CANADIAN FEDERALISM, FISHERIES AND THE CONSTITUTION: EXTERNAL CONSTRAINTS ON INTERNAL ORDERING

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I. INTRODUCTION

The supposed panacea of constitutional reform figures prominently in the recent responses of governments and concerned individuals to perceived strains within the Canadian federal structure.[1] A future for Quebec in Confederation and fiscal imbalances arising from the benefits of oil diplomacy accruing to the province of Alberta are seen as dominant issues in a constitutional crisis for which a greater structural decentralization of Canadian federalism appeals as the only apparent recourse capable of preventing the country from blowing apart. One further example of this general trend has emerged in Premier Brian Peckford's strident challenge to federal legislative jurisdiction extending over the Newfoundland fishery. While to some this may seem a trivial chapter in the overall constitutional debate, it illustrates with clarity an important proposition concerning the character of federal states which most of the

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[1] *E.g.*, THE TASK FORCE ON CANADIAN UNITY, A FUTURE TOGETHER (1979), CANADIAN BAR ASSOCIATION COMMITTEE ON THE CONSTITUTION, TOWARDS A NEW CANADA (1978); GOVERNMENT OF QUEBEC, QUEBEC-CANADA: A NEW DEAL (1979), THE CONSTITUTIONAL COMMITTEE OF THE QUEBEC LIBERAL PARTY, A NEW CANADIAN FEDERATION (1980); GOVERNMENT OF BRITISH COLUMBIA, CONSTITUTIONAL PROPOSALS, presented to the First Ministers' Conference on the Constitution, October, 1978, GOVERNMENT OF CANADA, THE CONSTITUTIONAL AMENDMENT BILL. TEXT AND EXPLANATORY NOTES (Bill C-60, 3rd Sess., 30th Parl. (1st reading June 20, 1978)). For critical comment on some of the above, *see* Beaudoin, *La philosophie "Constitutionnelle" du Rapport Pepin-Robarts*, 57 CAN. B. REV. 429 (1979); Dupré & Weiler, *A Sense of Proportion and a Sense of Priorities: Reflections on the Report of the Task Force on Canadian Unity*, *id.* at 446; La Forest, *Towards a New Canada: The Canadian Bar Association's Report on the Constitution*, *id.* at 493; Scott, *Bill C-60, Or, How Not to Draft a Constitution*, *id.* at 587; Lederman, *Constitutional Amendment and Canadian Unity*, in LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 17 (1978).

debate tends to either neglect or ignore. I argue that internal accommodations to competing domestic concerns within a federal compromise must be balanced against inhibiting dependencies external to the state, which suggest strongly that certain spheres of jurisdiction are properly manageable only through the central government and related national institutions.

The basic premise of this essay proceeds from the notion of a state as a subject of international law[2] and that within this rubric of international recognition, "[a] federal state shall constitute a sole person in the eyes of international law".[3] In practical terms, federal states are characteristically if not exclusively unitary entities for purposes of meeting the outside world.[4] In Canada, the idea of a unitary international personality currently exhibits signs of considerable wear and tear as the several provinces led by Quebec have increasingly asserted individualized presences abroad,[5] but the exceptions still prove rather than refute the general rule.

Abstract notions are best articulated where possible through concrete examples. Fisheries is both a good example and an important one. Government analysts have predicted that with proper management of fisheries and good marketing initiative, Canada has the potential to become the world's largest exporter of fish by 1985.[6] Even without such

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[2] The concept of statehood in international law was set forth in the Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19. Under Art. 1 of the Convention, "[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." For elaboration, *see* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 74-88 (2d ed. 1973).

[3] Convention on Rights and Duties of States, Art. 2.

[4] Some time ago, Professor Harold Stoke concluded in his classic work on the external personality of federations:

> It may be stated positively that the organization of none of the existing federations will justify the charge of divided international personality. No foreign government today would be warranted in looking beyond the national government of any existing federation for the responsible agent in foreign affairs.

H. STOKE, THE FOREIGN RELATIONS OF THE FEDERAL STATE 52 (1931).

[5] *See* LaPierre, *Quebec and Treaty-Making*, 20 INT'L. J. 362 (1965); Head, *New Federalism in Canada: Some Thoughts on the International Legal Consequences*, 4 ALTA. L. REV. 389 (1966); FitzGerald, *Educational and Cultural Agreements and Ententes: France, Canada and Quebec — Birth of a New Treaty-Making Technique for Federal States?* 60 AM. J. INT'L. L. 529 (1966); McWhinney, *Canadian Federalism and the Foreign Affairs and Treaty Power. The Impact of Quebec's Quiet Revolution*, 7 CAN. YEARBOOK INT. L. 3 (1969); J. BROSSARD, A. PATREY & E. WEISER, LES POUVOIRS EXTÉRIEURS DU QUÉBEC (1967); A. JACOMY-MILLETTE, TREATY LAW IN CANADA 78-94 (T. Helwig transl. 1975); Morris, *Quebec and Sovereignty: The Interface between Constitutional and International Law*, in LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 47 (1978).

[6] In 1978, the Director of the Marketing Services Branch within the federal Department of Fisheries was quoted as saying that "[e]xport sales *could* expand from $600 million in 1976 to almost $1.5 billion to $2 billion in 1985" — to equal the current exports of iron ore, lumber and softwoods. The Halifax Chronicle Herald, June 3, 1978, at 6, col. 6 (emphasis added).

optimistic projections, the fundamental importance of fisheries for Canadian coastal regions stands unquestioned. The ocean fishery (as distinguished from inland fisheries) serves to focus the analysis both in terms of the theory I wish to prove and the obvious point that this is the geographical locus of the constitutional controversy. In this context, an allegedly remote federal authority has been subjected to scrutiny by at least one political sub-unit as not sufficiently responsive to or protective of regional interests and concerns.

The essay falls into five basic divisions beginning with an account of domestic political views that center on the position of the province of Newfoundland as the leading exponent for constitutional reform of the fisheries power. A second section describes in some detail the historical evolution and current state of the existing constitutional structure which the views canvassed beforehand necessarily bring into question. They form the portion of the essay dealing with internal accommodations to the federal compromise. The next two divisions account for the externalities of the fisheries problem based in the international legal system. A four-stage analysis within the third section deals with the development of fisheries jurisdiction as a concept in public international law, Canadian practice as an integral part of this development, the relationship of the treaty-making function to the management and protection of coastal fisheries, and finally, the problem of enforcement as against other state actors. The fourth section attempts to reconcile the concerns of federalism related to fisheries with international realities. Conclusions comprise the fifth and final section and draw together individual arguments.

II. Constitutional Controversy

A. *The Newfoundland Position*

Longstanding dissatisfaction with federal fisheries management in the province of Newfoundland emerged full-blown in July of 1979. The particular issue was cod and who could fish for them off the Newfoundland coast. A letter from Premier Peckford to then federal Minister of Fisheries, James McGrath[7] (also a Newfoundlander), received no immediate response and in the provincial view Newfoundland's expression of special concerns with respect to exploitation of the northern cod stocks fell on deaf ears.[8]

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[7] Letter from the Hon. Brian Peckford, Premier of Newfoundland to the Hon. James McGrath, P.C., then Minister of Fisheries and Oceans, 30 July 1979.

[8] *See* annotated list of correspondence in Government of Newfoundland and Labrador, Discussion Paper on Fisheries Issues (submission of Premier A. Brian Peckford to the Minister of Fisheries and Oceans, Nov. 5, 1979) [hereinafter cited as Fisheries Issues].

A seminar on northern cod convened by the federal government was held at Corner Brook, Newfoundland in late August. There, the province's position paper[9] made explicit Newfoundland's claim to exclusive rights for exploiting the allowable quotas for cod to the limits of her capacity in the districts originally designated by the International Commission for the Northwest Atlantic Fisheries (ICNAF)[10] and now within the 200 mile fisheries zone proclaimed by Canada in January of 1977.[11] Newfoundland wished to reserve the best part of the codfishing effort to her inshore and middle distance fisheries based in the many small outport fishing villages dotting her coast. Whatever might be left over could be taken by larger offshore trawlers from other provinces provided the fish were landed for processing in Newfoundland plants, making them possible year-round operations rather than the seasonal efforts they had remained to date.[12]

The provincial argument for exclusivity was one based on current entitlement stemming from historical injustice and chronic dependence on the cod fishery.[13] Massive overfishing of the northern cod by foreign fleets had been finally overcome by extensions of Canadian jurisdiction. Nevertheless, in consequence of this previous foreign mischief, Premier Peckford declared, "[t]he social and economic dislocations were nothing short of catastrophic"[14] for Newfoundlanders. Now the threat appeared to be coming from inside the new fishing limits and from other Canadians — Halifax freezer trawlers.[15] Under a local perspective which in effect views all non-Newfoundland fishermen as foreigners, the Government of Newfoundland is determined not to lose out the second time around.

Premier Peckford later observed that the federal government saw fit to ignore the position taken by Newfoundland at Corner Brook and, moreover, adding insult to injury, had granted the province only one

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[9] THE POSITION OF THE GOVERNMENT OF NEWFOUNDLAND AND LABRADOR ON THE HARVESTING OF THE 2J + 3KL COD STOCKS (presented at the Government/Industry Seminar on Northern Cod held at Corner Brook Nfld., Aug. 28-30, 1979) [hereinafter cited as CORNER BROOK POSITION PAPER].

[10] *See infra* note 244.

[11] *See infra* note 267 and accompanying text.

[12] CORNER BROOK POSITION PAPER, *supra* note 9, at 5-7.

[13] *Id.* at 1-2. The Paper emphasizes that "60 percent of total inshore fishing effort in this Province" directly depends on the northern cod stock: *id.* at 1.

[14] *Id.* at 3. Referring to the decline in catches for the period 1954-1974, the Corner Brook Paper elaborated: "The number of full and part-time fishermen declined by more than 50 percent during the period. The economic base of whole communities disappeared and, in some instances, the communities themselves disappeared. This resulted in intolerable levels of unemployment combined with out-migration, reductions in earned incomes and greatly increased dependence on [federal] transfer payments." *Id.*

[15] "The past two years have seen a rapidly growing effort by the offshore fleets of other provinces in the northern cod fishery. We must view this trend with considerable alarm as it does nothing to support our policy of ensuring raw material supply to our seasonal processing plants. . . . This trend is, therefore, unacceptable to us." *Id.* at 6-7; Premier Peckford has gone so far as to identify particular Nova Scotia based processing companies constitutive of the threat he wishes to remove. The Globe and Mail (Toronto), Dec. 27, 1979, at 3, col. 1.

delegate out of forty to that meeting.[16] The cod issue was again raised by the Premier at the Canada-Newfoundland First Ministers meeting held at Ottawa in September.[17] But by this time it was becoming clear that the cod issues, while of great importance, merely served to focus wider provincial dissatisfaction with overall federal control.

The primary goal of a constitutional redistribution of legislative jurisdiction in the matter of fisheries emerged clearly in a discussion paper on fisheries forwarded to the federal Minister of Fisheries in November, 1979.[18] While the paper recommended interim measures entailing "a more structured federal-provincial decision-making process based on written principles and procedures" reflective of provincial rights and interests, that was only the beginning: "The long term solution must be the entrenchment of such provincial rights into the constitution. To achieve this, there must be a realignment of present jurisdictional responsibilities."[19] The paper concluded:

> [W]e must reiterate that the management of the Province's fishery resource by the Government of the Province represents a historic and moral right of Newfoundlanders to the economic benefits of those resources in the surrounding sea. Of particular note is the Northern Cod Stock which embodies all the elements of our concerns. It is on this basis that we pursue the primary constitutional objective and the interim measures. . .[20]

Provincial determination in this regard was further conveyed through an indirect threat accompanying the articulated goal. "In the event an acceptable cooperative approach is not implemented, the Province will have no choice but to exercise its rights."[21] Federal officials were left to surmise the full meaning of this statement, not to mention the possible consequences of its implementation.

The strength of Premier Peckford's resolve has been confirmed in the Speech from the Throne opening the spring session of the Legislative Assembly in February of this year.[22] While the provincial claim to offshore minerals was also stressed,[23] the Premier's platform stated unequivocally:

> [T]he fisheries are, and must remain, the corner stone of our economy and society. Consequently, it will always receive first priority with My Government.
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> . . . .

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[16] FISHERIES ISSUES, *supra* note 8, at 2.

[17] HON. A. BRIAN PECKFORD, DISCUSSION PAPER ON BILATERAL ISSUES (presented at the Canada-Newfoundland First Ministers meeting Ottawa, Sept. 5, 1979).

[18] FISHERIES ISSUES, *supra* note 8.

[19] *Id.*, at 4.

[20] *Id.*, at 5.

[21] *Id.*

[22] Speech From the Throne, at the opening of the 38th Gen. Ass. (2d Sess.) of the Province of Newfoundland, delivered by Lt. Gov. G. A. Winter, Feb. 28, 1980. (St. John's).

[23] *Id.*, at 5-8. *See infra* notes 157-64 and accompanying text.

> My Government is determined to achieve confirmation of the Province's special interest in and rights to, the economic benefits which can be derived from the fish stocks in the seas adjacent to our shores.
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> . . . .
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> My Government recognizes that the process of amending the Constitution is a slow one, while the problems of the fishery are urgent. In view of this, My Government will articulate a set of principles which it believes should, in the interim, direct the Federal Government's management of the fisheries resource in the waters adjacent to the Province.[24]

The speech mirrored the message to Ottawa of the previous year. A forthcoming White Paper on the development of the province's fisheries was announced and the Throne Speech set forth the basic features of fisheries management and policy deemed desirable from a provincial point of view.[25]

B. *Federal Reaction*

The position of the federal government on fisheries is essentially consistent with the preservation of its constitutional mandate which receives a detailed examination in Part III. The reaction from Ottawa to Premier Peckford's recent challenge appears equally consistent with this view. While the Speech from the Throne of the Clark Government had promised an in-depth review of fisheries policy and a White Paper on the subject to be "prepared in consultation with fishermen, the fishing industry and the provinces",[26] no constitutional concessions were intimated in the same manner or extent as was later forthcoming on the issue of offshore petroleum.[27]

The Minister of Fisheries, James McGrath, answered Premier Peckford indicating that 1979 federal quotas, established under the Fisheries Act,[28] already gave Newfoundland the lion's share of the

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[24] *Id.*, at 4.

[25] *Id.*, at 5. These features were enumerated as follows:

> (1) The fishery resources of the seas adjacent to the Province should be exploited by residents and landed in the Province subject to the historic pattern of fishing by other Canadians;
> (2) that the management and licensing process must proceed from cleared criteria and in a regular manner, with sufficient public input;
> (3) that the Government of the Province must play a major role in such a process to ensure that the interests of the Province are protected;
> (4) that all fish landed in the Province receive the maximum amount of processing possible before removal from the Province; and
> (5) that the structure of the industry favour owner-operated vessels and processing in a multitude of smaller plants to protect the continued economic viability and lifestyle of our smaller communities.

Id.

[26] Excerpt from the Speech from the Throne, at the opening of the 31st Parl. (1st Sess.) of the Parliament of Canada, delivered by Gov.-Gen. E. Schreyer, House of Commons, Oct. 9, 1979 (Ottawa). As reported in The Globe and Mail (Toronto), Oct. 10, 1979, at 9, col. 1.

[27] *See infra* note 158 and accompanying text.

[28] R.S.C. 1970, c. F-14.

allowable catch and that other provinces, particularly Nova Scotia, also possessed legitimate historical entitlements. Even apart from the international implications of cutting off foreign phase-out privileges in the 200 mile zone in order to grant Newfoundland exclusive access to cod stocks, Mr. McGrath concluded: "If I accepted Mr. Peckford's position I'd have to be a referee for five competing provinces."[29] As to the issue of shared jurisdiction the position was the same. It would entail "a balkanization of the East Coast fishery. Quite frankly, no Government of Canada could manage the fishery with such provincial jurisdiction."[30] Here, Mr. McGrath remained consistent with the views of his predecessor in the Trudeau Cabinet, Romeo LeBlanc, who has now returned to that portfolio. In announcing completion of a multilateral agreement establishing a successor organization to ICNAF, the Northwest Atlantic Fisheries Organization (NAFO),[31] in the spring of 1978 Mr. LeBlanc commented:

> To the provincial spokesmen arguing for more jurisdiction over fishing, I answer that I will not abdicate lightly the power given by the constitution, the same power that in the last four years enabled the federal government to take such strong action in getting the 200-mile limit and in rescuing and in reinvigorating major sectors of the industry.[32]

C. *Views of Industry and Labour*

Historically, both the fishing industry and the very powerful fishermen's unions have exercised influence on federal policies and have organized themselves to facilitate this process. Their proposals[33] have served both to stimulate and to shape Canadian initiatives at the highest levels of international negotiation and while there are no lack of gripes over particular federal policies at various times,[34] the overall results have not been disappointing enough for any movement to arise suggesting that the federal government should not continue to do the job. In fact, just the opposite is the case. A majority of east coast fishermen campaigned for

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[29] The Globe and Mail (Toronto), *supra* note 15.

[30] *Id.*

[31] Convention of Future Multilateral Co-operation in the Northwest Atlantic Fisheries, Oct. 24, 1978, in force Jan. 1, 1979, [1979] Can. T.S. No. 11.

[32] The Halifax Chronicle Herald, May 4, 1978, at 2, col. 3.

[33] *See* submissions of the United Fishermen and Allied Workers Union and of the Fisheries Council of Canada, discussed *infra* notes 248, 251 and accompanying text.

[34] *E.g.*, charges were raised by West Coast fishermen at the 1978 annual meeting of the United Fishermen and Allied Workers Union that the federal government was "selling out" their interests over boundary disputes with the United States concerning Dixon Entrance: The Vancouver Sun, Feb. 2, 1978, at A11, col. 1. Later, the same fishermen were reported to be hailing "tough" bargaining by Ottawa with the United States: The Globe and Mail (Toronto), June 3, 1978, at 12, col. 1. As the fish war wore on, the B.C. fishing industry was described as "maintaining a discreet diplomatic silence about negotiations with the Americans . . . ": The Globe and Mail (Toronto), Jul. 15, 1978, at 8, col. 1.

the reappointment of their favourite son from Moncton, Romeo Le Blanc, to the Fisheries and Oceans portfolio.[35]

In response to the current position of the Newfoundland Government, the Fisheries Council of Canada, an organization of the fish processing industry, has declared that "[t]he management of Canada's fishery is the clear responsibility of the federal government. . . . The [C]ouncil strongly opposes any change."[36] Similarly, the president of the Newfoundland Fishermen, Food and Allied Workers union has rejected the Peckford position, stating that interprovincial fishing borders were clearly against the interests of fishermen. President Richard Cashin was reported as saying that fishermen don't care who makes the rules so long as it's done fairly.[37]

D. *Other Provincial Views*

The province of Quebec would appear to have greater affinity for Mr. Peckford's position than most other interested provincial administrations. Since 1922, by virtue of a federal delegation of responsibilities to the province, Quebec has enjoyed greater control over fisheries than have other provinces. However, the Federal Minister of Fisheries has been at pains in the past to point out that this transfer of authority did not confer any legislative jurisdiction on the province for the regulation, maintenance and conservation of fisheries.[38] Naturally, this interpretation of the agreement is not accepted entirely by the Levesque administration. Similarly, Mme. Denise LeBlanc, Parliamentary Secretary to the Minister for Industry, Trade and Commerce (responsible for fisheries) in 1978, and representative to the National Assembly for Iles-de-la Madeleine (centre for the large Gaspé fishing industry), wrote a series of three articles for Le Devoir describing the development of the Quebec fishery and contending for increased provincial jurisdiction which, she argued, should extend into the 200 mile zone.[39]

It cannot be said that fisheries are a burning issue in Quebec politics. The proposals contained in the "Beige Paper" of the Quebec Liberal Party do mention the matter among other natural resource issues and

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[35] The Globe and Mail (Toronto), Mar. 4, 1980, at 10, col. 6.

[36] The Globe and Mail (Toronto), *supra* note 15.

[37] The Globe and Mail (Toronto), Mar. 6, 1980, at 8, col. 2. The article goes on to say that "there's no evidence so far to suggest the province can do a better job than the federal Government".

[38] *See* discussion of positions represented by Federal Fisheries Minister LeBlanc and Quebec Minister of Industry and Commerce Rodrigue Tremblay as reported by R. Gagne, Le Soleil (Quebec), Nov. 10, 1978, at A4, col. 1.

[39] *See* LeBlanc, Les pêches maritimes au Québec (1), (2), (3), Le Devoir (Montreal), May 29, 1978, at 5, col. 1; *id.*, May 30, 1978, at 5, col. 1; *id.*, May 31, 1978, at 5, col. 1.

purport to exact federal concessions accordingly.[40] On the other hand, the referendum proposal of the Government of Quebec does not mention fisheries in any respect;[41] nor does Professor McWhinney in his recent study of Quebec's desire for constitutional change.[42] Of course, an independent Quebec would be able to resolve the matter on its own account. It can be said, though, that the Quebec Government probably does not stand opposed to the constitutional rearrangement the Newfoundland Government seeks.

At the 1979 Conference of First Ministers on the Constitution, all ten provincial premiers reached agreement to pursue a policy of concurrent jurisdiction in the management of fisheries.[43] The Premier of Nova Scotia, John Buchanan, together with Newfoundland Premier Frank Moores (as he then was) were the primary instigators of a consensus they had started to form at the Constitutional Conference of First Ministers held in October, 1978. Their argument equated fishing for Nova Scotia and Newfoundland with oil for Alberta and manufacturing for Ontario as cornerstones for provincial welfare and future economic development.[44]

Premier Buchanan articulated the rationale for constitutional change as follows:

> Because the fishery is so vital to the provincial economy and offers such promise for increased benefits, the orderly development of the industry is critical for our future. It follows that the province should be able to develop this vital industry in a manner that would best achieve its economic and social goals. The economic development of its industry is very properly a matter of provincial jurisdiction and responsibility. . . .
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> However, in the case of the fishery resource, the province has not been able to develop the fishing industry in the manner that would achieve provincial objectives and bring the greatest benefits to Nova Scotia. Unlike all other natural resources, the fishery is managed by the federal authority. Since it is not possible, certainly not practical, to realistically pursue fisheries development separate from fisheries management, the province cannot develop its fishing industry despite the fact that industrial development is clearly within provincial jurisdiction.
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> We are convinced Mr. Chairman, that it is necessary at this time for Canada to accept concurrency in the fisheries as a constitutional fact of life. That there are problems with such a new regime is accepted — but I am confident that once the principle of a shared jurisdiction is accomplished we can resolve these problems.[45]

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[40] *See* THE CONSTITUTIONAL COMMITTEE OF THE QUEBEC LIBERAL PARTY, *supra* note 1, at 97.

[41] GOVERNMENT OF QUEBEC, *supra* note 1.

[42] E. McWHINNEY, QUEBEC AND THE CONSTITUTION 1960-1978 (1979).

[43] *See* TEXT OF REPORT OF PREMIER J. M. BUCHANAN, FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, VERBATIM RECORD (Ottawa, Feb. 7, 1979).

[44] COMMENTS BY PREMIER J. M. BUCHANAN ON FISHERIES AND CONSTITUTIONAL REVIEW (presented to the Federal-Provincial Conference of First Ministers on the Constitution, Document 800-10/031, at 2, Ottawa, Feb. 5, 1979).

[45] *Id.* at 4-5.

In summation, Premier Buchanan emphasized four points: first, the present constitutional division of powers was unsatisfactory; secondly, the constitution should explicitly recognize the roles and responsibilities of the provinces in fisheries; thirdly, constitutional amendment should provide for concurrent jurisdiction in fisheries; and fourthly, there should be constitutional entrenchment of the joint management principle.[46]

At this point in the constitutional debate, nothing has been acted upon and the unified resolve between the provinces of Nova Scotia and Newfoundland has since dissipated. Part of Premier Buchanan's strategy for development of the Nova Scotia fishery, disclosed at the Conference in February of 1979, centred on development of the offshore fishery including increased use of freezer trawlers over a broad area,[47] presumably including the Newfoundland codfishing grounds. These aspirations were not received cordially by Premier Moores' successor,[48] and current Nova Scotia policies, while not explicitly rejecting constitutional reform, display a marked shift in support of continued federal jurisdiction. A White Paper released by the province in November, 1979 declared: "[T]he Federal Government should be primarily involved in the common property aspects of the industry, such as the fish 'in the wild', whereas the Province is primarily responsible for such things as onshore processing facilities, infrastructure, quality and productivity improvements, and training and working conditions".[49] The White Paper added that given the importance of the industry to the province and "[s]ince it is not practical to pursue fisheries development separately from fisheries management, close cooperation between the two levels of Government is essential. Provinces must therefore have a major input into fisheries policy, not merely in an advisory role, but as a partner in decision making. . . ."[50]

Much of the original position remained, but gone was the strident call for a constitutional redistribution of powers. Nova Scotia has not taken kindly to the prospect of the interprovincial barriers to fishing privileges Premier Peckford seeks to erect. Premier Buchanan advised the Prime Minister in December, 1979: "We believe in the basic and fundamental principle that all the Atlantic provinces should have access to every fish stock."[51] More explicit still was the view of Nova Scotia's Minister for Fisheries who remarked that "[e]ither we're going to have a country, Canada, or we're not. If we have a country, you can't start saying certain fish are for certain provinces. The fishery is a Canadian resource and we share it."[52] Apparently, the quest for provincial

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[46] *Id.* at 5.

[47] *Id.* at 3, and TEXT OF REPORT OF PREMIER J. M. BUCHANAN, *supra* note 43.

[48] *See supra* note 15 and accompanying text.

[49] GOVERNMENT OF NOVA SCOTIA, A DISCUSSION PAPER ON THE PROPOSED NOVA SCOTIA FISHERIES POLICY 3 (Nov., 1979).

[50] *Id.* at 4.

[51] The Globe and Mail (Toronto), *supra* note 15.

[52] *Id.*

responsibility and autonomy in Nova Scotia's understanding of the term does not include the concept of exclusivity in the same sense as Canada might claim it against other nations. For Premier Peckford it clearly does.

In the west, the concerns of the province of British Columbia appear to be focused on getting the federal government to do the right thing by her fishermen. Since most fisheries problems in British Columbia are embroiled in bilateral relationships with the United States in one way or another — on the delimitation of maritime boundaries,[53] in the negotiation of treaty arrangements for reciprocal fishing privileges[54] and in coordinated fisheries management[55] — there may be little choice but for the province to make sure the federal government properly represents her interests. To this end, a detailed report was prepared by the provincial government on boundary delimitation issues and submitted to Ottawa in 1977.[56] The situation on the west coast illustrates dramatically both the mixed blessings of federal jurisdiction from the provincial point of view and its utter necessity where the international regime remains unsettled.[57]

Notwithstanding the fundamental importance of fisheries for the province, British Columbia did not choose to make the matter of fisheries jurisdiction a focal point in the series of reform proposals she submitted to the First Ministers' Conference on the Constitution in October, 1978.[58] With respect to the distribution of legislative powers, the

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[53] The province is particularly concerned with delimitation problems with respect to the Strait of Juan de Fuca, Dixon Entrance and Hecate Strait, in addition to an equitable claim to fishing rights off the Alaskan panhandle. *See* B.C. Submission to Ottawa, *infra* note 56; Beauchamp, Crommelin & Thompson, *Jurisdictional Problems in Canada's Offshore*, 11 ALTA. L. REV. 431, at 442-44 (1973).

[54] *E.g.*, Agreement Between the Government of Canada and the Government of the United States of America on Reciprocal Fishing Privileges in Certain Areas off their Coasts, Jun. 15, 1973, in force Jun. 16, 1973, [1973] Can. T.S. No. 23. This agreement was extended annually (*see infra* note 263) until the "fish wars" broke out in 1978; the United States failed to ratify the latest extension of privileges provisionally negotiated on Apr. 11, 1978 and Canada suspended provisional implementation on Jun. 2, 1978. *See* Vancouver Sun, May 16, 1978, at A2, col. 5; The Globe and Mail (Toronto), June 3, 1978, at 1, col. 6.

[55] *E.g.*, Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System, May 26, 1930, in force Jul. 28, 1937, Canada-U.S., [1937] Can. T.S. No. 10. Note the amending protocol, Dec. 28, 1956 (in force Jul. 3, 1957), [1957] Can. T.S. No. 21. *See also* International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952 (in force Jun. 12, 1953), Canada-Japan-U.S., [1953] Can. T.S. No. 3.

[56] GOVERNMENT OF BRITISH COLUMBIA, SUBMISSION OF THE PROVINCE OF BRITISH COLUMBIA ON WEST COAST MARITIME BOUNDARIES BETWEEN CANADA AND THE UNITED STATES (1977).

[57] *Cf.* Vancouver Sun, Jun. 6, 1978, at A4, col. 2: "It's a dangerous game the two governments are playing — made all the more foolhardy because, without rules, neither side can hope to win and the longer the game is played the greater the risk that nobody will be interested in even the most rudimentary rules of conduct."

[58] EXECUTIVE COUNCIL, PROVINCE OF BRITISH COLUMBIA, BRITISH COLUMBIA'S CONSTITUTIONAL PROPOSALS (1978).

province rejected the concept of special status for a particular province.[59] On the other hand, it was stated that British Columbia found "the arguments in favour of a substantially increased list of concurrent powers attractive".[60] Discreet support for the Buchanan/Moores proposals on fisheries at the meeting of First Ministers the following February[61] certainly indicates that management and control functions over the industry are properly viewed as a provincial concern in British Columbia. Again, however, the province has determined not to challenge directly the general field of Ottawa's jurisdiction over fisheries in the littoral sea. Rather, the emphasis has been to constructively guide the ends of federal legislative power in the provincial interest.

E. *Summary*

Premier Peckford has made a forthright challenge to the original division of powers under the B.N.A. Act. It is unclear how many other provinces support the cause of the Newfoundland Government and to what extent. More clearly, persuasive arguments exist on both sides of the question depending on the level at which they are made. Premier Peckford seeks a major concession from Ottawa; other provincial governments may find they both rue and praise the attainment of Newfoundland's goal.

The sum of these arguments must now be considered against the existing constitutional structure that the province of Newfoundland finds unacceptable and which so far the discussion has merely assumed. How this structure complements the constraining requirements of the international regime subsequently described suggests a level of argument not pursued by the province, but one that should offer an illuminating response to the issue of what distribution of legislative power ought to govern the Canadian fishery.

III. The Constitutional Framework

Power over fisheries in Canada is split between the federal government and the provinces along lines roughly parallel to a judicially defined dichotomy between supervisory powers and sovereign rights of ownership. The general rule was articulated by Lord Herschell in *Attorney General for Canada v. Attorneys General for Ontario, Quebec and Nova Scotia* (the *Fisheries* case) as follows:

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion

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[59] *Id.* at 90.

[60] *Id.*

[61] *See supra* notes 43-47 and accompanying text.

> Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada [62]

Section 91(12) of the B.N.A. Act confers on the Dominion Parliament legislative jurisdiction over "Sea Coast and Inland Fisheries", but because of the above-stated distinction, the grant has proved incomplete. It became apparent that "[w]hile a government's proprietary interests generally confer matching legislative and executive powers . . . , the converse proposition is not true".[63]

The basis for the distinction in law turns on a number of factors: the distinction of public property between the provincial and federal governments at Confederation; ideas of property, public and private, received from the law of England;[64] and the allocation of legislative jurisdiction by subject-matter as between the two levels of government. Yet the limited range of case law, as the following analysis will show, exemplifies almost ad nauseam the same basic theme. The struggle between province and Dominion is characterized by a competition between the simple notion of entitlement based upon the constitutionally entrenched principle of provincial ownership of natural resources, and the federal power to regulate a resource inherently incapable of ownership in its natural state — that is, at least in the open sea, fish before they are caught.

A. *The Distribution at Confederation*

Under the terms of section 109 of the B.N.A. Act, "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union . . . " were retained by them. The four western provinces achieved similar status through a grant of property rights under the B.N.A. Act, 1930.[65] Partial exceptions to this position are found in section 108, transferring certain public works and property from each province to the Dominion pursuant to an enumerated schedule appended to the 1867 Act,[66] and in section 117, permitting the Dominion to take provincial lands and property for purposes of national defence.

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[62] [1898] A.C. 700, at 709-10 (P.C.).

[63] P. HOGG, CONSTITUTIONAL LAW OF CANADA 393 (1977).

[64] *See* G. LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION 3-14 (1969).

[65] 21 Geo. 5, c. 26.

[66] The schedule contains ten headings providing for the transfer of all major government and public transportation facilities including: 2. Public Harbours, 5 Rivers and Lake Improvements.

Prior to Confederation, the received law of England was that all ungranted lands belonged to the sovereign in the public domain who remained entitled by prerogative right to all territorial and casual revenues arising therefrom.[67] Therefore, to employ the words of Chief Justice Ritchie in *Mercer v. Attorney General for Ontario*,

> at the time of the union the entire control, management, and disposition of the crown lands, and the proceeds of the provincial public domain and casual revenues, were confided to the executive administration of the provincial government as representing the Crown, and to the legislative action of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate. . . .[68]

And sections 109 and 117 of the B.N.A. Act confirmed that property rights in natural resources remained vested in the provinces after the union was effected. Moreover, pursuant to section 92(13) of the Act, the provinces retained general legislative jurisdiction over "Property and Civil Rights in the Province".

B. *Judicial Interpretation*

To the extent that one could speak of proprietary rights in fish once they had been caught and appropriated to a particular use, the apparent distribution of powers between federal and provincial authorities remained ambiguous. The Dominion assumed from the outset that legislative jurisdiction over fisheries was sufficient to cover the broader

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[67] Since the time of Queen Anne, the sovereign has been restricted in his or her ability to alienate Crown lands ((1701) 1 Anne, stat. 1, c. 7), and by the time of George III, the distinction between public and private roles was clarified, such that the majority of Crown revenues were paid into the consolidated revenue fund and the King was paid a yearly allowance out of which lands could be purchased and sold in a private capacity ((1800) 39 & 40 Geo. III, c. 88); *see* LA FOREST, *supra* note 64, at 4-6.

In Canada, reception of the English common law was complicated somewhat by the status of Quebec as a "conquered" rather than "settled" colony and the preservation of French civil law in that province pursuant to the Quebec Act, (1774), 14 Geo. 3, c. 83. The provinces of Upper and Lower Canada were created by the Constitutional Act of 1791, 31 Geo. 3, c. 31 which specified that controversies pertaining to property and civil rights were to be governed by pre-existing law, but the following year a statute of Upper Canada stated the law of England was to govern: (1792) 32 Geo. 3 c. 1 (Upper Canada); these laws remained on the books through the Act of Union of Upper and Lower Canada in 1840, 3 & 4 Vict. c. 35, to the establishment of the separate provinces of Ontario and Quebec at Confederation (B.N.A. Act, s. 6). *See* G. LA FOREST, *supra* note 64, at 4-8. According to Dr. La Forest, all of this raises "a serious question whether in determining a matter concerning prerogative rights to property in Quebec or Ontario, one must look solely to the English law of prerogative or whether one must also look to the French law". *Id.* at 7. With certain qualifications *viz.* the province of Quebec, he concludes that the English law applies "throughout Canada". *Id.* at 9. *See infra* notes 107-11 and accompanying text.

[68] 5 S.C.R. 538, at 633 (1881).

context.[69] Prior to the famous formulation by Lord Herschell, this view was challenged by a private litigant who had purchased a leasehold from the federal government purporting to grant exclusive rights to the fishery in the upper reaches of New Brunswick's Miramichi River, but was prevented from exercising them by persons with conveyances of land antedating Confederation.[70] The suit of Christian A. Robertson against the Crown for failure of consideration and damages accordingly gave the courts their first opportunity to scrutinize the federal assumption of power.

The Supreme Court of New Brunswick had ruled that Robertson's lease could not prevail against the earlier conveyances.[71] On the petition of right to the Exchequer Court, Mr. Justice Gwynne upheld the view that an exclusive right of fishing existed in the parties holding the conveyances preceding Robertson's lease.[72] But in the special case referred to the court, the eighth question raised a broader issue: "Where the lands, above tidal water, through which the said River passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a Lease of that a portion of the River?"[73] It had been admitted "[t]hat the Government of *Canada* did not own the lands adjoining the said river within the limits of the said lease".[74]

Relevant to this inquiry was the common law division between a fishery susceptible to private dominion and the "Common Fishery", a right enjoyed by the whole public. The public right extended over the seacoast and over rivers to the limits of "the ebb and flow of the tide". The Exchequer Court found that a fishery above the tidal portions of rivers could be owned in conjunction with ownership of the river bed normally accompanying a grant of land or apart therefrom, although the burden was on the party making the separate claim and the presumption went with the title.[75] The right of fishing in the proprietary zone therefore went with the *solum* in most instances and section 109 of the B.N.A. Act made it clear that title to the beds of rivers had not gone to the Dominion. In the result, the court felt obliged to characterize "the fisheries or right of fishing in all rivers running through ungranted lands in the several Provinces, . . . *as distinct and severed from the property in, or title to, the soil or beds of these rivers*, under the exclusive Legislative control of the Dominion Parliament".[76]

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[69] The Department of Marine and Fisheries, under authority of The Fisheries Act, S.C. 1868, c. 60, proceeded to grant both licences and leases to fisheries in both tidal and non-tidal waters. *See* Thompson, *Institutional Constraints in Fisheries Management*, 31 J. FISHERIES RESEARCH BOARD CAN. 1965, at 1969 (1974). Ozere, *Survey of Legislation and Treaties Affecting Fisheries*, in 2 CANADA, RESOURCES FOR TOMORROW 799 (1961).

[70] The Queen v. Robertson, 6 S.C.R. 52 (1882).

[71] Steadman v. Robertson, 18 N.B.R. 580 (1879).

[72] *Supra* note 70, at 61-103.

[73] *Id.* at 63.

[74] *Id.* at 58.

[75] *Id.* at 67-68, citing Mayor of Carlisle v. Graham, L.R. 4 Ex. 361 (1869)

[76] *Id.* at 69 (emphasis by the court).

This reasoning enabled Mr. Justice Gwynne to answer in response to the eighth question of the special case that while the Minister could not lawfully issue a lease to the bed of the river, he could lawfully issue, pursuant to the authorizing legislation,[77] "a licence to fish, as a franchise apart from the ownership of the soil in that portion of the River".[78] On this point, the Exchequer Court was reversed.

Chief Justice Ritchie, writing for the majority of the Supreme Court of Canada, expressly followed the rationale he had previously set forth in *Mercer v. Attorney General for Ontario*[79] and concluded: "I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in fisheries . . . and so give to the parliament of *Canada* the right to deprive the province or individuals of their right of property therein. . . ."[80] In consequence thereof,

> [t]o all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.[81]

Denying the federal right to license fishermen on non-tidal waters flowing through ungranted lands meant that, as far as the proprietary fishery was concerned, the exclusive right to fish belonged to the Crown in the right of the province. Intimations that these proprietary rights might lead to limited legislative competence under the "Property and Civil Rights" power were an added encouragement for the provinces to take up the battle for jurisdiction more directly.

For the next several years the province of Ontario pressed for greater control of fisheries with a series of legislative enactments[82] that were part of Premier Oliver Mowat's larger campaign to decentralize Confederation and increase provincial autonomy.[83] A reference was brought by the federal government containing seventeen questions asking the Supreme Court to determine the validity of the conflicting statutes enacted by the Dominion and by the provinces of Ontario, Quebec and Nova Scotia.[84] The judges of the Supreme Court of Canada delivered separate written opinions in the matter and the results were inconclusive.[85]

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[77] The Fisheries Act, R.S.C. 1886, c. 95 (consolidating S.C. 1868, c. 60).

[78] *Supra* note 70, at 100.

[79] *Supra* note 68 and accompanying text.

[80] *Supra* note 70, at 123.

[81] *Id.*

[82] The Ontario Fisheries Act, 1885, S.O. 1885, c. 9; An Act for the Protection of the Provincial Fisheries, S.O. 1892, c. 10.

[83] Mowat's attack concentrated on the apparent open-endedness of the property and civil rights clause. *See* CONFEDERATION: BEING A SERIES OF HITHERTO UNPUBLISHED DOCUMENTS BEARING ON THE BRITISH NORTH AMERICA ACT 84-87 (J. Pope ed. 1895).

[84] *Fisheries* case, *supra* note 62.

[85] In summary, the majority found *inter alia*:

In the Privy Council Lord Herschell delivered the opinion of the Board. Having set forth his famous dictum by way of introduction,[86] His Lordship passed to the issues at hand. "Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries."[87] But, keeping in mind the stated dichotomy, Lord Herschell elaborated: "[T]he power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights".[88] On this point, however, His Lordship remained equivocal:

> The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred . . . If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordship's opinion is not an exercise of the legislative jurisdiction conferred by s. 91.[89]

Insofar as federal legislation empowered the grant of fishery leases or purported to confer other property rights, it was *ultra vires*. Yet, equally, the exclusiveness of the legislative authority conferred on the Dominion by section 91 could not be questioned.[90]

On balance, the case proved to be a modest victory for the provinces in the administration of inland fisheries. Their Lordships had been careful to add that "it does not follow [from the exclusive legislative competence of the Dominion under s. 91] that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries".[91] The practical effect of this view was some form of shared jurisdiction so long as the provinces refrained from direct fisheries management.

> that the Provincial Governments alone had power to grant leases and licences as to fishing [in all ungranted waters within the territorial limits of the province with the exception only of public harbours, Holman v. Green, 6 S.C.R. 707 (1881)]: that the jurisdiction of the Dominion as to fisheries was limited to passing general laws . . . and that the Provincial Legislatures had jurisdiction to make regulations as to fisheries within their respective provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation.

Id. at 704-05.

[86] *Supra* note 62 and accompanying text.

[87] *Id.* at 712.

[88] *Id.* at 712-13.

[89] *Id.* at 713.

[90] *Id.* at 715. The classes of subjects in ss. 91 and 92 are exclusive to their assigned level of government as explicitly stated in the opening words of each section *See* P. HOGG, *supra* note 63, at 95.

[91] Lord Herschell elaborated:

> For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries

Following the *Fisheries* case the provinces became bolder still and, led by the province of British Columbia, attempted to extend their authority to grant exclusive fishing rights in the tidal reaches of rivers and to the marginal sea beyond the seacoast. This challenge resulted in the *Attorney General for British Columbia v. Attorney General for Canada (British Columbia Fisheries Reference)*.[92] The Governor General in Council referred three questions to the Supreme Court of Canada. The first two asked for a decision as to whether the Legislature of British Columbia was competent to grant exclusive fishing rights, first in tidal waters and non-tidal navigable waters and second, in the zone within one marine league of the coast of the province; the third asked the Court to identify any difference between tidal waters and the open sea so far as concerned the legislative authority claimed by the province.[93]

The Supreme Court answered all three questions in the negative but restricted these replies to cover "rights of fishing as commonly understood" and with respect to the second and third questions the Court chose "to refrain from answering the said question[s] in so far as [they relate] to any right other than exclusive to fish in the waters therein mentioned".[94]

Upon an appeal by the province to London, Viscount Haldane, who had been counsel for the Dominion on the *Fisheries* case,[95] delivered judgment. The first question in particular pertained to British Columbia's competence to grant exclusive fishing rights in the tidal and non-tidal but navigable waters of a strip of land known as the "railway belt". This land had been ceded by provincial statute to the Dominion for purposes of completing the trans-continental railroad pursuant to paragraph 11 of the 1871 Terms of Union under which the province had been admitted to Confederation.[96] Their Lordships found that the transfer of title had the effect of also transferring all proprietary rights in the non-tidal waters of the zone to vest in the Dominion. But this was a special circumstance.[97] Moreover, it was stressed that the issue of "whether non-tidal waters are

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> which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation. . . .

Supra note 62, at 717.

[92] [1914] A.C. 153, 15 D.L.R. 308 (P.C. 1913).

[93] *Id.* at 162-63, 15 D.L.R. at 310.

[94] *Id.* at 156.

[95] *Supra* note 61.

[96] *See* Schedule to the Order of Her Majesty in Council Admitting British Columbia into the Union, 16 May 1871, reprinted in STATUTES, TREATIES AND DOCUMENTS OF THE CANADIAN CONSTITUTION 1713-1929, 660-61 (W.P.M. Kennedy ed. 1930). Paragraph 5 of the Terms of Union provided that "Canada will assume and defray the charges for the following services . . . (E) Protection and encouragement of Fisheries." *Id.* at 660. This provision may have been interpreted to strengthen the jurisdictional arguments of the Dominion; but, while referred to by the Board (*supra* note 92, at 164, 15 D.L.R. at 311), it does not appear from the reasoning in the judgment to have been relied upon in their reply to any of the three questions submitted.

[97] *Supra* note 92, at 166, 173, 15 D.L.R. at 312, 318.

navigable or not has no bearing on the question".[98] These points, however, did not touch upon the new aspect of the provincial claim to which the Board devoted separate attention.

Viscount Haldane recognized the same distinction between private and public rights noted by the Supreme Court of Canada in *Robertson*[99] and which had formed the basis for Lord Herschell's distinction between legislative jurisdiction and proprietary interests. Magna Carta had forbidden the King to make royal grants of fisheries in the foreshore and to the limits of the ebb and flow of the tide in all rivers, estuaries and bays. Since that time, the law of England recognized a general public right that could not be alienated to fish in this zone.[100] In the result, Viscount Haldane concluded: "[N]o public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the Law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia."[101]

The foregoing discussion reduced the matter to a determination of legislative competence, pure and simple. As such the *Fisheries* case[102] proved inapposite to the current enquiry and the division of legislative jurisdiction under the B.N.A. Act was controlling:

> Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore, when by s. 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament.[103]

With respect to salt water fisheries, this statement would appear to have foreclosed any legal basis for a provincial claim to jurisdiction.

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[98] *Id.* at 173, 15 D.L.R. at 318.

[99] *Supra* note 75 and accompanying text.

[100] Citing Lord Hale in DE JURE MARIS (1667), the Board agreed with his proposition that the public had as subjects of the Crown an entitlement to fish in both tidal waters and the high seas:

> The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. . . . Finding its subjects exercising this right as from immemorial antiquity the Crown as parens patriae no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts.

Supra note 92, at 169, 15 D.L.R. at 315. *See* HALE, DE JURE MARIS, reprinted in S. MOORE, A HISTORY OF THE FORESHORE AND THE CASE RELATING THERETO 370 (3d ed. 1883).

[101] *Supra* note 92, at 170, 15 D.L.R. at 316.

[102] *Supra* note 62.

[103] *Supra* note 92, at 172, 15 D.L.R. at 317-18.

The Privy Council declined to pronounce upon the further question of whether the provinces might possess a proprietary interest in the bed of the sea from low water mark to a distance of one marine league from their coasts, since the issue remained controversial and was a matter, in the Board's view, best dealt with through international consensus and one, finally, for public international law to determine.[104] In any event, resolution of this issue was not considered material to control over fisheries since "the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land".[105] The Supreme Court of Canada has since resolved the title issue,[106] at least insofar as it affects the province of British Columbia and her contemporary partners in Confederation. But with respect to the province of Newfoundland, this controversy is still very much alive and will merit further attention later in this discussion.

In *Attorney General for Canada v. Attorney General for Quebec (Quebec Fisheries)*,[107] Viscount Haldane restated the common law view of the public right to fish in tidal waters set forth in the *British Columbia Fisheries Reference* and found a virtually identical regime applicable in the province of Quebec: a result of antecedent legislative history in the united province of Upper and Lower Canada which contrasted with the prevailing civil law system of private law rights.[108] It therefore proved to be the case that "neither the Government of Quebec, nor any member of the Executive Council, [had] power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts".[109] However, in confirming the legislative jurisdiction of the Dominion over fishing in tidal waters, the Board stated: "It is also true

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[104] *Id.* at 174, 15 D.L.R. at 319.

[105] *Id.*

[106] *Reference Re* Ownership of Off-Shore Mineral Rights [1967] S.C.R. 792, 65 D.L.R. (2d) 353; *see* Head, *The Canadian Offshore Minerals Reference*, 18 U. TORONTO L.J. 131 (1968).

[107] [1921] 1 A.C. 413, 56 D.L.R. 358 (P.C. 1920).

[108] *Id.* at 421-29, 56 D.L.R. at 361-68. Viscount Haldane elaborated as follows:

> It is true that here their Lordships have nothing to do with the public title arising out of the English common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian Legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and s. 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant exclusive leases and licences, to fish in the harbours, roadsteads, creeks and rivers of the old Province of Canada, is the foundation of the public title.

Id. at 429, 56 D.L.R. at 368. *See* An Act to amend chapter sixty-two of the Consolidated Statutes of Canada, and to provide for the better regulation of Fishing and protection of Fisheries (1865) 29 Vict. c. 11. *Cf. supra* note 67.

[109] *Id.* at 431, 56 D.L.R. at 370.

that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself."[110] Moreover, proprietary rights, while they might apply to granted lands between low and high water, still remained indeterminable beyond low water mark.[111]

The division of powers in relation to fisheries was again tested in the reference *Attorney-General for Canada v. Attorney-General for British Columbia (Fish Canneries)*[112] dealt with by the Privy Council in 1929. The decision is best remembered for the articulation by Lord Tomlin of his "four propositions" which have had a much wider significance for subsequent judicial interpretation of the Canadian constitution generally than is relevant to this discussion.[113] For present purposes, it dealt with federal legislation attempting to regain some of the ground lost to the provinces in previous decisions of the Board. Through The Fisheries Act, 1914,[114] Parliament had sought to regulate the processing of fish and fish products through a licensing scheme governing fish canneries and fish curing establishments pursuant to its general legislative jurisdiction over fisheries. The Supreme Court of Canada found this exercise of jurisdiction, challenged by the provinces of British Columbia, Ontario and Quebec, *ultra vires* the Dominion; the Privy Council agreed.

Prior to delivering the ruling of the Board, Lord Tomlin pronounced his four guidelines for resolving conflicts of jurisdiction between the Dominion and the provinces as follows:

> (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92. . . .
> (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion. . . .
> (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91. . . .
> (4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is

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[110] *Id.* at 428, 56 D.L.R. at 367-68.

[111] *Id.* at 431-32, 56 D.L.R. at 370-71.

[112] [1930] A.C. 111, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194 (P.C. 1929).

[113] *See* F. VARCOE, THE DISTRIBUTION OF LEGISLATIVE POWER IN CANADA 73-78 (1954), for explanation and comment.

[114] S.C. 1914, c. 8. The impugned sections were s. 7A (as enacted by The Fisheries Amendment Act, 1917, S.C. 1917, c. 16, s. 2); s. 18 (2)(*a*) (as enacted by An Act to amend the Fisheries Act, 1914, S.C. 1924, c. 43, s. 1); and s. 18(2) (*b*) (as enacted by An Act to amend the Fisheries Act, 1914, S.C. 1922, c. 24, s. 1)

> clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail. . . .[115]

The Dominion argued that the impugned legislation was valid in the first place as falling directly within the subject-matter of the enumerated power over fisheries in section 91(12) and in the alternative that, if not directly included, the provisions were sustainable as "necessarily incidental to effective legislation upon an enumerated subject".[116] These arguments can be seen to fall under the first and third of Lord Tomlin's propositions; in neither instance did the Board find them compelling.

Lord Tomlin cited the description of the term "fishery" as it appeared in the Act[117] and observed: "It may well be that this definition is not an apt one to apply to the words 'sea coast and inland fisheries' in s. 91. . . ."[118] But the Dominion contention which sought to embrace jurisdiction over the conversion of fish into marketable commodities reached beyond what the constitutional mandate could support.

> The fact that in earlier fishery legislation raising no question of legislative competence matters are dealt with not strictly within any ordinary definition of "fishery" affords no ground for putting an unnatural construction upon the words "sea coast and inland fisheries." In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."[119]

Similarly, the Board could not adduce a nexus between the federal licensing scheme and the recognized jurisdictional competence of the

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[115] *Supra* note 112, at 118, [1929] 3 W.W.R. at 452-53, [1930] 1 D.L.R. at 196-97 (footnotes omitted).

[116] *Id.* at 120, [1929] 3 W.W.R. at 454, [1930] 1 D.L.R. at 198.

[117] By s. 2 of the Fisheries Act, 1914, as cited by the Board, the term "fishery" means and includes

> the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir or other fishing appliance used in connection therewith.

Supra note 112, at 120, [1929] 3 W.W.R. at 454, [1930] 1 D.L.R. at 198. The operative portion of the definition contained in the current Act is identical to the above: *see* Fisheries Act, R.S.C. 1970, c. F-14, s. 2.

[118] *Supra* note 112, at 120, [1929] 3 W.W.R. at 454, [1930] 1 D.L.R. at 198. In the judgment of the Supreme Court of Canada appealed from, Mr. Justice Newcombe had adopted the following definitions of the term:

> In Patterson on Fishery Laws (1863), p. 1, the definition of a fishery is given as follows: "A fishery is properly defined as the right of catching fish in the sea, or in a particular stream or water; and it is also frequently used to denote the locality where such right is exercised."
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> In 4 Murray's New English Dictionary, p. 257, the leading definition is: "The business, occupation, or industry of catching fish, or of taking other products of the sea or rivers from the water."

Re Fisheries Act, 1914, [1928] S.C.R. 457, at 472, [1928] 4 D.L.R. 190, at 201.

[119] *Supra* note 112, at 121, [1929] 3 W.W.R. at 455, [1930] 1 D.L.R. at 199.

Dominion so as to meet the requirements imposed for the exercise of powers "necessarily incidental" to the jurisdiction conferred.[120]

On the other hand, the Board found that "[t]he impugned sections confer powers upon the Minister in relation to matters which in their Lordships' judgment *prima facie* fall under the subject 'property and civil rights in the province,' included in s. 92 . . . ".[121] This assessment sealed the fate of the Dominion claim. Once the fish are out of the water and appropriated for conversion to a particular use in the marketplace, they become property and therefore lie beyond the purview of federal regulation. Nevertheless, the Board intimated that their disposition of the affair might have been modified had a case been made under the second of their four controlling propositions. But, in the words of Lord Tomlin, "[i]t is not suggested that [the matters placed under federal regulation] are of national importance and have attained such dimensions as to affect the body politic of the Dominion . . . ":[122] hence the federal position could not be supported. The remainder of the decision dealt with the construction of special regulations pursuant to The Fisheries Act, 1914, where constitutionality was not an issue.

The last of the older authorities usually relied upon for an explanation of the division of powers related to fisheries[123] concerned two appeals from criminal convictions for the illegal possession of fish out of season.[124] It pertains exclusively to inland fisheries and is therefore of indirect interest; nevertheless, it does serve to reinforce the principles elaborated above. One Tomasson fell afoul of regulations under the Fisheries Act, 1914,[125] which declared a closed season on the species of fish in his untimely possession; one Wagner had been convicted of a similar offence but under the Game and Fisheries Act of the Province of Manitoba.[126] The Manitoba Court of Appeal upheld

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[120] The Board elaborated:

> It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters.

Id. at 121-22, [1929] 3 W.W.R. at 455-56, [1930] 1 D.L.R. at 199.

[121] *Id.* at 122, [1929] 3 W.W.R. at 456, [1930] 1 D.L.R. at 199-200.

[122] *Id.*, [1929] 3 W.W.R. at 456, [1930] 1 D.L.R. at 200.

[123] *See* Thompson, *supra* note 69, at 1977-78.

[124] Rex v. Wagner, 40 Man. R. 305, [1932] 2 W.W.R. 162, [1932] 3 D.L.R. 679 (C.A.); Rex v. Tomasson, 40 Man. R. 321, [1932] 2 W.W.R. 176, [1932] 3 D.L.R. 693 (C.A.).

[125] R.S.C. 1927, c. 73.

[126] S.M. 1930, c. 15.

Tomasson's conviction under the federal legislation but allowed Wagner's appeal.

The court considered the law as applied to the *Wagner* case at length and was able thus to deal summarily with *Tomasson*.[127] Chief Justice Prendergast noted that Manitoba had received ownership over all its natural resources in 1930; a provincial statute had been passed approving the agreement of transfer from the Dominion, which included fisheries, but the statute was appropriately limited by the existing jurisdiction of the Dominion Parliament.[128] Moreover, the purpose of the federal Act appeared to be perfectly consistent with the jurisdiction conferred.

> Its main object is the preservation of fish, and the main means therein provided for to that end and which in the nature of things would seem to be the most effective and necessary, is the regulating of the manner of fishing and the establishing of a close season. Prohibition against possession after the close season of fish caught during the close season, if it were there, would be ancillary to the enforcement of the close season and thus also within the Dominion's proper jurisdiction.[129]

But the Manitoba Act purported to regulate in the same way as the federal Act and this it could not do. Relying on Lord Herschell's reasoning in the *Fisheries* case,[130] a case he found indistinguishable on the facts, the Chief Justice declared the legislation to be wholly *ultra vires* the province.[131]

Mr. Justice Dennistoun concurred in the result but did so on the basis of an application of the doctrine of Dominion paramountcy[132] to what he perceived to be a case of overlapping jurisdictions *in relation to* fisheries.[133] Thus a conviction would have been possible under provincial law for possession of an article in commerce; but in the present instance this situation was reached only after the fish had been taken out of season — in contravention of federal law.[134] And as to that aspect,

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[127] *Tomasson*, *supra* note 124, at 322-24, [1932] 2 W.W.R. at 177-79, [1932] 3 D.L.R. at 693-95.

[128] Manitoba Natural Resources Act, S.M. 1930, c. 30. S. 10 of the agreement appended thereto (as quoted by the court) reads:

> Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

Wagner, *supra* note 124, at 306, [1932] 2 W.W.R. at 163, [1932] 3 D.L.R. at 680.

[129] *Wagner*, *supra* note 124, at 307, [1932] 2 W.W.R. at 164, [1932] 3 D.L.R. at 681.

[130] *Supra* note 61.

[131] *Wagner*, *supra* note 124, at 309-10, [1932] 2 W.W.R. at 165-66, [1932] 3 D.L.R. at 682-84.

[132] *See* Tennant v. Union Bank of Canada, [1894] A.C. 31 (P.C. 1893); P. HOGG, *supra* note 63, at 101-14.

[133] *Wagner*, *supra* note 124, at 310-15, [1932] 2 W.W.R. at 166-71, [1932] 3 D.L.R. at 684-88.

[134] The learned Justice observed that the wording of the Dominion and provincial legislation was the same except that the latter included the word "caught", raising the

only the Dominion Parliament could regulate.[135] Therefore, under the circumstances, first in time had to prevail.

The one dissent on the four judge panel, that of Mr. Justice Robson, sought to uphold the Manitoba Act as a valid exercise of regulatory power with respect to "proprietary rights" over fisheries, arguing that the Manitoba legislation applied only after the fish had been "caught" and had become property.[136] His Lordship dissented in *Tomasson* for similar reasons.[137]

After a long silence on the subject, the Supreme Court of Canada was required very recently to decide two appeals, each challenging the constitutionality of provisions of the Fisheries Act,[138] under which the appellant had been prosecuted. In *Fowler v. The Queen*,[139] a British Columbia logger ran afoul of subsection 33(3) of the Act in the course of removing timber from his land by dragging it across a small stream no more than a few feet wide. Evidence presented by the Crown showed the stream to be seasonally inhabited by spawning salmon but there was no proof of harm occasioned by the plant debris that had fallen into it.[140] Subsection 33(3) stipulated:

> No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

There was no question that the wording of the provision reached the conduct of the accused, only one as to the constitutionality of the law. On the contrary, the accused argued only that subsection (3) fell squarely within provincial legislative competence pursuant to the Property and Civil Rights power and related heads under section 92 of the B.N.A. Act, and was therefore *ultra vires* the Dominion. The Provincial Court Trial

argument that once out of the water the fish were property and therefore amenable to provincial jurisdiction. It was dismissed as follows:

> It is not the possession of fish that is primarily attacked, but it is the possession of fish illegally "caught." Before any case can be made out under the provincial Act it must be shown that the fish were taken in violation of the Dominion law which alone has jurisdiction to deal with the subject.

Id. at 313-14, [1932] 2 W.W.R. at 169-70, [1932] 3 D.L.R. at 686-87.

[135] It was settled law well prior to this case that some kinds of laws could have a "double aspect" such that the same subjects might be dealt with both under s. 91 and s. 92 — but for different purposes: Hodge v. The Queen, 9 App. Cas. 117, at 130 (P.C. 1883); W. Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, in THE COURTS AND THE CANADIAN CONSTITUTION 193 (W. R. Lederman, ed. 1964). Where purposes conflict or one side exceeds its purpose, the doctrine of paramountcy comes into play: *see* P. HOGG, *supra* note 63, at 85.

[136] *Wagner*, *supra* note 124, at 315-20, [1932] 2 W.W.R. at 171-75, [1932] 3 D.L.R. at 688-92; compare with Dennistoun J.A., *supra* note 133.

[137] *Tomasson*, *supra* note 124, at 324-28, [1932] 2 W.W.R. at 179-82, [1932] 3 D.L.R. at 695-99.

[138] R.S.C. 1970, c. F-14.

[139] (S.C.C., June 17, 1980).

[140] Statement by the trial judge, quoted by the Supreme Court, *id* at 5.

Judge accepted the argument, but the County Court reversed this decision. The British Columbia Court of Appeal agreed with the County Court, holding that subsection 33(3) was "legislation clearly in relation to the matter of inland fisheries and particularly to the preservation of fish".[141]

However, the Supreme Court of Canada saw matters differently. Mr. Justice Martland wrote the opinion for a unanimous Court. On a review of the authorities beginning with the *Robertson* case[142] and previous judicial interpretation of the word "fishery" applicable to the Act,[143] the Court found that the subsection extended beyond the regulation and protection of fisheries above: "Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie* subsection 33(3) regulates property and civil rights within a province."[144] Therefore, in the Court's view, the legislation could be supported in law only if it proved possible to construe it as "necessarily incidental" to effective exercise of the fisheries power in line with the third of Lord Tomlin's four propositions.[145]

Mr. Justice Martland concluded that the legislation did not meet the required test; it was simply too broad in its import.[146] "Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to

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[141] Cited by the Supreme Court of Canada in text of judgment, *supra* note 139, at 5.

[142] *Supra* note 70.

[143] See the statement of Newcombe J., *supra* note 118, followed by Chief Justice Davey in Mark Fishing Co. v. United Fishermen & Allied Workers' Union, [1972] 3 W.W.R. 641, at 645-46, 24 D.L.R. (3d) 585, at 591-92 (B.C.C.A. 1972) who added: "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found, and the right is exercised." *Id.* at 646, 24 D.L.R. (3d) at 592.

[144] Text of judgment, *supra* note 139, at 10.

[145] *See supra* note 115 and accompanying text.

[146] The judgment elaborated:

> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.

Supra note 139, at 12. Earlier in the opinion (*supra* note 139, at 9), Mr. Justice Martland framed his reasoning by quoting with approval a passage from the joint opinion written by Chief Justice Laskin (Judson and Spence JJ. joining in dissent) in Interprovincial Co-Operatives Ltd. v. The Queen, [1976] 1 S.C.R. 477, at 495, 53 D.L.R. (3d) 321, at 335 (1975) which, not in itself subject to disagreement by the majority, reads in part:

> Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.

fisheries."[147] Accordingly, subsection 33(3) was found to be *ultra vires* the Federal Parliament.

The second case, *Northwest Falling Contractors Ltd. v. The Queen*,[148] brought into question the constitutionality of neighbouring subsection 33(2) which dealt with the prohibition of "deleterious substances" in waters frequented by fish.[149] The evidence was highly prejudicial to the accused, showing the company responsible for a sizable oil slick resulting from tank leakage into a baymouth off the British Columbia coast.[150] Nevertheless, an order of prohibition was sought prior to plea, alleging the unconstitutionality of subsection (2) on the ground that it was not legislation in relation to fisheries pursuant to section 91(12) of the B.N.A. Act, but only legislation in relation to the environment generally and therefore a matter of "Property and Civil Rights", properly excluded from federal jurisdiction.[151] Neither the British Columbia Supreme Court nor the Court of Appeal acceded to the argument, and both courts denied the order. After due consideration, the Supreme Court of Canada came to hold a similar view.

Again, Mr. Justice Martland wrote the opinion for the unanimous Court. Argument was heard contemporaneously with *Fowler*[152] and, on review of the same authorities applied to that case, the Court found no problem in deciding that the impugned subsection was properly aimed at the "Protection and Preservation of Fisheries" pursuant to section 91(12) of the B.N.A. Act.[153] The learned Justice distinguished the subsection from the one scrutinized in *Fowler* as follows:

> Unlike subsection (2), subsection (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. . . .
> In my opinion, subsection 33(2) was *intra vires* of the Parliament of Canada to enact. The definition of "deleterious substance" ensures that the scope of subsection 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.[154]

The relevant distinction explanatory of the different results in these

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[147] *Supra* note 139, at 12.

[148] (S.C.C., July 18, 1980).

[149] Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), which reads:

> Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Subsection (4) of the Fisheries Act allows for exceptions to the rule pursuant to duly authorized regulations of the Governor in Council controlling the disposal of certain wastes.

[150] Text of judgment, *supra* note 148, at 4-5.

[151] *Id.* at 5.

[152] The Court heard argument on *Fowler* on Dec. 4 and 5, 1979 and *Northwest Falling Contractors* on Dec. 5, 1979.

[153] Text of judgment, *supra* note 148, at 8.

[154] *Id.* at 9.

two cases would seem to be that federal authorities may not legislate as to particular activities — such as logging — which might pose a threat to fisheries, but only as to particular effects, whatever the activity might happen to be. Yet it is possible that factual distinctions can tell us more. In *Fowler*, the regulated activity was inland and dealt with the use of property and deployment of natural resources, clearly provincial ground. *Northwest Falling Contractors*, on the other hand, concerned a threat to the environment in the offshore where, as we have seen, public rights to utilization are paramount and property is no longer the most relevant concept. In short, it is not so much a question of control over the same regime but control over different regimes.

Viewed in this way, the latest jurisprudence may be taken to extend the broad construction of *Wagner* and *Tomasson*[155] which allowed for shared federal and provincial jurisdiction with respect to *inland* fisheries. While nothing in the two latest judgments suggests that the Supreme Court intended to redefine the scope of the federal power over fisheries, the prevalence of the provincial interest involving the inland fishery is made abundantly clear. More clearly, the case law as a whole should point to inland fisheries as an obvious focus for a possible realignment of constitutional responsibilities. And federal authorities appear somewhat amenable to relinquishing control over that part of the field.[156] Yet, with equal clarity, the precedents demonstrate convincingly the pervasiveness of federal jurisdiction in the coastal zone and on the open sea. In this context I will be arguing that the existing situation is also the appropriate one.

C. *Extenuating Circumstances on Proprietary Rights*

The foregoing analysis of the constitutional framework for fisheries under the B.N.A. Act offers little if any basis for a provincial claim to jurisdiction over the tidal or coastal zone — the only area that really counts for the province of Newfoundland. But with respect to possibly available claims in law, one avenue remains to be explored. In this respect it does prove helpful to consider the province's related claim to exclusive ownership of the mineral resources beneath the sea bed of the continental shelf.[157]

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[155] *Supra* note 124.

[156] In a statement drafted by the Department of Fisheries and Oceans and tabled by federal authorities at the request of the provinces during negotiations of the Continuing Committee of Ministers on the Constitution, it is stated that "[t]he Federal Government is prepared to discuss constitutional change which would formalize provincial authority to manage inland fisheries". The possibility of transferring authority "on a species basis" (e.g. oysters and clams) in the inter-tidal zone is also suggested by the document. However, it also makes clear that the intention of the federal government to retain jurisdiction over coastal and offshore fisheries management. Notes For A Statement By the Department of Fisheries and Oceans of Canada 1-3 (July, 1980).

[157] *See* GOVERNMENT OF NEWFOUNDLAND AND LABRADOR, DEP'T OF MINES AND

For a brief time it appeared that the province of Newfoundland, along with other maritime provinces, would have its way with offshore minerals when the short-lived federal administration of Joseph Clark purported to give them away late in 1979[158] — notwithstanding the apparent federal victory in the *Offshore Mineral Rights Reference*.[159] Prime Minister Trudeau has made no such promise. Nevertheless, the legal claim of the province of Newfoundland is distinguishable from that

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ENERGY, HERITAGE OF THE SEA . . . OUR CASE ON OFFSHORE MINERAL RIGHTS 11-16 (1978) [hereinafter cited as HERITAGE OF THE SEA]; on the assumption that they are right, the Province has enacted legislation and appropriate regulations for the development and administration of offshore oil. *See* Nfld. Reg. 139/78 (53 Nfld. Gazette, Pt. II, 975); The Petroleum and Natural Gas Act, R. S. Nfld. 1970, c. 294. *See generally* GOVERNMENT OF NEWFOUNDLAND AND LABRADOR, DEP'T OF MINES AND ENERGY, A WHITE PAPER RESPECTING THE ADMINISTRATION AND DISPOSITION OF PETROLEUM BELONGING TO HER MAJESTY IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND (1977).

[158] *See* OFFICE OF THE PRIME MINISTER, PRESS RELEASE (Oct. 3, 1979) containing the exchange of correspondence between Premier Peckford and Prime Minister Clark, dated Aug. 23 and Sept. 14, 1979 respectively, and copies of correspondence to similar effect with the premiers of British Columbia, Nova Scotia and the other provinces. The Prime Minister endorsed four principles to serve as the basis for an agreement confirming provincial ownership of the mineral resources lying in the sea bed continental shelf. These principles were contained in an Annex to the Prime Minister's letter of Sept. 14 as follows:

> (1) The Province of Newfoundland should own the mineral resources of the continental margin off its coast insofar as Canada is entitled to exercise sovereign rights over these resources in accordance with international law. Such ownership should be, to the extent possible, of the same nature as if these resources were located within the boundaries of the Province. The legislative jurisdiction of the Province should, to the extent possible, be the same as for those resources within the boundaries of the Province.
>
> (2) Such ownership of and legislative jurisdiction over offshore resources by Newfoundland will be consistent with and subject to the division of legislative competence as between Parliament and provincial legislatures under the Constitution of Canada.
>
> (3) Thus the legislative jurisdiction and responsibilities of the Government of Canada in areas such as the protection of the environment, national defence, customs and excise, shipping and navigation, external affairs, the management of international and interprovincial trade and pipelines, will continue.
>
> (4) The above principles will be further confirmed and implemented by the signing of an agreement between the Government of Canada and the Government of Newfoundland and by appropriate legislative action and constitutional change.

The Province had previously rejected a federal compromise agreed to by other maritime provinces in 1977 which avoided the constitutional issue and proposed a sharing of oil revenues (75% to the provinces and 25% to the Dominion) in the offshore. *See* OFFICIAL MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL GOVERNMENT AND THE MARITIME PROVINCES (Feb. 1, 1977); Harrison, *The Offshore Mineral Resources Agreement in the Maritime Provinces*, 4 DALHOUSIE L.J. 245 (1978). Since that time, however, the MEMORANDUM has come to be regarded in provincial circles as more than likely a "dead letter". (Correspondence from Executive Council Office, Policy Board, Government of Nova Scotia to the author, 7 Mar. 1980).

[159] *Supra* note 106.

of the other provinces. The legal ramifications have been elaborated with some thoroughness elsewhere[160] and need not be canvassed here in any detail.

Briefly, the first component of the Newfoundland claim asserts that the English common law recognized long ago the sovereign rights of the Crown extending to the continental shelf underlying the territorial sea and beyond.[161] Secondly, even if this right somehow did not accrue under the common law, it is argued that the province acquired it through antecedent dominion status and through recognition in public international law of the right of sovereignty over the resources of the adjacent shelf prior to Newfoundland joining the Union in 1949.[162] The third Term of Union explicitly provided that Newfoundland was to become an equal partner in Confederation with the other provinces,[163] so whatever property the province as sovereign possessed at the time must have been retained.[164] On the other hand, as of 1949 the implied existence of the international legal norm remained subject to conflicting authorities;[165]

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[160] *See* Ippolito, *Newfoundland and the Continental Shelf: From Cod to Oil and Gas*, 15 COLUM. J. TRANSNAT'L L. 138 (1976); Kovach, *An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources*, 23 CHITTY'S L.J. 18 (1975); Martin, *Newfoundland's Case on Offshore Minerals*, 7 OTTAWA L. REV. 34 (1975); Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law*, 22 McGILL L.J. 541 (1976); Douglas, *Conflicting Claims to Oil and Natural Gas Resources off the Eastern Coast of Canada*, 18 ALTA. L. REV. 55 (1980).

[161] A strong line of authority supports this view. *See* Attorney General v. Chambers, 4 De G.M. & G. 206, 43 Eng. Rep. 486 (Ch. 1854); Gammell v. Lord Advocate, 3 Macq. 419 (H.L. 1859); Gann v. Free Fishers of Whitstable, 11 H.L.C. 192 (1865); Duchess of Sutherland v. Watson, 6 Sess. Cas. 199 (1868). On the other hand, the adoption by the Supreme Court of Canada of the ratio in Regina v. Keyn, [1876-77] 2 Ex. 63 in the *Reference re* Ownership of Off-Shore Mineral Rights may have completely negated this argument; *supra* note 106, at 801-04, 65 D.L.R. (2d) at 361-64. For a discussion of the conflicting views, *see* G. LA FOREST, *supra* note 64, at 92-96.

[162] By the British North America Act, 1949, 12 & 13 Geo. 6, c. 22, and Schedule thereto comprising the Terms of Union of Newfoundland with Canada, pursuant to Memorandum of Agreement, Dec. 11, 1948. The Province had achieved dominion status pursuant to the Statute of Westminster, 1931, 22 Geo. 5, c. 4; *see* Martin, *supra* note 160, at 39-40.

[163] Par. 3 of the Terms provides:

> The British North America Acts, 1867 to 1946, shall apply to the Province of Newfoundland in the same way and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except insofar as varied by these Terms. . . . "

[164] Par. 2 of the Terms provides: "The Province of Newfoundland shall comprise the same territory as at the date of Union. . . . " Moreover, the 37th term states in addition that

> "[a]ll 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."

[165] Note in support the 1945 Proclamation of President Truman concerning the mineral resources of the continental shelf, *infra* note 208; Petroleum Development Ltd.

moreover, scholars have pointed to ambiguities in Newfoundland's dominion status before Confederation, raising doubts concerning its sovereign capabilities to absorb rights in the shelf[166] even if no doubt surrounded them. Nevertheless, assuming a victory for Newfoundland in a contemplated reference to the Supreme Court of Canada on offshore minerals,[167] a limited extension of proprietary rights in the fishery might be a legal possibility.

The judgment of Viscount Haldane in the *British Columbia Fisheries Reference* stated "[t]he general principle . . . that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum".[168] Then, following the distinction made between proprietary rights of the province limited by the ebb and flow of the tide, and the legislative jurisdiction of the Dominion — rendered absolute in the tidal zone and beyond by the common law concept of the public right to fish — his Lordship remarked:

> It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner.[169]

From this analysis it would follow that provincial ownership in the continental shelf would also entail ownership of the sedentary fisheries of the shelf — species including lobster, scallops, oysters — thereby creating a basis for jurisdiction.

It may seem troublesome that previous decisions of municipal courts in Canada and Great Britain dealing with the public right to fish have

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v. Sheikh of Abu Dhabi, 18 Int'l L.R. 144, at 152-54, 1 INT'L & COMP. L. Q. 247, at 253-55 (Lord Asquith of Bishopstone, Umpire 1951); Hurst, *Whose is the Bed of the Sea?* 4 BRIT. Y.B. INT. L. 34 (1923); Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT. L. 376 (1950). *Contra*, Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 GROTIUS TRANSACTIONS 115 (1950); M. MOUTON, THE CONTINENTAL SHELF 275 (1952).

[166] Following her accession to dominion status, the economic vagaries of the depression forced Newfoundland to surrender government back to the United Kingdom as the island could not meet the public debt. *See* Newfoundland Act, 1933, 24 & 25 Geo. 5, c. 2. Thus "[i]t is questionable whether Newfoundland retained sufficient sovereignty at this point so as to enjoy the inherent rights of coastal states to control offshore resources". Ippolito, *supra* note 160, at 156; Douglas, *supra* note 160, at 63-65. Alternatively, it is argued that under the 7th Term of Union the Constitution of the Dominion was revived prior to entering Confederation and that therefore the Province took any rights it could have acquired over the continental shelf in the interim as a full dominion, rather than those same rights (if in fact they existed at the time) devolving from the British Sovereign to the Crown in right of Canada. *See* Martin, *supra* note 160, at 41-43.

[167] The Province had prepared extensively for a reference to the Supreme Court before an accommodation was reached with the Clark Government. *See* HERITAGE OF THE SEA, *supra* note 157. That reference is now very likely to proceed with the reaccession of a Trudeau administration.

[168] *Supra* note 92, at 167, 15 D.L.R. at 314.

[169] *Id.* at 171, 15 D.L.R. at 317.

rejected the distinction subsequently asserted by Viscount Haldane.[170] A Nova Scotia court interpreted the common law position in the following terms:

> There does not appear to be any distinction, so far as the question of right is involved, between taking swimming fish and shell fish covered by the soil; the right of the public to fish on the sea shore between high and low water mark includes the right to take shell fish.[171]

Similarly a British Columbia court found that "ownership of the soil . . . is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them".[172] But these cases go to a different point — back to the proposition of Magna Carta — that, irrespective of the division of powers in a federal context, the Crown could not interfere with the public right to fish seaward of the limits of the tidal zone. They are not necessarily inconsistent with Viscount Haldane's view of the constitutional limits to be placed on federal authority, where the presence of provincial proprietary rights in the *solum* set the appropriate boundary for their exercise. Of course, this bifurcated reasoning becomes unnecessary when the Crown in right of the Dominion can assert proprietary rights on its own behalf which, at least as against the province of British Columbia, the Supreme Court has said it can.

In summation of the exception to the general rule, Professor La Forest's assessment appears apt. He states: "[P]rovincial proprietary rights over fisheries are not limited to freshwater fisheries but extend to fisheries in tidal waters where the bed is vested in the province. In tidal waters . . . provincial proprietary rights to ordinary fisheries are rather shadowy."[173] It would seem that only proof of title will be conclusive. And where a province has title to the *solum*, the "affixing of engines" thereto — kiddles and weirs for example — be they for fishing or other purposes, falls to provincial jurisdiction since, as the Supreme Court of Canada has subsequently held,[174] the proprietary element is dominant.

Whether or not the province of Newfoundland would want to overcome by force of statute the common law doctrine protecting the public right to fish for sedentary species is unclear. The fact that the province can do so if it chooses has support in public international law.

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[170] *See* Gann v. Free Fishers of Whitstable, 11 H.L.C. 192, 11 E.R. 1305 (1865); Goodman v. Mayor of Saltash, 7 A.C. 633 (H.L. 1882). In Canada, *see* Meisner v. Fanning, 3 N.S.R. 97 (S.C. 1842); Wilson v. Codyre, 27 N.B.R. 320 (C.A. 1888); City of St. John v. Wilson, 2 N.B. Eq. R. 398 (1902).

[171] Donnelly v. Vroom, 40 N.S.R. 585, at 591 (S.C. 1907) (Meagher J.), *aff'd*, 42 N.S.R. 327 (C.A. 1907).

[172] Capital City Canning and Packing Co. v. Anglo-British Columbia Packing Co., 2 W.L.R. 59, at 63, 11 B.C.R. 333, at 339 (S.C. 1905) (Duff J.).

[173] G. LA FOREST, *supra* note 64, at 78.

[174] *Reference re* Waters and Water Powers, [1929] S.C.R. 200, [1929] 2 D.L.R. 481 (Duff J.); *see* W. MCCONNELL, COMMENTARY ON THE BRITISH NORTH AMERICA ACT 202 (1977).

Sedentary fisheries are a legal component of the continental shelf. While their inclusion was debated at length in the International Law Commission,[175] it was confirmed by the 1958 Geneva Convention on the Continental Shelf.[176]

Overall, it remains difficult to see what the province of Newfoundland would gain through asserting this kind of claim. First, the ability to grant exclusive rights would serve only to allow more direct control of fishermen. Also, to take lobster as an example, the jurisdiction of the Dominion to regulate the size and number of lobsters that could be caught[177] and in what times in the year would remain unaffected. Then, more basically, this claim would not reach the free-swimming species of fish[178] that are the major interest of Newfoundland and of primary importance to the provincial economy. In short, the possible extension of jurisdiction would give the province very little if anything that it needs and nothing in the context of the real power to regulate for conservation and management purposes that Premier Peckford says he wants. It is noteworthy, however, that the Newfoundland argument is not one the law might conceivably support. In the circumstances, it seems likely that the public right to fish will remain intact. Premier Peckford has shown no inclination to interfere with it.

D. *Summation*

The law of Canada affords no basis for compelling Ottawa to acquiesce in responding to Premier Peckford's demand for increased provincial jurisdiction over seacoast and tidal fisheries. On the other hand, there is no question that the processing aspects of the fishing industry are matters of property and civil rights properly within the provincial sphere and that there exists a shared jurisdiction over inland fisheries. Fish in the open sea as distinguished from those residing in private lakes and streams cannot be appropriated until they are caught. The fish swim where they please contemptuous of the juridical lines by which habitually territorial humans desire to section portions of their ocean environment. Canadian law recognizes no distinction between the open sea and inland waters for regulatory purposes. The distinction

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[175] It had been originally proposed to have a separate regime for sedentary species, but this separation from non-living resources of the shelf was subsequently dropped. *See* discussion in [1953] 1 YEARBOOK INT. L. COMM'N 135.

[176] Art. 2, para. 4, Apr. 29, 1958 (in force Jun. 10, 1964), U.N. Doc A/CONF 13/L.55, 499 U.N.T.S. 311. *See* Goldie, *Sedentary Fisheries and Article 2(4) of the Convention on the Continental Shelf*, 63 AM. J. INT. L. 86 (1969).

[177] *See* The Queen v. Pierce Fisheries Ltd., [1971] S.C.R. 5, 12 D L R (3d) 591 (1970).

[178] While sedentary species are included under the resources of the continental shelf, *supra* note 85, the Geneva Convention on the Continental Shelf is equally explicit in Art. 3: "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters."

should not be used to exclude provincial jurisdiction in the case of inland waters, in the absence of a proprietary interest. Here our concern is focused on the ocean domain, the law and policy to govern the wealth of marine life it contains, and the constitutional distribution of power within Canadian federalism best suited to govern the seacoast fishery, given the external constraints that are imposed. In this domain the international public law of the oceans also governs; it demands both understanding and an adequate appreciation before the domestic constitutional issue can be properly analysed and decided. More simply, the domestic issue is not merely domestic.

IV. THE INTERNATIONAL REGIME

Extensions of national sovereignty beyond the internationally acknowledged boundaries of the state for whatever purpose have validity in practical terms only insofar as they are recognized by other states. The Canadian fishery, no matter who controls it, depends on maintaining this recognition. In turn, that is determined through the principles of international law and custom applicable to all state claims. For some time, freedom of the seas, the idea that something belongs to all (*res communis*) and therefore can belong to no one (*terra nullius*),[179] has been viewed as basic among the principles. But it was not always so.[180]

The basic freedom of the sea was codified in the 1958 Geneva

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[179] The concept derives from the Roman law. According to one authority,

> [t]he text of the jurist Marcianus [2nd century A.D.], preserved in the Digest of Justinian, is the first formal pronouncement in recorded legal theory on the legal status of the sea and on the right of men to use the sea and its products. It is stated that the sea and its coasts are common to all men.

Fenn, *Justinian and the Freedom of the Sea*, 19 AM. J. INT. L. 716 (1925) (footnote omitted). The Institutes of Gaius had characterized the law of men (*humani juris*), to be distinguished from divine law (*divini juris*), into two categories: public and private. The Digest of Justinian placed the sea into the former of these: *id.* at 720-21. *See generally* C. PHILLIPSON, 2 INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 367 (1911).

[180] The issue had been hotly contested through the 16th and 17th centuries after Portugal and Spain had attempted to divide the oceans between them by the Treaty of Tordesillas in 1494, and the competition escalated to secure and protect the trading routes of far-flung empires. But the ultimate battle between exponents of closed seas (*mare clausum*) and freedom of the seas (*mare liberum*) was one of scholarship between Hugo Grotius, a Dutch author, who put forth the latter view in his MARE LIBERUM (1609) and in DE JURE BELLI AC PACIS (1625), and John Selden, an Englishman wishing to defend *inter alia* earlier British claims to dominion over the English Channel. *See* P. POTTER, FREEDOM OF THE SEAS IN HISTORY, LAW AND POLITICS 57-80 (1924). However, the position of the British government subsquently shifted as the advantages of high seas freedoms for naval powers in particular became clear and the Grotian view has prevailed to the present day. *See generally* T. FULTON, SOVEREIGNTY OF THE SEA (1911). For a convenient summary, *see* the *General Introduction* to L. SOHN, LAW OF THE SEA (3d ed. 1980) (cases and materials in use at the Harvard Law School).

Convention on the High Seas[181] which, alone among the four Conventions emerging from the First Law of the Sea Conference of the United Nations, was regarded as "declaratory of established principles of international law".[182] It provides:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:
> (1) Freedom of navigation;
> (2) Freedom of fishing;[183]
> (3) Freedom to lay submarine cables and pipelines;[184]
> (4) Freedom to fly over the high seas.
> These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.[185]

These four named freedoms, as the wording makes clear, were generally supportable in jurisprudence and in particular rules of international law prior to 1958.[186] Freedom of fishing figured prominently if not decisively in the decision of the International Court of Justice in the *Fisheries Case (United Kingdom v. Norway)*[187] as well as in earlier arbitral jurisprudence.[188] It is clear that Canada is bound by these principles[189] though not by the document itself since, for reasons that remain obscure, the federal government has declined to ratify the

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[181] Convention on the High Seas, Apr. 29, 1958 (in force Jan. 3, 1963), U.N. Doc. A/CONF. 13/L.53, 450 U.N.T.S. 11.

[182] Convention on the High Seas, *preamble*. The preambles to the other three conventions negotiated at Geneva contain no reference to the provisions adopted as being "declaratory of established principles" or as a codification of "the [existing rules] of international law" pertaining to the agreement but say only that "*The States Parties of this Convention . . . Have agreed* as follows. . . . " *See* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958 (in force Sept. 10, 1964), U.N. Doc. A/CONF. 13/L.52, 516 U.N.T.S. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958 (in force Mar. 20, 1966), U.N. Doc. A/CONF. 13/L.54, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958 (in force Jun. 10, 1964), U.N. Doc. A/CONF. 13/L.55, 499 U.N.T.S 311.

[183] *See also* Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 1.

[184] *See* Convention For Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989, T.S. 380, 1 Bevans 89; the Convention is still in force with forty states party thereto, *see* U.S. DEPT. OF STATE, TREATIES IN FORCE 365 (1978)

[185] *Supra* note 181.

[186] I. BROWNLIE, *supra* note 2, at 235.

[187] Fisheries Case (United Kingdom v. Norway), [1951] I.C.J.R. 115, 18 Int'l L.R. 86; *see infra* note 215 and accompanying text.

[188] Brownlie refers to the *Behring Sea Fisheries* arbitrations in 1893 and 1902, *supra* note 2, at 236; *see also* D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 205-11 (1965).

[189] It is recognized that generalizable provisions in bilateral and multilateral treaties can either generate or be declarative of customary rules of law binding on all

instrument so as to render the latter formally binding.[190] Notwithstanding the curious omission, Canadian government officials have acceded to the independently binding effect of generalizable norms of customary international law contained in the Conventions.[191]

The freedom to fish remains an integral component of the wider principle, analogous to the public right protected under the common law. Yet, in response to the pressing needs of most countries for more food in a shrinking world and to the comparatively recent discovery that the economics of scarcity do apply to the resources of the ocean,[192] a consensus among nations has emerged primarily in the post World War II period, supportive of a more restricted freedom — preferred access to fisheries complementary to the perceived needs of nationals off their own coasts.

The notion of preferred access has developed hand in hand with extensions of national sovereignty into the littoral sea, a development canvassed briefly in the following section. Canada has played an influential role in the modern era of this movement. It is one where a delicate balance between national initiative and international consensus can be viewed as the controlling element for progress.[193] In the tracing of these developments, it will become apparent that Canadian success in the

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states. *See* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 104-66 (1971); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT. L. 275 (1965); H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 59-60 (1972); M. MCDOUGAL AND ASSOCS., STUDIES IN WORLD PUBLIC ORDER 15 (1960).

[190] Of the four Conventions Canada signed at Geneva in 1958, only the Convention on the Continental Shelf was ratified, after considerable delay. For a listing of the ratifications to the four Conventions, *see* UNITED NATIONS, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS, LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS AT 31 DECEMBER 1979, at 565-86 (1980), U.N. Doc. ST./LEG./SER. D/13. *See also* Johnson, *Canadian Foreign Policy and Fisheries*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 52, at 64 (B. Johnson & M. Zacher eds. 1977).

[191] In 1964, the Undersecretary of State for External Affairs acknowledged the customary force of the Geneva Convention on the Continental Shelf: "[It] cannot bind any country not a party to it. However, it is generally considered that the Convention formulates and develops rules which are applicable in international law. . . ." Statement reprinted in Gotlieb (ed.), *Canadian Practice in International Law during 1964 as reflected in correspondence and statements of the Department of External Affairs*, 3 CAN. YEARBOOK INT. L. 315, at 325 (1965). By analogy this statement must apply to the Convention on the High Seas since it alone was declaratory of established principles. *Supra* note 182 and accompanying text.

[192] *See* UNITED NATIONS, PAPERS PRESENTED AT THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA (Rome, Apr. 18 — May 10, 1955) (1956), U.N. Doc. A/CONF. 10/7; WHO PROTECTS THE OCEAN (J.L. Hargrove ed. 1975); D. JOHNSTON, *supra* note 188.

[193] For the most part, it has been pointed out, there is no alternative to seeking the cooperation of one's neighbours in fisheries management outside zones of national jurisdiction. *See* A. KOERS, THE ENFORCEMENT OF INTERNATIONAL FISHERIES AGREEMENTS ON THE HIGH SEAS 2 (Univ. of Rhode Island Law of the Sea Institute, occasional paper no. 6, 1970).

area has been due to its ability to act decisively as a unitary actor in the international forum. To the extent that securing the Canadian fishery against external encroachments continues as a function of the ability to speak with one voice on global and transnational fisheries issues, maintaining that voice remains fundamental to that interest. Thus, the international legal aspects of Canadian fishing concerns assume primary importance within the internal constitutional debate when it is a question of which level of government can best represent them.

A. *Evolvement of Zones of Exclusive Jurisdiction*

The first qualification of freedom of the seas following the demise of competing proprietary concepts was the notion of effective occupation over a narrow band of the littoral sea proposed by Bynkershoek in 1702. His famous maxim, *Potestatem terrae finiri, ubi finitur armorum vis*, became known as the "cannon-shot rule"[194] which, at the suggestion of the Italian jurist Galiani in 1782,[195] subsequently became theoretically fixed at a distance of one marine league (three nautical miles). With respect to what was variously described as the littoral sea, marginal waters and maritime belt, nations exercised sovereign rights for various purposes including defence, customs and excise, and fisheries. And while the three mile limit was generally accepted as appropriate by the major maritime powers of the nineteenth century, it tended to go beyond that in particular contexts.[196]

No order was imposed on the disjointed practice of states until the Hague Conference for the Codification of International Law held in 1930.[197] There, the concept of the littoral sea as a "territorial sea" over which the coastal state was to enjoy essentially complete sovereignty (save the right of innocent passage exercisable by merchant shipping) emerged in its tentative form, eventually to be confirmed by the Geneva Convention on the Territorial Sea in 1958.[198] However, attempts in both instances to adopt a clear rule on the breadth of the territorial sea did not meet with similar success.

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[194] Van Bynkershoek, *De Dominio Maris Dissertatio*, translated and reproduced in CLASSICS OF INTERNATIONAL LAW 44 (J. B. Scott ed. 1923): "Wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry; for that is as far as we seem to have both command and possession."

[195] DE DOVERI DE PRINCIPI NEUTRALI (1782); for discussion of the rule's evolvement, *see* M. MOUTON, *supra* note 165, at 193-200.

[196] *See* S. SWARZTAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS 95-103 (1972).

[197] *See* League of Nations, 3 Acts of the Conference for the Codification of International Law, Minutes of the Second Committee, Territorial Waters, Doc. C. 351(b). M. 145(b). 1930. V. in LEAGUE OF NATIONS, 4 CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930] 1203 (S. Rosenne ed. 1975).

[198] Art. 1 of the Convention on the Territorial Sea and the Contiguous Zone reads:

1. The sovereignty of a State extends, beyond its land territory and its

At the Hague Conference, the cataloguing of state practice[199] revealed a general consensus favouring the three mile limit for the territorial sea but also marked resistance to foregoing the possibility of wider contiguous zones of specialized jurisdiction in matters of particular interest to the coastal state.[200] It is a safe proposition that, even in the interwar period, fisheries concerns loomed large within that category.[201]

The notion of a contiguous zone abutting the territorial sea to extend the littoral jurisdiction of the state beyond the territorial sea in respect of more limited purposes was an institution born of the necessity to reconcile the interests of coastal states with those of the great maritime powers and their insistence on minimizing encroachments on high seas freedoms. Hence, it appeared as a pragmatic response to "the need to temper what would otherwise have been a rigid dichotomy between the freedom of the high seas and sovereignty over the territorial sea".[202] But, given the functional nature of the concept in addition to the inconsistent practice of states, the problem of delimitation was not readily reducible to a single norm.[203] The Hague Codification Conference failed to

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internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

Arts. 14 to 23 inclusive set forth the nature of the right to innocent passage generally (Arts. 14-17) and with respect to particular classes of vessels: merchant ships (Arts. 18-20); government ships other than warships (Arts. 21-22); warships (Art. 23). *See* L. OPPENHEIM, 1 INTERNATIONAL LAW 487 (8th ed. H. Lauterpacht 1955); G. GIDEL, 3 LE DROIT INTERNATIONAL PUBLIC DE LA MER 181 (1936) asserting that states have sovereignty over the territorial sea. For a more qualified view, *see* C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 89-91 (6th ed. 1967).

[199] *See* League of Nations, Report of the Committee of Experts for the Progressive Codification of International Law, L.N. Doc. C. 196. M. 70. 1927. V, at 33 *et seq*.

[200] I. BROWNLIE, *supra* note 2, at 193-94.

[201] For an account of early attempts to protect fisheries beyond the zone of national jurisdiction, *see* J. TOMOSEVICH, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES (1943).

[202] W. EXTAVOUR, THE EXCLUSIVE ECONOMIC ZONE 30 (1979); Professors McDougal and Burke have commented that this dichotomy

> is far from adequate to describe the complex distribution among states of inclusive and exclusive competences over the use of the oceans. It is entirely possible, as indeed is demonstrated in historic and continuing practice, both to accord particular states an occasional exclusive competence to regulate specified activities in contiguous waters which is adequate to protect their unique interests (interests which are generally regarded as common to all states similarly situated) and at the same time, to protect the inclusive interests, in both use and competence, of all other States in these same waters.

M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 610-11 (1962).

[203] The Comment to Art. 20 (Contiguous Zone) in The Harvard Research Draft Articles of 1929 prepared for the Hague Codification Conference in the following year states:

> It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles as the powers described in the article are not dependent on sovereignty over the *locus* and are not limited to a geographical area which

formalize the concept of an intermediate zone even in principle, partly because of the inability to agree on a uniform breadth for the territorial sea from which the contiguous zone would be measured, and partly because, given that uncertainty, it was difficult to predict what the content of the institution should encompass and what specific rights should be protected.[204] Nevertheless, the fact remained that the situation could not be left hanging without individual state actors feeling compelled to take matters into their own hands.

Individual attempts to assert jurisdiction over fisheries resources for their management and conservation in the national interest paralleled similar claims to jurisdiction over the continental shelf and the mineral resources they contained underlying the littoral sea.[205] The seminal Truman Proclamations of 1945[206] addressed both issues, although the trend-setting claim by the United States to a limited sovereignty over the potential resource wealth of the continental shelf[207] has tended to eclipse the significance of the companion claim to regulate fisheries.[208] This second Proclamation was framed in explicitly conservationist terms although there could be little doubt as to domestic priorities.[209] It is instructive to quote the policy formulation at length:

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United Sates and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such

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> can be thus defined. The distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral State and by the connection between the interests of its territory and the acts performed on the high sea.

Harvard Law School, *Research in International Law Part III, The Law of Territorial Waters*, 23 AM. J. INT. L. (SPEC. SUPP.) 241, at 334 (1929).

[204] *See* W. EXTAVOUR, *supra* note 202, at 32-40.

[205] For a survey of state practice, *see* M. WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW 752 (1965).

[206] *See* 13 DEPT. STATE BULL. 484-87 (1945).

[207] Presidential Proclamation No. 2667 (Sept. 28, 1945), *id.* at 485.

[208] Presidential Proclamation No. 2668 (Sept. 28, 1945), *id.* at 486.

[209] *See* Presidential Proclamation No. 2668, *preamble*, *id.*

> conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected. . . . [210]

The Proclamation emphasized the two themes of unilateral action and international cooperation. It reflected a realization that while initiatives could be taken, the constraints of the international environment would always have to be dealt with and accommodated once the decision had been taken to go beyond the commonly accepted reaches of sovereign boundaries.

It is noteworthy that an executive order supplemented each Proclamation to provide for implementation of the policies set out,[211] but there were important differences in the scope of the two claims. The order underpinning the policy with respect to the continental shelf explicitly reserved jurisdiction and control in the Secretary of the Interior over the said resources, pending the enactment of specific legislation.[212] While the claimed jurisdiction fell short of planting the flag, that distance was slight.[213] In contrast, the order accompanying the policy on fisheries conservation gave only recommendatory authority to the Secretary of the Interior for the establishment of appropriate zones of regulation. Clearly the nature of this resource necessitated a more flexible (and tentative) approach than did the immobile wealth of the continental shelf.

A number of nations were quick to follow the example offered by the United States. But many did not have the same concern for preserving high seas freedoms as did President Truman's advisors, and the claims of several Latin American governments in particular tended to be more ambitious.[214] More modest in scope but perhaps of greater overall significance was the decision of the International Court of Justice in 1951 recognizing the claim of Norway to employ straight baselines along the outer edge of the island fringe or "skjaergaard" lying along her coast from which the territorial sea could be measured, thus excluding foreign fishing fleets from the area.[215] Apart from the special features of the Norwegian coast, the dependence of Norway's populace on the inshore fishery formed a key element in the case.

At Geneva in 1958, the principle of a contiguous zone was finally accepted and entrenched in the Convention on the Territorial Sea and the

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[210] *Id.*

[211] *See* Exec. Orders 9633, 9634 (1945), *id.*

[212] *See* Outer Continental Shelf Lands Act, 43 U.S.C. §1331 (1970).

[213] The Government of the United States has continually insisted on maintaining the distinction between exclusive rights (over the resources of the continental shelf) and ownership. *See* United States v. Ray, 423 F.2d 16 (5th Cir. 1970).

[214] *E.g.*, Argentina (1946); Chile (1947); Guatemala (1949); Honduras (1950); Mexico (1945); Nicaragua (1950); Panama (1946); Peru (1947). *See* M. WHITEMAN, *supra* note 205. Chile, for example, claimed an exclusive fishing zone extending 200 nautical miles off its coast. *See* Presidential Declaration of June 23, 1947, El Mercurio (Santiago de Chile), translated and printed in 2 INT'L L.Q. 135 (1948); reprinted in M. WHITEMAN, *supra* note 205, at 794.

[215] Fisheries Case (United Kingdom v. Norway), *supra* note 187.

Contiguous Zone,[216] but the question of delimitation of these acknowledged zones of jurisdiction failed to gain approval. Thus Article 24 of the Convention provided, *inter alia*:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured. . . .[217]

Apart from recognition of the basic principles, the Convention on the Territorial Sea was most notable for its recognition of a system of "straight baselines" drawn to enclose a coastline that is deeply indented or fringed by islands from which the breadth of the territorial sea and contiguous zone could be measured.[218] The adoption of this method was of particular importance to countries such as Canada[219] given the nature of her coastline and a number of "historic" bays susceptible to possible closure.[220] The traditional rule of following the natural sinuosities of the coastline[221] was far less satisfactory in view of the increased breadth of jurisdiction to be had under the new approach.

Agreement had been reached at Geneva that the contiguous zone should not extend farther than twelve nautical miles beyond the baselines from which the territorial sea was to be measured, but the issue of where the one terminated and the other began remained unresolved. Moreover, Article 24 of the Convention on the Territorial Sea and Contiguous Zone exhibited the glaring omission of not dealing with the question of an exclusive fishing zone among the enumerated matters to which the functional jurisdiction of the contiguous zone could be applied.[222] It was hoped that the second Geneva Conference on the Law of the Sea convened in 1960 would resolve these two outstanding issues.[223]

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[216] U.N. Doc. A/CONF. 13/L.52, 516 U.N.T.S. 205.

[217] The third and last paragraph outlines a procedure of delimitation between States adjacent to or opposite one another.

[218] Convention on the Territorial Sea and the Contiguous Zone, Arts. 4 to 7.

[219] *See International Conference on the Law of the Sea*, 10 EXTERNAL AFFAIRS 21, 86, at 89 (1958); Yogis, *Canadian Fisheries and International Law*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 398, at 405 (Macdonald, Morris, & Johnston eds. 1974).

[220] *E.g.*, Passamaquody Bay, the Bay of Fundy, Gulf of St Lawrence, Conception Bay, Hudson Bay. *See* G. ALEXANDROWICZ & A. DE MESTRAL, 2 OCEAN LAW: A CANADIAN PERSPECTIVE 56-181 (1976). 1970 legislation established "closing lines" to effectively seal off certain of the historically claimed areas. *See infra* note 259 and accompanying text.

[221] Convention on the Territorial Sea and the Contiguous Zone, Art. 3.

[222] As one recent commentator has put it, "Article 24 is remarkable for its silence on the question of jurisdiction over fisheries in the contiguous zone." W. EXTAVOUR, *supra* note 202, at 41; for further discussion, *see id.* at 42-44.

[223] *See generally* United Nations, Official Records of the Second United Nations Conference on the Law of the Sea (Mar. 17 — Apr. 26, 1960), Committee of the Whole, Verbatim Records of the General Debate (1962), U.N. Doc. A/CONF. 19/9.

Canada had proposed the idea of a three mile territorial sea and a nine mile contiguous fishing zone before the 1956 session of the United Nations General Assembly,[224] after which a formal submission was advocated at Geneva.[225] This proposal was subsequently withdrawn in favour of a joint proposal with India and Mexico recommending a six mile territorial sea together with a six mile contiguous fishing zone.[226] Canada reformulated the six plus six proposal[227] in line with the "baselines" concept and submitted it to the 1960 Conference.[228] The American and Canadian delegations subsequently joined to advocate the same formula in conjunction with a ten year phase-out period for foreign fishing interests in the outer six miles of the zone.[229] In final plenary meeting, the joint proposal missed by one vote the required two thirds majority approval of the Conference.[230] Without the achievement of a formal agreement, each state was left to go its own way.

Since 1960, the practice of an ever increasing number of states has confirmed far more expansive encroachments on high seas freedoms, including the freedom to fish, than those which eluded the Geneva attempt at international consensus.[231] The Third United Nations Conference on the Law of the Sea (UNCLOS III) which began in 1974 can be characterized as both a product of and a catalyst for the forces of change that practice illustrates.[232] After more than six years of hard negotiation

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[224] *See* Gotlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law*, 2 CAN. YEARBOOK INT. L. 55, at 65 (1964).

[225] *See* U.N. Doc. A/CONF. 13/C. 1/L. 77/REV. 1 in United Nations Conference on the Law of the Sea (Feb. 24-Apr. 27, 1958), 3 Official Records, First Committee (Territorial Sea and Contiguous Zone), Summary Records 232, U.N. Doc. A/CONF. 13/39.

[226] U.N. Doc. A/CONF. 13/C. 1/L. 77/REV. 2, *id.*; a third revision employed the original wording of the first proposal but with the six mile configuration for the territorial sea: U.N. Doc. A/CONF. 13/C. 1/L. 77/REV. 3, *id.*

[227] *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, STATEMENTS AND SPEECHES, No. 58/14, at 5 (1959).

[228] U.N. Doc. A/CONF. 19/C. 1/L. 4 in United Nations, Official Records of the Second United Nations Conference on the Law of the Sea (Mar. 17 — Apr. 26, 1960) Summary Records 167 (1960), U.N. Doc. A/CONF. 19/8. *See also* the American proposal, U.N. Doc. A/CONF. 19/C. 1/L. 3, *id.* at 166.

[229] U.N. Doc. A/CONF. 19/C. 1/L. 10, *id.* at 169

[230] *Id.* at 170. For a convenient summary from a Canadian point of view, *see* Johnson, *supra* note 190, at 61-64; Gotlieb, *supra* note 224, at 64-71.

[231] The claim of Iceland to a 50 mile fishery zone, endorsed in part by the International Court of Justice, was indicative of this trend: Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1974] I.C.J. R. 3, 55 Int'l L.R. 149. *See* W. EXTAVOUR, *supra* note 202, at 127-67; REGIONALIZATION OF THE LAW OF THE SEA, (D.M. Johnson ed. 1978).

[232] For a running account of the progress of the Conference, *see* Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT. L. 1 (1974); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT. L. 1 (1975); Stevenson & Oxman, *The 1975 Geneva Session*, 69 AM. J. INT. L. 763 (1975); Oxman, *The 1976 New York Sessions*, 71 AM. J. INT. L. 247 (1977); Oxman, *The 1977 New York Session*, 72 AM. J. INT. L. 57 (1978); Oxman, *The Third United Nations Conference on the Law of the Sea:*

UNCLOS III is apparently on the brink of achieving a comprehensive treaty.[233] For present purposes, it will suffice to say that the Informal Composite Negotiating Text (ICNT), constituting the latest draft version of the proposed treaty,[234] upholds a firm consensus on a twelve mile territorial sea[235] and on coastal State jurisdiction over fisheries within an exclusive economic zone (EEZ)[236] measured a distance of 200 nautical miles from common baselines.[237] The coastal state is to have under the ICNT, *inter alia*,

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. . . .[238]

The long and frustrating debate over a twelve mile contiguous zone now, in retrospect, appears trivial when compared to the apparently awesome victory of coastal state power in the emerging new legal order for the oceans. To the more cynical observer, even UNCLOS III may seem trivial when viewed as little more than a rubber stamp for what individual nations have already seen fit to do on their own. A casual perusal of the ICNT, however, should discredit such an appraisal; yet, even acceding to the cynical view, the individual state actor is confronted with the necessity of a minimum of international recognition for the claimed wealth to be enjoyed. Regulation and enforcement pose enough difficulties even *after* everyone has agreed to abide by the rules. Thus, however we may choose to characterize the nature of the appropriate international regime or its derivation, the fact remains that in the nature of things one is required. And once it is established, the accepted common ground must be maintained and observed.

B. *Canadian Practice on the Fishing Zone Concept*

Prior to World War II, the Canadian position on a territorial sea was

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The Seventh Session, 73 AM. J. INT. L. 1 (1979); Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session*, 74 AM. J. INT. L. 1 (1980).

[233] The final round of plenary negotiations to resolve the few remaining points of difference (pre-eminently concerning the regime of the seabed beyond 200 miles) is scheduled for New York in the summer of 1980; the treaty is likely to be opened for signature at Caracas early in 1981.

[234] United Nations Third Conference on the Law of the Sea (9th sess., Mar. 3 — Apr. 4, 1980): Informal Composite Negotiating Text/Revision 2, U.N. Doc. A/CONF. 62/WP. 10/REV. 2 (Apr. 11, 1980) [hereinafter cited as ICNT].

[235] ICNT, Arts. 2, 3.

[236] On the growth of the concept of the exclusive economic zone embracing fisheries, *see* Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT. L. 494 (1977); Nelson, *The Patrimonial Sea*, 22 INT. & COMP. L. Q. 668 (1973); W. EXTAVOUR, *supra* note 202, at 171.

[237] ICNT, Arts. 55-59.

[238] ICNT, Art. 56(1)(a).

consistent with the British maritime view of a three mile maximum. In the post-1945 era, however, a variety of pressures were brought to bear influencing the Canadian Government to embark upon a course based on coastal rather than maritime interests.[239] The inadequacies of coastal state jurisdiction limited to three miles articulated in the Truman Proclamations[240] were further emphasized by an increasing number of unilateral claims to a twelve mile territorial sea and a smaller number of claims asserting jurisdiction just over fisheries.[241] These trends, together with recognition of an escalating threat in the form of greatly increased fishing efforts close to home by foreign high seas fleets, prompted a growing concern that Canadian fishing interests could not be made secure without an appropriate regulatory framework, either international or domestic in scope, for management and conservation of the fishery beyond three miles.

Canada was a signatory to the International Convention for the Northwest Atlantic Fisheries in 1949[242] which had established an International Commission (ICNAF) for scientific research into and management of fisheries in the region. But the Commission lacked teeth for enforcement purposes and depended on the voluntary cooperation of its membership to ensure compliance with Commission proposals.[243] This arrangement offered little solid protection for Canada and prompted the Canadian Government to append in its Instrument of Ratification to the Convention an explicit reservation of domestic legislative discretion to make alterations with respect to the limits of Canada's jurisdictional authority over the territorial sea and fisheries.[244] Fortunately, better protection for the west coast fisheries had been secured through binding treaties of a more concrete nature, pre-eminently the International North Pacific Fisheries Convention[245] which established a tri-lateral regime between Canada, the United States and Japan.

The subsequent decision of the World Court in the *Fisheries Case (United Kingdom v. Norway)*[246] endorsed a view in keeping with

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[239] *See* Gotlieb, *supra* note 224, at 56-64.

[240] *See supra* notes 206-13 and accompanying text.

[241] Twelve mile territorial seas had been proclaimed by Panama (1951), Ethiopia (1953), Libya (1954), Venezuela (1956), Cambodia and Indonesia (1957), United Arab Republic and Panama (1958); fishing limits of 10 miles were asserted by Yugoslavia in 1950 and of 12 miles by Iceland and Thailand in 1958. Gotlieb, *supra* note 224, at 59.

[242] Feb. 8, 1949, in force Jul. 3, 1950, [1950] Can. T.S. No. 10.

[243] For succinct discussion of the framework of ICNAF, *see* Yogis, *supra* note 219, at 400-02.

[244] The Canadian reservation reads: "That ratification by Canada of the Convention extends to Newfoundland and that any claims Canada may have in regard to the limits of territorial waters or to the jurisdiction over fisheries, particularly as a result of the entry of Newfoundland into Confederation, will not be prejudiced." [1950] Can. T.S. No. 10 (addendum).

[245] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, in force Jun. 12, 1953, Canada-Japan-U.S., [1953] Can. T.S. No. 3.

[246] Fisheries Case (United Kingdom v. Norway), *supra* note 187. *See* text accompanying note 215, *supra*.

Canadian concerns. Prime Minister St. Laurent noted analogous characteristics in the Canadian coastline and the historical dependencies on fishing established by practice in the Maritime provinces, and was moved to seek extension of Canadian coastal jurisdiction along similar lines.[247]

The changing international climate, and increasing political pressure from domestic fishing interests[248] induced Canada to campaign on a coastal state platform at Geneva in 1958 and again in 1960. Leading into the second conference, a choice was made to aim for the single functional objective of a contiguous fishing zone of twelve miles in breadth from straight baselines rather than to go after a similarly delimited territorial sea.[249] After the Geneva effort failed in both instances to resolve the delimitation issue, it remained for Canada to decide whether she could afford to remain loyal to an already badly eroded status quo.

An initial effort was made to rally Geneva supporters of the Canadian approach around a more limited multilateral consensus;[250] but when this effort proved unavailing, and additional pressure was brought to bear by representatives of the fishing industry,[251] Canada decided to

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[247] H.C. DEB., 26th Parl., 3rd Sess., at 6702 (July 30, 1956).

[248] *See* submission of United Fishermen and Allied Workers' Union in HOUSE OF COMMONS, STANDING COMMITTEE ON MARINE AND FISHERIES (21st Parl., 6th Sess.) (Evidence of May 28, 1952). The union petition requested *inter alia*:

> (a) the proclamation by Canada in legal form to all countries of the boundaries of our territorial waters on the Pacific coast.
>
> (i) this praclamation [*sic*] to be based on the Norwegian method of establishing base lines from which territorial waters are measured, as approved by the recent decision of the International Court of Justice at The Hague;
>
> (ii) the width of the belt of territorial waters from the base lines to be proclaimed as Canadian waters for purposes of fishery protection to be not less than nine (9) miles (the Mexican limit) or more than the extent of the Continental shelf adjacent to our shores.

Id. at 79.

[249] According to Allan Gotlieb (then Undersecretary of State for External Affairs),

> [t]he Canadian proposal was accordingly based on the assumption that the growing pressure in favour of extending territorial sea limits arose because of the wish of coastal states to acquire jurisdiction over the fisheries resources in adjacent seas. The Canadian approach was immediately seen to be a valuable method for reconciling the position of states opposing an extension of the territorial sea because it would interfere with the freedom of the high seas and those wishing to acquire greater control of their offshore fisheries.

Supra note 224, at 65-66 (footnotes omitted).

[250] *Id.* at 73-74. *See also* H.C. DEB., 24th Parl., 3d Sess., at 4709 (Jun. 9, 1960); H.C. DEB., 25th Parl., 1st Sess., at 1699 (Nov. 16, 1962); H.C. DEB., 25th Parl., 1st Sess., at 3261 (Jan. 30, 1963).

[251] *See* Fisheries Council of Canada, A Brief Concerning Canada's National and Territorial Waters (Ottawa, 28 Jan. 1963) urging before Parliament that the government proceed with unilateral action for the protection of Canadian fisheries. The report further recommended the use of straight baselines to close off areas of special interest to Canadians including the Bay of Fundy and the Gulf of St. Lawrence. Reprinted in CANADA, SENATE, STANDING COMMITTEE ON BANKING AND COMMERCE, PROCEEDINGS, No. 1, 7 May 1964, 40-44 (1964).

go it alone. In June of 1963, Prime Minister Pearson stated before Parliament:

> In the light of the failure of efforts to bring about an agreement on the breadth of the territorial sea and the contiguous fishing zone, the government has decided, after careful deliberation, that the time has come to take firm action to protect Canada's fishing industry. It is well known that foreign fishing operations off Canada's east coast, which have increased enormously over the past five years, are not only depleting our offshore fisheries resources but are posing other problems. There are indications also that Canada's west coast fisheries may soon be threatened. In similar circumstances an increasing number of countries have felt themselves compelled to abandon the three mile fishing limit. All told, more than 40 countries have already extended their territorial limits, and more than 50 countries their fisheries limits beyond three miles.
>
> With these considerations in mind the Canadian government has decided to establish a 12 mile exclusive fisheries zone along the whole of Canada's coastline as of mid-May, 1964, and to implement the straight baseline system at the same time as the basis from which Canada's territorial sea and exclusive fisheries zone shall be measured.[252]

As a result of this policy decision, the Territorial Sea and Fishing Zones Act was proclaimed in force on 23 July 1964.[253] Allowances were to be made for countries enjoying historical rights to fish in the areas affected. These would be phased out by agreement over time.[254] Similarly, treaty obligations giving fishing rights to other countries — notably, the United States and France — would be honoured[255] until agreements could be reached respecting their termination or continuation subject to an appropriate regime for the protection of the fisheries concerned.

Canada took great pains at the outset to emphasize that her chosen course was far from heretical within the practice of states and to respect the acknowledged entitlements of other countries. In fact, these pains proved so extensive that the objectives of the legislation in its original form were never achieved. The stipulated negotiations with affected countries proved inconclusive and the required drawing of straight baselines barely got off the ground. Clearly it was no exaggeration to label the Act "a disasterous flop".[256] This failure has been attributed in part to a conflict between the national interest and "the Pearsonian commitment" to multilateral action which had the effect of blunting the effectiveness of the legislation. Another more pragmatic cause was that Canada failed to think out her position prior to proceeding by not

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[252] H.C. DEB., 26th Parl., 1st Sess., at 621 (Jun. 4, 1963).

[253] S.C. 1964-65, c. 22.

[254] *See* Statement of the Secretary of State for External Affairs, H.C. DEB., 26th Parl., 2d Sess., at 3410-11 (May 20, 1964).

[255] Coastal Fisheries Protection Regulations, amended, P.C. 1964-1112 (98 Can. Gazette, Pt. II, 723) (Order-in-Council under the Coastal Fisheries Protection Act, S.C. 1952-53, c. 15, s. 4), allowing these countries extended rights within the 12 mile zone; *see* Gotlieb, *supra* note 224, at 75-76.

[256] Johnson, *Canadian Foreign Policy and Fisheries*, *supra* note 190, at 66; for discussion of the elements of this failure, *see id.* at 65-67.

estimating correctly the degree of foreign opposition her attempted action would face.[257]

In 1970, the Trudeau administration adopted a stiffer approach. It amended the Territorial Sea and Fishing Zones Act,[258] incorporating much stronger language to unilaterally declare a twelve mile territorial sea replete with fishery closing lines to seal off four additional areas, including the Gulf of St. Lawrence and the Bay of Fundy,[259] reserving them for Canadian fishermen. This legislation was introduced in tandem with the Arctic Waters Pollution Prevention Act;[260] the controversial closing lines were to serve as anti-pollution barriers as well. Corollary amendments to the Canada Shipping Act[261] were designed to regulate all foreign vessels coming within these zones.

Canada again proposed a gradual phasing out of privileges for affected countries in return for recognition of her jurisdictional claims. This time, agreements were forthcoming from several nations where previously no form of compromise could be negotiated.[262] Stiff opposition from the United States was overcome through an agreement to mutually observe reciprocal access notwithstanding the new Canadian regime.[263] By this time the Canadian claim to a twelve mile territorial sea did not appear outrageous when compared to what many other nations had already claimed.[264] Of course, the closing lines were a different matter.

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[257] *Id.* at 67.

[258] *See* An Act to Amend the Territorial Sea and Fishing Zones Act, R.S.C. 1970 (1st Supp.), c. 45.

[259] A line of 97 miles was drawn across Queen Charlotte Sound, of 28 miles across Dixon Entrance; of 61 miles across the mouth of the Bay of Fundy; of 54 miles and 45 miles respectively across Cabot Strait and the Strait of Belle Isle enclosing the Gulf of St. Lawrence. *See* Johnson, *supra* note 190, at 68.

[260] R.S.C. 1970 (1st Supp.), c. 2.

[261] An Act to amend the Canada Shipping Act, S.C. 1971, c. 27 (amending R.S.C. 1970, c. S-9).

[262] *E.g.*, agreements were confirmed by Exchanges of Notes with Norway (Jul 15, 1971, [1971] Can. T.S. No. 27) and with Portugal (Mar. 27, 1972), France (Mar. 27, 1972), Denmark (Mar. 27, 1972), United Kingdom (Mar. 27, 1972) and Spain (Dec 18, 1972); *see* CANADA, DEP'T OF EXTERNAL AFFAIRS, ANNUAL REVIEW 1972, at 73 (1973).

[263] In April 1970, the two countries had agreed, with certain exceptions, to the granting of reciprocal fishing privileges within their existing zones of exclusive jurisdiction. *See* Agreement Between the Government of the United States of America and the Government of Canada on Reciprocal Fishing Privileges in Certain Areas off their Coasts, Apr. 24, 1970, [1970] Can. T.S. No. 11. This Agreement was twice extended by Exchange of Notes (Apr. 21, 1972, [1972] Can. T.S. No. 13 and Apr. 19, 1973, [1973] Can. T.S. No. 16) notwithstanding the new Canadian fishery limits. In 1973, a new agreement responded to the U.S. enactment of a nine-mile fishing zone beyond the Territorial Sea: *see* Agreement Between the Government of Canada and the Government of the United States of America on Reciprocal Fishing Privileges in Certain Areas off their Coasts, Jun. 15, 1973, in force Jun. 16, 1973, [1973] Can. T.S. No 23. This Agreement was also extended by Exchange of Notes (Apr. 24, 1974, [1974] Can T.S. No. 14; Apr. 24, 1975, 26 U.S.T. 554; and, Apr. 22, 1976, [1976] Can. T.S No. 32). *See infra* note 279.

[264] *See supra* note 241 and accompanying text.

As the development of international law escalated rapidly in support of coastal state power after 1970, the Canadian position developed accordingly. It is fair to say that Canadian policies and objectives were not far removed from the cutting edge of these developments. Thus, Canada went ahead to declare a 200 mile exclusive fishing zone effective 1 January 1977,[265] in keeping with majority support for the EEZ concept at UNCLOS III.[266] Prior to the Order in Council taking effect, negotiations had commenced with the foreign fishing nations who again were to be deprived of further privileges. This new list of phasing-out agreements[267] within the 200 mile zone did not prove overly difficult to realize. Most of the nations affected were embarked on a similar course in respect of their own coastal fisheries and were reconciled to the costs of that choice.[268]

C. *Assessment of the Canadian Approach*

The methods chosen by Canada to achieve the jurisdictional control requisite to the protection and maintenance of its coastal fisheries have reflected and continue to reflect an appreciation of international constraints on national objectives. These could only be achieved through policies capable of eliciting the necessary cooperation and agreement of other state actors. They were at least in part shaped by the international legal process as well as being a product of internal concerns. Canadian negotiators have entered this process with goals delimited by a functional analysis of the problem at hand. According to one commentator who has been a leading participant in Canadian international affairs,

> [t]he Canadian approach is not a doctrinaire one based on preconceived notions of traditional international law nor is it a radical or anarchistic approach careless of contributing further to the already chaotic state of the Law of the Sea. The Canadian position has been to analyze the problem and attempt to determine the specific measures needed to resolve the issues. On the multilateral plane, Canada . . . pioneered the functional approach . . . whereby states assert only that amount and that kind of jurisdiction necessary

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[265] *See* Fishing Zones of Canada, P.C. 1977-1 (111 Can. Gazette, Pt. II, 115) (Order-in-Council under the Territorial Sea and Fishing Zones Act, R.S.C. 1970, c. T-7, s. 5(1)) and Foreign Vessel Fishing Regulations, P.C. 1976-3178 (111 Can. Gazette, Pt. II, 68) (Order-in-Council under the Fisheries Act, R.S.C. 1970, c. F-14, s. 34).

[266] *See* p. 299 *supra*.

[267] *See* Agreement Between Canada and Norway on their Mutual Fisheries Relations, Dec. 2, 1975, in force May 11, 1976, [1976] Can. T.S. No. 4; Agreement Between Canada and Poland on Mutual Fisheries Relations, May 14, 1976, [1976] Can. T.S. No. 5; Agreement Between Canada and the Union of Soviet Socialist Republics on their Mutual Fisheries Relations, May 19, 1976, [1976] Can. T.S. No. 6; Agreement Betweeen Canada and Spain on Mutual Fisheries Relations, June 10, 1976, [1976] Can. T.S. No. 7.

[268] The United Kingdom and Norway both declared 200 mile fishing zones on Jan. 1, 1977; the Soviet Union and the United States declared their 200 mile fishing zones in effect as of Mar. 1, 1977. *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, CANADA AND THE LAW OF THE SEA 33 (rev. ed. 1977).

> to meet the particular problem in question. When Canada has acted unilaterally, it has refrained as much as possible from asserting total sovereignty and instead has asserted just that jurisdiction necessary to fulfil the particular functions required.[269]

Thus, for example, the 200 mile fishing zone was one of restricted jurisdiction. A more sweeping economic claim would have exceeded the legitimate bounds of the exercise.

D. *Canadian Treaty Making and Protection of Fisheries*

Canadian responses to problems of fisheries management in the littoral sea and beyond have been historically a matter of coming to terms with foreign interests. The international legal process shaping the law of the sea in which Canada continues to play a prominent role makes that point abundantly clear.

Treaties and international agreements of a less formal nature[270] are the main recourse to secure interests lying beyond the territorially defined reach of state jurisdiction. While extensions of national jurisdiction have reduced this dependence, many threatened branches of the Canadian fishery must huddle under the sometimes shaky umbrella of treaty protections. The first treaty Canada is credited with negotiating, independent of Great Britain, related to the establishment of a regime for the shared exploitation and protection of Pacific halibut stocks.[271] A series of bilateral agreements with the United States since 1923 succeeded in both maintaining and rejuvenating this fishery.[272]

Over time, the preservation of the all-important salmon fishery on both the east and west coasts of Canada has been the subject of a series of bilateral and multilateral agreements, particularly pertaining to the British Columbia fishery.[273] Moreover, the salmon issue has formed the basis for a concerted campaign by Canada to gain recognition in international law of the abstention principle, in order to prevent high seas exploitation prejudicing the asserted entitlements of states of origin who

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[269] Beesley, *The Law of the Sea Conference: Factors Behind Canada's Stance*, [1972] Jul/Aug INT'L PERSPECTIVES 28, at 33. Mr. Beesley is currently the Chief (non-elected) Head of Mission in the Canadian delegation to UNCLOS III.

[270] For a classification of the various legal instruments employed by Canada to effect international agreements, *see* A. GOTLIEB, CANADIAN TREATY-MAKING 43-46, 55-59 (1968).

[271] *See* Treaty Between Canada and the United States of America For Securing the Preservation of the Halibut Fishery of the North Pacific Ocean, Mar. 2, 1923, in force Oct. 21, 1924, CANADA, DEP'T OF EXTERNAL AFFAIRS, TREATIES AND AGREEMENTS AFFECTING CANADA IN FORCE BETWEEN HIS MAJESTY AND THE UNITED STATES OF AMERICA, 1814-1925, 505 (1927).

[272] *E.g.*, Convention for the Preservation of the Halibut Fishery for the Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, in force Oct. 28, 1953, Canada-U.S., [1953] Can. T.S. No. 14. *See also* J. TOMOSEVICH, *supra* note 201, at 143-45; D. JOHNSTON, *supra* 188, at 373-74; Yogis, *supra* note 219, at 400.

[273] *See supra* note 55.

must bear the major cost of maintaining the spawning habitat that ensures survival of the species.[274] Limited recognition of the special interests and preferred status of the state of origin is now reflected in the contemplated United Nations treaty on the law of the sea.[275] Nevertheless, the failure to elicit the necessary cooperation from particular states did bring the Atlantic salmon fishery in New Brunswick and Nova Scotia to the brink of extinction.[276] Its future recovery remains seriously in doubt.

Most recently, reciprocal fishing relations between Canada and the United States have taken a marked turn for the worse. Canadian and American fishermen on both east and west coasts inevitably compete for the same resources. Sometimes the fishing efforts of each country fortunately display different points of emphasis that allow the possibility of trade-offs.[277] Since 1970, a series of annual bilateral agreements[278] has served to preserve a fluctuating status quo notwithstanding extensions of exclusive fisheries jurisdiction by both Ottawa and Washington.[279] Under normal circumstances, the new regimes would have operated to preclude fishermen of either country from continuing traditional fishing efforts off the coasts of their neighbour.

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[274] Canada first pursued the case of special status for anadromous species in the forum of ICNAF and later at UNCLOS III with concrete draft proposals and a lavish publishing campaign to illustrate the breadth of the problem. *E.g.*, a Canadian submission entitled The Special Case of Salmon — the most important anadromous species — U.N. Doc. A/CONF.62/C.2/L.81 (1973); R. HAIG-BROWN AND DEPT. OF THE ENVIRONMENT, FISHERIES AND MARINE SERVICE, THE SALMON: CANADA'S PLEA FOR A THREATENED SPECIES (1974); for an account of developments to 1977, *see* Fairley, *Fisheries Jurisdiction and the Atlantic Salmon: Fact and Law from a Canadian Point of View*, 4 DALHOUSIE L.J. 609, at 619-30 (1978).

[275] *See* ICNT, Art. 66.

[276] *See* Fairley, *supra* note 274, at 609-19; and for a statistical summary of the decline of the Atlantic salmon fishery until the Government closure of the commercial fishery in 1974, *id.*, Appendix I at 645.

[277] *E.g.*, a valuable herring roe industry has been developed by British Columbia fishermen totalling $210 million in sales for 1978. To date this industry has not interested American fishermen. But there is a dispute over albacore tuna which the United States claims a right for her fishermen to exploit even when the highly migratory species ventures within the Canadian zone of jurisdiction (inside 200 miles off the B.C. coast). Canada has not accepted the American position and arrests of American tuna boats occurred in the late summer of 1979. At the same time, United States fishing interests have moved to establish a competitive herring industry on the west coast. The "Tuna Wars" have since given way to a truce to be followed by further negotiations. *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, COMMUNIQUÉ, CANADA-U.S. DISCUSSIONS ON TUNA FISHING OFF THE WEST COAST OF CANADA (No. 66, Sept. 11, 1979). But "[a]ll this sounds ominous to Canadian fishermen, who fear reduced catches if the Americans decide to go into herring in a big way. . . . Each side is under heavy pressure from its fishing interests, which have conflicts among themselves." N.Y. Times, Sept. 16, 1979, at 12, col. 1.

[278] *Supra* note 263.

[279] Canada took the first initiative by declaring a 9 mile fishing zone in 1964, S.C. 1964-65, c. 22, followed in 1970 by a 12 mile territorial sea, R.S.C. 1970 (1st Supp.), c. 45. The United States declared a 9 mile contiguous fishing zone in 1966; *see* Fisheries Zone Contiguous to Territorial Sea of United States, 16 U.S.C.A. §1091 *et seq.*

The utilization of renewable reciprocity agreements averted immediate confrontation on many complicated issues of entitlement raised by the new zones of jurisdiction. Yet the issues themselves persisted. The advent in 1977 of declarations by both countries of 200 mile fishing zones[280] brought matters to a head; the following spring, existing reciprocal privileges again came up for renewal. A provisional agreement by an exchange of notes was entered into by both governments in April, 1978[281] to provide additional breathing space until the end of the year. However, Canada suspended provisional implementation in June when it appeared that American Senate ratification would not be obtained, which would prevent the United States from meeting her obligations under the agreement. The United States followed suit and reciprocal privileges for both countries came to an abrupt end.[282]

Before the "fish war" emerged full-blown, President Carter and Prime Minister Trudeau had respectively appointed special negotiators Lloyd N. Cutler and Ambassador Marcel Cadieux in August, 1977, for the purpose of reaching a comprehensive settlement on the panoply of offshore matters outstanding between the two countries. The Cadieux-Cutler negotiations led to the submission of two joint reports, one in October, 1977 and one in March of 1978. Both reports indicated that a comprehensive agreement had not as yet been reached and the latter recommended terms for continuing interim reciprocal arrangements for the remainder of the year. After reciprocity had dissolved, the mandate of special negotiators Cadieux and Cutler was renewed by Washington and Ottawa in the hope of achieving an overall settlement.[283]

These efforts have come to fruition in the signing on 29 March 1979 of four basic agreements between the United States and Canada — two pertaining to the Atlantic fishery and two relating to the west coast fisheries.[284] The Pacific coast agreements comprise a Protocol to the Halibut Treaty[285] allowing Canadian access to halibut stocks off the coast of Alaska for two years, and an exchange of notes permitting American fishermen access to British Columbia groundfish for a similar period.[286]

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[280] For Canada, *see supra* note 265 and accompanying text. The United States published a similar intention to enact a 200 mile fisheries zone, effective Mar. 1, 1977; *see* Fishery Conservation and Management Act of 1976, 16 U.S.C.A. §1801 *et seq*.

[281] CANADA, DEP'T OF EXTERNAL AFFAIRS, CANADA/U.S.A. MARITIME BOUNDARIES NEGOTIATIONS: A CHRONOLOGY 2 (1979).

[282] Transitional United States Fishing Vessel Licence Exemption Regulations, revocation, P.C. 1978-1833 (112 Can. Gazette, Pt. II, 2710) (Order-in-Council under Coastal Fisheries Protection Act, S.C. 1952-53, c. 15, s. 4).

[283] *Supra* note 281, at 3-4.

[284] *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, COMMUNIQUÉ, SIGNATURE OF THE CANADA/U.S. FISHERIES AND BOUNDARY AGREEMENTS (No. 29, Mar. 29, 1979).

[285] Protocol Amending the Convention Between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Mar. 29, 1979.

[286] Canadian Ambassador to the United States, Peter M. Towe, to Secretary of State Cyrus Vance, Mar. 29, 1979; Secretary of State Cyrus Vance to the Canadian Ambassador to the United States, Mar. 29, 1979.

The major agreements, however, were those relating to sharing and management of Atlantic coast stocks and a proposed submission of the Gulf of Maine boundary delimitation dispute to binding third party adjudication or, in the alternative, to arbitration.[287]

The East Coast Fisheries Resources Agreement[288] is a lengthy document providing for comprehensive management and specific allocation of particular fish stocks[289] in the Georges Bank area and elsewhere. Of special importance for the Nova Scotia fishery, Canada is to receive 73.35 per cent of the total allowable catch for scallops in the extensive scallop beds of Georges Bank.[290] The Agreement further provides for an East Coast Fisheries Commission consisting of equally represented delegations from both countries to supervise the fishery in accordance with procedures also set out.[291] Under Chapter II of the Agreement, any disputes arising between the state parties in the Commission can be referred to the binding decision of a standing single arbitrator appointed by the parties for a specified term.[292] The agreement specifies that it is to remain in force until terminated by further agreement of the parties.[293]

All these provisions have no force or effect until the treaty can be ratified in accordance with the constitutional requirements of both countries[294] and, unfortunately, ratification proceedings have bogged down terribly in the United States Senate. Canadian officials doubt ratification will occur until after the 1980 American presidential election.[295] Even if the treaty does come into force, however, the permanence of the Agreement is tied to the resolution of the maritime boundary delimitation of Georges Bank.[296] The treaty and agreements referring that issue to adjudiciation by a Special Chamber of the International Court of Justice or a separate arbitral tribunal[297] also must be ratified before the case can be dealt with by whoever will be ultimately asked to hear it.

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[287] *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, COMMUNIQUÉ, JOINT STATEMENT ON ATLANTIC COAST FISHERIES AND BOUNDARY AGREEMENTS (No. 15, Feb. 14, 1979).

[288] Agreement Between the Government of Canada and the Government of the United States of America on East Coast Fishery Resources, Mar. 29, 1979.

[289] *Id.* Annexes A-D.

[290] *Id.* Annex B, para. 7(a).

[291] *Id.* Art. 2.

[292] *Id.* Arts. 18-19. In the event the Parties cannot agree on the renewal of an appointment, the task must be referred to the President of the International Court of Justice; Art. 18, para. 7.

[293] *Id.* Art. 25, para. 2.

[294] *Id.* Art. 25, para. 1.

[295] Interview with an official of the Dept. of External Affairs (Maritime Boundaries Section), Ottawa, Dec. 20, 1979.

[296] *Supra* note 288, Art. 25, para. 3.

[297] Treaty Between the Government of Canada and the Government of the United States of America to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, in COMMUNIQUÉ, SIGNATURE OF THE CANADA/U.S. FISHERIES AND BOUNDARY AGREEMENTS, *supra* note

Georges Bank is particularly valued by both Canada and the United States because of the immense concentration of marine resources on the bank and in the water column above, not to mention the prospect of considerable petroleum reserves beneath its surface which could provide substantial revenues to the coastal state. Careless exploitation of petroleum resources could easily destroy the fragile marine ecosystems in superjacent waters. For all these reasons, Georges Bank has precipitated an elaborate quarrel.[298]

Until these agreements become effective, there exists no protection against overexploitation of the fisheries in the areas covered by the anticipated management regime. There is particular alarm in the province of Nova Scotia where the fishermen have seen a substantial drop in the scallop fishery due, in their view, to an increased American fishing effort in the absence of regulatory restraints.[299] The Nova Scotia Minister of Fisheries was quoted as saying "that restrictions on Canadian fishermen on Georges Bank may have to be removed, because American fishermen are subject to no rules. The result, would be a quick wipeout of the scallops — but they're being wiped out anyway."[300] It is unlikely that federal policy-makers will relax conservation measures in the area unless the United States Senate abandons the agreements. But the current threat to scallops neatly illustrates the insuperable kind of dilemma that failure or delay in international cooperation can create. The necessity of obtaining that cooperation is clear.

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284. Attachment I: Special Agreement Between the Government of Canada and the Government of the United States of America to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, *id.* Attachment II: Agreement Between the Government of Canada and the Government of the United States of America to Submit to a Court of Arbitration the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Mar. 29, 1979, *id.* Attachment III. By Art. 8 of the Agreement to go before the World Court and Art. 14 of the Agreement to Arbitrate, each agreement comes into force with the Treaty and remains in force until the latter is terminated.

[298] The Canadian claim has been revised from an application of the equidistance principle as formulated in the Geneva Convention on the Continental Shelf, *supra* note 184, Art. 6, para. 2, to a claim of equitable equidistance on the basis of the judgment of the Court of Arbitration in the delimitation of the continental shelf underlying the English Channel: France-United Kingdom: Arbitraton on the Delimitation of the Continental Shelf, 18 INT'L LEGAL MATERIALS 397 (1978). The United States, on the other hand, argues for delimitation based on the natural prolongation of the continental shelf which suggests that on the basis of underwater topography that the whole of George's Bank may appertain to the New England coast. *See* the North Sea Continental Shelf Cases, [1969] I.C.J. R. 3, 41 Int'l L.R. 29; Grisel, *The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Seas Continental Shelf Cases*, 64 AM. J. INT. L. 562 (1970).

[299] 1979 landings were down 20 percent from the previous year although steep price rises increased the value of the diminished catch from $63 to $73 million. "The decline is directly linked to the delay by the American Senate in ratifying the Canada-U.S. treaty. . . . The longer ratification is put off, the more American fishermen increase their effort and their catch." The Globe and Mail (Toronto) Mar. 1, 1980, at 8, col. 4.

[300] *Id.*

Extensive use of the treaty power remains an essential, indeed central, requirement for the prompt and effective execution of Canadian fisheries policies in the offshore. Given the current distribution of legislative powers, exclusive federal jurisdiction over fisheries ensures that no problems will be encountered in this respect. Shared regulatory jurisdiction with the provinces could, however, create serious difficulties traceable to the status of treaties under the Canadian constitution. Uncontroverted Privy Council authority in *Attorney General for Canada v. Attorney General for Ontario* (the *Labour Conventions* case)[301] still stands for the uncomfortable proposition that the assumption of international obligations, an executive act of the Crown within the federal prerogative,[302] does not include implementation of the assumed obligations as a matter of internal law. Rather, Lord Atkin determined that the latter process remains subject to the constitutional division of legislative powers; the subject-matter of the required legislation determines whether the Dominion or the provinces have the discretion to enforce the treaty obligation under domestic law.[303] Unfortunately, the B.N.A. Act did not address the matter;[304] there it rests.

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[301] [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.).

[302] *See* A. GOTLIEB, *supra* note 270, at 4-6, 13-14; United Nations, Dep't of Economic and Social Affairs, 3 Legislative and Administrative Series 24-34 (1953), U.N. Doc. ST./LEG./SER. B/3.

[303] Lord Atkin stated:

> In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Supra note 301, at 348, [1937] 1 D.L.R. at 679.

For criticism, see the statement of Lord Wright (who was sitting on the Board with Lord Atkin at the time of this decision) in *A tribute to Rt. Hon. Sir Lyman Poore Duff, G.C.M.G.*, 33 CAN. B. REV. 1123, at 1127 (1955); Rand, *Some Aspects of Canadian Constitutionalism*, 38 CAN. B. REV. 135, at 142-43 (1960).

[304] S. 132 of the Act has conferred legislative authority on the Dominion Parliament to implement treaties but only in respect of "Obligations . . . arising under Treaties between the Empire and such Foreign Countries." But, according to Professor Laskin (now Chief Justice, S.C.C.), "[s]ection 132 of the B.N.A. Act is a provision whose literal terms have been overtaken by . . . Canada's attainment of international personality. . . . It is, hence, obsolete unless its words are tortured to meet the present international position, and this is too much to expect of the Courts." LASKIN'S CANADIAN CONSTITUTIONAL LAW 218 (4th ed. A. Abel 1973).

Subsequent judicial dicta have cast some doubt on the continued force of Lord Atkin's aging pronouncement,[305] but contemporary jurisprudential comment is mixed.[306] No one seriously contends that the point taken by the Privy Council has been affirmatively overruled.

The consequences of a bifurcated regulatory jurisdiction over fisheries could raise innumerable difficulties if a province chose to set quotas and carve out exclusive entitlements inconsistent with what Canada could negotiate in the presence of conflicting foreign entitlements. Competing jurisdictions in problems of fisheries management and conservation could entail added complexities to an already intricate regulatory bureaucracy. Moreover, interprovincial wranglings might further jeopardize maintenance of a workable international framework. Several of the provincial opinions canvassed on the fishery[307] do evidence significant regional sensitivity to the international scope of the problems imposed. Still, some do not.

E. *The Problem of Enforcement*

Current optimism for the future of the Canadian fishery owes much to the enhanced resource base that extensions of Canadian jurisdiction into the ocean have made available to it. At the same time, the expansion of sovereign rights carries with it the expensive and complex responsibility of seeing that these rights are enforced — and enforceable — on a continuing basis. Failure to enforce claimed rights against offenders suggests to the international community that these rights do not exist; interested foreign nations and enterprises will act accordingly.

Policing the vast expanse of ocean demarcated by the 200 mile zone of jurisdiction entails a mammoth effort by the Canadian armed forces (Department of National Defence) and Coast Guard (Department of Transport). Surveillance and enforcement by specially designed fisheries patrol vessels, naval destroyers and maritime patrol aircraft are all part of a coordinated federal effort to ensure that the extent of reciprocal relationships with other nations is not exceeded and the juridical boundaries of jurisdiction remain a practical reality.[308] To achieve this objective, the effort required does not come inexpensively.

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[305] *Reference re* Ownership of Off-Shore Mineral Rights, *supra* note 106, at 315-17, 65 D.L.R. (2d) at 374-76; MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134, at 168-69, 66 D.L.R. (3d) 1, at 28-29 (1976).

[306] Affirming the doctrine of the *Labour Conventions* case, *see* Head, *supra* note 106, at 155; *but see* La Forest, *The Labour Conventions Case Revisited*, 12 CAN. YEARBOOK INT. L. 137, at 145-52 (1974), in support of a broad federal mandate for "sovereign power under international law".

[307] *See supra* notes 43-47 and accompanying text.

[308] *See generally* Middlemiss, *Canadian Maritime Enforcement Policies*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA, *supra* note 190, at 311; Stanford, *Canadian Perspectives on Future Enforcement of the Exclusive Economic*

It would seem from the foregoing that since securing the increased entitlements to the wealth of the sea is and must remain a collective national burden, the benefits derived therefrom should be similarly distributed. Problems of sharing entitlements do not arise on the west coast in a domestic context. But as among Maritime fishermen the potential for conflict persists. Indeed, between the provinces of Newfoundland and Nova Scotia, the problem is manifest. While my purpose does not extend to a reasoned elaboration of the equities of federalism, the idea which merits recognition under this view is that the acquisition and enforcement of rights by Canada necessarily dictates the availability of those rights to all fishermen as Canadians.

V. Federal-Provincial Accommodations and Constitutional Reform

Assignments of power within federal states and controversy arising over its proper distribution in particular instances frequently obscure the point that the same people may be affected no matter which government makes the decision. Of course any division of powers presupposes some of them having and requiring a broad reach where others do not and therefore should not be so administered. Unfortunately, the division in fact is seldom that neat. Thus, for example, the policing of the cod fishery off the coast of Newfoundland depends on the negotiation and enforcement of international treaty obligations and must account for the historic entitlements of fishermen spread among several provinces — manifestations of a "national interest" in the broadest sense. At the same time, however, the cod fishery is of central importance to the province of Newfoundland in economic terms and an integral component of outport life.

In exercising its managerial jurisdiction over fisheries, the federal government has acknowledged that a broad range of sometimes disparate and conflicting interests must be protected and therefore represented in some capacity at the stage where policies are formulated, though the final power of decision is retained in accordance with its constitutionally defined task.[309] Moreover, this recognition has been carried over into recent treaty negotiations undertaken by Canada on fisheries matters.

The Department of External Affairs has developed a system of ad hoc appointments to the membership of international negotiating teams charged with the duty of securing Canadian interests through agreements with foreign powers. Provincial governments whose concerns appear to

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Zone, 5 Dalhousie L.J. 73 (1979). Stanford notes that surveillance costs increased from $5-1/2 million in 1976 to $12 million in 1977, not including $18 million in capital outlay for three new fisheries patrol vessels; in 1977, air patrols totalled 3270 hours on the east coast alone, and 746 boardings of foreign vessels were made at sea: *id.* at 81.

[309] These observations are drawn from discussions with a senior official in the Department of External Affairs, Ottawa, Dec. 20, 1979 and Feb. 27, 1980.

be affected by particular negotiations undertaken by the federal government are invited to furnish knowledgeable delegates equipped to advise the head of mission on the probable local effects of a given strategy. Comparable invitations are extended to representatives of the industry and labour similarly affected. Thus, for example, in the recent negotiations concerning the delimitation of Georges Bank, the team led by Ambassador Cadieux included government representatives from the provinces of New Brunswick and Nova Scotia as well as delegates from local (Maritime) industry and labour.[310] At UNCLOS III, provincial and industrial representation has been commensurately more comprehensive.[311]

Receptivity of federal officials to provincial consultation suggests an optimistic view of the federal compromise; yet, it provides no guarantee for fair representation of the fundamental economic and social priorities a province in the position of Newfoundland must have in view. If the primacy of federal managerial jurisdiction over fisheries is to be conceded, then ad hoc representation of provincial interests does not go far enough to ensure that a balance of those interests figure in the ongoing formulation of policy. Institutionalized channels of representation are called for.

A proposal that has been considered recently by the Federal Department of Fisheries and Oceans[312] envisages the formation of "Regional Fisheries Councils" to provide a formalized framework for ensuring that policies do not emerge from a dangerous vacuum, heedless of geographically individualized concerns. "Morally and strategically the people involved with long term interests in the fishery need to have a say in their operation in order to lend expertise and minimize policy costs."[313] To meet this declared goal one organizational structure did not seem capable of responding adequately to the often disparate interests reflected in different sectors of the Canadian coastal zone.

> Thus we recommend the establishment of four fisheries councils, British Columbia, Quebec, Newfoundland, and the Maritimes to be comprised of federal and provincial government representatives but dominated by fishermen to coordinate Canadian fisheries activities commensurate with optimum yields and the efficient handling of those catches both at sea and on shore. Such councils should maintain adequate liaison with government to ensure

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[310] *Id.*

[311] *E.g.*, the Canadian Delegation to the Sixth Session of UNCLOS III contained Government representatives from the provinces of New Brunswick, Nova Scotia, Newfoundland, Ontario and Quebec and from a large number of organizations in the fishing industry (both management and labour) including the Pacific Trollers' Association; the United Fishermen and Allied Workers' Union (B.C.); the Fisheries Council of Canada; the Newfoundland Fishermen, Food and Allied Workers Union; and the Atlantic Fishermen's Association. *See* CANADA, DEP'T OF EXTERNAL AFFAIRS, *supra* note 268, at 123-25.

[312] P. Gunther, Working Paper on Fisheries Jurisdiction (private paper obtained from the Dept. of Fisheries and Oceans, Feb. 1979).

[313] *Id.* at 17.

> that international obligations are not domestically injurious and that programs to assist shipyards for military purposes are of assistance to the long term rebuilding of the fishery fleet. They would then be responsible not only for short term but also long term planning of the fishery.[314]

The proposal considers the problem of fisheries jurisdiction in essentially economic terms, but it is most intriguing for present purposes in that it places the fishermen themselves at a pivotal point in the process which governs their livelihood.

Under this scheme a separate council is justified for the province of Newfoundland "[b]ecause the vast majority of fish caught off Newfoundland shores . . . do not inhabit waters adjacent to the Maritimes . . . ".[315] Premier Peckford, on the other hand, has made bluntly apparent more fundamental human concerns motivating the province to claim a much stronger separate voice. Overall, however, the necessity — and desirability — of "prompt, well informed co-operative action" on a regional basis[316] is for the most part self-explanatory. The proposed scheme concludes with the view that "[r]oles for Ottawa remain in the formulation of foreign policy, co-ordinator of the four councils, policing, research, some taxation, and insurance schemes . . . ".[317]

The creation of some form of bridging jurisdiction to overcome federal-provincial polarity holds promise for a common middle ground. Ultimately, Premier Peckford and his supporters might be content with such a compromise which does not sacrifice the federal elements essential to the preservation of the Canadian fishery overall. It is unclear whether such a scheme would entail any transfer of legislative jurisdiction currently held within the existing constitutional framework, although it appears likely that fisheries councils would exert an influence — if they are to exert any at all — not easily flouted through federal legislative supremacy arbitrarily applied. If, however, the effect of the councils is to replace a single jurisdiction with a patchwork of many, for reasons that should come readily to mind by now, they may bring a mixed blessing.

At the Federal-Provincial Conference of First Ministers in February, 1979, Premier Buchanan of Nova Scotia noted that "after much persuasive talk on our part" the federal government was willing to begin talks on forms of concurrent jurisdiction; he mentioned a federal proposal for a single regional fisheries council composed of federal and provincial fisheries ministers which would meet at least thrice yearly.[318] While, at the time, the Nova Scotia Premier thought this initiative was "certainly not the answer to the problem",[319] it seems clear that it provides a better answer than the inevitable chaos of separate (provincial) jurisdictions.

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[314] *Id.* at 18. The Dept. does not favour this view (letter to author 4 Nov. 1980).
[315] *Id.* at 17.
[316] *Id.*
[317] *Id.* at 18.
[318] Text of the Report of Premier J.M. Buchanan, *supra* note 43.
[319] *Id.*

Federal-provincial consultation at the ministerial level or lower down can do much to alleviate substantial differences in interest without resort to transfers of power. Hence, the necessary retention of legislative power by the federal government need not foreclose awareness of and allowances for important regionalized concerns. But this argument seems less persuasive when regionalized concerns can be seen as prevailing. The report of the Canadian Bar Association, *Towards a New Canada*, released in 1978, appreciates the point and recommends that jurisdiction over inland fisheries go entirely to the provinces while tidal and seacoast jurisdiction should be retained by the federal government.[320] This recommendation does not impinge upon the regulatory constraints imposed by the international legal system and it accords substantially with much of what judicial interpretation of divided jurisdiction over fisheries has already established. There is much to commend this view.[321]

The Canadian Bar Association proposal merits further mention for its inclusion of a reservation as to jurisdiction over anadromous species. Here the concern is salmon and since their habitat embraces both inland waters and the open sea, it was considered important to retain a decisive voice in Ottawa. Apparently in recognition of the external dependencies integral to the Canadian interest in salmon,[322] the report declares: "Here the principle of federal paramountcy should prevail . . . ".[323]

The federally appointed Task Force on Canadian Unity has also identified fisheries as one of several contentious areas where the B.N.A. Act has not been as helpful as it might be.[324] The Pepin-Robarts group envisions a two-step process for appropriately restructuring the constitutional mandate. It involves, first, a detailed review of the particular policy area in order to delineate by agreement the aspects which should fall appropriately to the exclusive jurisdiction of one government or the other, or which should be shared under some form of concurrent

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[320] CANADIAN BAR ASSOCIATION COMMITTEE ON THE CONSTITUTION, *supra* note 1, at 109 (1978).

[321] The recommendation is elaborated as follows:

> In practice, considerable cooperation has developed between the two levels of government in regulating fisheries. In some provinces, the laws are largely administered by the federal government; in one at least [Quebec] it is the other way around. . . . But the lack of confrontation may be drawing to a close as interest in problems of pollution, land reclamation and management of water as a resource expand. By and large, the federal presence here probably merely complicates provincial planning regarding other uses of water. There seems little point in concurrency here. Accordingly it would seem advisable to transfer jurisdiction over inland fisheries to the provinces leaving seacoast fisheries to the federal Parliament. That approach has been adopted in the Australian Constitution (Art. 51(10)).

Id.

[322] *See supra* notes 273-76 and accompanying text.

[323] CANADIAN BAR ASSOCIATION COMMITTEE ON THE CONSTITUTION, *supra* note 1, at 109.

[324] THE TASK FORCE ON CANADIAN UNITY, *supra* note 1, at 90.

jurisdiction; and secondly, the development of a standing intergovernmental body incorporating both a public and a private sector membership for the formulation of an overall policy in the particular field.[325]

What the Task Force recommends is remarkably similar to the above-mentioned concept of regional fisheries councils. But it does not answer the central question of what the new distribution of powers should be in the particular case — something the Canadian Bar Association recommendation does in a laudably lucid manner. While the Commissioners properly characterize the fisheries problem as one "in which there are both Canada-wide and distinctive provincial dimensions and in which, therefore, both the central and provincial governments have a very keen interest",[326] they neglect the major point that decisive external elements are ignored at the peril of the state in the determination of related internal distributions of power.

An appropriate consultative framework to expedite the formulation of fisheries policies can serve to ameliorate regional perceptions of federal insensitivity to local priorities. At the same time, the imposition of a formal duty to solicit opinion and weigh competing interests need not destroy a preferred assignment of legislative power to one level of government. That the federal government should continue in its preferred role as overall manager of the Canadian fishery is, I suggest, a battered proposition but eminently seaworthy.

VI. CONCLUSION

During the Debates on Confederation of the Canadian Parliament held at Quebec City in the winter of 1865, Attorney General Macdonald was preoccupied with engineering the consensus required for his national dream. He defended the proposed division of powers for the new nation in the following terms:

> I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the General Parliament as contradistinguished from those reserved to the local legislatures; but any honourable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies.[327]

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[325] *Id.* at 91-92.

[326] *Id.* at 91.

[327] Statement by John A. Macdonald, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 6 Feb. 1865, reprinted in STATUTES, TREATIES AND DOCUMENTS OF THE CANADIAN CONSTITUTION 1713-1929, *supra* note 96, at 565.

For many contemporary critics of the status quo, the prophetic campaign rhetoric of Canada's first Prime Minister rings hollow in an era when the desire for a new constitutional mandate runs strong. But in the present context, should we presume that the time-weathered dictum of the Founding Fathers is really out of date? At least insofar as the Canadian fishery is concerned, I have meant to suggest for the most part that it is not.

The bifurcation of fisheries jurisdiction under the Canadian constitution is good. Proprietary aspects of this jurisdiction have a unique impact on particular regions and communities heavily dependent on the fishing industry as a whole. The interests are local and no comparable national interests inveigh against them. But regulation of "seacoast fisheries", their management and conservation for the benefit of all Canadian fishermen, regardless of the community they sail from, is a different matter.

First and foremost among the differences, the protection and security of the fisheries have depended and will continue to depend both on recognition and forbearance of Canadian claims by other members of the international community, and the ability of Canada to enforce the claims she has made on the international regime. If these matters do not befall the national interest it is difficult to comprehend ones that would. In this sense, the fisheries issue may be merely one part of a larger question Canadians have yet to answer as to the merits of preserving the spirit if not all the details of their original federal compromise. If, however, we are to assume a positive answer to the larger issue, the lesser argument holds. A contrary answer contributes dangerously to an opposite conclusion.

A second factor not lost in the arguments of federal officials is the inherent impracticality of multiple regulatory jurisdictions that separate provincial controls would create. With few exceptions — even lobsters and scallops move around — fish have no respect for the human fiction of juridical boundaries and cross them with impunity. Enforcing a common boundary against the world taxes Canadian resources enough as it is. The creation of additional barriers amounting to national boundaries within the federal state would be horrendous to contemplate administratively and virtually impossible to enforce constructively without a massive disruption of current fishing efforts. The question might also be raised with respect to who would police these divisions since the current deployment of men and *materiél* required for the task at the international level is a burden borne solely by the federal taxpayer. Notwithstanding additional burdens, that one will persist.

A third point involves both practical and theoretical considerations. One basic advantage of federal systems is that regional differences can be protected without sacrificing the commonality of interests fully sovereign boundaries necessarily entail. Much of the theory of federalism derives from its utility. A significant body of regionalized opinion supports the notion of common regulation as the best means for optimal exploitation

of the fishery for all concerned, even with the acknowledgment of many conflicting priorities.

The foregoing conclusions all constitute valid rebuttals to the jurisdictional claims Premier Peckford seeks to press upon Ottawa. However, these claims tend to characterize issues in terms of an all or nothing proposition — something more than any provincial administration has claimed or wants — and to that extent the arguments may mislead. The problem lies in understanding how notions of shared jurisdiction beyond the level of formalized consultation can be entertained without effectively destroying the commonality of interest federal power represents and protects. Provincial jurisdictions cannot similarly protect this interest and still maintain a federal system of government. A negotiated compromise over particular regional discontents under federal auspices could give Newfoundland most of what it needs in the way of substantive protection for vitally important fisheries. But the province has chosen not to emphasize the achievement of favourable solutions to particular problems so much as to secure a mechanism for ensuring that designated policies can be implemented at will.

Distinctions between ends and means are vital to problems of fisheries management. Particular goals no matter how laudable in themselves do not warrant unilateral imposition where the calculus of interests at stake cannot be demarcated by the bright lines of discrete provincial jurisdiction. Yet, any apportionment of regulatory jurisdiction over open sea fisheries would in effect do just that. The nature of the beast defies separation. While people and governments can always complain about the criteria chosen for determining a fluctuating balance of interests struck at the federal level, dividing the process virtually guarantees that no accommodation will be possible.

Again, the constitutional struggle over fisheries inevitably merges with the larger one of determining the desirability of continuing the federal arrangement in Canada. Realizing what the question amounts to should at least make clear to decision-makers at every level what the possible consequences of their answer will be.