Southward by the Atlantic Ocean from the said Cape to Cape Sable aforesaid, including the Island of that name, and all other Islands within forty leagues of the Coast, with all the rights, members and appurtenances whatsoever thereunto belonging.[71]

Perhaps such early commissions in some degree distinguished the cases of Nova Scotia and of New Brunswick arising after the *Re: Offshore Mineral Rights* case from that of the Australian states. As Chief Justice Barwick reminded the *New South Wales* litigants, there was:

> ... nothing in the Constitution granted to any of the colonies which supports the view that thereby the boundaries, or the territorial description, of the colony were or was enlarged. Local autonomy replaced representative government of limited capacity; but still only in relation to colonial affairs, of which, in my opinion, the control of the territorial seas and subjacent soil did not form part.[71a]

At least something along these lines did support the Nova Scotia and New Brunswick offshore claims after 1967.

Nova Scotia prior to Confederation successfully exercised her offshore jurisdiction in the three-mile territorial zone. In 1770 it

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[70] *Supra*, note 9, 87.

[71] Description supplied by Department of the Attorney General of Nova Scotia officials to G. LaForest, quoted *ibid.*, 86 fn.8.

[71a] 8 A.L.R. 1, 14. Or as Chief Justice Barwick elsewhere put it:

> "What was involved in the process of colonization in the case of the Australian colonies was the placing under delegated government defined areas of land. No alienation of property or of rights was involved. Nothing in the least comparable to the consequences of a conveyance of land occurred upon or by the act of establishing a colony. No *ad medium filum* analogy is available. The colonies were colonies in the classical sense of that word" (at p.12).

enacted a statute providing that should fishermen in any vessels within three leagues of the shores of the province throw into the sea any heads, bones or other offal of the fish they had taken, they would be liable to a fine of five pounds.[72] The Nova Scotia hovering act of March 12, 1836 empowered customs and excise officers and sheriffs and magistrates to board any vessel within three marine miles of the coast, to search each such vessel's cargo, and in some instances to forfeit the ships and cargoes.[73] Mr LaForest recalls that the hovering acts of Nova Scotia, Prince Edward Island and New Brunswick clearly were consistent with the thinking of the Crown because British orders-in-council confirmed them; they surely would have been disallowed had they violated British policy.[74]

In the January 9, 1963 opinion of the Nova Scotia Supreme Court in the case of *Re: Dominion Coal Co. Ltd and County of Cape Breton*[75] a question at issue was whether a submarine mine in Spanish Bay within three miles of the Nova Scotia coast[76] was assessable by Cape Breton County. Chief Justice Isley made an important assumption when he held that it was not:

> In my opinion, the fact that the Crown in the right of Nova Scotia owns the coal under the marine belt (assuming, but not deciding, this to be the case) has no bearing on the question whether the marine belt is part of the county.[77]

The Isley assumption that Nova Scotia owned the submarine coal that was in question seemed encouraging to post-1967 Nova Scotia territorial sea and continental shelf claims. However, Chief Justice Isley explained in this way his determination that the Cape Breton County assessment must fail:

> I think that the outside limit of a county at common law is low-water mark (not high-water mark) and that this is clear from the opinions of numerous Judges who expressed opinions in *The Queen* v. *Keyn*.[78]

Any salute to *Keyn* must (at least slightly) seem to weaken provincial offshore claims; it was seen above how the Supreme Court of Canada invoked *Keyn* at provincial expense.

On the other hand, in *Dominion Coal* Justice Currie did offer a more friendly assessment of Nova Scotia's position:

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[72] 1770, 10 Geo.III, c.10 (N.S.).

[73] 1836, 6 Wm.IV, c.8 (N.S.)

[74] *Supra*, note 9, 101, citing "Proceedings in the North Atlantic Fisheries Arbitration, 1910", Washington (1912), vol.5, appendix to the Case of Great Britain, 962, 963, 1055.

[75] (1963), 40 D.L.R. (2d) 593.

[76] *Ibid.*, 597.

[77] *Ibid.*, 601.

[78] *Ibid.*, 599.

> Prior to Confederation of Canada, Nova Scotia exercised jurisdiction over an area of territorial waters three miles in width measured from its coasts, bays and rivers. See particularly the "hovering" Act, 1836, 6 Wm. IV, c.8, approved by the King in Council, thus recognizing that the control and administration of these waters reposed in the Province of Nova Scotia.
>
> By virtue of s.109, *B.N.A. Act*, all property rights held by Nova Scotia before Confederation were retained: [citation omitted]. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act*. [citations omitted] Since Confederation Nova Scotia has exercised exclusive jurisdiction and administration over the submarine coal areas of the Province, as is evidenced by the many statutes, leases, grants, *etc.*[79]

But this solid-sounding declaration is *obiter* and of limited consequence.

Prior to Confederation, New Brunswick successfully exercised her offshore jurisdiction in the three-mile territorial zone. An Act of May 3, 1853 granted Fisheries Wardens the power to designate fit places for the deposit of fish offal (gurry grounds), defendants casting offal overboard into the waters of or near Grand Manan Island being liable to a five pound fine.[80] An 1854 Act gave the Governor in Council the authority to make regulations for the management and protection of seacoast fisheries, or around any island of the New Brunswick coast within three marine miles of the low-water mark, offenders being liable to a fifteen pound fine and ten days incarceration.[81]

The April 22, 1932 Supreme Court of New Brunswick Appellate Division opinion in *Rex* v. *Burt*[82] assessed the November 7, 1931 seizure in the Bay of Fundy of Captain Burt's schooner laden with intoxicating liquor approximately one and three-quarter miles offshore. Defendant Burt was charged with and convicted of having liquor in his possession within the Province of New Brunswick in violation of the 1927 *Intoxicating Liquor Act*.[82a] Justice Baxter wrote for the Court:

> The first question to be answered [*sic*], and the most important in the case, is whether the *locus* of the seizure, approximately one and three-quarter miles from the shore, is part of the Province of New Brunswick.
>
> By the Royal Instructions issued to Governor Carlton upon the separation of what is now the Province of New Brunswick from the Province of Nova Scotia, the southern boundary of the new Province was defined as "a line in the centre of the Bay of Fundy from the River Saint Croix aforesaid to

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[79] *Ibid.*, 620 (Currie J., dissenting in part).
[80] 16 Vict., c.39, s.5 (N.B.).
[81] R.S.N.B. 1854, c.101, s.6.
[82] (1932) 5 M.P.R. 112.
[82a] *An Act to Regulate and Control the Sale of Liquor*, 17 Geo.V, c.3 (N.B.).

> the mouth of the Musquat (Missiquash) River" clearly indicating the claim of Great Britain at that time to the whole of the Bay of Fundy as a portion of her territory. Upon this the Crown bases the contention that the Bay is a *mare clausum*. In its largest sense this may be a political rather than a legal question. [citation omitted] It is sufficient for the disposition of the present appeal to say that, as the greater includes the less, the three-mile limit was undoubtedly treated as part of the new Province. The exercise of jurisdiction over the lesser limit is now so generally admitted in international law that I do not think it is open to question that the legislative authority of the Province extends over that area at least. Whether the three miles are to be measured from the coast or from low water mark is another point which does not fall to be decided here.[83]

In recognizing that "the greater includes the less" Justice Baxter premised the holding upon both the ground that the Bay of Fundy constitutes waters internal to New Brunswick, and the ground that New Brunswick enjoyed rights in the three mile offshore region. (The 1967 Supreme Court of Canada considered only the former as a premise of its holding.)[84] As Justice Baxter would add in the February 14, 1934 Supreme Court of New Brunswick Appellate Division opinion in *Filion* v. *New Brunswick International Paper Company*:[85]

> *The soil right within the three mile limit must have been in the Province* or if the area were included in the harbour of Dalhousie it may have passed to the Dominion by the British North America Act so far as the area formed a part of that harbour at Confederation.[86]

It had been pointed out that, particularly as to their continental shelf claims after 1967, Nova Scotia and New Brunswick were aided by the fact that the early commissions establishing these provinces included all of the rights and appurtenances to the described regions; the continental shelf doctrine developed in large part through the concept of appurtenance.[87] As the International Court of Justice held in the *North Sea Continental Shelf Cases* in 1969:

> ... the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of *appur-*

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[83] *Ibid.*, 117-18.

[84] *Re: Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792, 809. LaForest, *supra*, note 9, 102: "Though the Supreme Court of Canada ... refers to the case as one dealing with inland waters, the fact is that it was based on both grounds, and indeed, Chief [*sic*] 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."

[85] (1934) 8 M.P.R. 89.

[86] *Ibid.*, 95 (italics added).

[87] *Supra*, note 9, 107 (citing scholarly authorities).

> *tenance* [italics added] is derived the view which, ... the Court accepts, that the coastal States rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States.[88]

And as in that three party continental shelf case the Court then reiterates:

> ... fundamental ... appears to be the principle — constantly relied upon by all the Parties — of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because — or not only because — they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, — in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.[88a]

The commission to Governor Patterson establishing as a separate colony Prince Edward Island (which at that time was known as the Island of Saint John) describes it as "our island of Saint John, and Territories adjacent thereto in America, and which now are or which heretofore have been dependent thereupon...".[89] Prince Edward Island's 1843 hovering act empowered officers throughout the Island to board any vessel hovering within three marine miles of the coast in order to enforce fishing regulations and prevent smuggling.[90]

It must be pointed out that the continental shelf claim of Prince Edward Island after 1967 could have been but little facilitated by the fact that the commission establishing the colony included the adjacent territories. As the International Court of Justice has noted, specifically in relation to the terminology of adjacency, continental

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[88] *North Sea Continental Shelf Cases* [1969] I.C.J. 3, 30.

[88a] *Ibid.*, 32.

[89] Quoted in Laforest, *supra,* note 9, 87, citing Can.Sess.Pap. 1883, no.70, 2.

[90] 6 Vict., c.14 (P.E.I.).

shelf language is "imprecise"[91] and "capable of a considerable fluidity of meaning".[92]

6. Newfoundland and the World Court

Cabot Martin has asserted aggressively that the pre-Confederation scope of jurisdiction claimed by Newfoundland, as evidenced in her various statutes, should not distract from the underlying fact that coastal state continental shelf rights prevail *ipso facto*.[93] For this he relies upon the decision of the International Court of Justice in the *North Sea Continental Shelf Cases*.[94]

In a critical paragraph rejecting the continental shelf delimitation "just and equitable share" doctrine proposed by the Federal Republic of Germany, the International Court of Justice went to the very heart of international law as it pertains to the continental shelf:

> ... important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.[95]

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[91] [1969] I.C.J. 3, 30.

[92] *Ibid.*

[93] C. Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline* (1975) 7 Ottawa L.R. 34, 36. For a pro-federal government discussion of the Newfoundland offshore issue, see A. Kovach, *An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources* (1975) 23 Chitty's L.J. 18. For the most recently published analysis of the Newfoundland offshore, see J. Ippolito, *Newfoundland and the Continental Shelf: From Cod to Oil and Gas* (1976) 15 Columbia J. of Transnat'l. L. 138. For a pro-federal government, anti-state discussion of Nigerian offshore federalism, see E. Nwogugu, *Problems of Nigerian Offshore Jurisdiction* (1973) 22 Int'l. & Comp. L.Q. 349.

[94] [1969] I.C.J. 3.

[95] *Ibid.*, 23, para.19.

That Newfoundland prior to Confederation may not expressly have exercised continental shelf rights need not defeat her proprietary claim if, as Mr Martin remarks, in quoting from this critical paragraph, the rights are inherent and need not be constituted or exercised.[96]

Further, Mr Martin could have added the comment which Dr Daniel Patrick O'Connell, a leading international law scholar, made four years prior to the *North Sea Continental Shelf Cases* decision:

> At Geneva [in 1958] it was agreed that the shelf, to a depth of 200 metres, or beyond where the depth of the superjacent waters admits of exploitation, was subject to the "sovereign rights" of the littorial State for the purpose of exploitation of natural resources. No one else might make a claim to another's shelf, and the rights of the coastal State were expressed to be independent of occupation, or, indeed, of any formal proclamation. The result seems to be that a State may assert jurisdiction over its shelf without ever having claimed it.[97]

Dr O'Connell understood that coastal state continental shelf rights obtain *ipso facto*, and that no special legal process is necessary on the part of the coastal state, nor need any special legal acts be performed.

Dr O'Connell considered that the only appropriate continental shelf approach to be that of *ipso jure* subjection to the littoral state. He considered this implicit in the final Act of the 1958 Geneva Conference; he found this continental shelf approach initially advanced incidental to a high seas regime preliminary report by the United Nations International Law Commission.[98]

In order to support this latter finding Dr O'Connell correctly relies on the proceedings of the International Law Commission meeting of July 14, 1950. Mr Manley O. Hudson of the United States pointed out immediately following a Commission vote of that date that the Commission thereby was declaring that the right to explore and exploit the continental shelf did not depend on any claim to the right by the littoral country.[99] Indeed he took that opportunity to vent his displeasure, expounding his personal opinion that the right of littoral states to exercise control and jurisdiction over the continental shelf should be subject to the exercise of the right for the

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[96] *Supra*, note 94, 36-37.

[97] D.P. O'Connell, *International Law* (1965), 578. This O'Connell treatise seems especially authoritative, having been expressly and repeatedly relied upon by the Supreme Court of Canada in the 1967 decision *Re: Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792, 807, 808.

[98] O'Connell, *ibid.*, 578.

[99] U.N. Doc. A/CN.4/SR.68, p.13, para.37.

purposes of exploring and exploiting the shelf, and should not *ipso jure* be granted them.[100]

On the same occasion, Mr Ricardo J. Alfaro of Panama affirmed that the submarine platform was neither *res nullius* nor *res communis*.[101] He recognized that the only thing to do was to wait and see what the littoral state would choose to do.[102] When Mr Alfaro speculated as to the implications of a littoral state's determination neither to explore nor exploit the shelf, he questioned whether the subsoil recources might originally be explored or exploited by a second state.[103] Mr Hudson logically replied that at any time a littoral state in exercising its proper right could evict an intruder.[104] These positions are significant inasmuch as they tend to support the pre-existing rights of the littoral state.

The I.C.J. is not the only authority consulted by Mr Martin. He quotes the latter portion of this passage from the Augnst 1951 decision of Lord Asquith of Bishopstone as Umpire in the *Abu Dhabi Arbitration*:[105]

> I am not impressed by the argument that there was in 1939 no word for "territorial waters" in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking "prose" all his life because the fact was only brought to his notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist.[106]

In Mr Martin's appraisal, Lord Asquith's comments about the territorial sea apply equally to the continental shelf.

But of course such territorial sea/continental shelf analogy is not as simple as might appear. Even in the *Abu Dhabi Arbitration* Lord Asquith, speaking of the continental shelf doctrine, declared:

> I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.[107]

And the period "hitherto" 1951 included the 1949 entry of Newfoundland into Confederation.

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[100] *Ibid.*, at p.14, para.37.
[101] *Ibid.*, at p.14, para.42.
[102] *Ibid.*, at pp.14-15, para.42.
[103] *Ibid.*, at p.15, para.42.
[104] *Ibid.*, at para.43.
[105] (1952) 1 Int'l. & Comp. L.Q. 247.
[106] *Ibid.*, 253.
[107] *Ibid.*, 256.

7. Federal implications of the North Sea principles

Chief Justice Barwick of the High Court of Australia recognized in the August 6, 1969 offshore federalism case of *Bonser* v. *La Macchia*[108] that if the continental shelf had not of its very nature belonged *a priori* to the nation-state, and if the contemporary rights to it depend upon convention, it is after all the federal state that is the relevant party to the convention.[109] The late, renowned Dr Wolfgang Friedmann, in quoting the critical paragraph of the World Court decision,[109a] saw that the Court dealt briefly and almost casually with the issue of whether the continental shelf concept had already become part of general international law.[110] He quoted with approval from the dissenting opinion in the *North Sea Continental Shelf Cases* of Judge Tanaka, who enunciated the process whereby the continental shelf concept had passed into general customary law:

> The Geneva convention of 1958 on the Continental Shelf, first *lex ex contractu* among the States parties, has been promoted by the subsequent practice of a number of other States through agreements, unilateral acts and acquiescence to the law of the international community which is nothing else but world law or universal law.[111]

Chief Justice Barwick, then, speculated that if continental shelf rights were conventional the federal government would enjoy contractual rights as parties to the convention. Judge Tanaka, applauded by the most eminent Dr Friedmann, found the continental shelf rights articulated in the 1958 Convention, *i.e.*, after the *Abu Dhabi Arbitration*, as originally *lex ex contractu*.

Had continental shelf rights accrued to coastal states only after 1949, as a result of the 1958 Geneva Convention, Newfoundland today would be unable successfully to assert that she had carried continental shelf rights with her into Confederation. This message was implicit in the words of Chief Justice Barwick in the *Bonser* opinion as he discussed the territorial sea claims of Australian states (the Supreme Court of Canada's *Re: Offshore Mineral Rights* precedent obviously in the front of his mind):

> I think it is essential to bear in mind that when colonies were formed all that relevantly occured was that a specified land mass was placed at the

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[108] (1968-69) 122 Commw. L.R. 177.

[109] *Ibid.*, 187.

[109a] *Supra*, p.560.

[110] W. Friedmann, *The North Sea Continental Shelf Cases — A Critique* (1970) 64 A.J.I.L. 229, 232.

[111] [1969] I.C.J. 3, 178 (Tanaka J., dissenting), quoted by Friedmann, *ibid.*, 232 (italics in Tanaka).

> outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters. The progression was from the condition of governorship with near absolute powers to a state of self-government with plenary powers to make laws for the peace, order and good government of that land mass. This was the utmost to which the colonies ever attained. The colonies were never at any stage international personae nor sovereign and the States still are not. Thus any concession or convention made between nations as to the use which might be made of the bed of the sea or of the waters above it applied and still applies, in my opinion, only as between nations and, in the case of conventions, as between nations parties to the convention. The plenary nature of the legislative power granted over and with respect to described territory cannot, in my opinion, be a basis for regarding that territory as itself extended to those places in which laws made undersuch a power may validly have effect. Apart from legislation or prerogative or statutory instrument of the United Kingdom, any seeming accession to the realm or to jurisdiction over the sea by reason of international arrangements accrued, in my opinion, only to Great Britain and not to her colonies or her dominions or their territories in their own right.
>
> I respectfully agree with the conclusion drawn in connexion with the seabed and the waters above it adjacent to the Province of British Columbia by the Supreme Court of Canada in *Reference re Ownership of Off-Shore Mineral Rights*, and with the reasons which were given for that conclusion.[112]

One should not underemphasize the significance that the Chief Justice here attaches to the issue of whether the colonies/states were at any stage international persons. Had they been, their bids for their territorial seas would have been of greater substance. Without international personality, their claim, like that of British Columbia, could only be the weaker.

But continental shelf rights did in fact accrue to coastal states prior to 1949, according to the 1969 Barwick opinion. The Chief Justice accepted, at any rate for the purposes of *Bonser*, that the continental shelf appertains naturally to a nation as an international person.[113] If the continental shelf does in truth appertain naturally to a nation as an international person, and if Newfoundland prior to her entry into Confederation was an international person, then she brought into Confederation continental shelf rights accruing to her naturally. The International Court of Justice holding in *North Sea Continental Shelf Cases*, to which Chief Justice Barwick looked, insisted that *ipso facto* coastal state continental shelf rights arise,

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[112] *Supra*, note 108, 185.
[113] *Ibid.*, 187.

and that to enjoy these rights the coastal state need not have performed any particular act, legal or otherwise.

As Dr O'Connell correctly commented in 1970:

> It has not taken the High Court of Australia long to perceive the implications of the International Court's statement that the continental shelf rights exist *ipso facto* and *ab initio,* by virtue of sovereignty over the land. By *ipso facto* seems to be implied that these rights exist even if the coastal state does not claim or exercise them, and indeed, this is what the International Court said. The expression *ab initio* suggests a relation back in time, perhaps in geological time, for what the Court appears to mean is that no history of events can be utilized to negate any coastal state's inherent rights to the seabed, even though, when the events occurred, the continental shelf doctrine was not imagined. On this argument, the rights in question existed in relation to the seabed of the Australian continental shelf in 1876, and it then becomes argnable that it was beyond the power of the Court in *Regina* v. *Keyn* to deprive the Crown of them. If they amount to sovereignty, then *Regina* v. *Keyn* might have been wrongly decided, and everything that follows from it would be fallacious.[114]

Dr O'Connell admittedly does not see the issue of ancient littoral state rights to the continental shelf as one absolutely cut and dried, but in the Australian circumstances he agrees that the notion of "relation back in time" would seem to support not a Commonwealth but a state pretension to the seabed.[115]

This is immediately relevant to the territorial sea/continental shelf demands of Canada's eastern provinces. Australian appraisals are instructive in the Canadian framework, and *vice versa.* (Of course, the foreign judgment must be correctly interpreted; it will be seen below that the High Court in *New South Wales* misunderstood *Re: Offshore Mineral Rights.*)

Weighty authority supports the proposition that the Australian and Canadian offshore federal circumstances are constitutionally analogous, so that the judicial holdings in each nation may be highly persuasive in the other. Chief Justice Barwick himself drew the parallel, and Dr O'Connell in 1970 had commented that:

> Sir Percy Spender, with all the authority of a former President of the International Court of Justice, and at a symposium presided over by Barwick C.J., when the case of *Bonser* v. *La Macchia* had been argned but not decided, stated emphatically that he could find no plausible argument for distingnishing the Canadian from the Australian constitutional situa-

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[114] O'Connell, *supra,* note 5, 407. "Chief Justice Barwick, in *Bonser* v. *La Macchia,* obviously accepts the argument that *ipso facto* and *ab initio* attribution of the continental shelf to the coastal state means that the continental shelf has always lain within the inherent sovereiguty thereof" (at p.408).

[115] *Ibid.,* 404.

tion, and argued for the persuasive authority in Australia of the Canadian Supreme Court decision.[116]

In the *New South Wales* case, Chief Justice Barwick wrote as though he could have had Newfoundland in mind:

> Elsewhere I have expressed the view that the Imperial territorial waters in due time passed to Australia as the nation state and that in truth no territory of the Commonwealth ever had territorial waters of its own: [citing *Bonser*]. But, upon a territory being given its independence of Australia and ceasing to be a dependent territory, the marginal seas become, by virtue of that very independent national status, the territorial seas of the new nation.[117]

The strength of the Newfoundland offshore claims is further illuminated by the opinion in the *New South Wales* case of Mr Justice Gibbs, who agreed with Chief Justice Barwick that Australian states have no valid continental shelf claims:

> The Argument submitted on behalf of the States starts with the proposition, accepted by the International Court in the *North Sea Continental Shelf Cases* (at par.19) that "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources". Therefore it is said that the rights of the States to the continental shelf, although never asserted by any colony before federation, must now be taken always to have existed and that the States' ownership of the sea-bed no longer stops at the three-mile limit but extends to the outer limits of the continental shelf.
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> To say the rights of coastal States in respect of the continental shelf existed from the beginning of time may or may not be correct as a matter of legal theory. In fact, however, the *rights now recognized represent the response of international law to modern developments of science and technology, which permit the sea-bed to be exploited in a way which it was quite impossible for governments or lawyers of earlier centuries to foresee* [italics added]. In this matter the arguments of history are stronger than those of logic. In truth, when the Act was passed, the States had not asserted and did not have the rights to the continental shelf which the convention now accords to coastal States. Those rights, if theoretically inherent in the sovereignty of coastal States, were in fact the result of the operation of a new legal principle. When those rights were recognized by international law the Commonwealth was the international person entitled to assert them, and it did so. The assertion by the Commonwealth of those rights in no way interfered with any existing right of any State.[118]

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[116] D.P. O'Connell, *The Commonwealth Fisheries Power and Bonser* v. *La Macchia* (1970) 3 A.L.R. 500, 504.

[117] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 10.

[118] *Ibid.*, 49 (Gibbs J., dissenting).

However deadly the Gibbs logic may be to offshore claims of the Atlantic provinces of Canada other than Newfoundland, it can only reinforce the claims of Newfoundland.

Mr Justice Gibbs insisted that attention be paid to the original foreseeability of a 1975 offshore claim of an Australian state. Both 1976 territorial sea and continental shelf claims on the part of Canada's Atlantic provinces may have been unforeseeable as late as 1867 or 1871, and (at least) continental shelf claims in 1975 on the part of Australian states may have been unforeseeable as late as 1901. But the foreseeability prior to Newfoundland's entry into Confederation in 1949 of a 1976 offshore claim of Newfoundland was very real, not only as to the territorial sea but even as to the continental shelf.

After all, the fact that the Truman Proclamation of September 28, 1945 initiated the positive law of the continental shelf has been noted in the *North Sea Continental Shelf Cases* by the International Court of Justice,[119] and the Supreme Court of Canada in agreeing that the 1967 international law of the shelf had been foreshadowed by that Proclamation[120] included it in full in *Re: Offshore Mineral Rights of British Columbia.*[121] Mr Justice Gibbs in *New South Wales* adopts as his own the conclusion of the World Court that the Truman Proclamation initiated positive continental shelf law.[122] Mr Martin records that the United Kingdom by June 1949 had recognized that " 'the right of a littoral state to exercise its control over the natural resources of the seabed and subsoil adjacent to its coasts had been established in international practice' ",[123] and that, as Edwin J. Cosford pointed out in 1953,[124] Canadian acquiescence to various continental shelf claims (notably those of the United States) may have estopped Ottawa from denying the validity of those claims.[125]

By 1949 it was at least foreseeable that international actors like Newfoundland might enforce valid continental shelf claims. (Prior

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[119] *North Sea Continental Shelf Cases* [1969] I.C.J. 3, 33.

[120] *Re: Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792, 817.

[121] *Ibid.*, 818-19.

[122] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 48-49 (Gibb J., dissenting).

[123] *Supra*, note 93, 42-43.

[124] E.J. Cosford, *The Continental Shelf and the Abu Dhabi Award* (1953) 1 McGill L.J. 109, 125.

[125] *Supra*, note 93, 43.

to the 1949 Terms of Union coming into effect, the pre-1934 Newfoundland constitution was expressly revived by Term 7.[126])

In *New South Wales* Justice Mason, in the course of delivering his pro-federal government opinion, made a parenthetical effort[127] to distinguish coastal state rights in offshore territory from rights in land territory:

> ... the International Court of Justice has held that the continental shelf is a natural extension of the land territory of the coastal State appertaining to it for the purpose of exercising its sovereign rights [citing *North Sea Continental Shelf Cases*]. Even so, it is necessary to distinguish between the land territory of a coastal State on the one hand and its territorial sea and solum on the other hand, for the coastal State in the exercise of its sovereign rights is bound to give effect to the obligations relating to the right of innocent passage imposed upon it by the convention in respect of its territorial sea and solum. Accordingly, the territorial rights now conceded by international law to the coastal State in the solum of territorial waters stamp it with the character of territory that is different from the land territory of the coastal State.[128]

But the character stamped upon the offshore area in truth is similar to that of the land territory.

It should be kept in mind that the World Court states in the *North Sea Continental Shelf Cases* that "the legal regime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea".[129] Nor in Canada at any rate need the defense and foreign relations dimension of the offshore necessarily bar a Newfoundland claim, despite the fears of Mr Justice Mason. Even were it held that the Atlantic provinces owned the resources of the offshore, their exploitation rights would remain subordinate to the federal power to legislate respecting defense, navigation and other matters that come under section 91 of the Constitution.[130] Ottawa also could delimit boundaries with foreign countries because, touching as they must upon sovereignty, such treaties are self-implementing.[131]

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[126] Schedule of Terms of Union Newfoundland with Canada, *British North America Act, 1949*, 12-13 Geo. VI, c.22, (7).

[127] "All this in a sense is by the way." *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 88.

[128] *Ibid.*

[129] [1969] I.C.J. 3, 52.

[130] *Supra*, note 9, 103.

[131] *Ibid.*, citing *Francis* v. *R.* [1956] S.C.R. 618, *per* Rand and Cartwright JJ.

8. Re: Offshore Mineral Rights and New South Wales contrasted

Attention must be called to the fact that in *New South Wales* the High Court of Australia held that even offshore rights brought into the Australian union by a state would belong thereafter to the federal government. Chief Justice Barwick wrote:

> A consequence of creation of the Commonwealth under the Constitution and the grant of the power with respect to external affairs was, in my opinion, to vest in the Commonwealth any proprietary rights and legislative power which the colonies might have had in or in relation to the territorial sea, sea-bed and airspace and continental shelf and incline. Proprietary rights and legislative powers in these matters of international concern would then coalesce and unite in the nation. That, in my opinion, was the intendment of the Constitution. It is far easier to conclude that the Act of the Imperial Parliament setting up the federal Constitution intended to vest such matters of international consequence in the new Commonwealth, withdrawing them from the former colonies, than it was to decide that when an American state, already an independent nation in possession of international rights, entered the Union, these rights became vested in the United States. Yet that is received doctrine in the United States expressed in decisions which have recently been affirmed: [citing *California, Texas, Louisiana* and *Maine*]. The Supreme Court's reasons were applicable to the circumstances of the states originally entering the Union. These were then independent nation states. Yet without so clear an indication as the grant of the power with respect to external affairs, those states did not retain any rights or legislative power over the territorial sea, subsoil, etc. Later entrants to the Union, coming in on an "equal footing", were in the same situation.
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> This result conforms, in my opinion, to an essential feature of a federation, namely, that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas, the sea-bed and airspace and the continental shelf and incline.[132]

And as Justice Murphy added in the same case:

> Even if they [the Australian states] had become independent nations before [union in] 1901 with the sovereign rights of an independent state, on federation they would have lost the territorial seas and other attributes of international personality.[133]

Chief Justice Barwick equated the rationale in both the *New South Wales* case and *Re: Offshore Mineral Rights of British Columbia* to a rationale relied upon by the United States Supreme Court in *California, Texas, Louisiana* and *Maine*:[133a] the federal government enjoys exclusive offshore rights due to its role as international actor.

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[132] (1975) 8 A.L.R. 1, 16-17.

[133] *Ibid.*, 119, *per* Murphy J.

[133a] *U.S.* v. *California* 332 U.S. 19 (1947), *U.S.* v. *Texas* 339 U.S. 707 (1950), *U.S.* v. *Louisiana* 339 U.S. 699 (1950), *U.S.* v. *Maine* 43 L.W. 4359 (1975).

> The Canadian Supreme Court reached its conclusion after a close examination of the case law. I do not disagree with anything that is said in the Supreme Court's judgment about that law, though for my part, I have found it unnecessary to deal with it in these my reasons. However, the Supreme Court's conclusion depends in no small degree upon the fact of Canada's independent nationhood and its recognition as such by the nations of the world. Appropriately, it is concluded that such international rights and obligations as derive from the convention on the territorial sea devolve on Canada and not on any province of the federation. I can find no reason to differentiate in relevant respects the circumstances of this federation from those of the other great federations, except to say that the result of the cases to which I have referred more obviously flows in the case of our Constitution.[134]

But Chief Justice Barwick exaggerates the significance to the *Re: Offshore Mineral Rights* outcome of the international personality of Canada.

This exaggeration is suggested by his own choice of language. First, the Chief Justice states merely that the pro-Ottawa decision depended in "no small degree" on the international personality of Ottawa; even he does not appear to deem that dependence as having been overriding. Secondly, the Chief Justice accurately notices that the Canadian opinion closely examined the relevant case law (*i.e.*, history, and not any logical imperative inherent in federalism); he declares that his own conclusion hinges on reasons making such case law dissection unnecessary. Thirdly, the Supreme Court of Canada, in choosing the rule by which to ascertain provincial offshore rights, probably had Newfoundland, a former international actor, in mind; the Chief Justice of the High Court of Australia in isolating a rule to determine Australian state offshore rights could have had no such former international actor in mind. The Chief Justice working within his historical framework understandably found that the conclusion to which he and the majority in *New South Wales* adhered was a more obvious one in the Australian than in the Canadian instance.

A close reading of the British Columbia opinion shows the detailed attention paid by the Supreme Court of Canada to provincial history, and the modest attention afforded the federal government's performance on the international stage. The Supreme Court in the twenty-six page *Re: Offshore Mineral Rights* opinion opened with a four page outline[135] detailing the historical background up to 1967. The Court followed with a six page discussion[136] of statutes and

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[134] *Ibid.*, 17.
[135] [1967] S.C.R. 792, 797-800.
[136] *Ibid.*, 800-807.

case precedents relating to the territorial sea. The Court then devoted merely one page to the contemporary international law dealing with the territorial sea.[137] This did not lead the Court to jump to the conclusion that Canada as an international personality necessarily held the territorial sea; on the contrary, the Court did not dispute that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the colony rights to which under international law the British Crown was entitled.[138]

There followed seven pages of additional study[139] of case precedents concluding that the territorial sea lay beyond the limits of the territory of British Columbia in 1871 and did not become part of British Columbia following union with Canada.[140] Only then did the Court look to Canada as an international actor, and to the federal government as holder of the territorial sea rights at issue in the litigation.[141]

To be sure, in its subsequent analysis of the continental shelf issue the Court did immediately look into international law.[142] But the decision in the continental shelf issue was contingent upon the outcome of the territorial sea issue. The Court recognized that "[a]s with the territorial sea, so with the continental shelf,"[143] and declared that, of the two reasons why the federal government prevailed over British Columbia, foremost was the fact that the continental shelf was beyond the boundaries of British Columbia.[144] Canada's role as international actor was a secondary reason given by the Court.[145]

Consequently, the attempt in *New South Wales* to equate the primary rationale of *Re: Offshore Mineral Rights of British Columbia* with that inderlying *California, Texas, Louisiana* and *Maine* is misguided. The outcome in the Canadian case hinged upon provincial history and not upon any abstract imperatives inhering in federalism. British Columbia, unlike the United Kingdom, Canada or Newfoundland, was never a sovereign international person.

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137 *Ibid.*, 808-809.
138 *Ibid.*, 808.
139 *Ibid.*, 808-14.
140 *Ibid.*, 814.
141 *Ibid.*, 814-17.
142 *Ibid.*, 817-21.
143 *Ibid.*, 821.
144 *Ibid.*
145 *Ibid.*

Conclusion

Because Newfoundland was itself a sovereign international actor prior to Confederation, and because under international law continental shelf rights (and by implication territorial sea rights) adhere to the sovereign coastal state *ipso facto*, Newfoundland brought these rights into Confederation. Because the Supreme Court of Canada has relied upon evidence as to what offshore rights a province has brought with it into Confederation in determining whether offshore rights obtain in the province or in the federal government, Newfoundland as a matter of Canadian constitutional law should prevail in her offshore dispute with Ottawa.

Nova Scotia, New Brunswick, and Prince Edward Island were never themselves sovereign international actors. Continental shelf rights and territorial sea rights may always have inhered in the coastal state, but during the respective colonial periods of these provinces the coastal state for these purposes might have been the United Kingdom.

Chief Justice Barwick, after all, could easily accept in *Bonser* that offshore rights inhered *ipso facto*, but that the defined territories granted by the United Kingdom to the states during their respective colonial periods did not include the offshore waters or seabed; he examined the territorial terms of the instruments establishing the colonies in order to conclude this. The Supreme Court of Canada similarly recognized that although the history of British Columbia disclosed no conferring upon the governor or legislature of British Columbia the rights to which the British Crown was entitled under international law, such a prior development would have affected the 1967 decision. After the *Re: Offshore Mineral Rights* case such a pre-Confederation conferring of rights was precisely what Nova Scotia, New Brunswick and Prince Edward Island had to allege; this is the reason for the resort to history.[146]

Inasmuch as nation-state territorial sea and continental shelf claims prior to Confederation ranged from diffuse to non-existent, it was impossible for these provinces to point to territorial sea/continental shelf grants to them made in so many words. It has been seen above that grants using adjacency and appurtenance termino-

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[146] See *The Wall Street Journal*, Feb. 3, 1977, p.17: "The Canadian Government and the provinces of Nova Scotia, New Brunswick and Prince Edward Island have reached a partial accord on offshore mineral rights.
The accord deals with matters of administration and revenue sharing, but doesn't cover the unresolved issues of jurisdiction and ownership."

logy do exist, and offshore jurisdiction was exercised in some cases. The Supreme Court of Canada in the post-*Re: Offshore Mineral Rights* era would have had to decide as to each province whether these pieces of evidence did demonstrate the grant of offshore imperial rights to the colony.

Newfoundland is in a rather unique constitutional position. A most convincing argument may be advanced to the effect that, unlike the other Canadian provinces, and unlike the Australian states, Newfoundland historically possessed and exercised sovereign rights and powers which survived Confederation. The historical argument in *Re: Offshore Mineral Rights*, while it served to dismiss British Columbia's claim, can only strengthen Newfoundland's. The Supreme Court of Canada should recognize as valid Newfoundland's offshore claims.