

THE NEED FOR A CANADIAN SUBMERGED LANDS ACT: SOME FURTHER THOUGHTS ON CANADA'S OFFSHORE MINERAL RIGHTS PROBLEMS

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Introduction

In recent months, particularly since the May 22nd, 1979 federal election in Canada, the issue of title to and jurisdiction over the non-living resources of the continental shelf of Canada (referred to often as "offshore resources") has been very much in the news. During the federal election campaign in the spring of 1979 the leader of the Conservative Party, Mr. Clark, made it clear that if his party formed a government, it would transfer the ownership of offshore resources to the coastal provinces. Having won the May 22nd, 1979 election, Mr. Clark and the Conservative Government proceeded to take the first steps to implement the party's election promise. On September 5th, 1979 at a meeting between the Prime Minister and the Premier of Newfoundland, Mr. Clark agreed to give Newfoundland "control" over its offshore mineral resources, details of which were to be subsequently worked out by representatives of the two levels of government.¹ On September 14th, 1979, as a follow-on to their September 5th meeting, the Prime Minister wrote to Newfoundland Premier Peckford, confirming acceptance of four "basic principles" concerning offshore mineral resources, the most important of which was that,

The Province of Newfoundland should own the mineral resources of the continental margin off its coast insofar as Canada is entitled to exercise sovereign rights over these resources in accordance with international law. Such ownership should be, to the extent possible, of the same nature as if these resources were located within the boundaries of the province. The legislative jurisdiction of the province should, to the extent possible, be the same as for those resources within the boundaries of the province.

The eye of any constitutional lawyer will recognize the myriad of legal complexities inherent in such a proposal. How can resources on the continental shelf, which are outside the territorial limits of Canada, be cloaked with provincial ownership "of the same nature" as if these resources were located within the province? How can offshore resources, located well beyond the legal boundaries of a

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¹ Toronto Globe and Mail, Sept. 6th, 1979.

coastal province, ever be likened, in a legal sense, to those resources which are in law and in fact within provincial boundaries? Can provincial boundaries be extended beyond the low-water mark to encompass these resources? If these resources are at present owned by the Crown in right of Canada and under the exclusive legislative jurisdiction of Parliament, as the Supreme Court of Canada indicated in the 1967 *Offshore Mineral Rights Reference*,² can any province be given ownership of and legislative jurisdiction over these resources short of a constitutional amendment? And short of constitutional change, will legislation by Parliament conferring legislative jurisdiction over these resources on provincial legislatures not infringe the rule against interdelegation of constitutional powers, since it would appear that exclusive legislative jurisdiction over these resources now resides in Parliament? Since Canada exercises sovereign rights over the resources of the continental shelf only by virtue of conventional (and customary) international law, can a coastal province be given anything greater than those rights which international law accords to Canada, the exercise of which is subject to corresponding international servitudes on the part of Canada? And if the provinces are given title to these resources, who will remain responsible for fulfillment of Canada's international legal obligations regarding the regime of the continental shelf, Canada or the provinces?

The purpose of this article is not to discuss the foregoing constitutional intricacies of the Conservative Government's offshore resources proposals. Many other authors are no doubt intending to write volumes of material on the legal aspects of the so-called resource-transfer issue raised by Mr. Clark's proposal. Suffice it to say, for the purposes of this article, that the issue remains under debate at the political level in Canada. During the campaign in the February 18th, 1980 federal election, Mr. Trudeau is reported to have said that if the Liberal Party was returned to power, it would not implement the basic principles agreed to by Mr. Clark in his September 14th, 1979 letter to Premier Peckford.³

The purpose of this article—while it touches upon legal issues concerning federal versus provincial competence in respect of the

² [1967] S.C.R. 792.

³ Toronto Globe and Mail, Jan. 31st, 1980. Mr. Trudeau told a student audience at Memorial University in St. John's, Newfoundland that only the Supreme Court of Canada can decide the question of Newfoundland's offshore mineral ownership rights and that Mr. Clark had no legal authority to give Newfoundland control of offshore resources without a constitutional amendment. Mr. Trudeau also said that he would not follow Mr. Clark's route in transferring ownership and control over offshore resources to the coastal provinces, preferring instead to deal with the issue through administrative arrangements.

mineral resources in the submarine areas adjacent to Canada's coasts—is rather to demonstrate the need for an Act of the Parliament of Canada extending certain laws of Parliament and of the legislatures of the several coastal provinces to activities occurring on or related to installations or structures operating on the Canadian continental shelf. Such an Act, it is submitted, is necessary to fill an existing legislative vacuum, a vacuum which, unless remedied by legislation, will continue to exist quite apart from the question of title to or jurisdiction over the resources themselves. Indeed, it is the view of this author that even if the rights and jurisdiction over the resources of the continental shelf now belonging to Canada were transferred to the coastal provinces, the need would remain for federal legislation making the laws of Parliament and of the coastal provinces applicable within the submerged area beyond the land territory and internal waters of Canada. The reasons for this position are set out below.

I. *The Problems.*

By virtue of the operation of international law, Canada exercises sovereignty over the twelve-mile territorial sea adjacent to its coasts, including sovereignty over the seabed and subsoil beneath and the air surface above the territorial sea.⁴ In addition, international law accords Canada sovereign rights over its continental shelf beyond and adjacent to the territorial sea for the purpose of exploring it and exploiting its natural resources.⁵ As far as rights in offshore areas as between the Crown in right of Canada and the Crown in right of the

⁴ The 1958 Convention on the Territorial Sea and Contiguous Zone, U.N. Doc.A/Conf.13/L.52, provides, in Art. 1, that "[t]he sovereignty of a state extends, beyond its territorial land and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea". Art. 2 of the Convention provides that "[t]he sovereignty of a coastal state extends to the airspace over the territorial sea as well as to its seabed and subsoil". Although Canada has signed the Convention, it has not ratified or acceded to it. Nevertheless, the Convention articles in the matter of state sovereignty over the territorial sea can be safely taken as declaratory of customary international law on this point: see Brownlie, *Principles of Public International Law* (1973), p. 184. The Convention did not set down the breadth of the territorial sea. Due to divergencies in state practice, neither the 1958 or 1960 Law of the Sea Conferences could reach agreement on this point. Before and since the adoption of the Convention, numerous states have claimed territorial seas in excess of the three mile or cannonshot rule originating in Bynkershoek's *De dominio maris* (1704). See O'Connell, *International Law* (1970), Vol. 1, pp. 459-467. At present, Canada exercises sovereignty over a twelve-mile territorial sea, in accordance with what can now be said to be the generally accepted practice of states, reflected in Art. 3 of the Informal Composite Negotiating Text, Revision Two (ICNT/Rev. 1) (United Nations Document A/Conf.62/WP.10/Rev.2, 11 April 1980) of the Third United Nations Conference on the Law of the Sea.

⁵ Art. 2 of the 1958 Convention on the Continental Shelf, 1970 C.T.S. No. 4, ratified by Canada on Feb. 6th, 1970.

several Canadian provinces are concerned, Canadian constitutional law, it is submitted, accords the Crown in right of Canada property in and exclusive legislative jurisdiction with respect to the territorial sea and its seabed as well as exclusive rights and exclusive legislative jurisdiction with respect to the minerals and other natural resources of the continental shelf beyond the territorial sea.

While the legislative competence of the Parliament of Canada with respect to these adjacent submarine areas is complete, Parliament has yet to adopt any comprehensive legislation covering these matters. Thus, there is no law of Parliament vesting in the Crown in right of Canada property in and exclusive jurisdiction over the territorial sea and over the resources of the continental shelf beyond and adjacent to the territorial sea or, of equal importance, setting out the laws that are to apply to human activities taking place aboard installations or platforms engaged in exploring or exploiting the resources of the submarine areas beyond the limits of the internal waters of Canada. Some laws, it is true, apply in limited fashion by their specific terms to activities taking place in these offshore areas: the Criminal Code of Canada, for example, applies to acts or omissions occurring in the territorial sea of Canada;⁶ the Oil and Gas Production and Conservation Act,⁷ which deals with such matters as pooling and unitization of working interests in oil or gas production, applies to "those submarine areas adjacent to the coast of Canada to a water depth of two hundred metres or beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil thereof", following, in general terms, the definition of the continental shelf contained in the 1958 Convention on the Continental Shelf;⁸ the Ocean Dumping Control Act⁹ regulates the disposal of waste, *inter alia*, from the exploration and exploitation of seabed minerals within the territorial sea or fishing zones of Canada or any other area of the sea as prescribed.

Yet there is no single Act of Parliament which clearly establishes Canada's sovereign and property rights to the territorial sea or its sovereign rights over the resources of the continental shelf. Nor, of equal importance, is there an existing law of Parliament that establishes what laws are to be made applicable in ordering private relations among persons undertaking offshore resource-related activities, such as exploration or drilling for oil and gas. Nor is there any Act of Parliament that sets out the courts of Canada that are to

⁶ R.S.C., 1970, c. C-34, s. 433.

⁷ R.S.C., 1970, c. O-4.

⁸ *Supra*, footnote 5.

⁹ S.C., 1974-75-76, c. 55.

have jurisdiction to entertain actions arising out of these activities.

The resulting legislative vacuum is thus a profound and, indeed, a serious one. Take, for example, the application of Canadian criminal law to offshore areas beyond the twelve-mile territorial sea limit. It is, firstly, beyond doubt that the Criminal Code of Canada applies in respect of offences committed in Canadian internal waters, or beyond Canadian internal waters in the twelve-mile territorial sea of Canada, and insofar as persons charged with such offences are concerned, Canadian courts have jurisdiction.¹⁰ Secondly, beyond the territorial sea Canadian courts have criminal jurisdiction, as set out in the Canada Shipping Act,¹¹ in respect of crimes committed on the high seas or in foreign ports aboard Canadian or British registered ships. Given the definition of "ship" under the Act,¹² it is safe to conclude that the statute and hence the Criminal Code would have no application in respect of crimes committed aboard fixed or moveable drilling platforms engaged in drilling for oil on Canada's continental shelf.

The result of the foregoing is clear enough. Any criminal act committed by an individual aboard an offshore drilling platform on Canada's continental shelf is likely outside the jurisdiction of Canadian courts and outside the reach of Canadian criminal law enforcement authorities. But far short of criminal acts, it appears equally safe to conclude that such relatively simple matters as tort or contracts and a host of other matters which concern the day-to-day relationships of persons working aboard drilling platforms on Canada's continental shelf are also beyond the limits of Canadian law.

The problems surrounding the absence of substantive law applicable to private disputes arising in connection with offshore activities has come to the fore recently and most directly in the Federal Court of Canada's decision in *Dome Petroleum Limited v. Hunt et al.*¹³ That dispute related to an agreement between the plaintiff and defendants whereby the plaintiff undertook to drill a number of offshore wells for the defendants on the seabed of the Beaufort Sea. In ordering the statement of claim struck out, Dubé J., said, following *McNamara Construction Limited et al v. The*

¹⁰ *Supra*, footnote 6, s. 433.

¹¹ R.S.C., 1970, c. S-9, s. 683.

¹² *Ibid.*, s. 2. The term "ship" includes every description of vessel used in navigation. Unless a drilling platform is in some manner also a vessel "used in navigation", such as the Dome Petroleum Ltd. drillships deployed in the Beaufort Sea, it is difficult to see how the Canada Shipping Act, and hence the Criminal Code, can be made applicable.

¹³ [1978] 1 F.C. 11.

*Queen*¹⁴ and *Quebec North Shore Paper Company et al v. Canadian Pacific*,¹⁵ that:¹⁶

... a prerequisite to the exercise of jurisdiction by the Federal Court is that there be existing and applicable Federal law which can be invoked to support any proceedings before it. It is not sufficient that there be Federal jurisdiction, there must be an Act of Parliament on which to base the action. The Federal Court cannot grant relief in contract, even if the enterprise contemplated by the agreement falls within Federal jurisdiction, unless there is a specific Federal Act under which the relief sought may be claimed.

One suspects that, had not this matter been subsequently settled out of court, the plaintiff, whose head office is in Alberta, could have brought his action for breach of contract in the Alberta Supreme Court and obtained a writ for service *ex juris* on the defendants, residents of Texas.¹⁷ In other matters, however, particularly in the case of torts where both the *actus* and the damage occur beyond the boundaries of the province, the court where the plaintiff resides may not be prepared to accept jurisdiction.¹⁸ And even if jurisdiction is found, the applicable substantive law, where the act complained of occurs in the offshore and beyond the boundary of a province, may still be found lacking.¹⁹ The importance of some legislative means of filling this legal vacuum is therefore evident.

In order to avoid confusion, it may be useful to set out the following brief explanation of the terms used in this article in describing various offshore areas. To begin with, the entire submerged land area of Canada seaward of the low-water mark out to the abyssal ocean depths is generally, although misleadingly, referred to as the Canadian "continental shelf". In strict legal terms,

¹⁴ (1977), 75 D.L.R. (3d) 273.

¹⁵ (1977), 71 D.L.R. (3d) 111.

¹⁶ *Supra*, footnote 13, at p. 13.

¹⁷ The Alberta Supreme Court Rules, Alta. Reg. 390/68 (O.C. 2208/68) allows service of a writ of summons outside of Alberta in respect of breach of a contract made in Alberta (Rule 30). The judgment of Dubé J. does not state whether the Dome-Hunt contract in fact was made in Alberta: if it was, service on the defendant out of the jurisdiction would have been permissible according to the Rules. If the contract was made, let us say, in Texas, the action for breach presumably could have been commenced there.

¹⁸ Rule 30 of the Alberta Supreme Court Rules, *ibid.*, allows service of a writ of summons out of the jurisdiction in the case of torts, but only if the action "is founded on a tort committed *within* Alberta". Similar rules apply in respect of torts in other Canadian jurisdictions: see Supreme Court of Ontario Rules of Practice, R.R.O., 1970, Reg. 545, Rule 25. Rule 25 allows service out of Ontario in the case of a tort committed out of the jurisdiction if damages were sustained in Ontario.

¹⁹ The provincial legislatures, under s. 92 of the British North America Act 1867, 30 & 31 Vict., c. 3 (U.K.), as am., are confined to passing laws having effect "in the Province". A provincial legislature could not seek to make its laws in respect of property and civil rights under s. 92(13), for example, applicable beyond the boundaries of the province in respect of offshore drilling activity.

however, the continental shelf commences *outside* the limits of the territorial sea and not immediately beyond the low-water mark,²⁰ even though the shelf has been held by the International Court of Justice in the *North Sea Continental Shelf Cases* to constitute a "natural prolongation of the land territory" of the littoral state.²¹ In accordance with the 1958 Convention on the Continental Shelf, the term "continental shelf" means the seabed and subsoil of the submarine areas adjacent to the coast of Canada but *outside* the twelve-mile territorial sea to either (a) a point where the superjacent waters reach a depth of 200 metres or (b) beyond those limits, to where the depth of the superjacent waters admits to the exploitation of the natural resources of the said submarine areas.²² For a variety of reasons, the foregoing conventional definition of the term "continental shelf" is less than satisfactory. New technology has long since rendered the 200 metre depth criterion and the "limits of exploitability" test obsolete as a meaningful method of determining the outer limit of the continental shelf. Efforts are underway at the Third United Nations Conference on the Law of the Sea to improve upon the definition and to make clear that, in accordance with the 1969 International Court of Justice judgment referred to above, the juridical continental shelf consists of the natural prolongation of the land mass of the littoral state out to the edge of the continental margin, thus comprising the physical continental shelf, the continental slope and the continental rise.²³

²⁰ Convention on the Continental Shelf, *supra*, footnote 5, Art. 1.

²¹ North Sea Continental Shelf Judgment (*Federal Republic of Germany v. Denmark: Federal Republic of Germany v. Netherlands*), [1969] I.C.J. Rep. 3, at p. 22.

²² *Supra*, footnote 5.

²³ Art. 76 of the Informal Composite Negotiating Text, Revision Two, *op. cit.*, footnote 4, provides: "The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." Art. 76 does not define the term "outer edge of the continental margin", but a proposal of the Irish delegation to the Third Law of the Sea Conference provides, as an addition to Art. 76, a method for determining the outer edge of the margin by either (a) a distance of sixty miles from the foot of the continental slope or (b) to points where the thickness of sedimentary rock is at least 1% of the distance between such point and the foot of the slope: see Report of the Chairman of the Second Committee to the Plenary of the Conference, GE.78-85880, dated May 19th, 1978. At the time of writing this article, the Ninth Session of UNCLOS (March 3rd to April 3rd, 1980) has concluded. While certain legal issues respecting the continental shelf were discussed, the Report of the Chairman of the Second Committee of the Conference (A/Conf.62/L.51, March 29th, 1980), makes it clear that any further revision of the ICNT will not amend the above definition of the term "continental shelf".

The territorial sea of Canada pursuant to customary international law, as codified in this respect in the 1958 Geneva Convention on the Territorial Sea,²⁴ consists of a "belt of sea adjacent to its coast", which, following the development of international custom, has been defined in the Territorial Sea and Fishing Zones Act of Canada as comprising:

... those areas of the sea having, as their inner limits, the baselines described in section 5 and, as their outer limits, lines measured seaward and equidistant from such baselines so that each point of the outer limit line of the territorial sea is distant twelve nautical miles from the nearest point of the baseline.²⁵

The 12-mile territorial sea of Canada is, for the most part, fairly simple to ascertain.²⁶ Complications exist, however, in respect of those areas of the sea where the geographical coordinates for determining baselines have not been issued, such as in the Bay of Fundy, the Gulf of St. Lawrence, and other bodies of water which, politically if not legally, have been claimed as internal waters of Canada.²⁷ In light of section 5(3) of the Territorial Sea and Fishing Zones Act, which provides that until such time as geographical coordinates have been listed the baselines remain those applicable

²⁴ *Supra*, footnote 4.

²⁵ R.S.C., 1970, c. T-7, s. 3, as am. by R.S.C., 1970, 1st Supp., c. 45.

²⁶ Baselines, pursuant to s. 5 of the Territorial Sea and Fishing Zones Act, were promulgated along the coasts of Labrador and along the coasts of southeast, east and west Newfoundland, by Order in Council P.C. 1967-2025 (SOR/67-543) of Oct. 26th, 1967, and along the coasts of Nova Scotia, Vancouver Island and the Queen Charlotte Islands by Order in Council P.C. 1969-1109 (SOR/69-278) of May 29th, 1969. These Orders in Council were revoked and new baselines were promulgated by the Territorial Sea Geographical Coordinates Order, P.C. 1972-966 (SOR/72-151), May 9th, 1972. In the coastal areas where the foregoing baselines have been drawn, the territorial sea of Canada is simply measured outward twelve nautical miles from the baselines in accordance with s. 3 of the Territorial Sea and Fishing Zones Act.

²⁷ A good example are the waters within the Arctic archipelago, where Canada has often asserted, both officially and unofficially, that the waters thereof are internal waters of Canada: see statement of Secretary of State for External Affairs before House of Commons Standing Committee on External Affairs and National Defence, May 22nd, 1975, Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence, Issue No. 24, p. 6. When Canada extended its fishing zones in the Arctic to 200 miles on March 1st, 1977, Fishing Zone 6 (except in the boundary areas with the United States on the west and Greenland on the east) was simply stated as being bounded on its outer perimeter by a line "every point of which is distant 200 nautical miles from the nearest point of the baseline from which the territorial sea of Canada is measured in the Beaufort Sea, the Arctic Ocean and the Lincoln Sea". P.C. 1977-379, Feb. 24th, 1977 (SOR/77-173). No baselines have been published in the Arctic and so the delineation of the internal waters claimed by Canada in the Arctic archipelago and the territorial sea of Canada around the archipelago is not clear. A similar situation obtains across the mouth of the Bay of Fundy and across Cabot Strait and the Strait of Belle Isle in the Gulf of St. Lawrence, both areas Canada maintains are internal waters of Canada on the basis of historic title.

immediately before the coming into force of section 5, it would seem that the applicable baselines for determining the inner limit of the territorial sea of Canada where no coordinates have been provided is the low-water line along the coast in accordance with the Convention on the Territorial Sea. This is of course inconsistent with the view that the Bay of Fundy and other so-called special bodies of water such as the Gulf of St. Lawrence are internal waters of Canada.

However, this latter problem is not the focus of this article and for the particular discussion herein it can be left aside and assumed that at least for present purposes the twelve-mile territorial sea belt, within which Canada exercises full sovereignty, runs along and adjacent to the coasts of Canada and outside any area claimed by Canada as internal waters and outside any historic body of water considered as being within any Canadian province or territory. In addition, for purposes of this article, the continental shelf of Canada shall be taken as comprising the totality of the submarine areas adjacent to the Canadian coast but beyond the area of Canada's twelve-mile territorial sea throughout the natural prolongation of Canadian land territory out to the edge of the continental margin, borrowing the approach adopted at the Third United Nations Conference on the Law of the Sea. For purposes of simplification, reference to "submarine areas" or "offshore areas" means the totality of those areas of the seabed beyond the low-water mark, including the submarine area comprising the seabed of the territorial sea, to the edge of the Canadian continental margin. In order not to unnecessarily complicate matters, the distinction between the regime of internal waters and the territorial sea of Canada—although important—for the most part will not figure into this discussion. As well, it is useful to bear in mind that although international law distinguishes between the full sovereignty of a coastal state over the territorial sea together with its seabed and the superjacent air-space on the one hand, and the more restricted sovereign rights which a coastal state may exercise over the continental shelf for purposes of exploring it and exploiting its natural resources on the other, any legislative approach to the offshore areas directed to mineral resource-related activity need not necessarily make this distinction. As far as the issues of applicable law and jurisdiction of Canadian courts are concerned, the problems posed for Canada are the same and obtain both in respect of the territorial sea and the continental shelf beyond.

II. *The Present Legislation.*

Technical aspects of oil and gas exploration and production in the Canadian offshore are regulated by the Canada Oil and Gas Land Regulations and the Oil and Gas Drilling and Production Regula-

tions,²⁸ both made under the Public Lands Grants Act²⁹ and the Territorial Lands Act.³⁰ These regulations, originally intended for application only on land territory, as a matter of administrative procedure have come to be applied to the Canadian offshore, though nothing either in the Regulations themselves or in the Acts under which they were made seems to provide legal authority for such application.³¹ The Oil and Gas Production and Conservation Act³² confers on the Governor in Council wide powers to make detailed regulations dealing with exploration and drilling for and the conservation, processing and transportation of oil and gas. The Act, originally intended to deal with production and conservation of oil and gas in the Yukon and Northwest Territories, has been amended to apply, in addition to the Yukon and Northwest Territories, to all Crown lands not within a province and to "those submarine areas adjacent to the coast of Canada to a water depth of two hundred metres or beyond that limit where the depth of superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil thereof".³³ The use of the "exploitability test" follows the definition of the continental shelf in the 1958 Convention, referred to above. Regulations have not yet been made under the Act: the 1961 Oil and Gas Land Regulations and the Oil and Gas Drilling and Production Regulations continue to apply to the technical aspects of offshore exploration and development.

A new piece of legislation, Bill C-20, introduced in Parliament on December 20th, 1977, provided for the disposition and development of oil and gas rights on all Canada lands, defined, *inter alia*, to mean those submarine areas adjacent to the Canadian coast to a water depth of 200 metres or beyond that to where the depth of the

²⁸ P.C. 1961-797, June 6th, 1961 (SOR/61-253) as am. (Now in Consolidated Regulations of Canada 1978, 1517.)

²⁹ R.S.C., 1970, c. P-29.

³⁰ R.S.C., 1970, c. T-6.

³¹ The Territorial Lands Act applies to "territorial lands" that are under the control, management and administration of the Minister, defined as "lands *in* the Northwest Territories or *in* the Yukon Territory that are vested in the Crown or of which the Government of Canada has the power to dispose" (emphasis added). It seems doubtful that lands *in* either the Northwest Territory or the Yukon could be construed to include offshore seabed areas beyond the low-water mark, particularly in light of the definition of the Northwest Territories contained in the Northwest Territories Act, R.S.C., 1970, c. N-22, and of the definition of the Yukon Territories contained in the Yukon Act, R.S.C., 1970, c. Y-2, which lead to the conclusion that these territories end at the low-water mark. This point is particularly strong in the case of the Yukon, where the description of the metes and bounds of the Territory contained in the schedule to the latter Act provides that the Territory is bounded on the north "by that part of the Arctic Ocean called Beaufort Sea".

³² *Supra*, footnote 7.

³³ R.S.C., 1970, 1st Supp., c. 30, s. 3.

superjacent waters admits of the exploitation of seabed resources, in identical fashion to the Oil and Gas Production and Conservation Act. The proposed Act, *inter alia*, provided for the issuance of operating and production licenses for oil and gas under Canada lands, allowed the Minister to enter into exploration agreements with any person relating to Crown reserves, established civil liability resulting from discharge, emission or escape of oil or gas, set out royalty payments in respect of oil and gas production and provided for certain preferences to be given to Petro-Canada. It did not, however, deal with the technical aspects of offshore oil or gas drilling, leaving these matters for the existing 1961 Regulations or any new regulations made pursuant to Part I of the Oil and Gas Production and Conservation Act.

None of the foregoing existing federal Acts or regulations or the proposed legislation in Bill C-20 deals or purports to deal with questions of the private law applicable in the submarine areas adjacent to the coast of Canada in respect of matters involving sale of goods, contract, tort, marriage and divorce, criminal law, and so on or with establishing court jurisdiction in respect of these matters.

III. *The Precedents.*

As to the capacity of Parliament to legislate with respect to the territorial sea and the continental shelf, the matter has been settled, at least as far as the west coast is concerned, by the opinion of the Supreme Court of Canada in the 1967 British Columbia *Offshore Mineral Rights Reference*.³⁴ In its opinion, the Supreme Court held, *inter alia*, that Canada, not British Columbia, had property in and exclusive legislative jurisdiction in relation to the mineral and other natural resources of the seabed and subsoil of the territorial sea of Canada and exclusive legislative jurisdiction in respect of the mineral and other natural resources of the seabed and subsoil of the Canadian continental shelf.³⁵ The court reached this result following upon its conclusion that there was no historical material which showed that offshore areas were included within the boundaries of the colony of British Columbia in 1871 at the time it entered into union with Canada. Since the early boundaries of the colony did not expressly include any offshore area, the court went one step further and examined the common law to see whether the latter could provide an answer to the province's claim to property rights in the territorial sea and to the resources of the continental shelf. As a result of its examination, the court concluded that the provincial claim

³⁴ *Supra*, footnote 2.

³⁵ *Ibid.*, at pp. 821-822.

failed, largely on the basis of the decision of the English Court of Crown Cases Reserved in *Reg. v. Keyn*.³⁶ The Supreme Court's reliance on *Reg. v. Keyn*, as well as the decision on the *Reference* itself, has been the subject of some comment,³⁷ and it is not intended to reconsider the merits of the *Offshore Mineral Rights Reference* here. Suffice it to say that *Keyn's* case held, by a majority of seven judges to six, that while as between sovereign nations the territorial sea around the British Isles was British territory, under the common law the territory of England ended at the low-water mark. Accordingly, the Supreme Court of Canada was of the opinion that as a result of *Keyn's* case:³⁸

... the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over the territorial sea following union with Canada.

As with the territorial sea, so with the continental shelf.

The British Columbia *Offshore Mineral Rights Reference* has not settled the legal position of the other coastal provinces of Canada. Strong arguments have been made that the question of property rights in respect of offshore mineral resources and of legislative jurisdiction in respect of the territorial sea and continental shelf would be determined in favour of Newfoundland if the matter were referred to judicial consideration.³⁹ As far as Nova Scotia, Prince Edward Island and New Brunswick are concerned, their case rests, in part, on historical facts which seem to uphold the position that the letters patent, royal commissions or other instruments establishing the original boundaries of the provinces included certain offshore areas, and, to the extent that the provinces were thus

³⁶ (1876), 2 Ex. D. 63.

³⁷ See for example, Head, *The Canadian Offshore Mineral Reference* (1968), 18 U. of T. L.J. 131. And see particularly the very thorough analysis of the juridical value of *Keyn's* case insofar as provincial claims to offshore resources in Canada are concerned in Harrison, *Jurisdiction Over the Canadian Offshore: A Sea of Confusion* (1979), 17 Osgoode Hall L.J. 469. Harrison is critical of the treatment accorded *Keyn's* case by the Supreme Court of Canada in the *Offshore Mineral Rights Reference* and is of the view that the Supreme Court overstated the *ratio* of the case in holding that, on the basis of *Keyn*, specific legislative vesting of the territorial sea is required to bring it within the realm.

³⁸ *Supra*, footnote 2, at p. 814.

³⁹ The argument rests largely on Newfoundland's dominion rather than colonial status in the pre-confederation era (prior to 1949), the result of which is that Newfoundland possessed attributes of sovereignty when she joined with Canada in 1949, including, *ipso facto*, her own territorial sea and her own rights to the resources of the continental shelf by virtue of international law. See Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline* (1975), 7 Ottawa L.Rev. 34; Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law* (1976), 22 McGill L.J. 541.

constituted, it appears that they may have certain, albeit limited, claims to offshore areas and the seabed resources therein.⁴⁰

As to the larger question, whether the colonies of Nova Scotia, New Brunswick or Prince Edward Island or the Dominion of Newfoundland each possessed complete and sovereign rights to the territorial sea or other offshore areas by virtue of the operation of common law, it is difficult to imagine any Canadian court not according very strong judicial weight to the judgment of the Supreme Court of Canada in the 1967 *Reference*. Nor is it possible to imagine the same Canadian court ignoring the very thorough examination accorded the question of colonial offshore entitlements by the High Court of Australia in *New South Wales and others v. Commonwealth*⁴¹ and in *Bonser v. La Macchia*,⁴² both of which were decided after the 1967 *Reference*. In *New South Wales*, the court, citing with approval the treatment given *Reg. v. Keyn* by the Supreme Court of Canada in the *Offshore Mineral Rights Reference*, held as valid the Commonwealth Seas and Submerged Lands Act 1973.⁴³ The Act vests sovereignty in respect of the territorial sea of Australia, its airspace, seabed and subsoil, and vests sovereign rights in respect of the continental shelf, in the Crown in right of the Commonwealth. On the basis of *Reg. v. Keyn*, the several colonies which joined in the Australian Confederation in 1900 to constitute the Commonwealth were found by the High Court not to have possessed any separate rights to the territorial sea or its seabed or to the resources of the continental shelf without express Imperial legislation conferring such rights, of which, as in the case of the Canadian provinces, there was none.

However, the High Court decision went further. Barwick C.J., said that even if the states, as colonies prior to 1900, did possess proprietary rights in the offshore, these rights became vested in the Commonwealth at the time of Confederation:⁴⁴

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

⁴⁰ See LaForest, *Natural Resources and Public Property Under the Canadian Constitution* (1969), ch. 6.

⁴¹ (1975-76), 8 A.L.R. 1.

⁴² (1969-70), 122 C.L.R. 177. In *Bonser*, the question facing the High Court was whether the power of the Commonwealth over fisheries extended beyond three miles from the coastline. The court upheld the conviction of the defendant under the Fisheries Act, the Act being a valid exercise of federal power under the Australian constitution. In their judgments, Barwick C.J. and Windeyer J. approved the interpretation accorded *Reg. v. Keyn* by the Supreme Court of Canada in the *Offshore Mineral Rights Reference*, at pp. 184-185 and 220-222.

⁴³ Act No. 161 of 1973.

⁴⁴ *Supra*, footnote 41, at pp. 16-17.

vest in the Commonwealth any proprietary rights and legislative power which the colonies might have had in or in relation to the territorial sea, seabed 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. . . .

This result conforms, in my opinion, to an essential feature of 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 seabed and airspace and the continental shelf and incline. This has been decided by the Supreme Courts of the United States and of Canada . . . [citations omitted] 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. . . . 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.

And dealing with the same point, Mason J., said:⁴⁵

The Constitution Act of 1900 brought the Commonwealth into existence as a potential member of the community of nations, with a capacity to conduct its relationships with other nations. When it actually became a member of the community of nations, and accepted as an international persona, it is not necessary to decide What is of importance is that it is consistent with the Commonwealth's character as an international persona and with the States' lack of that character, that legislative power and jurisdiction over the territorial sea and its seabed should reside in the Commonwealth rather than the states.

Some case could be made for distinguishing the foregoing views from the Canadian situation because of the express conferral upon the Commonwealth of legislative power with respect to external affairs under the Australian constitution.⁴⁶ Nonetheless, these views of the Australian High Court would appear to be extremely damaging to the case of the Canadian littoral provinces, including Newfoundland, especially when considered together with the following very similar points in the *Offshore Minerals Reference* made by the Supreme Court of Canada:⁴⁷

It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia

⁴⁵ *Ibid.*, at p. 90.

⁴⁶ The Commonwealth of Australia Constitution Act, 63 and 64 Vict., c. 12, s. 51 gives the Parliament of the Commonwealth the power to make laws for the peace, order and good government of the Commonwealth with respect to, *inter alia*, external affairs.

⁴⁷ *Supra*, footnote 2, at pp. 816-817. These observations were echoed by Windeyer J. in *Bonser, supra*, footnote 42, at p. 221, namely that territorial waters are an adjunct of sovereignty, that before federation, sovereignty over the territorial sea was "vested in the British Crown and that now the Commonwealth has become, by international recognition, a sovereign nation, competent to exercise rights that by the law of nations are appurtenant to, or attributes of sovereignty" (at p. 224).

Canada has now full capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law. The territorial sea now claimed by Canada was defined in the *Territorial Sea and Fishing Zones Act* of 1964 referred to in Question 1 of the Order in Council. The effect of that Act, coupled with the Geneva Convention of 1958, is that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

By virtue of the fact that Newfoundland attained the status of a self-governing Dominion prior to her entry into the Canadian confederation, it would seem possible to distinguish her case from those of the other Atlantic provinces, which, while exercising a measure of self-rule, could not be said to have been fully sovereign and thus to have possessed the attributes of sovereign states. Thus, the argument runs, having attained independent dominion status, Newfoundland was a sovereign state like Canada and exercised sovereign rights with respect to the territorial sea and continental shelf which she brought with her when she joined Confederation in 1949.⁴⁸ These arguments, however, like all legal questions, may not be so apparently simple. Given the strength which *Reg. v. Keyn* enjoys in the courts both in Canada and in Australia, the proposition seems to remain firm that, absent legislation, the realm ends at the low-water mark. To have vested either the territorial sea or mineral rights in the continental shelf in its former colonies, specific legislation by the British Parliament seems to be necessary. Imperial or colonial legislation extending jurisdiction over discrete matters within the territorial sea, dealing with subjects such as hovering or fisheries, would not appear to be sufficient to meet the *Reg. v. Keyn* test, (although it has been suggested that Newfoundland legislation meets the essential requirements for proving title to the territorial sea).⁴⁹ As Mason J., noted in *New South Wales*:⁵⁰

⁴⁸ Martin, *op. cit.*, footnote 39, at pp. 40-42, points out that, firstly, Newfoundland's position as a self-governing Dominion was not altered by the period of Commission Government from 1934-1949 and that Newfoundland continued to be a sovereign state until union with Canada, having merely delegated performance of certain public functions to the United Kingdom. Secondly, in order to leave no room for doubt as to Newfoundland's status at the time of Confederation, the suspended constitution was *revived at the date* of union with Canada in accordance with Term 7 of the Terms of Union.

⁴⁹ Swan, *op. cit.*, footnote 39, at p. 550. However, for an opposite, and, it is submitted, correct view of the effect on Newfoundland's claims of the test in *Reg. v. Keyn*, see Kovach, *An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources* (1975), 23 Chitty's L.J. 18; Oppolito, *Newfoundland*

⁵⁰ See next page.

What Lush, J., said subsequently in his judgement (in *Keyn's* case) and what was undoubtedly correct, was that the territorial sea, though outside the realm, could be brought within the territory of England by Act of the Imperial Parliament. This view was shared by Cockburn, C.J. (at 198) and the judges who agreed with him. At the date of *Keyn's* case, no legislation to this effect had been passed by the Imperial Parliament and thus the territorial sea was not then incorporated into the realm of England.

Answering questions relating to the capacity of the colonial legislatures to make laws having effect in territorial waters, Mason J. pointed out that, as far as the Australian colonies were concerned, their 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, even to the extent of the colony legislating so as to vest in the Crown proprietary interests in the seabed.⁵¹ The Supreme Court of Canada was not so certain, it would appear, that the colonies in British North America had such wide capacity, but did go so far as to agree that the British Crown *might* have conferred upon the colony those rights to which the British Crown was entitled under international law.⁵² And, one is led to conclude, had the British Crown done so in the case of the Canadian colonies, the colonies would then either have had the capacity to legislate so as to acquire property rights in the seabed or those rights would have flowed directly from such Imperial legislation. Needless to say, such Imperial legislation does not exist in respect of the British North American colonies prior to Confederation in 1867, or, in the case of Newfoundland, prior to 1949.

The constitutional situation can therefore be summed up as follows. What is needed to meet the *Reg. v. Keyn* rule is specific Imperial or Dominion legislation either vesting title to the territorial sea or by some other method bringing it into the realm. This lacking, even though laws may have been enacted by the colony to exercise customs, fisheries or other jurisdiction in offshore areas, the claim of Newfoundland and the other Atlantic provinces is grossly, perhaps fatally, weakened. Newfoundland statutes prior to 1949 expressing legislative jurisdiction over certain offshore matters fall short of actual vesting of title to or property in the territorial sea, its airspace and its seabed. As far as bringing the territorial sea into the realm of Canada, as opposed to Newfoundland, is concerned, the test in *Reg. v. Keyn* has been met, according to the Supreme Court of Canada. It is not entirely clear by what legislative measure or at what point in time the territorial sea became part of the territory of Canada: it may

and the Continental Shelf: From Cod to Oil and Gas (1976), 15 Col. J. of Trans. L. 138.

⁵⁰ *Supra*, footnote 41, at p. 85.

⁵¹ *Ibid.*, at p. 90.

⁵² *Supra*, footnote 2, at p. 808.

have been a combination of many factors in the eyes of the court, as pointed out above, not least of which was the passing of the Territorial Sea and Fishing Zones Act in 1964. Whatever the measure or combination of measures may have been, the Supreme Court of Canada seems to have made it clear that the territorial sea adjacent to the coasts of Canada belongs to Canada and not to the coastal provinces.

As far as the continental shelf is concerned, considerable reliance seems to be placed by Newfoundland on the oft-quoted statement by the International Court of Justice in the 1969 *North Sea Continental Shelf* case to the effect that the rights of the coastal state in respect of its continental shelf exist *ipso facto* and *ab initio*,⁵³ thus strengthening the province's position that as a sovereign state it possessed a continental shelf of its own in 1949 at the time of union with Canada. But this part of the 1969 International Court of Justice judgment was considered by the Australian High Court in *New South Wales* and it was given a short shrift. Gibbs J., who dissented from the majority over states' rights to the territorial sea, dealt directly with the foregoing statement of the world court and he said:⁵⁴

To say that 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 seabed to be exploited in a way which it was quite impossible for governments or lawyers of earlier centuries to foresee. In this the arguments of history are stronger than those of logic. In truth, when the Act [of 1901] 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.

This is a significant judicial pronouncement on this particular aspect of the 1969 International Court of Justice judgment and on its effect on British constitutional law. The views of Gibbs J., would seem to carry some weight in Canada. Thus, evidence of a historical assertion of a claim to the resources of the continental shelf as a concept in law either by legislative action or otherwise would seem to be a requisite to the provincial case. To prevail, arguments of history are stronger than those of logic, borrowing from the pronouncement of Gibbs J.⁵⁵

⁵³ *Supra*, footnote 21, paragraph 19.

⁵⁴ *Supra*, footnote 41, at p. 49, italics added.

⁵⁵ The only other judicial comment on this particular passage of the *North Sea Continental Shelf Judgment* appears to have been by Barwick, C.J. in *Bonser v. La Macchia*, *supra*, footnote 42, at pp. 136-137, where he made in passing certain points

The foregoing has been an effort to demonstrate that the constitutional foundation for legislation by the Parliament of Canada in respect of the Canadian offshore to the limits of the Canadian continental shelf is a sound one and would likely be upheld by Canadian courts in light of the judicial precedents cited. On this assumption, the next step is to examine the possible scope of such legislation taking into account the practice of other states with whom Canada shares common legal traditions.

IV. *The Pattern and Practice of Others.*

Australia has enacted the Seas and Submerged Lands Act 1973⁵⁶ which vests sovereignty in respect of the territorial sea, the superjacent airspace and its bed and subsoil in the Commonwealth, and which vests sovereign rights in the Commonwealth in respect of the continental shelf for the purpose of exploring it and exploiting its natural resources. The Act was the subject of the *New South Wales* case, discussed above, and its validity as an exercise of federal competence was upheld by the High Court of Australia. In addition, Australia had earlier enacted the Petroleum (Submerged Lands) Act 1967⁵⁷ perhaps less profound in its constitutional effect than the 1973 Act but which dealt with the more fundamental issue of the laws applicable and with the jurisdiction of the courts in respect of all acts or circumstances arising out of or connected with offshore petroleum exploration and exploitation. The Act declares that the laws in force in a state—provided that such laws are within the authority of the Commonwealth Parliament—apply in the “adjacent area”, an area delineated in a schedule to the Act as seaward and adjacent to a particular state.⁵⁸ State courts are invested with “federal jurisdiction” in all matters arising in the offshore area

which could be more favourable to Newfoundland's case: “Thus, accepting for present purposes this decision of the International Court, internationally the continental shelf appertains to a nation as an international person. It is, therefore, on the footing of this decision, to the Crown in right of the United Kingdom that the natural rights over the seabed belonged. These rights were never made available to any of the Australian colonies.” Thus, following Barwick C.J.'s view that only a nation state could have claims to the shelf on the basis of the ICJ judgment, Newfoundland, as a self-governing Dominion would have brought with her the rights *ipso facto* and *ab initio* of which she was possessed when she joined Confederation. However, Barwick C.J. continued, much along the lines of the Supreme Court of Canada in the *Offshore Mineral Rights Reference* on this point: “But if contrary to that decision of the International Court, the continental shelf did not of its very nature belong to what was the nation state at the time of the creation of the colonies, and the rights to it now depend on the convention, it is the Commonwealth which is the party to the appropriate convention.”

⁵⁶ *Supra*, footnote 43.

⁵⁷ Act No. 118, 1967.

⁵⁸ *Ibid.*, s. 9.

designated as adjacent to that state.⁵⁹ Thus, the laws of the littoral states are made applicable to Australian submerged lands by virtue of Commonwealth legislation.

In the United Kingdom, the Continental Shelf Act 1964 provides that "any rights exercisable by the United Kingdom outside territorial waters with respect to the seabed and subsoil and their natural resources, except so far as they are exercisable in relation to coal, are hereby vested in Her Majesty".⁶⁰ To provide greater precision, the Act allows for Her Majesty to designate any area of the shelf as an area within which the foregoing rights apply, and this has been done by Order in Council.⁶¹ The rights exercisable in the territorial sea of the United Kingdom are those which are exercisable under common law following *Reg. v. Keyn*, discussed above. Jurisdictional powers in the territorial sea are dealt with by the Territorial Waters Jurisdiction Act 1878.⁶² Under the Continental Shelf Act 1964, any act or omission which takes place on any installation outside territorial waters on the continental shelf of the United Kingdom will be treated as if it had occurred in the United Kingdom.⁶³ The Act allows for making Orders in Council to provide for the application of those laws in force in different parts of the United Kingdom in respect of acts or omissions occurring in a particular part of the designated offshore area. Thus, the Continental Shelf (Jurisdiction) Order 1968⁶⁴ provides for the application of English, Scottish and Irish law to those parts of the United Kingdom continental shelf designated respectively as the English, Scottish and Irish areas—basically those areas of the continental shelf adjacent to the coasts of England, Scotland and Northern Ireland. The High Court of England has jurisdiction for the determination of questions which fall to be determined in accordance with the law in force in England (that is, in the "English area"); the Court of Session of Scotland for questions to be determined in accordance with the law in force in Scotland (that is, in the "Scottish area"); and Her Majesty's High Court of Justice in Northern Ireland for questions to be determined in accordance with the law in force in Northern Ireland (that is, in the "Northern Irish area").

⁵⁹ *Ibid.*, s. 10.

⁶⁰ 1964 Eliz. II, c. 29, s. 1.

⁶¹ The Continental Shelf (Designation of Areas) Order 1964, S.I. 1964, No. 697 and The Continental Shelf (Designation of Additional Areas) Orders 1965, S.I. 1965, No. 1531, 1968, S.I. 1968, No. 891.

⁶² 41 and 42 Vict., c. 73.

⁶³ *Supra*, footnote 60, s. 3.

⁶⁴ S.I. 1968, No. 892.

New Zealand, like Australia and the United Kingdom, has provided, in its Continental Shelf Act 1964, that "all rights that are exercisable by New Zealand with respect to the continental shelf and its natural resources for the purpose of exploring the shelf and exploiting those resources are hereby vested in the Crown".⁶⁵ The continental shelf of New Zealand is defined by the Act to be the seabed and subsoil of the submarine areas adjacent to the coast but beyond New Zealand territorial limits. Every act or omission which takes place on any off-shore installation used for exploration or exploitation of the resources of the continental shelf is deemed to take place in New Zealand and every court which would have criminal or civil jurisdiction in respect of that act or omission if it had taken place in New Zealand is given jurisdiction accordingly. Unlike Australia and the United Kingdom, New Zealand does not have to concern itself with making applicable the several laws in force in political subdivisions of that country, because there are none.

In the United States, the Outer Continental Shelf Lands Act, passed over twenty-five years ago, provides:⁶⁶

It is declared to be the policy of the United States that the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this sub-chapter.

By virtue of the Act, the "Constitution and laws and the civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf". The laws of each state, to the extent they are not inconsistent with federal law, are declared to be the law of the United States in force in the areas adjacent to each state. The areas adjacent to each state are determined by projecting state boundary lines seaward as determined by the President and published in the *Federal Register*. United States District Courts are given original jurisdiction over cases arising out

⁶⁵ Act No. 28, 1964.

⁶⁶ (1953), 43 U.S. Code 1332. According to the Outer Continental Shelf Lands Act, the term "outer continental shelf" means all submerged lands lying seaward and outside of the area beneath navigable waters, the latter term defined to mean, generally, the waters beyond the low-water mark of the several U.S. states up to a distance of three miles according to the Submerged Lands Act (1953), 43 U.S. Code 1301-15. By virtue of the Submerged Lands Act, all lands beneath "navigable waters" are vested in the respective states. The Act gives property in the seabed of the territorial sea to the states, thereby reversing the effect of U.S. Supreme Court decisions which held that the United States and not the individual states had sovereignty in the territorial sea and its seabed and, adumbrating the *New South Wales* case and the *Offshore Mineral Rights Reference*, held as well that even if the state possessed any such rights, these were relinquished to the United States at the time of union: *U.S. v. California* (1947), 332 U.S. 19; *U.S. v. Louisiana* (1950), 339 U.S. 669; *U.S. v. Texas* (1950), 339 U.S. 707.

of or in connection with any operations conducted on the outer continental shelf.⁶⁷

V. *The Proposal.*

In light of legislation passed to deal with submarine areas by states with similar interests related to offshore development,⁶⁸ it would seem appropriate for Canada to take similar measures, in particular, first to eliminate lingering uncertainties as to offshore resource ownership and as to the power of federal agencies to issue oil, gas or other mineral rights to the resources of the seabed in the offshore areas and, secondly, to make clear the substantive law to be applied in offshore areas in resolving private disputes and ordering private relationships. If it is assumed that resource activity in the Canadian offshore will expand as the search for conventional energy sources intensifies, the need for an appropriate legislative framework becomes all too evident.

The issue then is this: assuming Parliament's competence over all Canadian offshore areas, beyond provincial limits, what is the scope and essential ingredients of any Canadian legislation regarding these adjacent submarine areas? Should such legislation deal with sovereignty and property issues concerning the territorial sea and the resources of the continental shelf? Should the legislation establish a framework for the management and administration of those resources? Or should the legislation be more limited or *functional* in its approach and deal only with essential matters such as the applicable laws and the jurisdiction of the courts?

As far as sovereignty questions and questions of ownership of the resources of the territorial sea and its seabed as well as the resources of the adjacent continental shelf are concerned, the British Columbia *Offshore Mineral Rights Reference* provided an answer, at least in part. It will be recalled that in that case the Supreme Court of Canada concluded that by a combination of international law and the passage of the Territorial Sea and Fishing Zones Act in 1964 by the Parliament of Canada, the territorial sea became part of the territory of Canada. This conclusion followed a finding by the court that at no

⁶⁷ *Ibid.*, s. 1333. The laws in force in each state by virtue of the Submerged Lands Act apply within the three-mile territorial sea.

⁶⁸ Apart from the U.S.A., the U.K., New Zealand and Australia, other states have adopted legislation applying their laws to offshore resource-related activity. The Constitution of Mexico (1917, as am.), for example, provides in Art. 27 thereof that the Mexican nation is vested with direct ownership of all natural resources of the continental shelf and that all exploration and exploitation activities related thereto shall be governed by Mexican law. See, Constitution of Mexico, 1917 (as am.), General Secretariat, Organization of American States, Washington, D.C., 1972, pp. 8-9.

time before or after union with Canada did British Columbia have property rights to the territorial sea.

Following the logic of the *British Columbia Offshore Mineral Rights Reference*, it may then be concluded that the three Maritime Provinces, Quebec and Newfoundland possess no separate property rights in the territorial sea around their coasts and that, on the contrary, such rights inhere in the Crown in right of Canada. And by virtue of the operation of international law (supplemented perhaps by the Territorial Sea and Fishing Zones Act), the territorial sea, as well as its seabed and airspace, are part of Canadian territorial domain and under full Canadian sovereignty. Again, it would seem that following such a conclusion as to provincial claims to the territorial sea, rights to the resources of the continental shelf would also, for similar reasons, fall to Canada.

As a consequence, however desirable it may be, legislation by Parliament directly vesting property in the territorial sea, its seabed and airspace as well as vesting rights to the resources in the continental shelf in the Crown in right of Canada would not be absolutely necessary. As shown, these property and resource rights of the Crown appear to already exist independent of legislation. Moreover, the fact that questions of ownership and property and other rights to offshore areas on the Canadian east coast have not yet been settled politically, as noted in the introduction to this article, provides some practical justification in leaving these matters aside, at least for the time being, in any legislative approach to offshore questions. Indeed, in the recently concluded Memorandum of Understanding of February 1st, 1977 between the maritime provinces and the Federal Government dealing with the administration of offshore resources, it was agreed that offshore resource ownership and jurisdiction questions would be left in abeyance and that the Memorandum of Understanding would be implemented as a pragmatic solution without prejudice to respective legal positions.⁶⁹

⁶⁹ The Memorandum of Understanding outlines the basic terms of a detailed, comprehensive agreement, to be implemented by federal and provincial legislation which would provide for a single regulatory regime for offshore mineral resources. The agreement would provide for the administration and management of offshore resources beyond established Mineral Resource Administration Lines to be conferred upon a Maritime Offshore Resources Board (to be composed of three federal members and one from each of the three maritime provinces). The Board will issue rights in respect of the mineral resources of the offshore area covered by the agreement. Revenues earned from offshore resources will be distributed 25% to Canada and 75% to the province whose offshore area is the area from which the revenue is earned. For a detailed explanation of the entire scheme, see Harrison, *The Offshore Mineral Resources Agreement in the Maritime Provinces* (1978), 10 Dal. L.J. 245.

Given the strength of the federal case on the basis of the British Columbia *Offshore Mineral Rights Reference*, an absence of legislative vesting of rights as in the Australian, United Kingdom, United States of America and New Zealand approaches, would not seem to detract from or to be prejudicial to the case for federal ownership. Thus, it would not seem necessary to deal in the proposed legislation with the vesting of those property rights possessed by the Crown in right of Canada by virtue of international law. This question has been dealt with already by the Supreme Court of Canada in the British Columbia *Offshore Mineral Rights Reference* and to the extent that questions remain unresolved on the Atlantic coast, it would appear prudent to leave these matters either to subsequent judicial resolution or some practical solution arrived at the political level. Moreover, matters of sovereignty and property rights in respect of the territorial sea of Canada and in respect of the resources of the Canadian continental shelf raise larger issues involving the constitutional distribution of federal and provincial competence over resources and, as has recently been witnessed, involving the political demands of the provinces for greater control over such resources. Any federal legislation which purported to solidify these matters by asserting property rights over submerged land areas and in respect of resources where the provinces claim they have certain entitlements, however weak such provincial claims may appear in a legal sense, would only serve to complicate matters on the political front, and make more difficult the resolution of the immediate practical problem related to the applicable laws in respect of offshore resource-related activity, and the matter of the jurisdiction of Canadian courts over such activity.

The most direct legislative approach to fill the present legal vacuum, then, would be to leave aside sovereignty, property, resource ownership and resource management issues. By leaving these matters out of any new legislation, the additional problem of delineating in precise terms the inner limits of the territorial sea of Canada in certain areas where these have not heretofore been defined would be avoided. So too would difficult questions involving Canada's claims to certain offshore areas as internal waters of Canada by virtue of historic title under international law. As well, such an approach would obviate the need for distinguishing between the legal regime of full sovereignty over the territorial sea and the more limited regime of sovereign rights over the continental shelf, a matter which is discussed further in this article.

What then would be the essential elements in the proposed federal submerged lands legislation? How should such legislation be framed in order to meet the two basic practical issues regarding, first, the applicable substantive law in respect of activities occurring in the offshore areas and, secondly, the jurisdiction of the courts to

deal with disputes arising in connection with such activities? The most practical alternative, it is submitted, would be for the Federal Government to draft legislation which is *functional* in its approach—that is, legislation which deals with the central issues raised in the *Dome Petroleum* case,⁷⁰ by making substantive law applicable in respect of specific types of activity undertaken in a defined offshore area adjacent to the coasts of Canada. This approach, in effect, would be similar to Australia's Continental Shelf (Submerged Lands) Act 1967 and would apply in specific terms to offshore mineral resource-related activity (including, as a secondary feature, fishing for sedentary fish species beyond 200 miles)⁷¹ undertaken on the continental shelf of Canada. It would set out those federal laws and those laws in force in a given province that would apply *as part of federal law* to offshore resource-related activity and would specify the courts—federal and provincial—that would have jurisdiction over particular types of activities and disputes relating to those activities arising in specifically designated offshore areas.

The first problem facing legislative drafters would be one of definition of the offshore areas to which any new Act would apply. In this regard, an important matter which will have to be resolved will be whether a distinction, for purposes of the legislation, is required as between the territorial sea, on the one hand, and the continental shelf beyond and adjacent to it, on the other, given the fact that under international law the rights and entitlements of the state differ in respect of each. The territorial sea, it will be recalled, is under the full sovereignty of the coastal state, as is its seabed and subsoil and superjacent airspace, while with respect to the continental shelf, international law accords to the coastal state sovereign rights for purposes of exploring it and exploiting its natural resources. These juridical distinctions are likely of less significance than it might appear, however, in the context of municipal submerged lands legislation. Because, for practical purposes, seabed resource activity is the same whether it occurs within the twelve-mile territorial sea or whether it occurs beyond, the area to which any submerged land legislation is to apply could therefore simply be defined, as in the case of the Canadian Oil and Gas Production and Conservation Act, as the area adjacent to the coast of Canada out to a

⁷⁰ *Supra*, footnote 13.

⁷¹ Art 2(4) of the Convention on the Continental Shelf, *supra*, footnote 4, provides that the natural resources over which a coastal state exercises sovereign rights consists of both the mineral and other non-living resources of the seabed and subsoil: "... together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

defined limit. And because Canada is party to the 1958 Convention on the Continental Shelf, it would seem appropriate, as in the case of the Oil and Gas Production and Conservation Act and the proposed Oil and Gas Act, to define the outer limit of applicability by using the present conventional definition of the continental shelf, based on a water depth of 200 metres or alternatively on the "exploitability test". Recognizing certain unsatisfactory elements inherent in that definition, as noted earlier, it is for further reflection whether the new definition of the term "continental shelf", contained in the texts that have been negotiated at the Third United Nations Law of the Sea Conference, should be utilized in anticipation of eventual Canadian ratification of a new Law of the Sea treaty.

Turning to the question of the specific laws to be made applicable to offshore resource activity, federal legislation would have as its object to make applicable in respect of these offshore activities both federal laws in force and laws in force in a given province *as part of federal law*. As far as applicable federal laws are concerned, the new legislation will have to set out those federal Acts that are to be made applicable. The question is raised as to whether all laws of the Parliament of Canada are to apply or whether the legislation should specify in a list or schedule thereto those particular Acts, such as the Customs Act, the Criminal Code, that are to apply? The most straightforward approach would seem to be to make *all* laws of the Parliament of Canada in force from time to time applicable to activities undertaken in respect of the defined offshore areas to the same extent as if such activities had occurred within Canadian territorial domain.

Since many laws in force in the provinces are relevant to the ordering of relations between private parties engaged in offshore resource activity—such as civil rights, contracts, torts, sales of goods—it would therefore be necessary to incorporate relevant laws in force in the coastal provinces and in the two territories as part of the proposed Federal legislation. This could be done by providing, in the federal Act, that *all* laws in force in the province to the extent they are not repugnant to or inconsistent with applicable federal laws will apply, as part of federal law, to acts or omissions occurring in relation to seabed resource activity in the submarine areas adjacent to the coasts of Canada as defined. Alternatively, those specific provincial laws to be made applicable, to the extent they are not in conflict with federal law, could be left for subsequent designation, presumably by Order in Council, under the new federal Act. Either of the foregoing approaches has its advantages. One practical effect of the second approach is that it would allow for a degree of control by and hence discretion in the Federal Cabinet over the designation of those laws in force in a given province which are to be made applicable to offshore resource-related activities.

An important element of the proposed federal submerged lands legislation, particularly in the Arctic and on the east coast of Canada, is the precise delineation for purposes of the Act of those offshore areas where the laws of the several provinces or of the territories are to apply. On the east coast, for example, geographical coordinates will have to be published separating the area where the laws in force in New Brunswick are to apply from the area where the laws in force in Nova Scotia are to apply and so on. This, it would seem, could be accomplished by Order in Council, utilizing in part perhaps the Inter-provincial Lines of Demarcation set out in the February 1st, 1977 Memorandum of Understanding between the Federal Government and the three maritime provinces.

The new federal legislation will also have to make clear which courts are to have jurisdiction to deal with legal actions arising under specific subject heads. As far as the Federal Court of Canada is concerned, it has exclusive jurisdiction in certain matters and shares jurisdiction with provincial courts in others.⁷² Provincial courts, on the other hand, have exclusive jurisdiction over the trial of criminal offences and are the courts of ordinary jurisdiction in most civil cases. There would appear to be no reason to depart from the present jurisdictional division as between the Federal Court and provincial courts in respect of legal actions arising out of offshore activity. Thus, in respect of matters related to offshore resource activity, the provincial courts would remain the courts of ordinary jurisdiction in most civil matters as is the case at present and would retain their exclusive jurisdiction over criminal matters, while the Federal Court would retain jurisdiction over maritime matters, patents, Crown liability, and so on, as under the existing Federal Court Act.

The foregoing then is a suggested framework for Canadian submerged lands legislation. It embodies an attempt to deal in a *functional* manner with a major problem facing Canadian courts—that is, the substantive law applicable to private disputes related to resource activity on the continental shelf adjacent to the coast of Canada and the jurisdiction of the several courts of Canada to hear actions arising from those disputes. It proposes that the specific activity itself be the focus of the legislation, leaving aside politically sensitive matters of sovereignty and property and of vesting of title to specific offshore areas or the resources thereof as between the

⁷² The Federal Court Act, R.S.C., 1970, 2nd supp., c. 10. The Trial Division of the court has exclusive original jurisdiction in such matters as claims arising out of a contract entered into by or on behalf of the Crown (s. 17), applications for writs of *habeas corpus*, *certiorari*, prohibition or *mandamus* against any federal board, commission or tribunal (s. 18) or in relation to any member of the Canadian Forces serving outside Canada (s. 17), in matters relating to patents, copyrights and trademarks (s. 20).

Crown in right of Canada and the Crown in right of the several provinces. By so doing, it avoids difficult legal and political issues not necessarily relevant to resolving the central issues.
