# COMMENT
# CHRONIQUE DE JURISPRUDENCE

## *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* and *Reference re Newfoundland Continental Shelf*

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In 1984 the Supreme Court rendered two judgments concerning the ownership of parts of the continental shelf off the coasts of Canada. Both decisions contain new elements. The Court correctly moved away from the English precedents in the *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* by taking a broader view, more in keeping with Canadian history and geography, of what can constitute inland waters *inter fauces terrae*. The *Reference re Newfoundland Continental Shelf* contains a more extensive review of principles of international law than we are accustomed to seeing from the Supreme Court. While this is a welcome sign, some of the Court's conclusions are not immune from criticism. In particular, the holding that provinces cannot hold property extraprovincially in other than a private capacity may well have been in too broad terms. The character of provincial representation abroad, or agreements signed with foreign governments, might by implication be ealled into question.

La Cour suprême du Canada a rendu en 1984 deux jugements sur le droit de propriété de certaines provinces sur le plateau continental au large de leurs côtes. Chaque décision est innovatrice à sa façon. Dans la première, le *Renvoi relatif à la propriété du lit du détroit de Géorgie et des régions avoisinantes*, la Cour s'écarte à bon droit des précédents britanniques et donne une définition plus libérale des « eaux territoriales *inter fauces terrae* » qui s'adapte mieux à la réalité historique et géographique du Canada. La deuxième décision, le *Renvoi relatif au plateau continental de Terre-Neuve*, présente une étude des principes de droit international la plus élaborée que nous ait fournie la Cour suprême jusqu'à maintenant. Bien qu'il s'agisse en soi d'un développement heureux, il n'en reste pas moins que certaines conclusions prêtent flanc à la critique. Plus particulièrement, la conclusion que les provinces ne peuvent acquérir de biens à l'extérieur de leurs frontières qu'à titre privé a peut-être été formulée en termes trop généraux. Il s'ensuit que le statut des provinces à l'étranger de même que celui des ententes auxquelles elles sont parties sont implicitement remis en question.

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In 1984 the Supreme Court of Canada rendered two remarkable judgments settling outstanding questions with respect to the ownership of parts of the continental shelf off the coasts of Canada. The decision in the *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*[1] dealt with the lands under the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait. The *Reference re Newfoundland Continental Shelf*[2] resolved the question of ownership and jurisdiction over the continental shelf, but not over the bed of territorial sea, off the coasts of Newfoundland and Labrador.

Both decisions, in particular the decision concerning the Newfoundland continental shelf, were relatively predictable.[3] However, the decisions will have important consequences. British Columbia will now exercise jurisdiction over offshore oil and gas exploitation in the undersea lands in question, and the Province may well have a stronger hand in negotiating fisheries questions with the Federal Government in these waters. For Newfoundland, the loss is a major political setback. At least in law, Newfoundland now ceases to have any basis for regulating the activities of offshore oil and gas

[1](1984), [1984] 1 S.C.R. 388, 8 D.L.R. (4th) 161 [hereinafter cited to S.C.R. as *Strait of Georgia*].

[2](1984), [1984] 1 S.C.R. 86, 51 N.R. 362 [hereinafter cited to S.C.R. as *Newfoundland Reference*].

[3]See J.B. Ballem, "Oil and Gas and the Canadian Constitution on Land and Under the Sea" [1978] L.S.U.C. Special Lectures 251; K. Beauchamp, M. Crommelin & A.R. Thompson, "Jurisdictional Problems in Canada's Offshore" (1973) 11 Alta L. Rev. 431; A.L.C. de Mestral, "The Law Applicable to the Canadian East-Coast Offshore" (1983) 21 Alta L. Rev. 63; C. Douglas, "Conflicting Claims to Oil and Natural Gas Resources off the Eastern Coast of Canada" (1980) 18 Alta L. Rev. 54; R.J. Harrison, "Jurisdiction Over the Canadian Offshore: A Sea of Confusion" (1979) 17 Osgoode Hall L.J. 469; R.J. Harrison, "Natural Resources and the Constitution: Some Reeent Developments and Their Implications for the Future Regulation of the Resource Industries" (1980) 18 Alta L. Rev. 1; R.J. Harrison, "The Offshore Mineral Resources Agreement in the Maritime Provinces" (1978) 4 Dalhousie L.J. 245; I.L. Head, "The Canadian Offshore Minerals Reference" (1968) 18 U.T.L.J. 131; I.L. Head, "The Legal Clamour Over Canadian Off-Shore Minerals" (1967) 5 Alta L. Rev. 312; L.L. Herman, "The Need for a Canadian Submerged Lands Act: Some Further Thoughts on Canada's Offshore Mineral Rights Problems" (1980) 58 Can. Bar Rev. 518; J.T. Ippolito, "Newfoundland and the Continental Shelf: From Cod to Oil and Gas" (1976) 15 Colum. J. Transnat'l L. 138; N.J. Inions, "Newfoundland Offshore Claims" (1981) 19 Alta L. Rev. 461; A.J. Kovach, "An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources" (1975) 23 Chitty's L.J. 18; G.V. La Forest, "Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963) 1 Can. Y.B. Int'l Law 149; C. Martin, "Newfoundland's Case on Offshore Minerals: A Brief Outline" (1975) 7 Ottawa L. Rev. 34; G.S. Swan, "The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law" (1976) 22 McGill L.J. 541.

See also J. Brossard *et al.*, *Le territoire québécois* (1970); G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969); F. Loriot, *La théorie des eaux historiques et le régime juridique du Golfe Saint-Laurent en droit interne et international* (doctoral thesis, Université Laval, 1972) [unpublished].

drilling or taxing revenues directly from this potentially highly lucrative source. Newfoundland must now turn to the political process to obtain satisfaction if it is to have any at all.

From a strictly legal standpoint, both decisions contain points of considerable interest: in particular, the increasing sophistication of the Supreme Court of Canada in its dealing with questions of international law relating to the continental shelf, the territorial sea and inland waters. These matters will be the subject of this comment.

The dispute in the case of the *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* involved ownership of the lands, including the mineral and other natural resources of the seabed not determined by the Supreme Court of Canada in the reference *Re Offshore Mineral Rights of British Columbia*,[4] since they had been excluded by the terms of reference.[5] After sporadic negotiations lasting almost a decade, this matter was brought to the Court of Appeal of British Columbia on reference by the Lieutenant-Governor in Council of British Columbia. The British Columbia Court of Appeal ruled three votes to two in favour of the Province.[6] Further negotiations ensued over a period of years, but proved unsuccessful. The matter was brought before the Supreme Court of Canada in October 1982.

The fundamental test applied by the Supreme Court of Canada as to jurisdiction over offshore lands was the same as that propounded in 1967: namely, whether those lands below the low water mark were part of the Province upon its entry into Confederation. The historical record was clearly fraught with considerable ambiguity, and this is reflected in the sharp division of opinion between majority and dissenting opinions in both the British Columbia Court of Appeal and the Supreme Court of Canada. British Columbia argued successfully that the definition of the Province in the Imperial Statute of 1866,[7] setting out the seaward boundary of British Columbia as "the Pacific Ocean",[8] indicated a clear policy to include all these waters within the colony of British Columbia. This definition had its origin in the Oregon Treaty of 1846,[9] the Letters Patent establishing the colony of Vancouver Island, and the Imperial Acts of 1858 and 1863 which first established the colony of British Columbia.[10] In essence, the lawyers for the Federal

[4](1967), [1967] S.C.R. 792, 65 D.L.R. (2d) 353.

[5]*Ibid.* at 796: "Outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada . . . ."

[6](1976), [1977] 1 B.C.L.R. 97.

[7]*An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia* (U.K.), 29 & 30 Vict., c. 67.

[8]*Ibid.*, article 7.

[9]Oregon Treaty, June 15, 1846, United States-Canada, T.S. 120.

[10]*Supra*, note 1 at 402-21.

Attorney-General were unable to overcome this claim despite the fact that it is not clear in law when the waters of the two colonies attained the status of inland waters *inter fauces terrae*, and despite the fact that it was not British practice at that period in the nineteenth century to lay absolute claim to such extensive bodies of water as those involved here. Indeed, the dissenting judgment of Madam Justice Wilson is very hard to refute. She argued with great learning and skill that the Province had not successfully substantiated either its claim that one colony or both colonies had been granted or laid claim to these waters as inland waters, or its claim that the common law, as it existed in 1871, would have granted these waters that status.[11]

The majority of the Court shied away from a highly technical discussion of the case law regarding the definition of inland waters *inter fauces terrae*, and instead adopted an approach better suited to Canadian geography. In holding that the definition of the boundary of British Columbia was the Pacific Ocean, the majority of the Supreme Court of Canada did little more than indicate to the Federal Attorney-General that insufficient evidence had been adduced to rebut the argument of British Columbia. The majority did not really answer Madam Justice Wilson's learned arguments that the common law existing in 1871 and applicable in England today would not admit such extensive bodies of water as the Strait of Juan de Fuca and Georgia Strait to the definition of inland waters *inter fauces terrae*. The cases relied upon by Madam Justice Wilson, apart from a few rare Canadian decisions such as the Conception Bay case,[12] are English precedents developed over centuries by the courts of Great Britain to deal with the particularities of the geography of the British Isles. Such decisions[13] relate to a very different geography than that of Canada, and have always presented Canadian lawyers and Canadian courts with very great difficulty in determining whether at common law certain bodies of water should enjoy the status of inland waters *inter fauces terrae*. These bodies of water are generally much more vast than comparable British waters and frequently form part of a much more accidented and enclosed coastline than the one around the British Isles.

A further problem arising out of the tests in the British Isles is that the historical and customary tests which form part of the common law, as well as the tests based on pure geography and physical conformation, could seldom be applied in Canada, given the very short time within which Canadian

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[11] *Ibid.* at 427-71.

[12] *Direct United States Cable Co. Ltd* v. *Anglo-American Telegraph Co. Ltd* (1877), 2 A.C. 394, 36 L.R. 265 (P.C.).

[13] See, *inter alia*, *Harris* v. *Owners of the "Franconia"* (1877), 2 C.P.D. 173; *Mortenson* v. *Peters* (1906), 14 S.L.T. 227 (H.C. of Justiciary); *The "Fagernes"* (1927), [1927] P. 311 (C.A.); *Post Office* v. *Estuary Radio Ltd* (1967), [1968] 2 Q.B. 740 (C.A).

history has unfolded and the infrequency of human activity in many outlying coastal areas. The Supreme Court therefore was entirely correct in taking a broader view of what might constitute inland waters *inter fauces terrae*. Surely if any waters are *inter fauces terrae* they are the waters between the mainland of British Columbia and Vancouver Island.

This decision may well do much to assist Canadian lawyers and courts in the future in determining that other significant special bodies of water lying off the coasts of Canada, such as the Bay of Fundy, the Gulf of St. Lawrence, Hudson Bay, Hudson Strait, and indeed the full expanse of waters lying between the various Islands of the Canadian Arctic Archipelago, merit the designation of inland waters *inter fauces terrae* at international law and at common law. Should this be the case, the Supreme Court of Canada will not only have assisted in reducing a major uncertainty as to the legal status of many important bodies of water off Canada's coasts at common law, but equally may assist the Government of Canada in reaching a definitive legal and policy decision as to the status of these waters as internal waters at international law, thus removing any ambiguity as to whether they might also be considered territorial seas, economic zones, or possibly even high seas.

On a number of issues, the *Newfoundland Reference* is even more interesting in its implications for the future. Again the Supreme Court of Canada broke little new ground in the basic test which is applied to determine whether the continental shelf belonged to the Province of Newfoundland and Labrador. The question turned on whether the continental shelf formed part of the Province upon its entry into Confederation in 1949. In seeking to determine whether Newfoundland in 1949, unlike British Columbia in 1871, could succeed in showing that the continental shelf formed part of the Province on its entry into Confederation, the Court applied three further tests:

> (1) international law must have recognized the right to explore and exploit in the continental shelf prior to Newfoundland's entry into Confederation on March 31, 1949;
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> (2) the Crown in right of Newfoundland must have been in a position to acquire these rights;
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> (3) the Crown in right of Newfoundland must not have lost those rights under the Terms of Union with Canada.[14]

Chief Justice Dickson, speaking for the majority of the Court, dealt first with questions 2 and 3 respecting Canadian domestic law. Starting from the

[14]*Newfoundland Reference, supra*, note 2 at 98.

premise that, by definition, a colony, and subsequently a province, did not enjoy, as a matter of law, extraterritorial legislative competence,[15] he stated:

> A particular example of the extraterritorial incompetence of colonies is that they were incapable of acquiring new territory. Boundaries could only be altered by the British authorities in the form of an order in council under the *Colonial Boundaries Act*.[16]

The Chief Justice reasoned further that

> [i]t is only when a former colony, as a matter of constitutional law, acquires external sovereignty that it can also acquire continental shelf rights. Until such time it is the British Crown that is the beneficiary of the extraterritorial rights over the continental shelf accorded by international law.[17]

By parity of reasoning, Chief Justice Dickson concluded that the first nine Canadian provinces never gained extraterritorial legislative competence: "They have never acquired external sovereignty. They are thus incapable of acquiring continental shelf rights."[18] It was therefore necessary for Newfoundland to overcome the burden of proving that it possessed extraterritorial legislative competence and that it possessed external sovereignty in order to make its case before the Court.

Chief Justice Dickson was prepared to accept that Newfoundland, during the period from 1926 to 1934 (as witnessed by the Balfour Declaration and the designation of Newfoundland as a Dominion in the *Statute of Westminster*), had possessed the capacity to legislate extraterritorially and indeed had possessed external sovereignty.[19] However, in the opinion of the Court, the effect of the *Newfoundland Act*,[20] and the subsequent imposition of Commission Government from the period of 1934 to 1949, had the effect of depriving Newfoundland not only of its external sovereignty but even of its internal sovereignty.[21] To reach this conclusion, the Court considered the historical record of international contacts alleged by the Attorney-General of Newfoundland. The Court was not convinced that the Commonwealth Relations Office treated Newfoundland as having the capacity to act as an independent state during the period from 1934 to 1949. Nor was the Court prepared to accept arguments based on the Terms of Union, specifically terms 7 and 39 referring to provincial natural resources. The Court held that these natural resources could only be those situated within the territory of Newfoundland and that the Terms held no reference to the

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[15] *Ibid.* at 100.
[16] *Ibid.* at 100-1.
[17] *Ibid.* at 102-3.
[18] *Ibid.* at 103.
[19] *Ibid.* at 105.
[20] *Newfoundland Act, 1933* (U.K.), 24 & 25 Geo. V., c. 2.
[21] *Newfoundland Reference, supra*, note 2 at 110.

offshore. Thus, in the view of the Court, the British Crown had made no effort to transfer jurisdiction and ownership over the offshore to Newfoundland at the moment of union. The Court reached this conclusion on the basis of the somewhat tenuous argument that, since the rights referred to in term 37 and section 109 of the *Constitution Act, 1867* are public property rights and since a province was incapable of holding property outside the province, term 37 could not have applied to the continental shelf outside the province.

Taking the argument one step further, this time on the basis of international law, Chief Justice Dickson rejected the argument of the Attorney-General of Newfoundland by holding that, since the rights enjoyed by a state in the continental shelf are "sovereign rights"[22] and not property rights, any claim based upon term 37 of the Terms of Union must fail. Furthermore, since jurisdiction over the continental shelf was an incident of external sovereignty, the effect of the Terms of Union upon Newfoundland attaining the status of a province of Canada would be to transfer jurisdiction over the continental shelf to Canada, which alone possessed the external sovereignty necessary to acquire continental shelf rights.

The Court's review of international law as it existed in and prior to March 1949 was equally incisive. In the first place, the Court suggested that Newfoundland had not shown that any claim had been made by the appropriate Newfoundland or United Kingdom authority in order to bring the continental shelf under its jurisdiction.[23] Secondly, Chief Justice Dickson rejected any suggestion that the continental shelf doctrine had so crystallized by March 1949 that Newfoundland had acquired *ipso jure* jurisdiction over the continental shelf. In what must be one of the most interesting and extensive reviews of international law sources in recent Canadian Supreme Court decisions, Chief Justice Dickson concluded that the continental shelf doctrine, although in existence by 1949, did not reveal state practice sufficient to constitute a binding rule of customary international law.[24] It is interesting to note that the Court stated that "in order to constitute a custom there must be substantial uniformity or consistency, and general acceptance".[25] Newfoundland sought to argue on the basis of the language of the *North Sea Continental Shelf* case,[26] where it was stated that the continental shelf constituted "a natural prolongation of [the] land territory [of a state] into and under the sea [and that these rights] exist *ipso facto* and *ab initio*

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[22]*Geneva Convention on the Continental Shelf*, 499 U.N.T.S. 311, art. 2 (opened for signature 29 April 1958; entered into force 10 June 1964).

[23]*Newfoundland Reference, supra*, note 2 at 116.

[24]*Ibid.* at 124.

[25]*Ibid.* at 118.

[26]*North Sea Continental Shelf* (Ger. v. Den. & Neth.), [1969] I.C.J. 3.

by virtue of its sovereignty over the land".[27] In rejecting this contention, Chief Justice Dickson suggested that the International Court of Justice could not have intended to suggest retroactivity.[28] He continued with the following interesting and perhaps controversial passage:

> The development of customary or conventional international law is, by definition, the development of new law. There is no concept in international law of discovering law that always was. In our view, continental shelf rights have no retroactive application to a time before they were recognized by international law.[29]

In any event, as Chief Justice Dickson concludes, if the retroactivity argument were to succeed on the basis of rights given to Canada in later years by virtue of international law, these rights would not inhere to Newfoundland but rather to Canada, given that Canada alone was competent to acquire sovereign rights.[30]

Finally, the Court noted that nothing in the *Constitution Act, 1867*, section 92(13) or section 92A(1), would indicate that a province possessed extraterritorial legislative jurisdiction. On the contrary, according to the Court, the conclusion that Canada has the right to exploit the continental shelf leads easily to the conclusion that Canada has legislative jurisdiction by virtue of the powers vested in Parliament over the peace, order and good government of Canada.

This judgment is remarkable in a number of ways. First, the Supreme Court would appear to be prepared to analyse and deal with the concepts of public international law with much greater freedom than it has in previous decisions of this nature. This is a welcome development, even if there is some room left for argument on particular points, such as the standard of proof of a customary rule or the invocation of certain international law authorities (including Professor François, special *rapporteur* of the International Law Commission in 1950, whose views on the continental shelf were recognized even at that early date to be highly conservative). What is more controversial is the suggestion that since rights over the continental shelf are sovereign rights and not property rights, a province is inherently incapable of acquiring them. This conclusion may well be correct, but it is difficult to follow Chief Justice Dickson fully when he suggests that

> [o]utside their boundaries the provinces can hold no such public property; whatever extraprovincial property they do hold — such as provincial offices

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[27] *Newfoundland Reference, supra*, note 2 at 125.
[28] *Ibid.* at 126.
[29] *Ibid.*
[30] *Ibid.*

> in foreign countries — is held by them as private property in their capacity as legal persons.[31]

If this is also correct, it is a view which will go far to limit further attempts by provincial authorities to establish a capacity to deal with foreign governments on anything but a private basis, and calls into question the character of their representation abroad and indeed any agreement which might be signed on behalf of a province with a foreign government. This view surely runs into conflict with the decision of the English Court of Appeal in the case of *Mellenger* v. *New Brunswick Development Corp.*,[32] where the Court treated the acts and property of New Brunswick in Great Britain as enjoying the benefits of sovereign immunity. In this respect, the Supreme Court of Canada may well have gone too far, but clearly the decision as a whole reinforces a long-held federal view that only the Crown in right of Canada can represent Canada vis-à-vis other nation states.

What will be the impact of these opinions upon the final resolution of questions still pending as to the status of the continental shelf and the seabed of other areas off the Canadian coast? While *Re Offshore Mineral Rights of British Columbia* may have brought some comfort to those who argue that the subsoil of the Bay of Fundy and the Gulf of St. Lawrence are part of the respective provinces, it is unlikely that this decision brings any comfort to Nova Scotia, which has long but less vociferously argued that it too has continental shelf rights.[33] The only point clearly left open by the Court is that raised by the Newfoundland Court of Appeal in the *Reference Re Mineral and Other Natural Resources of the Continental Shelf*[34] on the issue of provincial ownership and jurisdiction over a three-mile territorial sea. This question was not before the Court and is not to be prejudged by the Court's decision in respect of the continental shelf. Newfoundland may well yet succeed in maintaining its argument that it possessed a three-mile territorial sea on the day of its entry into Confederation and thereby enjoys legislative jurisdiction and ownership over the seabed and subsoil out to three miles.[35]

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[31] *Ibid.* at 115.

[32] (1971), [1971] 2 All E.R. 593, [1971] 1 W.L.R. 604 (C.A.).

[33] From a political standpoint this dispute has been set to rest by the *Canada-Nova Scotia Oil and Gas Agreement*, S.C. 1983-84, c. 29.

[34] (1983), 145 D.L.R. (3d) 9, 41 Nfld & P.E.I.R. 271.

[35] The author wishes to commend to the attention of readers the extraordinary volume and quality of the research done by the Federal and Provincial advocates in preparing this and related cases. This research, the results of which were put before the courts in evidence, will be the bench-mark for any further scholarly work in this field.