NOTES

Legal Issues of the Offshore Mineral Rights Dispute in Canada

Following five years of political dispute, but by no means terminating it, federal Order in Council P.C. 1965-750 asked that the opinion of the Supreme Court of Canada be obtained in relation to five questions concerning the ownership of and jurisdiction over mineral resources in defined areas of the seabed of the territorial sea [1] and the continental shelf [2] off the coast of British Columbia. After hearing arguments from March 8th to 15th, 1967, the Court handed down its opinion on November 7th, 1967.[3]

The present note will discuss the opinion of the Supreme Court of Canada, with special reference to the style of the judgment and to the legal-historical context in which it was handed down.

I

In a 7-0 single opinion, the Supreme Court of Canada agreed with the federal government's argument in its entirety, and followed its logic quite closely. The first phase of the Court's reasoning sought to establish whether the area in dispute was part of the territory of British Columbia as a colony.[4] After a review of the history presented by both federal and provincial counsel,[5] the Court agreed with British Columbia that

> 1. Before Confederation all unalienated lands in British Columbia including minerals belonged to the Crown in right of the Colony of British Columbia; [and]

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[1] As defined by the *Territorial Sea and Fishing Zones Aet,* 13 Eliz. II, S.C. 1964-65, c. 22.

[2] Following the definition in Article 1 of the *Convention on the Continental Shelf,* U.N. Doc. A/Conf. 13/L55, which came into force June 10th, 1964.

[3] Reported as *Refcrence Re Ownership of Offshore Mineral Rights,* (1968), 65 D.L.R. (2d) 353, [1967] S.C.R. 192. Future references to the text of the judgment will be to the D.L.R. version.

[4] The Court noted that British Columbia could have succeeded in its claim only if it could have been found that "the *solum* was situate in British Columbia in 1871." (At p. 360).

[5] At pp. 357-9.

> 2. After union with Canada such lands remained vested in the Crown in right of the Province of British Columbia[6]

but pointed out that the crucial question remained unanswered:

> — whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation... The history of the Province affords no assistance in settling this problem...[7]

The Court then examined judicial opinions in the British Columbia and Quebec *Fisheries* cases,[8] but found that, there too, the main question before it remained unanswered.[9] However,[10] the judges then took the decisive step of accepting the key federal argument: that *Regina* v. *Keyn*[11] could be interpreted as establishing the territory of the realm as ending at the low-water mark.[12] The *Territorial Waters Jurisdiction Act*,[13] rather than overturning the *Keyn* decision, was interpreted as seeking merely to redefine the criminal jurisdiction of the Lord High Admiral in the three-mile belt, but without affecting the juridical status of its underlying seabed as being land outside the realm.[14] After an extensive review of relevant judicial

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[6] At p. 360.

[7] At pp. 360-1.

[8] *Attorney-General of British Columbia* v. *Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada* v. *Attorney-General of Quebec*, [1921] 1 A.C. 413.

[9] At pp. 361-2.

[10] Agreeing with MacDonald, J., in *Re Dominion Coal Co. Ltd.* and *the County of Cape Breton*, (1963), 40 D.L.R. (2d) 593, at p. 629.

[11] (1876), 2 Ex. D. 63.

[12] At p. 362. The conception that the three-mile belt is integrally part of the realm is not uncommon, even though it involves some technical inconsistencies, according to D.P. O'Connell, *Australian Coastal Jurisdiction*, in *International Law in Australia*, ed. by O'Connell, (London, 1965), pp. 248, 252. (Cited hereinafter as "O'Connell, *Australia*".)

O'Connell also notes that his interpretation of *Regina* v. *Keyn* was "supported... by decisions of other national courts of more recent date, though apparently not by the International Law Commission and the opinions of the jurists." *Ibid.*, p. 248. Professor O'Connell's interpretation is adopted throughout in the *Offshore Mineral Rights* opinion.

[13] 41-42 Vict., 1878, c. 73.

[14] At pp. 362, 364. Implicitly following the logic suggested in O'Connell, *Australia*, at p. 251. Cf. Ivan L. Head, *The Legal Clamour Over Canadian Offshore Minerals*, (1967), 5 Alta. Law Rev. 312, at pp. 321-323.

As an illustration of this rule, the Court suggested the hypothetical example of an offence committed within three miles of the mainland of British Columbia in 1879; jurisdiction would have fallen to English (not Canadian) courts.

pronouncements, distinguishing the matters covered from the ones present in the instant case,[15] the Court concluded that lands under the territorial sea were *not* within the realm of the colony of British Columbia.[16] Although the Imperial Crown might have conferred upon its colony of British Columbia those international rights which it possessed in parts or all of the territorial sea adjacent to that colony,[17] the Court found that the historical record of the colony did not disclose any such action.[18]

In the post-Union period, British Columbia could have acquired new territory only by an act of the Canadian Parliament pursuant to section 3 of the *British North America Act, 1871*.[19] The Court noted that no alteration had, in fact, occurred by this procedure, and added for greater certainty that there was "no other provision for extending the limits in any other way." [20]

International law, and not common law, was the law applicable to the disputed areas.[21] Jurisdictional rights in the area, bestowed

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[15] See *infra* at p. 480. Cases: *Attorney-General* v. *Chambers*, (1854), 4 De G. M. & G. 206, 43 E.R. 486; *Gammell* v. *Woods and Forests Commissioners*, (1859), 3 Macq. 419; *Whitstable Fishers* v. *Gann*, (1861), 11 C.B. (N.S.) 387, 142 E.R. 847; [on appeal] *Gann* v. *Whitstable Fishers*, (1865), 11 H.L.C. 192, 11 E.R. 1305; *Lord Advocate* v. *Clyde Navigation Trustees*, (1891), 19 Rettie 174; *Lord Advocate* v. *Wemyss*, [1900] A.C. 48; *Secretary of State for India* v. *Chelikani Rama Rao*, (1916), 32 T.L.R. 652; *R.* v. *Burt*, (1932), 5 M.P.R. 112. Also cited: *Cornwall Submarine Mines Act*, 21-22 Vict., 1858, c. 109.

[16] At p. 373. Accepting this federal argument, the Court also cited a *dictum* in the *British Columbia Fisheries* case to disqualify as "obsolete" the international law principle (*viz.*, that there was no difference between Crown land above or below the low-water mark) relied upon by the provincial argument [at pp. 366, 370]. In addition, the *de facto* examples of legislative claims to submarine areas were regarded by the Court as individual occurrences *not* establishing any *general* principle of ownership in the three-mile belt.

[17] As it had done, e.g., in the case of Conception Bay, Nfld. Cf. *The Direct United States Cable Co.* v. *The Anglo-American Telegraph Co.*, (1877), 2 App. Cas. 394.

[18] At p. 367.

[19] 34-35 Vict., 1871, c. 28: "The Parliament of Canada may from time to time, with the consent of the Legislature of any Province... increase, diminish, or otherwise alter the limits of such province."

[20] At p. 360. Perhaps this was the Court's way of casting doubt on British Columbia Minute in Council #3750 of Dec. 1, 1966, which laid claim to the continental shelf.

[21] Accepting the distinction proposed by the federal argument, separating (a) the rights of the Crown under common law, which extend only to the limits of the realm (which, in turn, ends at the low-water mark), from (b) the rights of a sovereign State under public international law, which may be

by international law, were exercised by Britain prior to the acquisition of Canadian sovereignty,[22] but with the advent of the latter, Canada earned the ability to acquire "new areas of territory and new jurisdictional rights which may be available under international law." [23] The Court recognized the combination of the *Territorial Sea and Fishing Zones Act*,[24] and the Geneva Convention of 1958[25] as having the effect of giving to Canada "sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada."[26]

Once lands under the territorial sea were established as property in Canada and not in British Columbia, exclusive jurisdiction, including the right to explore and exploit mineral resources in this area, was easily found for Canada. British Columbia, the Court held, had no legislative jurisdiction; lands under the territorial sea did not come within any enumerated head of section 92 of the *British North America Act* since these were outside the boundaries of the province.[27] Canada, on the other hand, was granted full rights in the area, either under Section 91(1A) or under the residual power of Section 91. The subject-matter not falling to the province under any head of Section 92 was therefore to be regarded as "a matter affecting Canada generally and covered by the expression 'the peace, order and good government of Canada'." [28]

> 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.[29]

Moreover, the Court held that

> 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 te Canada which is a sovereign Stato recognized by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sca.[30]

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exercised by a sovereign State beyond the limits of the realm to include its territorial sea. See: *Factum* of the Attorney-General of Canada, p. 7, paras. 13-15.

[22] At pp. 373-4.

[23] At p. 375. Citing, as an example, international recognition of Canada's rights in the territorial sea off British Columbia's mainland: *Pacific Salmon Fisheries Convention Act*, 5-6 Eliz. II, S.C. 1957, c. 11; *Pacific Fur Seals Convention Act*, 5-6 Eliz. II, S.C. 1957, c. 31.

[24] 13 Eliz. II, S.C. 1964-65, c. 22.

[25] *Convention on the Territorial Sea and Contiguous Zone*, U.N. Doc. A/Conf. 13/L52, which came into force Sept. 10, 1964.

[26] At p. 375.

[27] *Ibid.*

[28] At pp. 375-76.

[29] At p. 376.

[30] *Ibid.*

As for jurisdiction over and the right to explore and exploit the resources of the continental shelf, the Court cited the *Convention on the Continental Shelf* [31] as being the law in force concerning this area, and pointed to the practice of other sovereign states in relation to it.[32] The Court concluded that

> (1) The continental shelf is outside the boundaries of British Columbia, and
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> (2) Canada is the sovereign State which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.[33]
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> There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.[34]

II

Intimately related to the above abstract reasoning is the broader and more nebulous "style" in which the legal arguments are couched, the

> interaction, in the judicial mind, of rules of law, facts, and policies, and the process of choice as to each one of these... [:] which particular rules are... designated as relevant, which facts as material, and which policies as governing.[35]

Rules and principles of legal reasoning are not capable of a completely unambiguous application. Russell has urged scholars "to discover... where pure legal analysis ends and value judgments, which cannot themselves be determined by such analysis, begin." [36]

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[31] U.N. Doc. A/Conf. 13/L55, which came into force June 10th, 1964.

[32] Citing legislation by the United States, the United Kingdom, and New Zealand in relation to the continental shelf (at pp. 379-80).

[33] Ivan Head lists ten responsibilities and obligations derived from a reading of Articles 3, 4, 5(1), 5(5), 5(6), 5(7), and 5(8) of the *Convention, loc. cit.*, at pp. 325-6.

[34] At p. 380. "1958, or perhaps 1964,... marks the maturation of the concept of the continental shelf and its full acceptance by the international community. Public statements by some British Columbia spokesmen to the effect that the shelf 'always has' been British Columbia's are inconsistent with this fact... [S]tatements [etc.] with respect to the shelf and written prior to 1958 remain authoritative only to the extent that they are not inconsistent with the terms of the [Geneva, 1958] Convention." Ivan Head, *loc. cit.*, pp. 319-20.

[35] E. McWhinney, *Judicial Review in the English-Speaking World*, 3rd ed., (Toronto, 1965), p. 231.

[36] P. Russell (ed.), *Leading Constitutional Decisions* (Toronto, 1965), p. xxiii. (Hereinafter cited as "Russell, *Constitutional*").

By examining the judicial art of selecting, ignoring, and distinguishing cases,[37] one can attempt to assess the scope of "discretion" in the hands of the judges.[38] The following discussion tends to accept the "Legal Realism" notion of "judge-made law", i.e., the idea that "under the guise of interpretation, courts do take sides on 'burning issues'." [39]

Owing to the complexity of the *Offshore Mineral Rights* reference, the judges, it is suggested, had a rather broad discretion to assign varying degrees of importance to several types of considerations, including:

(1) adherence to precedents and statute law;

(2) the applicability of international law;

(3) the maintenance of the "federal principle" as they defined it;

(4) the relevance of the examples of other states; and

(5) "practical" political or administrative considerations.

It is the combination of the relative weight attached to each of these factors that determined both the outcome and the style of the Court's opinion. These considerations will now be discussed individually.

(1)

Russell has noted that

> [t]he issues that come before the court are always in some sense unique so that the judges will usually be able to "distinguish" previous decisions which they do not wish to follow as turning on grounds different from those in the case at hand.[40]

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[37] "Given rival precedents on the same general question and the art of distinguishing previous cases as different from the one at hand, it is entirely possible for a court, while looking exclusively to past cases for the premises of its reasoning, in fact so to select, ignore and distinguish cases that it is able to evolve its own doctrines of constitutional law." P.H. Russell, *The Supreme Court's Interpretation of the Constitution since 1949*, in *Politics: Canada*, ed. by Paul Fox, (Toronto, 1962), p. 64, at p. 78. (Hereinafter referred to as "Russell, *Politics*"). Cf. Russell, *Constitutional*, p. xxi; McWhinney, *op. cit.*, p. 74.

[38] "A degree of discretion is inherent in the courts'... function of applying the terms of a federal constitution to the enactments of national and local legislatures... In the application of any law to particular circumstances there is always... room for judicial discretion." Russell, *Constitutional*, pp. xiv-xvi.

[39] Cecil A. Wright, Foreword to McWhinney, *op. cit.*, p. viii. Wright adds: (at p. ix) "The difficulty here is that many judges honestly believe that they are not participating in policy-making or policy-enunciation..." Cf. McWhinney, *op. cit.*, p. 230.

[40] Russell, *Constitutional*, p. xxi. Cf. notes 37 and 38, *supra*.

In the *Offshore Mineral Rights* reference the Court was confronted with rival arguments often pointing to the *same* precedents for authority.[41] Previous cases, then, were unclear enough so that neither argument had to be favoured "inevitably" by the Court. Faced with two equally plausible and internally consistent lines of reasoning,[41a] the Court chose to accept one completely (*viz.*, that the realm ends at the low-water mark) and to reject the other as "obsolete" (*viz.*, that there is no difference between Crown lands above or below that mark in the three-mile zone). As noted above, this choice was fundamental to the federal "victory". The practice of distinguishing cases as being different and not applicable was used by the Court to give itself the discretion to choose one of the two conflicting lines of precedent headed by *Regina* v. *Keyn*.[42]

(2)

The international law of the sea, known to be in a state of evolution and growth,[43] is regarded by some as too tenuous to offer firm guiding principles for domestic constitutional law. Indeed, Ontario had argued before the Court on March 14, 1967 that, because there was a "difference of opinion under international law [as] to ownership of the sea bed, ... the courts should [therefore] steer away from that aspect." [44] Head agrees that the question, "in the final analysis, ha[d] little to do with international *law*", but went on to stress that it did "have much to do with international *relations*," pointing out that the question could not "be decided in a judicial vacuum." [45]

The judges of the Supreme Court, it seems, felt that international law offered no problems, and did not shy away from pronouncing on it. The Court's awareness of the pertinence of international rela-

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[41] Eleven, out of a total of thirty, authorities cited by British Columbia are also cited as authorities for the federal argument.

[41a] See, e.g., notes 12 and 16, *supra*.

[42] Note 12, *supra*. The question of choosing alternative lines of precedent in relation to the *Labour Conventions* case arises *infra*, at pages 489-490, 491-492.

[43] See, e.g., Head, *loc. cit.*, p. 317; O'Connell, *Problems of Australian Coastal Jurisdiction*, (1958), 34 B.Y.B.I.L. 198, at p. 256 (cited below as "O'Connell, B.Y.B.I.L.").

[44] Quoted in Vancouver *Sun*, Mar. 14, 1967.

[45] Head, *loc. cit.*, p. 323 [emphasis added]. Head also cites the *Fisheries* cases as illustrating a judicial awareness of international ramifications. *Ibid.*, p. 324. Cf. the observations of Mr. Justice Laskin, *infra*, note 67. The current dispute with France over St. Pierre and Miquelon's continental shelf may have made international-relations considerations more relevant to the decision.

tions was also unambiguous.[46] Its decision to accept so unqualifiedly Canada's reliance upon international responsibility as a valid argument was a major discretionary element in the style of the opinion.[47]

(3)

O'Connell has suggested that

> [t]he way a court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and system of government.[48]

The *Nova Scotia Inter-delegation* case[49] provides a rare example of a Canadian court explicity deciding an action was unconstitutional because it was "utterly foreign to the conception of federal organization."[50] The way in which the Court may have related the question of offshore mineral rights to its theory of federalism was not stated openly; the judges did not find it necessary to base their arguments explicitly on such philisophies. However, their views on the federal distribution of powers, if not explicit, are clear enough; these are discussed below.

(4)

It would not have been difficult for the Court to have rejected federal arguments referring to the situation in the United States as irrelevant on the grounds that the American constitutional structure,

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[46] At pp. 376, 380.

[47] By accepting, say, Ontario's plea to ignore (or minimize) the applicability of international law to the case, the Court could have avoided "penalizing" British Columbia for its lack of sovereign status. "Intornational recognition [argued the British Columbia *Factum*] of the right to explore and exploit beyond the three-mile belt does not affect, in any way [1] British Columbia's pre-Confederation right in the property [of the continental shelf] or [2] the division of legislative powers under the *British North America Act... Internationally* the tost of entitlement to the right of exploration and exploitation in the shelf is the ability to come within the meaning of the words 'coastal state'. This Canada can do, solely because British Columbia is within Confederation. *Domestically*, British Columbia is the 'coastal state'." *Factum*, p. 24 [emphasis original].

[48] O'Connell, B.Y.B.I.L., p. 259.

[49] [1950] 4 D.L.R. (2d) 369.

[50] Quoted in Russell, *Politics*, p. 71. Russell also gives a similar instance in the *Local Prohibitions* case (*Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348, at p. 360): "To attach any other construction to the general power... would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces." *Constitutional*, p. xviii.

division of powers, and judicial tradition were different from our own.[51] On the other hand, McWhinney has argued that

> The major influence, indeed inspiration, in the present-day practice of judicial review in the Commonwealth countries, has been the Supreme Court of the United States. This at first sight might seem rather surprising in view of the frequently expressed, official judicial distaste... for the citation of American constitutional precedents in argument before their Supreme Courts, or *a fortiori* for any reliance on those American... precedents in the actual judicial opinions deciding cases... Whatever its origins, however, the *indicia* of American legal influence in the Commonwealth countries are clear and unmistakable now in Commonwealth Supreme Court opinions — in the noticeably increased policy-orientation of judicial decision-making and the interests-balancing approach in general...[52]

Without placing heavy and direct reliance on the American experience, the Court nevertheless accepted the federal argument which pointed to the Truman Proclamation and the United States Supreme Court decisions to illustrate the relevance of international law to the domestic dispute.[53]

(5)

The "practical policy" nature of the judicial process presents perhaps the most controversial problems in assessing judicial interpretation. Closely related to the first factor discussed above, this aspect is seen by McWhinney as follows:

> ...we must face up squarely to the question of whether judges legislate, in the sense of making conscious choices between conflicting policy alternatives... It is not without significance that the controversy over the Privy Council's interpretation of the *B.N.A. Act* should all too frequently proceed in the form of a dispute over alternative rules of statutory construction, rather than in terms of the actual consequences to Canadian national life flowing from the individual decisions.
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> The need for a critical examination of the values employed by judges in making their decisions has been obscured all too frequently by much unproductive wrangling over the formulae in which the judges subsequently embody those values, although the varied members of the Privy Council have occasionally adverted to the consequences of their decisions.[54]

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[51] Head notes that there are "important historical and constitutional differences." *Loc. cit.*, p. 324. Cf. Edwin Black, *Offshore Oil Troubles the Waters*, (1965-66), 72 Queen's Quarterly, pp. 592-594.

[52] McWhinney, *op. cit.*, pp. 228-9.

[53] Cf. Point 2, discussed *supra*, pp. 481-482. "[T]he words of the Supreme Court of the United States, which reflect [the] concern [for the]... international responsibility [of] the United States, are valuable as illustrative of the international consequences which should, it is submitted, be considered by the Supreme Court of Canada in the present Reference." Head, *loc. cit.*, p. 324.

[54] McWhinney, *op. cit.*, p. 69. Cf. Russell, *Constitutional*, p. xix.

In the Canadian tradition, the judges in the *Offshore Mineral Rights* case chose not to pronounce explicitly on their value preferences and recognition of the practical consequences of their opinion. The Court's concern for the *international* consequences of its decision is an important exception, of course. In terms of the *domestic* policy implications, however, the Court was silent, although the judges were fully aware of the administrative problems involved:

> When [federal counsel] Carson pointed to the present circumstances whereby different exploration companies have rights granted separately by Ottawa and Victoria for overlapping areas, Mr. Justice J.R. Cartwright[54a] said [this] pointed up the need for the court's opinion.[55]

Overlapping permits presented only one of many practical problems. Black suggested the difficulties that would result from a Court opinion giving provincial jurisdiction within the three-mile belt and federal jurisdiction beyond.[56] Former federal Resources Minister Pepin has referred to

> the awful confusion coming from unco-ordinated initiatives in this domain. Suppose, for instance, in defense, which is a federal matter, there is a conflict of jurisdiction between undersea operations and oil drilling? Same for seashore pollution, which only the federal level of government is competent to solve with foreign powers.[57]

This implicit argument pointing to the "intolerable" state of affairs that would result if the Court were to find for British Columbia is reminiscent of the *Johannesson* decision, where Mr. Justice Kellock *explicitly* based part of his reasoning against provincial regulation of aerodromes on his estimation of the "intolerable" situation that would have ensued had airlines been found to be subject to local regulation.[58] However, in the *Offshore Mineral Rights* decision the Court found it unnecessary to refer to political and administrative consequences, since it was able to rationalize its decision by other principles, *viz.*, historical-legal interpretation and international-relations implications.

One further feature of the Court's opinion deserves comment. If the historical-legalism of the decision renders the Court "conserva-

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[54a] As he then was.

[55] Victoria *Daily Times*, Mar. 11, 1967. See also Vancouver *Sun*, Mar. 11, 1967.

[56] Black, *loc. cit.*, at p. 601.

[57] *L'Avenir de Sept-Iles Journal*, Nov. 14, 1967. M. Pepin, whose Department is one especially vexed with the complications of overlapping jurisdiction (of *three* levels of government), also pointed to the complexities of international relations, navigation, fisheries, as well as the two mentioned above. See *Le Soleil*, 13 nov. 1967 (10).

[58] *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292; discussed in Russell, *Politics*, p. 79.

tive" or "restrained" by some standards, the same cannot be said in terms of its having handed down a rare unanimous and joint opinion.[59] 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.[60] Thus, the "strength" of the pro-federal opinion cannot be denied.[60a]

O'Connell believed that, in the United States "tidelands" cases, the United States Supreme Court's decisions were based "less on precedent than on high policy;" [61] in that country, this "style" of opinion was natural. Since it was hard to find any "analytical answer" to the question of property in the lands below the territorial sea generally, he concluded that "the problem might be solved in terms of power and responsibilities rather than in terms of possession." [62] On the other hand, he suggested, an Australian court "would find great difficulty in deciding the question... in any terms other than ownership..."[63] The Canadian Court, interestingly enough, did a little of both. First it undertook to apply historical-legal analysis to resolve the question of property in the seabed. Once this was clearly established, the Court was then able to rely also on the international ramifications of offshore jurisdiction.

Proponents of "judicial activism" — usually taking the United States Supreme Court as the example to be followed — were regular critics of the Judicial Committee of the Privy Council for being too

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[59] Of the 53 constitutional cases decided by the Court between 1950 and 1965, only ten were single "Judgments of the Court", signed by only one Justice. See: Stephen R. Mitchell, *The Supreme Court of Canada since the Abolition of Appeals to the Judicial Committee of the Privy Council: A Quantitative Analysis* (Paper prepared for presentation to the Meeting of the Canadian Political Science Association, June 7, 1967, Carleton University, Ottawa), p. 12.

One recent such case — significantly pro-federal in outcome — is *Munro* v. *National Capital Commission,* (1966), 57 D.L.R. (2d) 753. Discussed, *infra,* note 92.

[60] Russell, *Politics, loc. cit.*

[60a] Mitchell, however, noting a "marked increase" in unanimous "Judgments of the Court" since 1958, suggests that this might be more a response to "an increased work load" than a result of a growing degree of unanimity. *Op. cit.,* p. 9.

[61] O'Connell, *Australia,* p. 249. He added that: "views on policy will differ according to the prevalence on the bench of federalist or unionist opinions." Cf. "In the so-called tidelands cases the United States Supreme Court did indeed attempt some doctrine, but it was no more than a superstructure to an essentially policy decision." O'Connell, B.Y.B.I.L., p. 259.

[62] O'Connell, *Australia,* p. 259; cf., *ibid.,* pp. 249, 291.

[63] *Ibid.,* p. 260.

"literalistic" (narrow statutory construction) and "legalistic" (bound by precedent) in its interpretation of the Canadian constitution.[64] This criticism of "style" usually coincided with the criticism of the resultant trend favouring provincial legislative powers at the expense of the central authority.[65] Assessing the decisions of the Supreme Court of Canada from 1949 to 1960, Russell noted that, while neither a distinctive "literal" nor a distinctive "liberal" approach had emerged, there had, nevertheless, been "an increasing degree of pragmatism in the court's interpretation of the division of powers."[65a] The *Offshore Mineral Rights* opinion seems to follow this latter trend. Although, on the surface, heavy reliance on historical and legal precedent may suggest that the Court was "oblivious to political and economic realities,"[66] this would be, it is submitted, a shallow conclusion. Both the Court's recognition of Canada's role in international relations,[67] and its liberal interpretation of the residual power by designating offshore development as a "matter affecting Canada generally," going "beyond local or provincial interests or concern,"[68] illustrate that the judges were at least implicitly aware of the political and economic context surrounding the purely legal issues submitted to them.[69]

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[64] See, e.g., Russell, *Constitutional*, p. xix, and *Politics*, pp. 77-78; Vincent MacDonald, *The Canadian Constitution after 70 Years*, (1937), 15 Can. Bar Rev. 401, at pp. 419 *et seq.*, and *The Constitution in a Changing World*, (1948), 26 Can. Bar Rev. 21.

[65] See, e.g., McWhinney, *op. cit.*, p. 69; Russell, *Constitutional*, p. xix.

[65a] Russell, *Politics*, p. 79.

[66] «[O]n ne manque pas de signaler jusqu'à quel point la Cour fait abstraction, en émettant cette opinion, des circonstances politiques qui prévalent au pays. On rappelle à cet égard que le Conseil privé s'ajustait beaucoup plus librement à des situations politiques.» Pierre O'Neill, *Le Devoir*, 8 nov. 1967.

[67] See: Head, *loc. cit.*, *passim*. Laskin has pointed to the decisions in *Pronto Uranium Mines Ltd.* v. *Ontario Labour Relations Board*, [1956] O.R. 862, *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, and *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 as demonstrating "not only a judicial awareness of the international impact on domestic regulatory schemes, but [also] a disposition to give that impact constitutional weight." Bora Laskin, *Some International Legal Implications of Federalism: The Experience of Canada*, in *Federalism and the New Nations of Africa*, ed. by David P. Currie, (Chicago, 1964), 389, at p. 410. Cf. the other point of view, note 47, *supra*.

[68] At pp. 375-76.

[69] Cf.: "One cannot complain... that the Judicial Committee failed to introduce into its interpretation of the constitutional values and beliefs extrinsic to the bare words of the act... [But] one is struck by the relative lack of thoughfnl articulation of the real problems and alternatives inherent in the adaptation of a written constitution to a dynamic society." Russell, *Constitutional*,

III

The Federal argument for jurisdiction over offshore resources was so firmly based on the contention that the lands in question 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.[70] O'Connell notes, with special reference to offshore rights disputes:

> it is difficult to state with clarity the effect of an expanding and changing international law of the sea upon disputed Federal-State maritime claims... So far [1958] judicial decision in the areas where it occurs has been tentative, and no real doctrine or theory has emerged... At bottom the problem is one of collision between two incompatible doctrines, [*viz.*,] the sovereignty of the constituent elements in a federal system, and their lack of responsibility in international relations.[71]

This intersection of domestic and international law does not present an equally difficult problem to all federal states. In constitutionally "centralized" federations like the United States, the central government may have, in addition to the normal executive power to conclude treaties, the legislative ability to implement these agreements. In the United States this power, although infrequently used,[72] is nevertheless firmly rooted in the Constitution.[73] However,

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pp. xviii-xix. Brossard, in his criticism of the *Offshore Mineral Rights* opinion, labelled the Court as «plus ou moins prisonnière de sa conception étroite du *Common Law*», and branded its opinion as «aussi discutable sur le plan juridique que sur le plan politique.» He also suggested that the opinion was «nettement politique.» *Le Devoir*, 22 nov. 1967.

[70] For a general discussion of this problem, see Laskin, *loc. cit.*, pp. 389-414; F.H. Soward, *External Affairs and Canadian Federalism*, in Lower, Scott, *et al.*, *Evolving Canadian Federalism*, (Durham, North Carolina, 1958), pp. 126-160.

[71] O'Connell, B.Y.B.I.L. at pp. 256, 259.

[72] As measured by the ratifications of International Labor Organization conventions. As of June 1, 1966, the United States had implemented only 7 out of a possible 124 conventions. Cf. Canada 21, Australia 26, India 30, and Mexico (the highest number for a federal state) 47. International Labor Organization, "Official Chart of Ratifications", June 1, 1966.

[73] "...all treaties made under the authority of the United States shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." (Art. IV, s. 2). In addition, Congress has the authority "to make laws which shall be necessary and proper for carrying into execution" any of the powers vested in it. (Art. I, s. 8). See Robert R. Bowie, *The Treaty Power in the Federal System: The Experience of the United States*, in Currie, *op. cit.*, p. 371, at p. 375.

the power to implement treaties is not considered an unlimited grant of authority:

> The Supreme Court... has stated flatly and repeatedly that the treaty power does not extend "so far as to authorize what the Constitution forbids." ...The treaty power may not be used to accomplish a domestic purpose when there is no genuine and sufficient justification for an international agreement containing the provisions in question.[74]

In Australia, the "foreign affairs" power vested in the Commonwealth is deemed to give it a capacity for treaty-implementing legislation.[75] This power, too, is restricted by the discretion resting with the courts to determine whether the implementing legislation is a *bona fide* attempt to give effect to an international agreement.[76] It should be noted that

> [t]he adherence to and ratification of [a] convention by the Commonwealth has not been considered to vest in the Commonwealth a blanket power... nor to deprive the States of their pre-existing legislative power.[77]

The treaty-implementing power has been the subject of much debate and commentary in Canada.[78] Most of this debate has brought forth arguments strongly in favour of a departure from the classic decision of the Privy Council in the *Labour Conventions* case of 1937.[79] The problem arises from section 132 of the *British North America Act,* which states that

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

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[74] Bowie, *loc. cit.,* p. 384.

[75] *Australian Constitution,* sec. 51 (xxix). See J.P. Nettl, *The Treaty Enforcement Power in Federal Constitutions,* (1950), 28 Can. Bar Rev. 1051, at p. 1053.

[76] Nettl, *loc. cit.,* at pp. 1056, 1060.

[77] R.D. Lumb, *The Law of the Sea and Australian Offshore Areas,* (St. Lucia, 1966), p. 60. Although the issue has never been brought before the Australian courts, Lumb suggests that there is "strong evidence to support the view that colonial sovereignty extended to the three-mile limit" (*ibid.,* p. 57; cf. *ibid.,* p. 61). "Property rights of the states in the seabed have not been ousted by the adherence of the Commonwealth" to international conventions. *Ibid.,* p. 60. Cf. O'Connell, *Australia,* at p. 260.

[78] See: Laskin, *loc. cit.*; Soward, *loc. cit.*; Nettl, *loc. cit.*; R.J. Matas, *Treaty-Making in Canada,* (1947), 25 Can. Bar Rev. 458; Lord Wright of Durley, *Tribute to Sir Lyman Poore Duff,* (1955), 33 Can. Bar Rev. 1123; G.J. Szablowski, *Creation and Implementation of Treaties in Canada,* (1956), 34 Can. Bar Rev. 28; Edward McWhinney, *Comment,* (1957), 35 Can. Bar Rev. 842; MacDonald, *The Canadian Constitution After Seventy Years, loc. cit.*; F.R. Scott, *Centralization and Decentralization in Canadian Federalism,* (1951), 29 Can. Bar Rev. 1904, at p. 1112.

[79] *Attorney-General of Canada* v. *Attorney-General of Ontario,* [1937] A.C. 326.

Canada has ceased concluding treaties "as part of the British Empire" since the 1919-31 period, and the "British Empire" no longer exists. Subsequent judicial interpretation has rendered this section inoperative, and thus created a lacuna in the conduct of foreign affairs. In the *Labour Conventions* decision, Lord Atkin stated, in part:

> It is impossible to strain the Section [132] so as to cover the uncontemplated event... For the purposes of... the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects, and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.[80]

The criticism by legal scholars that followed this pronouncement could easily form an entire study unto itself, and cannot be given full and proper treatment here; let it suffice to summarize the arguments broadly. They all underline the fact that in Canada "federal executive treaty-making power [is] left dangling... without the complementing legislative power of implementation,"[81] and suggest, alternatively, that:

A. The 1937 decision could just as easily (and should) have followed the logic of the 1932 *Radio case*[82] in allowing the residual power of section 91 to fill the void created by the inoperativeness of section 132, as a logical "heir"; in any case, later decisions should not feel bound by Lord Atkin's pronouncement, and can easily revert back to the alternative line of precedent flowing from 1932.[83]

B. The defunct section 132 should be repealed and replaced by an amended clause that would fully empower Parliament to pass implementing legislation.[84]

C. Either with or without such amendment (in the latter case, using an expanded interpretation of the "Peace, Order and Good Government" clause), the courts should assume the responsibility, as they do in Australia and in the United States, for deciding the validity of implementing legislation. This would protect the provinces from unwarranted intrusion by the federal government *via* dubious treaty-legislation, while at the same time restore

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[80] [1937] A.C. 326, at pp. 350-1.

[81] Laskin, *loc. cit.*, p. 396. Cf. Soward, *loc. cit.*, pp. 139-40.

[82] [1932] A.C. 304.

[83] Lord Wright, *loc. cit.;* Szablowski, *loc. cit.*, p. 59.

[84] Matas, *loc. cit.;* Nettl, *loc. cit.;* Szablowski, *loc. cit.;* Soward, *loc. cit.*, pp. 140-1.

to Canada a more certain position in concluding international agreements.[85]

This dimunition of federal authority vis-a-vis provincial power should also be seen in the larger context of the general provincialist interpretation of the division of legislative powers given by the Privy Council prior to the late 1940's. The intended (by the "plain wording" approach) federal residual power in section 91 became, through judicial interpretation, an "emergency power" only, while section 92(13), "Property and Civil Rights in the Province," became the real, or co-equal,[86] residual clause.[87]

However, the general modern-day trend, with the Supreme Court of Canada as court of final appeal, seems to be in the other direction. Some commentators have detected that certain decisions since the *Labour Conventions* case can be interpreted as gradually shifting the "federal balance" back towards the central government. This can be seen, for example, in the expansion of the residual "Peace, Order and Good Government" clause in such a way as to minimize the difficulties imposed by the "loss" of section 132.[88] In the *Offshore Mineral Rights* case, the federal government sought, with complete success, to take advantage of this trend so as to cover

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[85] McWhinney, *loc. cit.*,; Szablowski, *loc. cit.* One commentator, however, has argued that: "To a large extent, the central government is unaffected by the constitutional restriction of the *Labour Convcntions* case. Defense (with its wide possibilities of nationally directed policies), monetary control, a plenary taxing and a spending power, foreign trade, fisheries, and extraterritorial jurisdiction (relevant to high seas questions) are within its exclusive authority, and they go a long way to give it legal freedom to treat in vital areas of international relations, and consequently to impose domestic obligations." Laskin, *loc. cit.*, p. 400.

[86] James Hurley has suggested that "it might even be justified to say that in Canada residual powers have been divided between the federal and the unit governments, with the courts deciding at any given time which shall carry the day." J.R. Hurley, *Federalism, Co-ordinate Status and the Canadian Situation,* (1966), 73 Queen's Quarterly, pp. 156-7.

[87] "The just-short-of-unitary state that MacDonald thought he had achieved was cut down to something just short of a confederacy. The power to make laws for the peace, order and good government of Canada became a power not to make laws for the peace, order and good government of Canada, unless every other expedient had been exhausted and dire emergency threatened." A.R.M. Lower, *Theories of Canadian Federalism,* in Lower, Scott, *et al., op cit.*, at p. 40; J.A. Corry, *Constitutional Trends and Federalism,* in *ibid.*, at p. 118; McWhinney, *op. cit.*, at pp. 64-5; Jean Beetz, *Les Attitudes changeantes du Québec à l'endroit de la Constitution de 1867,* in Crépeau and Macpherson, *The Future of Canadian Federalism, (Toronto,* 1965), p. 119.

[88] Szablowski, *loc. cit.*, p. 59; Russell, *Constitutional,* pp. 135-6, and *Politics,* at pp. 66-8; Black, *loc. cit.*, at pp. 594-5.

offshore jurisdiction. Claiming that the matter was "of concern to Canada as a whole" and "beyond local or provincial concern or interest," [89] the federal argument distinctly echoed the *dicta* of Lord Simon in the *Canada Temperance Federation* case[90] and Mr. Justice Kellock in the *Johannesson* case.[91] The federal argument further invoked the more recent and important *Munro* case.[92]

The federal government argued for the domestic legislative power to cover rights which it had acquired by international convention, basing its claim on the contention that it now possessed property which lay outside the province, and ignoring the *Labour Conventions* decision. British Columbia, on the other hand, invoked this very case in its defence, contending that international law did not alter the domestic law of the land.[93] In their decision, the judges saw that they could resolve the issue without being forced to either overrule or endorse the *Labour Conventions* decision. Because, and only because, the disputed areas were found to be outside the boundaries of British Columbia, no such pronouncement was needed. The dispute over offshore jurisdiction, once ownership lay in Canada, was no longer a question of valid international law rights *versus* valid provincial rights enjoyed under the constitutional division of

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[89] *Factum* of the Attorney-General of Canada, p. 26 (para. 75). Cf. judgment at pp. 375-6.

[90] *Attorney-General of Ontario* v. *Canada Temperance Federation,* [1946] A.C. 193, at p. 205; the "true test" was "if... it goes beyond local or provincial concern or interests and must from its inherent nature concern the Dominion as a whole."

[91] [1952] 1 S.C.R. 292. Mr. Justice Kellock revived the logic of the *Radio* case by deciding for federal jurisdiction on the grounds that aeronautics went "beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada."

[92] (1966), 57 D.L.R. (2d) 753. Explicitly following the *Radio, Canada Temperance Federation,* and *Johannesson* cases, Mr. Justice Cartwright gave the Court's opinion that the subject-matter of planning a national capital, being under neither list of enumerated heads (sections 91 or 92), was therefore to be considered as coming under the residual power of section 91. He found it "difficult to suggest a subject-matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole..." Despite the fact that the exercise of expropriatory powers under the *National Capital Act* would inevitably affect the "civil rights" of residents in the provinces, "once it has been determined that the matter in relation to which the act is passed is one which falls within the power of Parliament, it is no objection to its validity that its operation will affect civil rights in the Provinces." (At p. 759).

[93] *Factum* of the Attorney-General of British Columbia, p. 21. Cf. note 47 *supra.*

powers.[94] Had the *solum* been found to be within the boundaries of the colony of British Columbia, then the Court would have had to resolve the real *Labour Conventions* dilemma, and would (it is suggested) have found it very difficult to decide legislative jurisdiction in favour of Canada without taking a clear stand on that famous decision.[95]

The Court's opinion can be seen as a clear pronouncement on the unique ability of Canada to acquire rights available under international law. However, it does not go so far as to find that these acquired rights are paramount to existing provincial rights under the federal distribution of legislative powers. Like the *Canada Temperance Federation* and *Johannesson* cases, the *Offshore Mineral Rights* reference does not eradicate the obstacles resulting from the "loss" of the treaty-implementing power of section 132. Rather, the present case, when added to the two above-mentioned decisions and the *Munro* case,[96] has the effect of continuing the recent judicial trend of deciding such *ad hoc* issues, when possible, "by the application of a wide and liberal construction of the 'peace, order and good government' clause."[97]

Finally, it should be noted that this new trend has not been universally welcomed. Just as the "restrained" and "legalistic" provincialist opinions of the Privy Council had their supporters and detractors,[98] so too have the Supreme Court of Canada's more "pragmatic" and "liberal" centralist opinions, but with the roles reversed. Following the *Offshore Mineral Rights opinion,* Quebec observers feared the inevitable centralization that would result if the Court were to generously hand all new and unforeseen activities to the federal government:

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[94] Just as the *Johannesson* case was only the prevention of provincial legislation in a federally-occupied field, and not the subordination of an already-existing provincial legislative power to one falling to the federal government *via* the residual clause of section 91. See Russell, *Politics*, pp. 67-8.

[95] As, for instance, the Australian courts would have similar difficulty, following Lumb's interpretation. See note 77 *supra.*

[96] In the present case, the Court did not explicitly cite the *Radio, Canada Temperance Federation,* and *Johannesson* cases, as did Mr. Justice Cartwright in the *Munro decision* (see note 92, *supra*), although it did adopt the wording of the federal argument, which did cite the last three cases as authority.

[97] Szablowski, *loc. cit.*, at pp. 55-6.

[98] Cf. note 3, *supra*; esp. Beetz, *loc. cit.*, p. 119: «Il est difficile de contester que plusieurs de ces [Privy Council] décisions auraient pu être différentes de ce qu'elles ont été, sinon à l'effet inverse, et que la discrétion dont jouissait le tribunal a servi l'intérêt des provinces plutôt que celui du pouvoir fédéral.»

> C'est une interprétation assez inquiétante pour notre fédéralisme [i.e., décentralisé] ... ; il y aurait danger de centralisation croissante à mesure que le temps passe et que des nouveautés apparaissent.[99]
>
> [L]a théorie de la compétence résiduelle [upheld by the Court] manifeste plus que jamais son esprit centralisateur, au point même d'embarrasser certaines autorités fédérales ... [L]a vieille théorie des dimensions nationales [referring here to the *Munro* case] pourrait permettre au gouvernement central de réduire les gouvernements provinciaux au rang d'administrations municipales, comme le souhaitait John A. MacDonald.[100]

Marcel Faribault, former constitutional advisor to the late Premier Johnson of Quebec, felt that an amendment was needed to place residual powers in the hands of the provinces.[101] Jacques Brossard, Université de Montréal law professor, pointed to the paradox that underlies Canadian constitutional history and current pressures for change:

> en violant les principes du fédéralisme [i.e., décentralisé], [la Cour suprême] est fidèle à l'esprit [i.e., centralisateur] du *B.N.A. Act*; le Comité judiciaire du Conseil privé, en respectant au contraire les principes du fédéralisme [décentralisé], a pour sa part beaucoup moins protégé la Constitution [centralisateur] de 1867.[102]

Neil CAPLAN*

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* B.A. (McGill), M.A. (Carleton). Currently postgraduate student in politics at the London School of Economics and Political Science. The present essay is adapted from a chapter of the author's M.A. thesis, *The Offshore Mineral Rights Dispute in Canada* (Carleton University, 1968). The author wishes to thank Professors H.L. Molot, F.J.E. Jordan, M.B. Stein, and G.V. La Forest for their comments and criticisms of earlier drafts.

[99] Paul Sauriol, *Le Devoir*, 9 nov. 1967.

[100] J. Brossard, « Les zones maritimes et le droit continental », *Le Devoir*, 22 nov. 1967. Cf. note 87, *supra*. See also: *La Presse*, 8 nov. 1967 and *L'Action*, 9 & 11 nov. 1967, for other critical French-Canadian opinion. Only *Le Soleil*, 9 nov. 1967, seems to regard the *Offshore Mineral Rights* opinion with equanimity.

[101] Reported by Peter C. Newman, *Red Deer Advocate*, Dec. 6, 1967.

[102] Brossard, *loc. cit.* (note 100).