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JURISDICTION OVER THE CANADIAN OFFSHORE: A SEA OF CONFUSION

By Rowland J. Harrison*

I. INTRODUCTION

In *Re Offshore Mineral Rights of British Columbia*,¹ the Supreme Court of Canada handed down a joint opinion that Canada, rather than British Columbia, had jurisdiction in relation to the mineral and other natural resources of the sea bed and subsoil off the coast of the Province.² The then Prime Minister, Pierre Elliott Trudeau, later referred to the opinion as “an authoritative clarification of the legal position . . . on the basis of principles that would appear to be substantially applicable to the east coast as well as to the west coast . . .”.³ However, the issue of jurisdiction over offshore areas was not resolved as finally and universally as the Prime Minister’s statement might imply. Indeed, the Prime Minister himself recognized the practical difficulties involved in ascertaining which specific areas would be federal and which provincial on the basis of the Court’s reference to the sea bed and subsoil seaward from the low-water mark “outside the harbours, bays, estuaries and other similar inland waters . . .”.⁴ Furthermore, the east coast Provinces

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² The particular questions asked of the Court, and the answers given, are discussed further in the text accompanying notes 62-68 and note 128, infra.
have repeatedly argued that the very principles of the Court’s opinion would lead to different conclusions if applied to their different histories. This has been particularly true of Newfoundland which, as well as denying the correctness of *Re Offshore Mineral Rights of British Columbia*, has publicly relied on its former status as a sovereign dominion as a basis for insisting that the *ratio* in that case would yield a different result with respect to Newfoundland than it did when applied to British Columbia.\(^5\)

The Supreme Court’s opinion may well have determined the issue of jurisdiction over offshore areas between Canada and British Columbia, but it is arguable that it did not provide a framework of understanding that would enable one to apply the judgment reliably to other situations. Indeed, in light of the reasoning in several judgments in a series of recent decisions of the High Court of Australia, as much confusion persists as ever. The Australian decisions serve to highlight several deficiencies in the reasoning of the Supreme Court of Canada in its opinion. The reasoning of the majority in the Australian cases supports the conclusion of *Re Offshore Mineral Rights of British Columbia*, and some of the judgments specifically approve of the result in that Reference and adopt its reasoning. However, the latter judgments seem to labour under the same difficulties that are identifiable in the Supreme Court’s reasoning, and thus do little to resolve matters convincingly.

Furthermore, the British Columbia Court of Appeal, in *Re Strait of Georgia*,\(^6\) had difficulty in agreeing on what was decided with respect to four particular straits in the *Re Offshore Mineral Rights of British Columbia* decision. The Court of Appeal divided three to two in holding that lands covered by the waters of the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait were the property of British Columbia.

In brief, there are several problems that arise from the reasoning of the Supreme Court in *Re Offshore Mineral Rights of British Columbia*.\(^7\)

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

7 Several articles have examined the Supreme Court’s opinion and some have pointed to the problems in the Court’s reasoning, but none has examined the implications of all of the Australian decisions. See, for example, Head, *The Canadian Offshore Minerals Reference* (1968), 18 U. Toronto L.J. 131, and Ballem, “Oil and Gas and the Canadian Constitution on Land and Under the Sea,” in L.S.U.C. Special Lectures 1978, *The Constitution* (Toronto: de Boo, 1978) 251. Ballem, op. cit. at 270, concludes that “The question of ownership and jurisdiction of offshore resources in Canadian territorial waters is still unsettled” and, further, that “Owing to the different and sometimes unique historical development of the Canadian provinces from their colonial days, it is doubtful if this matter will be finally determined until each province has had its day in court.” Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law* (1976), 22 McGill L.J. 541, discusses the *Seas and Submerged Lands* case, infra note 12, but concentrates on distinguishing the position of Newfoundland rather than on examining the implications of the Australian case for the validity of the reasoning of the Supreme Court of Canada in *Re Offshore Mineral Rights of B.C.*
This article will attempt to identify them and to clarify the issues involved in each.

Until recently, it appeared that the Supreme Court would be faced with a re-examination of *Re Offshore Mineral Rights of British Columbia* in the near future. In 1977, the federal government agreed on a scheme of joint administration of offshore mineral resources with Nova Scotia, New Brunswick and Prince Edward Island. This agreement effectively put aside the question of jurisdiction as far as these three provinces were concerned. Indeed, it was an underlying premise of the agreement that resolution of the question would be avoided and, thus, the application of *Re Offshore Mineral Rights of British Columbia* to these provinces was thereafter of largely theoretical interest. Newfoundland, however, found that agreement unacceptable and declared that it would proceed with the preparation of a reference to the Supreme Court of Canada to have the matter of jurisdiction resolved as between it and the federal government. In the course of that reference, the Court would have been called upon to re-examine its 1967 opinion.

In September, 1979, the new federal government of Prime Minister Joe Clark announced that it would grant full jurisdiction over offshore resources to the coastal provinces. That announcement might make it appear that jurisdiction is no longer an issue and, therefore, that any alleged problems in the Supreme Court's view of the matter in *Re Offshore Mineral Rights of British Columbia* are of no consequence.

While this development does mean, no doubt, that the Newfoundland reference will not proceed, and that the Supreme Court will not, therefore, be called upon to deal with the issue in the immediate future, it is premature to relegate the 1967 opinion to the realm of mere historical interest. What the constitution in fact says about jurisdiction over offshore areas continues to be pertinent for three primary, interrelated reasons. First, no agreement between governments in Canada can amend the constitution and, hence, constitutional jurisdiction over offshore areas will remain wherever it is now, in the absence of formal constitutional amendment. Second, the method of implementing any grant of jurisdiction will depend, fundamentally and critically, upon where that jurisdiction in fact resides. It is beyond the scope of this article to explore this problem further but, for the purpose of emphasizing its significance, one need only ask the following question: How could the federal government grant full jurisdiction over offshore mineral resources to, say, Newfoundland if it should be the position under the existing constitution that Newfoundland already has that jurisdiction? Third, there is always the possibility that a constitutional issue could be precipitated for resolution by the courts by actions beyond the control of even the combined efforts of the federal and provincial governments. Thus, an oil company holding oil and gas exploitation rights from the federal government might challenge the constitutional validity of any federal attempt to hand over jurisdiction to the provinces in a manner that infringed upon those rights. If it did so, the courts, of course, would have to resolve the issue exclusively on the basis of what the existing constitution says and not on the basis of any agreement between the federal government and any, or for that matter all, of the provinces. The more lenient attitude that has emerged in the courts in recent years with respect to granting standing to
individual citizens increases the chances that the issue might eventually wend its way to a judicial resolution.\(^8\)

For all of these reasons, the validity of the opinion of the Supreme Court of Canada in *Re Offshore Mineral Rights of British Columbia*, and the reasons for that opinion, continue to be of real interest.

II. RE OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

In *Re Offshore Mineral Rights of British Columbia*, the Supreme Court was asked five questions. The first three related to lands under the territorial sea seaward from the ordinary low-water mark on the coast, outside the harbours, bays, estuaries and other similar inland waters.

The Court was asked whether these lands were the property of Canada or British Columbia. Did Canada or British Columbia have the right to explore and exploit the lands? Did Canada or British Columbia have legislative jurisdiction over the lands?

The last two questions related to the mineral and other natural resources of the sea bed beyond the territorial sea, i.e., the resources of the continental shelf. Did Canada or British Columbia have the right to explore and exploit these resources? Did Canada or British Columbia have legislative jurisdiction in relation to these resources?

The answer to all five questions was “Canada.” Thus, as between British Columbia and Canada, the latter had exclusive jurisdiction over the mineral resources of both the territorial sea and the continental shelf beyond.

Briefly, the Court’s reasons were that, at common law, the jurisdiction of England and her territories ended at the low-water mark. Although the realm might be extended to include the territorial sea, such extension would require a positive exercise of jurisdiction by legislation. In the case of British Columbia, there had been no such legislative extension of the limits of the Province at the time of its entry into Confederation and, therefore, the boundary ended at the low-water mark of the Pacific Ocean. In other words, the lands under the territorial sea were outside the Province and, for that reason, beyond its proprietorship and legislative jurisdiction.

As far as the continental shelf beyond the territorial sea was concerned, the Court held that British Columbia had no jurisdiction because the legislative jurisdiction of the provinces is limited by *The British North America Act* to matters “in each Province.”\(^9\) The boundary of British Columbia having been

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\(^8\) See further Mullan, *Standing After McNeil* (1976), 8 Ottawa L. Rev. 32 at 49, where he poses the question:

More interesting perhaps and certainly more difficult will be the case in which a private citizen, say of Newfoundland, seeks, for example, to challenge the federal government’s statutory regulation of offshore mineral rights off the Newfoundland coast. Is this a justiciable constitutional dispute? Do private citizens have a “real stake” in its resolution? Would “grave inconvenience” result from the interference that such litigation would cause to ongoing inter-governmental negotiations?

fixed at the low-water mark by the Court's answers to the questions concerning the lands under the territorial sea, it followed that the Province could not have jurisdiction over the continental shelf.

The Court added that the right to legislate in relation to the resources of the continental shelf was a right acquired in international law. As Canada, and not the provinces, was the only unit of the federal system recognized in international law, these rights must belong to it.

III. THE CONTROVERSIAL AUTHORITY OF R. v. KEYN

Central to the reasoning of the Supreme Court of Canada in Re Offshore Mineral Rights of British Columbia was acceptance of the majority opinion in R. v. Keyn10 as authority for the proposition that, at common law, the territory of the realm ends at the low-water mark.11 That view of Keyn has also been accepted by a majority of the High Court of Australia in the recent series of cases dealing with jurisdiction over offshore areas, most authoritatively in New South Wales v. Commonwealth (the Seas and Submerged Lands case).12 In the Seas and Submerged Lands case, however, there were three powerful dissents from the prevailing view of Keyn that argued most persuasively that there is later authority in the Privy Council for a directly contrary view of Keyn. Rarely is one confronted with a case so shrouded in controversy regarding exactly what it decided.13

R. v. Keyn14 arose from a collision between two ships within three miles of the English coast off Dover, resulting in loss of life. The accused, a German national, was in command of the Franconia, which was merely passing through these waters en route to a foreign port. He was indicted for manslaughter before the Central Criminal Court where he set up a plea of jurisdiction, arguing that the English Criminal Courts had no jurisdiction over an offence committed out of the United Kingdom by a foreigner on board a foreign ship. In Re Offshore Mineral Rights of British Columbia, the Supreme Court of Canada saw the case as being quite straightforward:

The English Criminal Courts would have had jurisdiction if the act had occurred within the body of a county of England. The question whether the territorial sea was within the body of the county was, therefore, directly in issue. If it had been within the body of the county, the Court of Oyer and Terminer would have had jurisdiction. The majority decision of the Court was that the territory of England

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10 (1876), 2 Ex. D. 63.
13 No less than 13 judges participated, with the final decision being given by a majority of 7 to 6. The words of Buckley L.J. in Tehidy Minerals v. Norman, [1971] 2 Q.B. 528 at 547, [1971] 2 All E.R. 475 at 487 (C.A.), speaking of Angus v. Dalton (1877), 3 Q.B.D. 85, might as well have been spoken of the Keyn case; “This celebrated case, which in the course of its history enjoyed the attention of no less than 18 judges and members of the House of Lords, perhaps embodies a greater variety of judicial opinion than any other leading case.”
14 Supra note 10.
ends at low-water mark. There was, therefore, no jurisdiction in the Court of Oyer and Terminer.\textsuperscript{15}

In the Supreme Court’s opinion, the case had decided that the territory of England and the sovereignty of the Crown stopped at low-water mark, except where, under special circumstances and in special acts, Parliament had thought fit to extend it.\textsuperscript{16} A similar view of the decision has been expressed variously in the High Court of Australia in \textit{Bonser v. LaMacchia},\textsuperscript{17} \textit{R. v. Bull}\textsuperscript{18} and the \textit{Seas and Submerged Lands} case.\textsuperscript{10}

The \textit{Seas and Submerged Lands} case is the Australian counterpart to \textit{Re Offshore Mineral Rights of British Columbia}. It arose from the enactment by the Commonwealth Parliament of the \textit{Seas and Submerged Lands Act 1973},\textsuperscript{20} which declares that sovereignty in respect of the territorial sea and internal waters\textsuperscript{21} of Australia, the airspace over those waters, and the bed and subsoil thereof is vested in and exercisable by the Crown in right of the Commonwealth.\textsuperscript{22} Similarly, the Act declares that the sovereign rights of Australia in respect of the continental shelf, for the purpose of exploring it and exploiting its natural resources, are also vested in the Commonwealth Crown.\textsuperscript{23}

The High Court of Australia held unanimously that the Act was valid with respect to the continental shelf and, by a majority of five to two, that it was also valid with respect to the territorial sea and internal waters. The majority held that the Act was a valid exercise of the Commonwealth’s jurisdiction with respect to “external affairs.”\textsuperscript{24} The States, as former Imperial Colonies, ended at the low-water mark and had no sovereign or proprietary rights in respect of the territorial sea or the continental shelf.

There is no class of subject entitled “external affairs” under \textit{The British North America Act},\textsuperscript{25} but it is immediately apparent that the reasoning that led the Australian Court to the conclusion that the \textit{Seas and Submerged Lands Act 1973} was legislation with respect to external affairs is strikingly similar to the reasoning that led the Supreme Court of Canada to its conclusion that jurisdiction over submerged lands off British Columbia was federal because

\begin{footnotesize}
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\item\textsuperscript{15} \textit{Supra} note 1, at 804 (S.C.R.), 363 (D.L.R.).
\item\textsuperscript{16} \textit{Id.} at 806 (S.C.R.), 366 (D.L.R.).
\item\textsuperscript{17} (1969), 122 C.L.R. 177, [1969] A.L.R. 741 at 184 (C.L.R.), 744 (A.L.R.) \textit{per} Barwick C.J., at 218-19 (C.L.R.), 768 (A.L.R.) \textit{per} Windeyer J. \textit{Contra} at 201-02 (C.L.R.), 756-57 (A.L.R.) \textit{per} Kitto J.
\item\textsuperscript{19} \textit{Supra} note 12, at 368 (C.L.R.), 12 (A.L.R.) \textit{per} Barwick C.J., at 378-79 (C.L.R.), 20 (A.L.R.) \textit{per} McEachern J., at 462-63 (C.L.R.), 85 (A.L.R.) \textit{per} Mason J., by inference at 505 (C.L.R.), 119 (A.L.R.) \textit{per} Murphy J.
\item\textsuperscript{20} No. 161 of 1973.
\item\textsuperscript{21} Being defined by section 10 of the Act to be “any waters of the sea on the landward side of the baseline of the territorial sea. . . .”
\item\textsuperscript{22} Sections 6 and 10.
\item\textsuperscript{23} Section 11.
\item\textsuperscript{24} \textit{Commonwealth of Australia Constitution}, s. 51 (xxix).
\item\textsuperscript{25} 1867, 30 & 31 Vict., c. 3.
\end{itemize}
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it was a matter outside the classes of subjects assigned to the provinces under section 92. Both Courts relied on Keyn as authority for the proposition that, at common law, the realm ended at the low-water mark. Both Courts also regarded the international law source of the jurisdiction in question as indicative that such jurisdiction was beyond state or provincial powers because it was a matter of “external affairs” in the one case and a matter covered by the expression “the Peace, Order and good Government of Canada” in the other. It is not surprising that Re Offshore Mineral Rights of British Columbia was expressly adopted by the Chief Justice in the Seas and Submerged Lands case and referred to with approval by two of the other justices.

However, as already indicated, the Australian decision was not marked by the degree of unanimity about the Keyn case that is found in the Supreme Court of Canada’s opinion. The two dissenting judges and one of the majority rejected Keyn as authority for the proposition that the territory of the realm ends at low-water mark.

Gibbs J., in dissent, was of the opinion that ownership of the sea bed of the territorial sea was not in issue at all in Keyn. He said:

The prosecution [in Keyn] was ... in a dilemma which Cockburn C.J., who delivered the principal judgment for the majority, thus expressed (at 230): “To put this shortly, to sustain this indictment the littoral sea must still be considered as part of the high seas, and as such, under the jurisdiction of the admiral. But the admiral never had criminal jurisdiction over foreign ships on the high seas. How, when exercising the functions of a British judge, can he, or those acting in substitution for him, assume a jurisdiction which heretofore he did not possess, unless authorized by statute? On the other hand, if this sea is to be considered as territory, so as to make a foreigner within it liable to the law of England, it cannot come under the jurisdiction of the Admiralty.” Thus on the view taken by the majority, the Central Criminal Court lacked jurisdiction whether or not the sea within the three-mile limit formed part of the territory of England .... In my opinion it is apparent that a decision in R. v. Keyn could have been reached without deciding whether the territory of England stopped at low-water mark.

Both Gibbs J. and Stephen J., also dissenting, cited the view of the Keyn

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28 Supra note 12, at 365 (C.L.R.), 17 (A.L.R.). The Chief Justice had approved the decision previously in his reasons in Bonser v. LaMacchia, supra note 17, at 185 (C.L.R.), 745 (A.L.R.), where he said that the reasons given in the Canadian case were applicable to the circumstances of the Australian colonies.

29 New South Wales v. Commonwealth, id. at 463 (C.L.R.), 85 (A.L.R.) per Mason J., at 505 (C.L.R.), 119 (A.L.R.) per Murphy J.

30 Gibbs J. and Stephen J. See the discussion in the text accompanying note 19 ff., supra.

31 Jacobs J. See the further discussion in the text accompanying note 41 ff., infra.

32 New South Wales v. Commonwealth, supra note 12, at 395-96 (C.L.R.), 34 (A.L.R.). He also points out that, of those judges who formed the majority, only Cockburn C.J. discussed the question of the Crown’s ownership of the sea bed.
case expressed in the Privy Council by Lord Shaw in "Secretary of State for India in Council v. Chelikani Rama Rao:"

It should not be forgotten that that case has reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be decided there. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore.\(^3^3\)

As Stephen J. points out,\(^3^4\) this "authoritative exposition" in "Chelikani" of the "Keyn" case is not referred to by the Supreme Court of Canada in "Re Offshore Mineral Rights of British Columbia."\(^3^5\) For both Gibbs J.\(^3^6\) and Stephen J.,\(^3^7\) there were binding decisions of the Privy Council that the British Crown was the owner of the *solum* underlying the territorial sea. Given the view of "Keyn" expressed in the "Chelikani" case, one can only join with Gibbs J. in expressing surprise "that it should be thought that a decision as to the jurisdiction of the Central Criminal Court, given by the narrowest of majorities after an extreme conflict of judicial opinion, should be treated as binding . . ."\(^3^8\) Furthermore, there are other pronouncements of the Privy Council, including some uttered in the course of disposing of appeals from Canada,\(^3^9\) in which it is clear that the Committee did not regard the "Keyn" case as having decided conclusively that the three-mile territorial sea was not the property of the Crown. According to some authorities,\(^4^0\) the bed of the sea came to be vested in the Crown for some undefined distance from the shore so that accretion bringing into existence land above the tidal level within the territorial waters was regarded as vested in the Crown.\(^4^1\) These cases were discussed in "Re Offshore Mineral Rights of British Columbia," where there was some acknowledgment of the *dicta* therein to the effect that the *solum* of the territorial sea was vested in the Crown, but there was no express disapproval of them, nor any comment on how they were reconcilable with "Keyn."\(^4^2\) Were these decisions and *dicta* wrong or were the Supreme Court of Canada and the majority of the High Court of Australia simply refusing to follow them? If the latter, why? In the determina-

\(^3^3\) (1916), L.R. 43 Ind. App. 192 at 199, 32 T.L.R. 652 at 653, 85 L.J.P.C. 222.


\(^3^5\) The Supreme Court did discuss the "Chelikani" case, supra note 33, but inexplicably did not refer to the passage cited on the "Keyn" case. The Court gratuitously offered an "alternative explanation," which is not persuasive, citing Oppenheim's *International Law* as its authority for that explanation. See *Re Offshore Mineral Rights of B.C.*, supra note 1, at 814 (S.C.R.), 373 (D.L.R.).


\(^3^7\) Id. at 417 and 436-37 (C.L.R.), 50 and 65 (A.L.R.).

\(^3^8\) Id. at 396 (C.L.R.), 34 (A.L.R.).


\(^4^0\) Referring to *Lord Advocate v. Clyde Navigation Trustees* (1891), 19 Rentt. 174; *Lord Advocate v. Wemyss*, [1900] A.C. 48; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; and the "Chelikani" case, supra note 33.

\(^4^1\) *Bonser v. LaMacchia*, supra note 17, at 187 (C.L.R.), 746 (A.L.R.).

tion of an issue of such critical importance something more might reasonably be expected than the turning of a blind eye to contrary dicta of the highest authority.

Jacobs J., in the majority in the *Seas and Submerged Lands* case, obviously thought so too. In his judgment, *Keyn* did not establish that the jurisdiction of the realm ended at the low-water mark at common law. On the contrary, it had been stated “time and time again and must be accepted”\(^4\) that the seas belonged to the King, both in governorship and proprietorship.\(^4\) The *Chelikani* case had reaffirmed the dominion and proprietorship of the Crown in the sea that it claimed. However, this dominion and proprietorship had not been transferred to the Australian colonies, so that no part of the sea with which the *Seas and Submerged Lands Act* 1973 was concerned adhered to the Australian States as the successors in title to those colonies.\(^4\) Jacobs J. thus rejected the majority view of *Keyn*, but he concurred with the majority conclusion that the *Act* was a valid exercise of federal legislative authority.

The similarities in the constitutional histories of the Australian and British North American colonies are such that the same reasoning, if valid, would preclude provincial dominion over, and proprietorship in, any part of the sea adjacent to Canada, leaving aside for the moment the question of jurisdiction over the area offshore from Newfoundland. It is immediately apparent, therefore, that the reasoning of Jacobs J. raises the possibility of leaving the result of *Re Offshore Mineral Rights of British Columbia* undisturbed, but in a way that would permit the Supreme Court of Canada, in any future consideration of the issue, to accept the *Chelikani* case, and the other authorities that are contrary to its view of *Keyn*. Furthermore, His Honour’s analysis is enlightening as to just what is the true nature and source of jurisdiction over offshore areas, and it also has implications for Newfoundland’s claim to jurisdiction over the continental shelf beyond the territorial sea. It is proposed, therefore, to examine the judgment in some further detail.

Jacobs J. began by stating that the question whether any open seas were part of the realm of England was oversimplified and therefore misleading, for the answer depends upon the meaning given to the word “realm”:

If the word means all that which was within the allegiance of the King of England as of his Crown of England, then the seas were within the realm. But if the word means that place where the common law extends, then the seas are outside the realm (Co Litt, s. 439).\(^4\)

The common law had never extended to the seas. This had been shown by Cockburn C.J. in his leading judgment among the majority in *Keyn*. The common law was the law that applied to all persons within England, of which it


\(^{44}\) Windeyer J., in *Bonser v. LaMacchia*, supra note 17, at 214 (C.L.R.), 765 (A.L.R.), citing Hale in Ch. IV of *De Jure Maris*, acknowledged that this had been the case at one time but wrote that “That claim has long since been abandoned. It had indeed been discarded from the common law long before the decision in *Reg. v. Keyn* . . .” He did not, however, offer any comment on when, where, or how the claim had been so abandoned.


\(^{46}\) *Id.* at 485 (C.L.R.), 103 (A.L.R.).
was the law from time immemorial. It did not apply to persons or in places outside England unless it was made applicable by statute, and Keyn was therefore correct in result. But, according to Jacobs J.: 

To describe it as a case concerned with the respective extents of jurisdiction of the common law courts and the Court of Admiralty is not to diminish the importance of the decision but to emphasize its essential importance in the present context. The courts of common law had no jurisdiction because the common law did not extend to regulate the rights and obligations of persons beyond the boundaries of the counties . . . Whether or not the seas are described as outside the realm depends not on the extent of the realm but on the meaning given to the word, as I have earlier said, and in R. v. Keyn . . . the question was the meaning of that word in the Statutes of Richard II. It was not strictly necessary to decide in R. v. Keyn whether the Crown of England owned the sea or any part thereof below the low-water mark and not entre fauces terrae. The important point was that the common law did not extend there.47

The Crown's rights of governorship, or dominion, and proprietorship over the seas were not derived from the common law. They adhered to the King as ius regale, in right of his Crown of England by virtue of his kingship in its national rather than feudal aspect:

The royal right was a prerogative recognized by the common law, and to that extent it was part of the common law, but it did not have its source in that law. His rights therein were not governed by the common law and the extent thereof was not determined by that law.48

Thus, the long-established title of the Crown was a prerogative right that adhered to the King because he exerted an excellence and pre-eminence over other sovereigns, the breadth of his assertion depending on high politics and varying with considerations of power and of expediency. The history of changes lay not in legal but in political history.49

To summarize the views of Mr. Justice Jacobs: the court in the Keyn decision was right in holding that the common law did not extend beyond the low-water mark, but that holding did not mean that the Crown was thereby denied dominion over and proprietorship in the sea that it claimed. Such dominion and proprietorship were a Crown prerogative that had its source elsewhere than in the common law. The common law might not extend to the seas, but the Crown prerogative was not limited by the common law.

Gibbs J. expressed a consistent view on this point50 when he adopted the following dictum of Diplock L.J. in Post Office v. Estuary Radio Ltd.:

It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required.51

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47 Id. at 491-92 (C.L.R.), 108 (A.L.R.).
48 Id. at 487 (C.L.R.), 105 (A.L.R.).
49 Id. at 489 (C.L.R.), 106 (A.L.R.).
50 Id. at 388 (C.L.R.), 28 (A.L.R.).
Gibbs J. reaffirmed the correctness of this view in his later judgment in the High Court of Australia in Raptis v. South Australia.\(^{52}\)

Having rejected the majority view of Keyn, Jacobs J. then had to take a further step to uphold the Seas and Submerged Lands Act 1973 as a valid exercise of Commonwealth legislative authority. It had been submitted to the High Court of Australia that when a colony was made self-governing, or at least when responsible government was introduced, the prerogative of the King, manifested by his claim to the sea or a part thereof in right of his Crown of England or of the United Kingdom, was transferred to his prerogative in right of his Crown in the colony. However, in the view of Jacobs J.,\(^{53}\) the question had been answered as long ago as 1622 by "the famous and learned Robert Callis Esq." in his reading on the Statute of Sewers.\(^{54}\) Indeed, not only does English legal theory provide no basis for the view that the seas adjoining the Australian colonies came to be held by the Crown in right of these colonies and not in right of the United Kingdom, "but also in practical effect such a view is untenable."\(^{55}\) Clearly, His Honour argued, the Crown in right of a colony could not deny innocent passage, but the Imperial Crown could by virtue of its prerogative.\(^{56}\) He concluded:

It was argued that because the prerogatives of the Crown in the colony, even those of a proprietary nature, became vested in the Crown in right of the colony on the grant of responsible government ... then, even though the sea and its bed be not part of the colony, the prerogative right thereto nevertheless became vested in the Crown in right of the colony. The argument involves an obvious non sequitur.\(^{57}\)

Thus, the majority view of the Keyn case was wrong, but the rights of the Crown in the territorial sea had not devolved on the Australian colonies.

The same reasoning would seem to have equal force with respect to the British North American colonies—with the possible exception of Newfoundland—that occupied the same position in relation to the Imperial Crown as did the Australian colonies. If so, then the result in Re Offshore Mineral Rights of British Columbia was right, although the reasoning was wrong, particularly insofar as it relied on Keyn as authority for the proposition that the territory and sovereignty of the Crown stopped at the low-water mark.

The Canadian Supreme Court's almost unquestioning acceptance of Keyn as authority for this proposition is nothing short of staggering in view of the controversy that has been the hallmark of all other discussions of the decision. As recently as 1977, the Privy Council itself, in Pianka v. The Queen,\(^{59}\) noted

\(^{52}\) (1977), 15 A.L.R. 223 at 234; 51 A.L.J.R. 637 at 642.


\(^{54}\) 1531, 23 Hen. 8, c. 5 (U.K.).


\(^{56}\) Id. at 493 (C.L.R.), 109-10 (A.L.R.).

\(^{57}\) Id. at 494 (C.L.R.), 110 (A.L.R.).

\(^{58}\) See text accompanying note 96 ff., infra.

the difficulties in analysing the Keyn opinions clearly and pointed out that the Supreme Court of Canada, in a 1931 case not even cited in Re Offshore Mineral Rights of British Columbia, had accepted "as a well recognized principle that territorial waters within three miles of the shore are as clearly a part of the state as land." The refusal to confront the controversy, and even some of its own prior dicta, leaves one with the distinct impression that nothing was going to deter the Supreme Court from its conclusion. Viewed in this light, the Court's opinion was really a policy choice in favour of federal jurisdiction over offshore areas. If so, then one hopes that in any future consideration of the question, the Court's view might be articulated as such.

IV. THE PROBLEM OF CANADIAN OWNERSHIP OF THE TERRITORIAL SEA BED

There is a curious feature of the opinion of the Supreme Court of Canada on the territorial sea in Re Offshore Mineral Rights of British Columbia that could be explained by acceptance of Jacobs J.'s analysis in the Seas and Submerged Lands case. In its formal answer to the questions posed by the Reference, the Supreme Court concluded that the sea bed and subsoil of the area from the ordinary low-water mark seaward to the outer limits of the territorial sea were the property of Canada, as well as being under Canada's legislative jurisdiction. Yet the Court had concluded earlier in its reasons that the sea bed could only be vested in the Crown by an act of the Legislature. How was it, then, that the sea bed and subsoil of the territorial sea were held to be not just within Canada's legislative jurisdiction but the property of Canada?
To be consistent with the Court’s own reasoning, the answer could only be that it came about as the result of some statutory provision to that effect—but no such provision was pointed to, nor is there any such provision of which the writer is aware. Ownership is not provided for in the *Territorial Sea and Fishing Zones Act* as that Act stood at the date of the *Reference* nor as later amended. That Act, so far as relevant, simply defines the extent of the territorial sea. Under Jacobs J.’s analysis, however, the sea bed and subsoil of the territorial sea would now be the property of the Crown in right of Canada as the successor in title to the prerogative ownership of the former Imperial Crown. Thus, the Supreme Court of Canada’s answer was right, but for unstated reasons. If this view is not accepted, then the Court’s answer that the lands in question were the property of Canada must have been wrong. They might be made the property of Canada by legislation, but at the time of *Re Offshore Mineral Rights of British Columbia* they had not been so dealt with, nor have they been since.

Jacobs J.’s analysis is indeed appealing. Its acceptance would permit the Supreme Court of Canada to abide the result in *Re Offshore Mineral Rights of British Columbia*, while at the same time accepting the Privy Council au-

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66 R.S.C. 1970 (1st Supp.), c. 45. It is interesting to note in this context the provisions of the *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c. 2. This Act expressly applies to “arctic waters,” thus extending Canadian jurisdiction to those waters, and “arctic waters” are defined to include waters “the natural resources of whose subjacent submarine areas . . . Canada has the right to dispose of or exploit . . .” It is doubtful that this amounts to a declaration of ownership in Canada, but even if it did, it would still not explain why the sea bed and subsoil of the territorial sea off British Columbia are the property of Canada because the Act by its own terms only applies north of the sixtieth parallel of north latitude.

67 The terms of section 2 of *An Act to regulate the disposition and development of oil and gas rights*, Bill C-20, 1977 (30th Parl. 3d Sess.), introduced into the House of Commons on December 20th, 1977, are noteworthy in this context:

“Canada lands” means lands that, in respect of the natural resources therein, are under the administration, control and management of the Minister and includes

(a) any such lands that belong to Her Majesty in right of Canada or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the minerals therein, and

(b) 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 the exploitation of the natural resources of the seabed and subsoil thereof . . . .

No such provisions are contained in the *Territorial Lands Act*, R.S.C. 1970, c. T-6, or in the *Public Lands Grants Act*, R.S.C. 1970, c. P-29, which are the legislative sources of present federal regulation of offshore oil and gas exploration activity. This observation raises the possibility that the present regulation is not validly authorized by the appropriate statutory provisions as would seem to be implicitly recognized by the proposed section 2 of Bill C-20. Bill C-20 lapsed with the expiration of the Third Session of the Thirtieth Parliament and had not been reintroduced at the date of writing.

68 This analysis, by the way, might also explain why the *Territorial Sea and Fishing Zones Act*, R.S.C. 1970, c. T-7, as am. by R.S.C. 1970 (1st Supp.), c. 45, does not declare ownership of the sea bed and subsoil of the territorial sea to be vested in Canada, its purpose being—to paraphrase Jacobs J.—to define the breadth or width from time to time of the Crown’s assertion, not to establish either ownership or jurisdiction adhering to the Crown by virtue of its prerogative.
authority that is contrary to the Court's view of Keyn. Furthermore, it would clarify the apparent anomaly in the conclusion that the sea bed and subsoil of the territorial sea were the property of Canada, as well as being within its legislative jurisdiction.

V. THE FACT OF COLONIAL OFFSHORE JURISDICTION

However, there is a further matter to be discussed before the analysis can be fully accepted. It is this: in fact the former British North American and Australian colonies did exercise jurisdiction over the territorial sea adjacent to their shores prior to formation of the respective federations. How is the actual exercise of jurisdiction over the territorial sea to be reconciled with the view that jurisdiction over, and ownership of, the bed of the territorial sea did not adhere to the colonies?

This is a further unsatisfactory feature of the reasons given for the opinion in Re Offshore Mineral Rights of British Columbia. The Court did refer to the dissenting judgment of Currie J. in the Nova Scotia Court of Appeal in Re Dominion Coal Co. Ltd. and County of Cape Breton and quoted the headnote summary:

Prior to Confederation, Nova Scotia exercised jurisdiction over territorial waters three miles in width measured from its coasts, bays and rivers, and under s. 109 of the B.N.A. Act, all property rights held by Nova Scotia before Confederation were retained. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the B.N.A. Act.70

Clearly, the Court was aware of the fact that at least some of the colonies had exercised jurisdiction over the adjacent territorial sea, but it offered no comment.71 Granted, the exercise of jurisdiction over the territorial sea would not necessarily of itself be conclusive of ownership of the sea bed and subsoil. In some instances, however, the colonies, as well as exercising legislative jurisdiction over the territorial sea, had also disposed of rights in the bed itself.72

In the Seas and Submerged Lands case, it was argued before the High Court of Australia that, because colonial legislatures legislated in respect of the seas within the limits of the three-mile belt of territorial sea—with the ap-

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70 (1963), 40 D.L.R. (2d) 593, 48 M.P.R. 174.
71 The Court did discuss some cases involving apparent exercises of jurisdiction over the territorial sea but saw none of them as involving any general delegation by the Imperial Crown. See Re Offshore Mineral Rights of B.C., supra note 1, at 808 ff. (S.C.R.), 367 ff. (D.L.R.). The Court did not, however, face the general issue being addressed here. At the same time, it should be noted that nothing in the Court's joint opinion suggests that there was any evidence before it of such an exercise of jurisdiction by British Columbia prior to its entry into Confederation. Ballem, supra note 7, at 268, says that "Unlike British Columbia, each of the Maritime provinces can cite pre-Confederation statutes whereby jurisdiction over the territorial sea was exercised."
72 Mining leases were issued off the coast of Nova Scotia, see the dissenting judgment of Currie J. in the Dominion Coal Case, supra note 70, at 618-19 (D.L.R.), 200-01 (M.P.R.), and off the coast of New South Wales, see the dissenting judgment of Gibbs J. in New South Wales v. Commonwealth, supra note 12, at 405 (C.L.R.), 41 (A.L.R.).
proval of the law officers in their advice to the Imperial Crown and therefore with no disallowance of the legislation—and because a colonial legislature could not pass extra-territorial legislation, therefore the adjoining seas must have been within the territory of the colonies.73

Barwick C.J. of the High Court had first dealt with the argument in Bonser v. LaMacchia, where he concluded:

Of course, the colonies were competent to make laws which operated extra-territorially—that is to say, beyond their land margins and in and on the high seas, not limited to the three-mile belt of the territorial sea. But this legislative power of the colony was derived, in my opinion, from the plenary nature of the power to make laws for the peace, order and good government of the territory assigned to the colony.74

This explanation was adopted by Jacobs J. in the Seas and Submerged Lands case.75 The conclusion that follows from it is that the exercise of offshore jurisdiction by the colonies did not operate so as to make the territorial seas part of the colonies. As Barwick C.J. saw it in the later case, the colonial laws, which the opinions of the law officers of the Imperial Crown had supported, all touched and concerned the colony and its welfare.76 If the opinions meant that the territorial seas were either colonial property, or were under colonial domain, the law officers were under a basic misconception.

But, as Gibbs J. argued in dissent in the Seas and Submerged Lands case,77 while it might be possible to regard some of this legislation as extra-territorial, but nevertheless sufficiently connected with the colony to be within its power, that could not truly be said of all of it:

For example, it seems to me that if the doctrine of extra-territorial incompetence were logically applied, and unless the waters within the three-mile limit were regarded as part of the colony, a colony would have no more right to prevent foreigners, in a foreign boat, from fishing in the territorial sea except under licence than it would to prevent them from hunting in a neighbouring colony. If the territorial sea is outside the colony, how can one justify legislation regulating the exploitation of the minerals under the sea-bed or the pearl-shell upon it?78

The inescapable conclusion was that the territorial sea adjoining the colony was part of the territory of the Crown. Furthermore, the rights and property of the Crown to the territorial sea and its bed were exercised on the advice of the colonial Ministers once the colony was self-governing, and were therefore held by the Crown in right of the colony.79

However, in the later Australian case of Pearce v. Florenc,a Gibbs J.

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73 New South Wales v. Commonwealth, id. at 495 (C.L.R.), 111 (A.L.R.) per Jacobs J.
74 Supra note 17, at 189 (C.L.R.), 747 (A.L.R).
75 Supra note 12, at 495 (C.L.R.), 111 (A.L.R).
76 Id. at 371 (C.L.R.), 14 (A.L.R).
77 Id. at 404 (C.L.R.), 40 (A.L.R).
78 Id. at 404-05 (C.L.R.), 40-41 (A.L.R).
felt obliged to modify this opinion because of the views expressed by the ma-
majority in the Seas and Submerged Lands case that the power to make laws for
the peace, order and good government of the colony was large enough to
enable the colonial legislatures to enact legislation that applied to the offshore
waters. Thus, all of the colonial legislation applying to the offshore, includ-
ing that dealing with leases for mining, could be regarded as valid on the basis
that it was legislation for the peace, order and good government of the re-
spective colonies and not on the basis that it was intra-territorial because the
territory of the colonies included the territorial sea.

The issue must now be treated as authoritatively settled for Australia.
Indeed, in Robinson v. Western Australian Museum, at least two members of
the High Court of Australia have since gone so far as to uphold State legisla-
tion declaring a wreck lying on the sea bed off the coast of Western Australia
to be the property of the State as a valid law for the peace, order and good
government of the State.

However, as already indicated, the issue was not addressed as such in
Re Offshore Mineral Rights of British Columbia. The Supreme Court of Can-
da could, therefore, face the fact that colonial legislation could apply in off-
shore areas free from any specific rejection of the view that such legislation
demonstrated that the colonies included the territorial sea as part of their territ-
ory. The Court could, in other words, choose between the views on the matter
of the majority and of the minority in the Seas and Submerged Lands case. It
should be emphasized here that Gibbs J. felt himself obliged to offer his ex-
planation in the Florenca case only because he was bound by the majority
opinion to the contrary in the Seas and Submerged Lands case—he did not indi-
cate that he was reconsidering his own earlier view because he later thought
that it was wrong. Is it really rational to explain legislation disposing of
property interests in offshore areas outside the territory of a colony on the
basis that such legislation was for the peace, order and good government of the
colony?

However, if the Supreme Court of Canada were to adopt Gibbs J.'s dis-
senting view in the Seas and Submerged Lands case, the option of adopting
Jacobs J.'s approach in that case—so as to abide the result of Re Offshore
Mineral Rights of British Columbia while at the same time acknowledging
that the Imperial Crown did have dominion and ownership in the territorial
sea—as suggested above, would no longer be available. The Crown preroga-
tive would be a prerogative of the Crown in right of the respective colonies
and, now, in right of the respective provinces and states, unless an effect of
federation in each country was to transfer that prerogative from the former
colonies to the respective federal units. Indeed, Barwick C.J., in the Seas and

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83 Supra note 71.
84 In the text following note 68, supra.
Offshore Jurisdiction

Since the decision of the High Court of Australia in the Sea and Submerged Lands case, that Court has considered the question of state jurisdiction over offshore areas in three cases. In the first two of these—the Florence case and Raptis v. South Australia—the Court upheld in the one, and acknowledged in the other, that state fisheries legislation would validly apply in offshore areas. In the third case, Robinson v. Western Australian Museum, as already mentioned, at least two members of the Court upheld the validity of State legislation declaring a wreck lying on the sea bed off the coast of Western Australia to be the property of the State. The basis for these decisions was the fact that the Australian states continue to be able to legislate for matters outside the limits of their respective territories as an exercise of their power to make laws for the peace, order and good government of the states. In order to prevent the confusion that might otherwise arise in any consideration of these cases in Canada, however, two fundamental differences that exist between the positions of the Canadian provinces under the provisions of The British North America Act, on the one hand, and the Australian states under the Australian Constitution, on the other, should be explained briefly.

The first difference arises from the limitation imposed upon the legislative powers of the provinces by the introductory words “In each Province” in section 92 of The British North America Act. These words impose a territorial limitation and it would seem clear that, in the event that all of the Canadian coastal provinces were held to end territorially at the low-water mark, as has been held with respect to the Province of British Columbia, the provinces would thereby be precluded from legislating with regard to any matter beyond the low-water mark. This situation would not arise in the Australian states, which were not supplied with new state constitutions by the Australian Constitution and, indeed, retained their colonial constitutions which empowered them to make laws for the “peace, order and good government” of the several colonies respectively and, after federation, for the several states. Thus, the majority holding in the Sea and Submerged Lands case—that the territory of the several states ended at the low-water mark—did not preclude the possible operation of state laws in the offshore area.

Secondly, the Australian Constitution, generally speaking, assigns concurrent legislative powers to the Commonwealth Parliament, with express provision for paramountcy of Commonwealth laws over state laws in the event

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85 See text accompanying notes 104-08, infra.
86 Supra note 80.
87 Supra note 52. See text accompanying note 157 ff., infra.
88 Supra note 82.
89 Gibbs J., in New South Wales v. Commonwealth, supra note 12, at 414 (C.L.R.), 48 (A.L.R.), commented that what had been said in Re Offshore Mineral Rights of British Columbia with respect to the legislative power of the Province was clearly inapplicable to the position of the Australian States “whose legislative powers are not limited in the manner indicated in s. 92 of the British North America Act.”
of inconsistency. The Australian states, therefore, are not necessarily precluded from legislating with respect to matters in the offshore area by any holding that those matters are within Commonwealth jurisdiction.

The Australian constitutional scheme should be distinguished from that adopted by the British North America Act, with its division of mutually exclusive powers. The legislation variously upheld in the three recent Australian cases, therefore, could only be upheld in Canada if the territory of the provinces was held to extend beyond the low-water mark.

The main point in the context of the present discussion, however, is that the Supreme Court of Canada has not really dealt with the fact that at least some of the former British colonies, including some of those in North America, did exercise legislative jurisdiction over the adjacent offshore areas. How is that fact to be reconciled with the view that such areas were outside of the territories of the colonies? The High Court of Australia has answered that the power of the colonies to legislate for their peace, order and good government embraced matters in the adjacent offshore areas, but this is not an entirely convincing explanation with respect to those colonial laws that dealt with property interests in the sea bed.

VI. THE SUPREME COURT'S RELIANCE UPON THE IMPERIAL TERRITORIAL WATERS JURISDICTION ACT 1878

Immediately following R. v. Keyn, the Imperial Parliament enacted the Territorial Waters Jurisdiction Act 1878, the purpose of which was to reverse the decision of the Court. In its opinion in Re Offshore Mineral Rights of British Columbia, the Supreme Court of Canada asked what would have happened if an offence had been committed within one marine league of the coast of British Columbia in 1879. In answer to its own question, it said:

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

This view of the Imperial act was a critical consideration for the Court. It was later adopted by Windeyer J. in the High Court of Australia and applied by him to the Australian colonies in Bonser v. LaMacchia.

Yet it seems so obviously wrong. Stephen J. later thought so too in the Seas and Submerged Lands case where he said:

The Supreme Court also took the view that the Territorial Waters Jurisdiction Act 1878, because it applied the criminal law of England to the open seas within

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90 *Australian Constitution*, section 109.
91 41 & 42 Vict., c. 73 (U.K.).
92 Supra note 1, at 805-06 (S.C.R.), 365 (D.L.R.).
93 Id. at 805 (S.C.R.), 365 (D.L.R.).
94 Supra note 17, at 220 (C.L.R.), 769 (A.L.R.).
the territorial waters of Her Majesty's dominions, necessarily proceeded upon a
footing inconsistent with any concept that British Columbia possessed the solum
within territorial waters. This inconsistency is not, with respect, apparent to me;
the terms of the Act appear to me to cast no light upon the ownership of league
seas; it is but an instance of the effective exercise of Imperial legislative power.95

What Stephen J. is saying, and what seems to be so clearly right, is that colo-
nial jurisdiction over the territorial sea, or ownership of the bed thereof, did
not, of course, preclude the effective exercise of paramount Imperial legis-
lative jurisdiction, the reason being that the colonial legislatures were subor-
dinate to the Imperial Parliament. It follows that the applicability of the
Territorial Waters Jurisdiction Act to waters offshore from the colonies, and
in particular offshore from a Canadian province in 1879, is irrelevant to the
question of whether the Province of British Columbia possessed as part of its
territory the solum of the territorial sea in 1878. At that time, the Imperial
Parliament could have extended its laws to any part of the territory of any of
the Canadian provinces.

VII. SOME CONCLUSIONS

What, then, are the conclusions to be drawn from all of this? The reason-
ing of the Supreme Court of Canada in Re Offshore Mineral Rights of British
Columbia, at least with respect to the territorial sea, is clearly open to chal-
lenge, particularly in its interpretation of Keyn and its avoidance of the con-
trary authority, most notably the observations of the Privy Council in Cheli-
kani. Furthermore, even if that reasoning is accepted, the conclusion of the
Supreme Court that the sea bed and subsoil of the territorial sea are the prop-
erty of Canada is wrong. The Court's own reasoning would lead to the con-
clusion that the lands in question were not the property of Canada, even
though they fell within the legislative jurisdiction of Canada. They might be
made the property of Canada by an exercise of that jurisdiction, but, in the
absence of any such exercise, they are not the property of the Crown by virtue
of any of its rights. The results of the various cases, including Re Offshore
Mineral Rights of British Columbia itself, might be justified by adopting the
reasoning of Jacobs J. in the Seas and Submerged Lands case that the sea bed
and subsoil of the territorial sea were within the ownership and jurisdiction of
the Imperial Crown, but not of the Crown in right of its colonies. Support of
all of the results, however, would require rejection of the view that the colonies
had the jurisdiction that they had, in fact, exercised over the territorial sea
and its bed prior to the respective federations in Canada and Australia. On
any approach short of a rejection of the results on the territorial sea in both
Re Offshore Mineral Rights of British Columbia and the Seas and Submerged
Lands case there is a dilemma.

VIII. SOME IMPLICATIONS FOR NEWFOUNDLAND'S CLAIM

So far we have been discussing the question of the territorial sea off the
former colonies, the status of the new provinces and states being that of Im-
perial colonies at the dates of the respective federations. Newfoundland was

95 Supra note 12, at 436-37 (C.L.R.), 65 (A.L.R.).
not, however, an Imperial colony at the date of its entry into the Canadian federation, and it is proposed now to examine the implications of the foregoing for the status of the territorial sea off Newfoundland.96

These implications are best understood by first discussing the situation prior to the entry of Newfoundland into the Canadian federation as a province in 1949. There may be some debate about the exact status of Newfoundland at the time of its entry into Confederation,97 but it seems clear that, for at least some period prior to that time, it had enjoyed equal status with Canada and Australia in what was to become the British Commonwealth of Nations.98 If it is assumed that this means that Newfoundland was a sovereign state, then the various views expressed in Re Offshore Mineral Rights of British Columbia and the Seas and Submerged Lands case lead to the conclusion that, for that period, Newfoundland had at least legislative jurisdiction over and, according to some of the views, ownership of the sea bed and subsoil of the territorial sea.

The two dissenting judges in the Seas and Submerged Lands case held that the Crown's proprietary rights in the sea bed and subsoil of the territorial sea become vested in the Crown in right of the Australian colonies on the attainment of self-government. Their reasoning would seem to lead equally to the conclusion that these rights also vested in the Crown in right of Newfoundland on the attainment of self-government there and, presumably, continued to be enjoyed by the Crown in right of Newfoundland after Newfoundland's accession to nationhood during the period leading up to the Statute of Westminster, 1931. The reasoning of Jacobs J., if applied to Newfoundland, would seem to lead to the conclusion that the rights under discussion were enjoyed by the Imperial Crown prior to the development of independent status for Newfoundland but, again presumably, would have devolved on the Crown in right of Newfoundland upon the attainment of nationhood in the same way that the rights with respect to the Australian colonies had devolved upon the Crown in right of the Commonwealth. The views of the other majority judges in the Seas and Submerged Lands case would imply legislative jurisdiction for Newfoundland by the time it attained nationhood as an aspect of the new nation's sovereignty. It would seem, however, that their reasoning would not

96 See generally Swan, The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law, supra note 7, at 573, where the writer concludes that Newfoundland is in a unique constitutional position due to its history and that that history, which served to dismiss British Columbia's claim in Re Offshore Mineral Rights of British Columbia, can only strengthen Newfoundland's claim. It is respectfully submitted that the author places too much reliance in this conclusion on the validity of the Supreme Court of Canada's reasoning and not enough on the possibility that other reasons may just as well support the same result—other reasons that would not necessarily serve to distinguish the position of Newfoundland.
97 See Martin, Newfoundland's Case on Offshore Minerals: A Brief Outline, supra note 5, at 38 ff.
98 See the Statute of Westminster, 1931, 22 Geo. 5, c. 4 (U.K.).
99 See text accompanying note 19 ff., supra.
100 See the discussion in the text accompanying note 43 ff., supra.
101 See the discussion in the text accompanying note 24 ff., supra.
accord ownership of the sea bed and subsoil of the territorial sea to Newfoundland prior to its entry into Confederation because of their view that not even the Imperial Crown had such ownership, unless Newfoundland could point to an exercise of its legislative jurisdiction that would indicate that it had acquired ownership.

The formal answers to the questions on the territorial sea posed for the Supreme Court of Canada in Re Offshore Mineral Rights of British Columbia would imply both legislative jurisdiction over and ownership of the sea bed and subsoil thereof for Newfoundland as a sovereign nation: the situations of Canada and Newfoundland as a sovereign state would seem to be indistinguishable. However, as discussed earlier, it is not clear how the Supreme Court arrived at its conclusion with respect to property in the sea bed and subsoil. The view consistent with the Court's own reasoning would seem to be that Canada had legislative jurisdiction over the area that it might exercise in order to acquire ownership. If this is correct, and the Court were moved to reconsider its formal answer on ownership of the sea bed and subsoil, then the implication would be that Newfoundland, as a sovereign nation, similarly had legislative jurisdiction over the territorial sea, which it too might have exercised so as to acquire ownership of the sea bed and subsoil thereof.

Thus, ownership of the sea bed and subsoil of the territorial sea off Newfoundland during the period that it was a sovereign nation would appear to be supported by the two minority judges and Jacobs J. in the Seas and Submerged Lands case and by the formal answer of the Supreme Court of Canada in Re Offshore Mineral Rights of British Columbia but, perhaps ironically, the majority view in the Australian case and the reasoning in the Canadian case would support only legislative jurisdiction.

Resolution of this divergence of views would seem to be necessary in order to determine whether Newfoundland continues to have jurisdiction over the territorial sea. If it were determined that Newfoundland in fact owned the sea bed and subsoil of the territorial sea prior to its entry into Confederation, then Term 37 of the Terms of Union between Newfoundland and Canada would be conclusive in favour of Newfoundland's continued ownership. If, on the other hand, it were determined that Newfoundland had only legislative jurisdiction over the area, and not ownership, then Term 37 would not assist the Province's claim to continued jurisdiction, unless it were established that its legislative jurisdiction had been exercised so as to vest ownership in the Crown in right of Newfoundland prior to entry into Confederation. Thus, it would seem that, in order to succeed in its claim to ownership of and legislative jurisdiction over the sea bed and subsoil of the territorial sea today, Newfoundland would have to establish either that it had such ownership in accordance with the views of the minority judges and

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102 See the discussion in the text accompanying note 62 ff., supra.
103 British North America Act, 1949, 12 & 13 Geo. 6, c. 22, s. 37 (U.K.).
All lands, mines, minerals and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.
Jacobs J. in the *Seas and Submerged Lands* case and with the formal answer in *Re Offshore Mineral Rights of British Columbia*, or that it had, in fact, exercised its legislative jurisdiction so as to acquire such ownership prior to its entry into Confederation in 1949.

It should be pointed out in this connection that Barwick C.J. in the *Seas and Submerged Lands* case went so far as to say that, even if the Australian colonies had had proprietary rights in the sea bed and subsoil of the territorial sea, the intendment of the *Australian Constitution* was that such rights would "coalesce and unite in the nation."¹⁰⁴ After pointing out that this was received doctrine in the United States,¹⁰⁵ where the states originally entering the Union had been independent nation-states and not merely colonies, he commented further:

This result conforms, in my opinion, to an essential feature of a federation, namely that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas, the sea bed and airspace and continental shelf and incline.¹⁰⁶

This is clearly a policy argument in support of the conclusion that all rights with respect to offshore areas adhere to the central government in a federal state and was admittedly *obiter*.¹⁰⁷ Even if valid as a general proposition, it is difficult to see how it could override the express language of Term 37 of the Terms of Union between Newfoundland and Canada¹⁰⁸ if it were found that Newfoundland had proprietary rights in the sea bed and subsoil of the territorial sea prior to its entry into Confederation. It may, however, underscore the argued necessity for Newfoundland to establish that it had ownership of the sea bed and subsoil rather than simply legislative jurisdiction over the territorial sea.

The foregoing discussion has concentrated on the sea bed and subsoil of the territorial sea and has said nothing explicitly about the continental shelf beyond the limits of the territorial sea. It would be irrational, if not illogical, to conclude that neither the Canadian provinces nor the Australian states had jurisdiction over the territorial sea, but did have jurisdiction over the continental shelf beyond the territorial sea. In *Re Offshore Mineral Rights of British Columbia*, the Supreme Court of Canada said:

As with the territorial sea, so with the continental shelf. There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:

1. The continental shelf is outside the boundaries of British Columbia, and
2. Canada is the sovereign State which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not

¹⁰⁴ *Supra* note 12, at 373 (C.L.R.), 16 (A.L.R.). Murphy J. went so far as to say, at 505 (C.L.R.), 119 (A.L.R.), that "Even if [the States] had become independent nations before 1901 with the sovereign rights of an international state, on federation they would have lost the territorial seas and other attributes of international personality."


¹⁰⁶ *Supra* note 12, at 374 (C.L.R.), 15-17 (A.L.R.).

¹⁰⁷ *Id.* at 371-72 (C.L.R.), 15 (A.L.R.).

¹⁰⁸ *British North America Act, 1949*, 12 & 13 Geo. 6, c. 22 (U.K.).
the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.\footnote{109} Thus, a conclusion that a Canadian province does not have any jurisdiction over the territorial sea off its shores would seem necessarily to involve a denial of provincial jurisdiction with respect to the continental shelf. But a conclusion that a province has jurisdiction over its territorial sea, presumably arising from its ownership of the sea bed and subsoil thereof, then raises for separate consideration the question of jurisdiction over the continental shelf beyond the territorial sea.

In the \textit{Seas and Submerged Lands} case, Gibbs and Stephen JJ., having concluded that the Australian states had proprietary rights in the sea bed and subsoil of the territorial sea, considered separately the question of jurisdiction over the continental shelf. Both decided without hesitation in favour of the Commonwealth and held that the provisions of the \textit{Seas and Submerged Lands Act 1973}\footnote{110} relating to the continental shelf were valid enactments of the federal Parliament.

Stephen J. thought it clear that the Australian colonies before federation had made no claim to ownership of or dominion over the waters of Australia's continental shelf:

\begin{quote}
The continental shelf was at the time of federation and remained for a considerable period afterwards \textit{res nullius}, in the words of Lord Shaw in \textit{Chelikani's Case}. Into this vacuum stepped the Commonwealth ....\footnote{111}
\end{quote}

On this view, in order to succeed in a claim to jurisdiction over the continental shelf, a Canadian province would have to show that it had “stepped into the vacuum” prior to Confederation and, furthermore, that Confederation had not had the effect of divesting it of any jurisdiction so acquired. It is doubtful that any province, other than possibly Newfoundland, could establish that it had claimed ownership of or dominion over the continental shelf prior to Confederation, quite apart from the question of whether any such claim could have been validly made by a former colony.

However, Newfoundland would have been competent during its life as a sovereign nation to have made such a claim. On the basis of Stephen J.'s view, the question would, therefore, be whether it had in fact done so.

The same requirement of establishing a claim to the continental shelf by Newfoundland during the period of its status as a sovereign nation would also seem to follow from Jacobs J.'s analysis of the nature of the Crown's rights in offshore areas. It will be recalled that he was of the view that the Crown, as a matter of prerogative, had dominion over, and proprietorship in, the sea "which it claimed."\footnote{112} The whole basis of his reasoning, however, was that the Crown did indeed claim exclusive dominion and ownership of the seas,
"the breadth or width of [the] assertion from time to time depending on high politics and ... vary[ing] from time to time depending on considerations of power and of expediency." On this view too Newfoundland would have to establish that it had asserted dominion and ownership of the seas beyond the territorial sea.

Newfoundland would, however, no doubt cite the view of the International Court of Justice in the North Sea Continental Shelf Cases that:

[T]he rights of the Coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea bed and exploiting its natural resources. In short there is an inherent right.

On this basis, it would argue that these rights adhered to Newfoundland as a sovereign nation prior to its entry into Confederation without any express assertion of jurisdiction over the continental shelf. Even then, however, it would still have to show that the effect of Confederation was not the transfer of the rights to the federal government. On this aspect of the matter, it would again presumably rely on Term 37 of the Terms of Union, but, it is submitted, with greater difficulty than in the case of the territorial sea. Term 37 speaks of "lands, mines, minerals, and royalties belonging to Newfoundland," and it seems clear that the rights to the continental shelf that the International Court of Justice regarded as inherent are not rights under which the resources in question belong to the coastal state. Rather, they are rights for the purpose of exploring the sea bed and exploiting its natural resources which, it is submitted, are outside the language of Term 37. That they do not amount to ownership of the resources themselves is clear from the language of the International Court and of the 1958 Convention on the Continental Shelf. It is significant in this context that the Supreme Court of Canada was not asked in Re Offshore Mineral Rights of British Columbia whether the resources of the sea bed and subsoil of the continental shelf were the property of Canada or British Columbia, but only who had legislative jurisdiction over and who had the right to explore and exploit the resources. With respect to the territorial sea, the Court had been asked both of these questions and the further question of who had property in the sea bed and subsoil thereof.

Of all the judgments in Re Offshore Mineral Rights of British Columbia and the Seas and Submerged Lands case, only that of Jacobs J. in the latter case suggests that the Crown in any of its rights had dominion and proprietorship in the sea "which it claimed." The rights discussed by all of the other judges would appear to be outside the words "all lands, mines, minerals, and royalties belonging to Newfoundland."

Quite apart from this, it is far from clear that the view of the International Court of Justice, that rights in respect of the continental shelf exist ipso facto and ab initio, would be accepted by the Supreme Court of Canada. The view of Gibbs J. in the Seas and Submerged Lands case is noteworthy. Re-

113 Id. at 489 (C.L.R.), 106 (A.L.R.).
115 British North America Act, 1949, 12 & 13 Geo. 6, c. 22 (U.K.).
sponding directly to the argument of the Australian states, based on the North Sea Continental Shelf Cases, that their right to the continental shelf must be taken always to have existed, although it was never asserted, he said:

To say the rights of Coastal States in respect of the continental shelf existed from beginning of time may or may not be correct as a matter of legal theory. In fact, however, the rights now recognized represent the response of international law to modern developments of science and technology, which permit the sea bed to be exploited in a way which it was quite impossible for governments or lawyers of earlier centuries to foresee. In this matter the arguments of history are stronger than those of logic.  

If this view were adopted in preference to that expressed by the International Court of Justice, Newfoundland would have to point to an acquisition jurisdiction over the continental shelf. Even if it could do so, it would still have to establish that the effect of its entry into Confederation in 1949 was not to transfer any such acquired jurisdiction to Canada.

IX. THE PROBLEM OF INLAND WATERS

It will be recalled that, in Re Offshore Mineral Rights of British Columbia, the Supreme Court of Canada was asked to determine jurisdiction over areas “outside the harbours, bays, estuaries and other similar inland waters” seaward from the ordinary low-water mark. Conceptually at least, the question of determining what areas are “inland waters” is different from that of determining jurisdiction over areas that are outside those waters. Nevertheless, there is a clear relationship between the two because, on the approach taken by the Supreme Court of Canada in Re Offshore Mineral Rights of British Columbia and by the High Court of Australia in the Seas and Submerged Lands case, the answers to each depend upon the status of the various areas at common law. This relationship became clear in Re Strait of Georgia.

The British Columbia Court of Appeal was asked by a Reference whether or not the lands underlying the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait were the property of the Province. The answer given by the Court was affirmative, by a majority of three to two.

Farris C.J.B.C., for the majority, thought that the issue was resolved quite simply by reference to the statutorily defined boundary of the Province “to the West by the Pacific Ocean.” It followed, in his analysis, that all that lay east of the Pacific Ocean to the Rocky Mountains was part of British Columbia. From there, it was a simple step to the further conclusion that the lands in question belonged to the Province. Indeed, the Attorney-General of Canada had conceded that if the lands were in British Columbia, they belonged to the Province.
Neither of the dissenting justices saw the issue quite so simply. Seaton J.A. thought that the crucial question was whether the waters of the straits were inland waters at common law. In his view, the Supreme Court of Canada's opinion in *Re Offshore Mineral Rights of British Columbia* had dealt with all waters off the coast of British Columbia other than waters that were inland waters as that term was used at common law. Thus, the question now posed for the Court had been answered by that *Reference* unless the waters of the straits were inland waters at common law—that is to say, were waters *inter fauces terrae*, "between the jaws of the land." He concluded that they were not and that the *Reference* had decided the matter. Even if the *Reference* had not dealt with the straits in question, His Lordship argued that the reasoning in that decision was applicable and that British Columbia did not extend beyond the low-water mark. Specifically, the former colonies of British Columbia and Vancouver Island, later amalgamated to form British Columbia, comprised only the land to the low-water mark within the area embraced by the boundaries referred to in the Act for their Union and not the whole area within those boundaries.

McIntyre J.A., in a separate dissenting opinion, adopted a similar line of reasoning and agreed that the lands underlying the four straits were lands that had already been held by the Supreme Court of Canada to belong to the Queen in right of Canada. He further agreed that the legislative enactments creating and fixing the boundaries of British Columbia excluded the water from the new colony.

An analysis of these dissenting opinions reveals two related matters on which the majority and the minority disagreed. First, had the issue been answered already by *Re Offshore Mineral Rights of British Columbia*? The majority thought not and distinguished that case, whereas both dissenting justices thought that it was directly on point. Secondly, just where is the coastal boundary of British Columbia? The majority thought that it was the Pacific Ocean, thus including within the province all of the area to the east of that Ocean, whether dry land or bodies of water. The minority thought that the province comprised only dry land above the low-water mark and waters *inter fauces terrae*, which the straits in question were not.

Had, then, the question referred to the British Columbia Court of Appeal in *Re Strait of Georgia* been answered by the Supreme Court's opinion in *Re Offshore Mineral Rights of British Columbia*? The answer to this question depends in turn on the reply to the question put to the Supreme Court of Canada in the earlier *Reference*. The Supreme Court had been asked:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of

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122 *Id.* at 113.
123 *Id.* at 111 ff.
124 The Latin phrase is used as *intra* rather than *inter fauces terrae* in some of the judgments, but *Black's Law Dictionary* (St. Paul: West Publishing Co., 1968) shows it only as the latter.
125 *Reference re Strait of Georgia*, supra note 6, at 117 ff.
126 *Id.* at 128 ff.
127 *Id.* at 136 ff.
the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(a) Are the said lands the property of Canada or British Columbia?
(b) Has Canada or British Columbia the right to explore and exploit the said lands?
(c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands? 128

The Supreme Court’s answer in favour of Canada was seen by Farris C.J.B.C. as deciding simply that the territorial sea off the coast of British Columbia belonged to Canada and never formed part of British Columbia. 129

The phrase “the territorial sea” as used in His Lordship’s opinion must be understood in the sense of encompassing the area seaward from the baselines established for the purpose of measuring the territorial sea to the distance established by the relevant legislation. Clearly, he saw the area so described as different from the straits designated in the present Reference, as he concluded unequivocally that the “internal waters”130 mentioned in the Order in Council “are not part of the territorial sea.” 131 On that view of the matter, he could conclude that Re Offshore Mineral Rights of British Columbia was not determinative of the issue in the present case. 132

But was it in fact the territorial sea so understood to which the Supreme Court had addressed itself in the earlier Reference? Seaton J.A. and McIntyre J.A. thought not, arguing that the references to the Territorial Sea and Fishing Zones Act in the question asked of the Supreme Court of Canada related to the definition of the outer limit of the area only. The inner boundary of that area was not at the baselines from which the territorial sea was measured, but at “the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters . . .” 133 In other words, the Supreme Court had determined that both the territorial sea and inland waters on the landward side of the baselines drawn for the purposes of measuring that territorial sea were the property of Canada. Seaton J.A. thought that, if it had been the intention to limit the inquiry to the land covered by the statutorily defined territorial sea, the Reference would have said: “the subsoil within the territorial sea of Canada as defined.” 134 In fact the question dealt with an area that included the land under the statutorily defined territorial sea and also included other land, namely, land outside the harbours, bays, estuaries and other similar inland waters but inside the baselines of the territorial sea. 135 One must presume

129 Reference re Strait of Georgia, supra note 6, at 103.
130 Id. at 98.
131 Id. at 103.
132 Id. at 106.
134 Reference re Strait of Georgia, supra note 6, at 111.
135 Id. at 111-12.
that the Supreme Court had answered the question asked of it, as it would be
wrong to limit the scope of a decision by applying a statutory definition to a
term used in the reasons. Furthermore, the area now in question was in-
cluded in maps placed before the Supreme Court of Canada as an area claim-
ed by Canada, and it would be unreasonable to think that the Court had failed
to appreciate the significance of the exhibit.

Seaton J.A. thought that the term "harbours, bays, estuaries and other
similar inland waters" was a good description of waters that were considered
to be inland at common law. This view would seem to suggest that Re Off-
shore Mineral Rights of British Columbia had dealt with the status of all
waters off the coast of British Columbia from the low-water mark out to the
outer limit of the territorial sea, excluding only those waters that were "har-
bours, bays, estuaries and other similar inland waters" or that were, in the
words of the common law, inter fauces terrae. Thus, the status of the straits
in question had been determined by the Supreme Court of Canada unless
those straits were inter fauces terrae, which His Lordship concluded they were
not on the facts.

McIntyre J.A. agreed that the definition and extent of the territorial sea
as set out in the Territorial Sea and Fishing Zones Act was only important in
defining the outer limits of the waters in question in Re Offshore Mineral
Rights of British Columbia. The Supreme Court had dealt with all lands sea-
ward from the low-water mark on the coast of the mainland and several
islands of British Columbia, with the exception of waters inter fauces terrae.
As these Straits did not fall within that description, the Supreme Court had
already answered the question now posed.

It is difficult to disagree with the minority interpretation of the question
posed to the Supreme Court in Re Offshore Mineral Rights of British Colum-
bia. The words of the Order in Council did not ask whether the lands of "the
territorial sea" were the property of Canada or British Columbia. Clearly they
describe an area bounded on the one side by the "ordinary low-water mark on
the coast ... outside the harbours, bays, estuaries and other similar inland
waters" and bounded on the other side by "the outer limit of the territorial sea
of Canada, as defined in the Territorial Sea and Fishing Zones Act ...." The
reference to the territorial sea as defined in the Act is only for the purpose of
fixing the seaward limit of the area. At the same time, however, it must be
noted that some parts of the Supreme Court's opinion do suggest synonymity
between the area referred to in the Order in Council and the statutorily de-
defined territorial sea. Indeed, Farris C.J.B.C. thought several passages in the
opinion made it clear that the Supreme Court was dealing with rights in the

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136 Id. at 112.
137 Id. at 115 ff. He notes that counsel, other than for Newfoundland, spent little time
on the "crucial" question of whether these particular waters were inland waters.
138 Id. at 130.
139 Id. at 130 and 140.
140 See, for example, Re Offshore Mineral Rights of B.C., supra note 1, at 814 and
816 (S.C.R.), 373 and 375 (D.L.R.). This apparent confusion adds further significance
to the remarks in the text accompanying note 157 ff., infra.
The Court did refer repeatedly to the territorial sea, but it is unclear whether the references were to the territorial sea as defined by statute or, as Seaton J.A. thought, as a description of the waters set out in the question. In his opinion, "the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia outside the harbours, bays, estuaries and other similar inland waters" used to be the inner limit of the territorial sea. It would be reasonable, therefore, to think that the Supreme Court had used the term "the territorial sea" to describe the waters set out in the question put to it. That would be an accurate use of the term and there was no other convenient description for the waters.

The discussion of this issue as to just what was decided by Re Offshore Mineral Rights of British Columbia may seem to have been somewhat laboured. If that is so, however, it is because the implications for the resolution of whether the federal Parliament or the provincial Legislatures have jurisdiction in numerous areas around the coastline are very great indeed. If the Supreme Court should uphold the minority view, then only those areas that are within harbours, bays, estuaries and other similar inland waters—which are inter fauces terrae at common law—will be within provincial jurisdiction, except where a province might be able to establish an express extension of its boundaries to include areas seaward of those waters.

Whatever the sense in which the Supreme Court used the term "the territorial sea" in its opinion, the view seems compelling that the Order in Council referred to more waters than just those embraced by the statutorily defined territorial sea, and it was, after all, the question posed by the Order in Council that the Court answered in favour of Canada. But even if Farris C.J.B.C. is right and the Court must be seen as having dealt only with the statutorily defined territorial sea, that still leaves to be answered the question of ownership of the lands underlying the four straits designated in the British Columbia Order in Council. If Re Offshore Mineral Rights of British Columbia had included these waters, that would be determinative that the underlying lands were the property of Canada, but a finding that they had not been included would not be determinative that they were the property of British Columbia.

However, before turning to an examination of this issue, there is a further matter requiring comment relating to the majority view in Re Strait of Georgia that the Supreme Court had dealt with the statutorily defined territorial sea. As the majority saw it, the Supreme Court Reference had dealt with the territorial sea in the sense of the area seaward from the baselines drawn for the purpose of measuring that sea. These would be the lines provided for in section 5 of the Territorial Sea and Fishing Zones Act that, in accordance with

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141 Reference re Strait of Georgia, supra note 6, at 106.
142 Id. at 111-12. For the sake of clarity, it should be emphasized here that the term "the territorial sea" used in this way would embrace both the territorial sea, as the area between the baselines established for the purpose of measuring that sea and the outer limit of that sea, and waters to the landward side of those baselines but outside the harbours, bays, estuaries and other similar inland waters. See the further discussion in the text accompanying note 161 ff., infra.
the majority view, establish the inner limit of the area determined by the
Supreme Court to be the property of Canada. However, the outer limit of the
area with which the Court was concerned in Re Strait of Georgia was bounded,
by the terms of the Order in Council, "on the west by a line from Tatoosh
Island lighthouse to Bonilla Point reference mark and on the north by a
straight line drawn across Queen Charlotte Strait from Greeting Point on Nigei
Island to McEwan Point on Branham Island . . .". If the lines so prescribed
correspond exactly with the baselines drawn for measuring the territorial sea,
no difficulty would arise. If, however, they should not correspond precisely,
then either part of the area described in the British Columbia Order in Council
must have included part of the territorial sea outside the baselines, or the area
described did not include all of the area out to the baselines. The interesting
possibility thus arises that the majority opinion, by answering that British Co-
lumbia owns the lands described, has transferred part of Canada's territorial
sea to the Province or, alternatively, has left undecided the ownership of a
strip between the baselines and the lines described in the Order in Council.
The majority did not consider at all the question of whether the baselines for
the territorial sea coincided with the lines prescribed by the Order in Council.

Having determined that Re Offshore Mineral Rights of British Columbia
had not dealt with the lands described in the Order in Council, Farris C.J.B.C.
had to consider the ownership of those lands independently of that authority.
One says "independently" but in fact it seems that His Lordship saw the issue
in essentially the same way as the Supreme Court had seen the issue in the
earlier case. The question to which both courts seem to have addressed them-
selves is: Are the lands in issue within the Province?

As indicated, the majority had no difficulty in answering that they were,
because the boundaries of the Province were statutorily defined "to the West
by the Pacific Ocean.". The Province included all that lay within the boun-
daries so defined. However, the matter is not quite so simple, as there is some
authority for the proposition that the term "territory" means the land mass
only and does not include any areas of the sea.

In the Seas and Submerged Lands case in the High Court of Australia,
Mason J. concluded that the specific inclusion of "islands" in the Letters Pa-
tent describing some of the Australian colonies was inconsistent with the no-
tion that the colonies included any portion of the sea. This confirmed that the
colonies were limited to the land mass and islands. Jacobs J. was more ex-

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plicit and stated that the primary meaning of "territory" was land, and that
this primary meaning would have to be displaced by the wording of the parti-
cular descriptions of the colonies which, in the case of the Australian colonies,
had not been done.

Applying these two views to the case of British Columbia in Re Strait of

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144 Supra note 6, at 98.
145 Text accompanying note 120, supra.
146 Supra note 12, at 458-61 (C.L.R.), 82-84 (A.L.R.).
147 Id. at 480-85 (C.L.R.), 99-103 (A.L.R.). South Australia is an exception. See
the text accompanying note 159, infra.
Offshore Jurisdiction

Georgia, Farris C.J.B.C. concluded that any presumption that “territory” means land only was rebutted by the language used to define the western boundary of the colony. He said:

If “territories” meant land alone, the western boundary of British Columbia could not possibly be the Pacific Ocean, but would have to be the Gulf of Georgia. This flies in the face of the clear terms of the statute, which specified the Pacific Ocean as the western boundary.\textsuperscript{148}

Thus, whether as a simple matter of interpretation or as a matter of rebutting a presumption, in Farris C.J.B.C.’s judgment, the description of the boundaries of British Columbia did include within the former colony the waters of the straits in question.

Seaton and McIntyre JJ.A., however, disagreed. In Seaton J.A.’s view, reference to the Pacific Ocean and the territories of the United States of America in the description of the boundaries of British Columbia did not imply that everything up to that line was to be within the new colony and that that line constituted the boundary of the colony any more than would a grant of “all My territories in the Pacific Ocean” necessarily include the sea bed of the whole Pacific Ocean. He added:

For the province I think the most that can be said is that the language is capable of bearing that meaning. But it is at least equally capable of bearing a different meaning, namely, that it was granting the land alone. I think it is more likely that the latter meaning is the appropriate one.\textsuperscript{149}

Similarly, McIntyre J.A. concluded that “in the ordinary sense of the word and as it has been used historically, ‘territory’ refers to land and not to water.”\textsuperscript{150} For him it was clear that in the statutes under review its meaning was limited to land, although the word could be used in a context that would accord to it a broader meaning.

These views were clearly \textit{obiter} in view of the fact that both Seaton and McIntyre JJ.A. had already disposed of the issue before them by concluding that \textit{Re Offshore Mineral Rights of British Columbia} had determined the answer to the question before them in the instant case.\textsuperscript{151} Nevertheless, they point to a clear divergence of opinion on the issue of whether the use of the word “territory” in the description of the boundaries of former colonies limits the colonies to the land masses within the boundaries.

The issue, it is submitted, is really one of interpretation. Even if the primary meaning of “territory” is land, there is still a question of whether that meaning has been displaced in particular cases. The question then becomes: what sort of wording is sufficient to displace that primary meaning? Will the mere reference to a boundary beyond the low-water mark be sufficient or must there be something more?

Interestingly, the question may have been answered inferentially by the Supreme Court of Canada in \textit{Re Offshore Mineral Rights of British Columbia}
in commenting upon, and distinguishing, the New Brunswick case of *R. v. Burt*.152 In that case, the Appellate Division of the Supreme Court of New Brunswick had held that the seizure of a ship carrying a cargo of intoxicating liquor approximately one and three-quarter miles from the shore off Chance Harbour in the County of Saint John had occurred within the Province of New Brunswick. The decision was based upon the fact that:

> By the Royal Instructions issued to Governor Carlton upon the separation of what is now the Province of New Brunswick from the Province of Nova Scotia, the southern boundary of the new Province was defined as "a line in the centre of the Bay of Fundy from the River Saint Croix aforesaid to the mouth of the Musquat (Missiquash) River" clearly indicating the claim of Great Britain at the time to the whole of the Bay of Fundy as a portion of her territory.153

In distinguishing this case, the Supreme Court of Canada said that the place of seizure was within the Province of New Brunswick.154 The Supreme Court thus seemed to be accepting that the definition of the boundary of New Brunswick as "a line in the centre of the Bay of Fundy" was sufficient to extend the territory of the Province to that line.

In the recent decision of the High Court of Australia in *Raptis v. South Australia*,155 it was held that the inclusion of the phrase "all and every the Bays and Gulfs thereof" in the Letters Patent fixing the boundaries of South Australia was sufficient to include within the State's territorial boundaries "waters which would not otherwise form a part of the State."156

Two related questions then emerge from *Re Strait of Georgia*. First, was the Supreme Court of Canada in *Re Offshore Mineral Rights of British Columbia* concerned only with the territorial sea as defined by statute or was it concerned with all waters outside waters *inter fauces terrae* to the outer limit of the territorial sea? Secondly, is the mere reference to a line beyond the low-water mark sufficient to extend the boundary of a province to that line so as to include the whole area on the landward side of the line within the territory of the province, or is there a presumption that only land within the area forms its territory—a presumption that would need to be rebutted by clear language indicating that areas covered by water were also part of the province? This second question is important for the resolution of the status not only of the straits under consideration in *Re Strait of Georgia*, but also of the Bay of Fundy between New Brunswick and Nova Scotia. It will also have a bearing on what significance the Supreme Court might attach to the fact that the description of the boundaries of at least some of the British North American colonies included the phrase "with all the rights, members and appurtenances, whatsoever, thereto belonging."157

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152 (1932-33), 5 M.P.R. 112.
153 *Id.* at 117.
155 *Supra* note 52.
156 *Id.* at 240 per Stephen J., Barwick C.J. agreeing, *id.* at 229. See also *id.* at 259 per Jacobs J.
157 See further Houston, *Documents Illustrative of the Canadian Constitution* (Toronto: Carswell, 1891).
X. THE CONFUSED INTERFACE BETWEEN INTERNATIONAL LAW AND DOMESTIC CONSTITUTIONAL LAW

A reading of the several cases under discussion here quickly reveals that there is not simply one offshore area comprising everything seaward from the low-water mark but, rather, that there are several distinct bodies of water, the status of which varies for jurisdictional purposes, both in the domestic constitutional context in a federal system and in the international context. It is submitted that a great deal of confusion in those cases arises from a failure to make these distinctions, first between the several bodies of water and, secondly, between domestic constitutional law questions and international law questions. Seaton J.A. noted this second failing in Re Strait of Georgia when he observed:

A number of the province's arguments shifted from sovereignty and international law to proprietorship and common law without recognition of the step.168

However, before addressing the specific question of the relationship of international law to the question of domestic constitutional jurisdiction, the several bodies of water should be identified.

In Raptis v. South Australia, the key question for the High Court of Australia was whether the waters of Spencer Gulf and Gulf St. Vincent were within the boundaries of the State and, if so, where the seaward boundaries of the two Gulfs were located. Gibbs J. said:

In the present case the bays and gulfs were included in the territory of the Province [of South Australia] by the express provisions of the Letters Patent, which were themselves expressly authorized by 4 & 5 Will. IV, c. 95. There is nothing in the statute or in the Letters Patent to afford any support for the view that the words "the Bays and Gulfs thereof" are to be given a restricted meaning, so that they refer only to bays and gulfs that would have been treated as part of the territory by the rules of common law or of international law.169

Earlier in Bonser v. LaMacchia, Windeyer J. had said that Spencer Gulf and Gulf St. Vincent were within South Australia. His phrasing is significant:

It is worth noticing too that the Province of South Australia included 'all and every the islands adjacent thereto and the bays and gulfs thereof': 4 & 5 Wm. IV, c. 95. Spencer Gulf and St. Vincent's Gulf are therefore to be deemed to be inter fauces terrae.160 (Emphasis added).

It is submitted that the waters of the Gulfs are of the same status as waters inter fauces terrae in the sense that they form part of the territory of South Australia, but that is because of the effect of the Letters Patent and not because they are waters inter fauces terrae at common law. There is, therefore, a conceptual distinction between waters inter fauces terrae at common law and waters beyond those waters that nevertheless form part of a province's or state's territory because its boundaries have been extended in such a way as to include those latter waters within the territory of the province or state.

168 Supra note 6, at 113.
169 Supra note 52, at 234. The Raptis case is analysed by O'Connell in Bays, Historic Waters and the Implications of A. Raptis & Son v. South Australia (1978), 52 Aust. L.J. 64.
160 Supra note 17, at 233 (C.L.R.), 778 (A.L.R.).
The several bodies of water may, then, be identified as follows. First are waters inter fauces terrae. There has always been difficulty in determining when particular bodies of water are within the jaws of the land. Hill J., put the problem rather picturesquely in The Fagernes when he said: "What is the metaphor, the open mouth of a man or of a crocodile?" Notwithstanding the difficulty of application, it is clear that all such waters are within the body of the realm and, therefore, are part of the territory of the Canadian provinces and the Australian states.

Next, as clearly established by the Raptis case and, by implication by the Supreme Court of Canada's distinguishing of the Burt case—and, indeed, as was clear from the majority opinion in the Keyn case itself—there may be bodies of water enclosed within the boundaries of the states and provinces by express provision and which would not be part of the territory as waters inter fauces terrae. In other words, seaward from the closing lines employed to delineate waters inter fauces terrae, there may be other bodies of water within the territory of the provinces or states that it is convenient to think of as bounded on the landward side by either the low-water mark or the closing lines employed to delineate waters inter fauces terrae, as the case may require, and bounded on the seaward side by the line to which the boundaries had been extended. If we accept the validity of Re Offshore Mineral Rights of British Columbia and the majority judgments in the Seas and Submerged Lands case, these areas would form part of the province or state and would, therefore, be owned by the province or state and be within their legislative jurisdiction. All areas except for these and waters inter fauces terrae would be under federal jurisdiction.

Third, there may be waters to the landward side of the baselines employed for the purpose of measuring the nation's territorial sea as permitted under the terms of the Geneva Convention of 1958. Such baselines might conceivably be to either the landward or the seaward side of the outer limits of any waters falling within the territory of a province or a state by virtue of an express extension of its boundaries, as discussed in the previous paragraph. It is extremely unlikely—one might almost say not possible—that such baselines would ever be to the landward side of the closing lines employed to delineate waters inter fauces terrae.

Fourth, there is the territorial sea itself, which could describe several bodies of water and have different seaward boundaries, depending upon which body was being described. In its widest sense, it would describe all of that body of water seaward from the low-water mark or closing lines of waters inter fauces terrae to the outer limits of the territorial sea claimed. In a narrower sense, it would describe that body of water seaward from the same mark or lines to what is referred to as the Imperial territorial sea, appropriately de-

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162 [1926] P. 185 at 189.
163 See the text accompanying note 152 ff., supra.
scribed in some of the cases under discussion as the “league seas.” In yet another sense, it might mean that body of water seaward from the baselines drawn by the country concerned for the purposes of measuring its territorial sea to the outer limit of the territorial sea claimed.

Fifth, there is the area beyond the outer limit of the territorial sea, which area, of course, embraces the continental shelf.

The importance of the distinction between domestic constitutional law questions and international law questions becomes immediately apparent from this catalogue of the several bodies of water. There is significance in distinguishing between some of those bodies only in the context of domestic constitutional law. International law is not at all concerned with whether waters are inter fauces terrae or are waters on the landward side of baselines employed for the purposes of measuring the territorial sea. Both, as far as the international community is concerned, are the nation’s internal waters, but the recognition of them as internal waters by other nations has no bearing on their status under the constitution of the particular nation to which they are adjacent. It may well be argued that the whole question would be so much simpler if they were not kept separate but were coalesced so that base and closing lines for international law purposes were also used for the resolution of questions between Commonwealth and States, Canada and Provinces.

Murphy J. in Raptis, in the High Court of Australia, obviously thought so, too:

The territorial limits dividing the internal waters from the territorial sea should be determined in accordance with the prevailing rules of international law which are an important part of the world order.

... The presumption is that, in the Letters Patent of 1836, the United Kingdom Government claimed only the internal waters that the prevailing rules of international law attached to the land claimed. Although these rules were uncertain then, they have now been clarified.

The rules for ascertaining territorial limits are set out in the Convention on the Territorial Sea and the Contiguous Zone (The Geneva Convention of 1958)...

His conclusion on the facts of that case leaves no room for doubt that he equated the base closing lines that would, in his view, be proper under the Convention for purposes of measuring the territorial sea with the boundary of South Australia. It is submitted, however, that these views, desirable as the practical implications may be, are simply inconsistent with the rulings in Re Offshore Mineral Rights of British Columbia and the Seas and Submerged Lands case that British Columbia and the Australian States are respectively bounded by

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164 That is assuming that the baselines have been fixed in compliance with the international law rules for such baselines.

165 Supra note 52, at 262-63. The U.S. Supreme Court arrived at this position in U.S. v. State of La. (the Louisiana Boundary Case), 394 U.S. 11, 89 S. Ct. 773 (1969), where it held that that part of Louisiana's coastline which, under the U.S. Submerged Lands Act, § 2(c), 43 U.S.C.A. § 1301(c), consists of the “line marking seaward limit of inland waters” is to be drawn in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone. However, the decision was based on interpretation of the Submerged Lands Act.
the low-water mark. Those rulings necessarily recognize that there will be waters beyond the low-water mark but inside the baselines established for the purpose of measuring the nation's territorial sea. They therefore also mean that the dividing line for domestic constitutional purposes may be different from the dividing line for international law purposes between the nation's territory and its offshore waters.

Barwick C.J. was clearly right when he said in *Raptis*:

But the instant question is not to be decided, in my opinion by any considerations of international law or by the opinion of courts, tribunals or writers in that area.

Similarly, in *Re Strait of Georgia*, Seaton J.A. cautioned:

In my view, except insofar as international law has influenced domestic law, the law of nations does not concern us. I assume that these were British waters, that they are now Canadian waters and that they are now inland or internal waters in an international law sense. But that does not advance British Columbia's position because ours is not an international law question.

It is clear that the Supreme Court of Canada was not mindful of the distinction in *Re Offshore Mineral Rights of British Columbia*, where it concluded that British Columbia had no jurisdiction over offshore areas because those areas were outside the province and because the rights in issue arise by international law. Professor Ivan Head has described the Court's statements in this part of its opinion as "shocking in their impact" and "inexplicable," save on the basis that "the Court was not cognizant of what it was saying."

The argument seems to be that the rights with which the courts are concerned derive from international law, that they are dependent upon the international community for recognition and, therefore, are matters "not coming within the classes of subjects assigned exclusively to the provinces" or are "external affairs." But, in the context of a domestic constitutional law question, how do these rights derive from or depend upon international law any more than does the recognition of the nation itself? The argument misses the point: within a federal system, where go these rights rather than whence came they?

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166 Except where expressly extended beyond that mark.

167 *Supra* note 52, at 228.

168 *Supra* note 6, at 113. Even if one accepts the view recently expressed by Denning M.R. in *Trendtex Trading v. Bank of Nigeria*, [1977] 1 Q.B. 529 at 554 (C.A.), that the rules of international law form part of domestic law, the point being made here still stands because the rules of international law are not concerned with the question of whether rights in a federal system reside with the central or the regional governments and legislatures.

169 *Supra* note 1, at 816-17 and 821 (S.C.R.), and 375-76 and 380 (D.L.R.).


171 Lowe, *International Law and Federal Offshore Lands Disputes* (1977), 1 Marine Policy 311 at 313, seems to be making the same point when he says that “Canada is no more nor less responsible for offshore activities than it is for onshore activities which undoubtedly fall under provincial jurisdiction.”
XI. CONCLUSIONS

A re-examination of the reasons for the Supreme Court of Canada’s opinion in *Re Offshore Mineral Rights of British Columbia*, in the light of the reasons for judgment in the series of recent Australian cases on jurisdiction over offshore areas, raises a number of serious doubts about the validity of those reasons and points to several perplexing questions:

1. Why did the Supreme Court ignore the Privy Council’s rejection in the *Chelikani* case of the view that the *Keyn* case had established that the territory of the realm ended at the low-water mark?

2. On what basis did the Court answer that the sea bed and subsoil of the territorial sea off British Columbia were the property of Canada when its own reasons would seem to compel the conclusion that ownership in offshore areas could only be acquired by express legislative enactment?

3. How is the denial of colonial jurisdiction over the territorial sea to be reconciled with the fact that the colonies actually exercised jurisdiction in the area, in some cases by disposing of property interests in the bed thereof?

4. Why is the *Territorial Waters Jurisdiction Act* 1878 inconsistent with any theory that British Columbia possessed as part of its territory the *solum* of the territorial sea before its entry into the Canadian federation?

5. What is the inner boundary of the waters that were held by the Supreme Court to be beyond provincial jurisdiction? Is it at the baselines used for purposes of measuring the breadth of the territorial sea or is it the same as the boundary of waters *inter fauces terrae*?

6. What is the relevance to a domestic constitutional law question, defining federal or provincial jurisdiction, of the recognition accorded to the nation’s claims by international law?

The answers to these questions will not necessarily lead to a reversal of the Court’s answers to the questions that it was asked with respect to British Columbia, nor to a different answer for any other province. One hopes, however, that those answers will recognize the profound significance of the questions for any convincing resolution of what is—in view of the stakes involved as the search for natural resources moves more and more rapidly seaward into the last frontier on this planet—one of the most important constitutional matters that the Court has had to resolve.

The fact that some of the questions were overlooked or even avoided by the Supreme Court tempts the conclusion that the Court was really moved to find so unequivocally in favour of Canada by policy considerations. If that is so, then the Court’s opinion does not bode well for claims to jurisdiction over offshore areas by any other province.