NOVA SCOTIA'S CASE FOR COASTAL AND OFFSHORE RESOURCES

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I. INTRODUCTION

The spring of 1980 witnessed a legislative assertion of control over offshore resources by the government of Nova Scotia. Three statutes — the Petroleum Resources Act,[1] the Energy and Mineral Resources Conservation Act,[2] and the Pipeline Act,[3] — were passed by the legislature with the intention of regulating all aspects of oil, gas and mineral exploitation in Nova Scotia's undersea territory. The first two Acts define that territory as follows:

> This Act applies to all Nova Scotia lands, which means the land mass of Nova Scotia including Sable Island, and includes the seabed and subsoil off the shore of the land mass of Nova Scotia, the seabed and the subsoil of the Continental Shelf and slope and the seabed and subsoil seaward from the Continental Shelf and slope to the limit of exploitability.[4]

The equivalent definitional section in the Pipeline Act is nearly identical,[5] and is intended to apply only to pipelines.[6]

This definition, if taken to the extreme, might include the seabed of most of the North Atlantic. However, the drafters of the legislation argue that the definition had to be broad enough to include every possible claim. While the province's boundaries offshore are no more and no less than the boundaries of Canada, they concede that Nova Scotia's jurisdiction can extend no further than international constraints will allow.[7] Their approach, the drafters argue, is consistent with previous

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[1] S.N.S. 1980, c. 12.
[2] S.N.S. 1980, c. 5.
[3] S.N.S. 1980, c. 13.
[4] S.N.S. 1980, c. 12, s. 7; S.N.S. 1980, c. 5, s. 4.
[5] S.N.S. 1980, c. 13, s. 2(2).
[6] S. 2(1).
[7] NOVA SCOTIA, DEPT. OF MINES AND ENERGY, OFFSHORE OIL & GAS: A CHANCE FOR NOVA SCOTIANS 20-21 (1980). With regard to international law, it appears that the drafters were relying on Art. 1 of the Geneva Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L.55 (29 Apr. 1958) (reprinted in 52 AM. J. INT'L L. 858 (1958)), which set the seaward limit of the shelf where the seabed and subsoil are at a depth of 200 metres or less, "or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources of the said areas . . . ." Given current technology, there appears to be no limit to exploitability, except in the very deepest parts of the sea, and the definition of the Continental Shelf in the DRAFT CONVENTION ON THE

jurisdictional claims made by the government of Nova Scotia and with the area covered by the 1977 Federal-Provincial Memorandum of Understanding, which was agreed to by the Maritime provinces.[8] In any event, it is open to question whether the Supreme Court of Canada would feel bound to consider the drafters' interpretation of their definitional sections, or instead would decide that the sections are so broad as to be *ultra vires* the province.

This paper will attempt to assess Nova Scotia's case for control and ownership of her offshore resources. The paper has been divided into three sections, corresponding to the various claims which the province might make: (1) the offshore case; (2) the case for jurisdiction over a three-mile belt; and (3) the special case of inland waters.

II. The Case For Jurisdiction Over The Offshore

Section 7 of the British North America Act provides that the "Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this [the B.N.A.] Act." Section 109 further provides that "[a]ll Lands, Mines, Minerals, or Royalties, shall belong to . . . Nova Scotia . . . in which the same are situate or arise . . . ." Lord Herschell of the Privy Council in the *Fisheries Case, Attorney-General of Canada v. Attorney-General of Ontario*,[9] interpreted the Constitution in this regard as follows:

Law of the Sea (Offical Text), A/Conf. 62/WP. 10/Rev. 3, art. 76 (22 Sep. 1980) [hereafter cited as Draft Convention] recognizes this fact by eliminating any reference to limits of exploitability. *See also* Maize, *Deep-sea Mining*, [1978] 2 Editorial Research Rep. 723, for a discussion of modern deep-sea mining technology and its international ramifications. *See also* Art. 3 of the Draft Convention which sets a limit of 12 nautical miles for a state's territorial sea. It would be difficult for Nova Scotia to make an argument similar to Newfoundland's with regard to the Continental Shelf because such a concept was not established in international law prior to 1867.

[8] Memorandum by Stewart McInnes on Provincial Jurisdiction of the Offshore for Government of Nova Scotia (1980). *See* Oil and Gas Rights Act, S.N.S. 1972, c. 12, which contains the following provisions:

> 1(i) "marine area" means the sea-bed and subsoil of any area covered by sea water and excludes any area so specified by regulation;
>
> 2(l) The law of the Province is hereby declared to be, and to have been at all times prior hereto, in force in the marine area and Sable Island.
>
> 3(l) The marine area, the subsoil of Sable Island and all minerals including oil and gas situate therein are hereby declared to be, and to have been at all times prior hereto, vested in the Crown.

See also Federal-Provincial Memorandum of Understanding (1977) in which Art. 2 states:

> The Area to be covered by the Agreement will be the seabed and subsoil seaward from the ordinary low water mark on the coasts of Nova Scotia, New Brunswick and Prince Edward Island to the continental margin, or to the limits of Canada's jurisdiction to explore and exploit the seabed subsoil off Canada's coast, whichever may be farther . . . .

[9] [1898] A.C. 700 (P.C. 1897).

> 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 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.[10]

For example, Lord Herschell commented that in the case of public harbours which fall under the section 91 jurisdiction of the Dominion Parliament, only those parts of the foreshore and seabed which were used for harbour purposes would be under federal control. Conversely, the province would retain proprietary rights over those parts of the seabed and foreshore of the harbour which are not used for harbour purposes.[11]

Since the province legally retains the territorial boundaries and proprietary rights which it possessed prior to Confederation, it remains only to determine what they were. However, before moving on, the case of *Re Offshore Mineral Rights of British Columbia*[12] should receive brief consideration. In that case, the Supreme Court of Canada adopted the principle set forth in *Regina v. Keyn*[13] that at common law the territory of a state ended at the low water mark, and that it would take an act of the legislature to extend it.[14] A strong argument might be made that the *Keyn* case was, at the time it was decided, a legal anomaly, breaking from a long line of authority which held that the resources of the territorial sea were owned by the Crown in the same way that it owned other property.[15] In any case, it is probably irrelevant with regard to Nova Scotia's claims[16] as the Supreme Court recognized "that while British Columbia

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[10] *Id.* at 709-10.

[11] *Id.* at 711-12. *See also* LaForest, *The Meaning of "Public Harbours" in the Third Schedule of the British North America Act, 1867*, 41 CAN. B. REV. 519 (1963).

[12] [1967] S.C.R. 792, 65 D.L.R. (2d) 353 [hereafter cited as *Offshore Minerals Reference*].

[13] 2 Ex. D. 63, 2 Q.B.D. 90 (C.C.R. 1876).

[14] *Supra* note 12 at 802-07, 65 D.L.R. (2d) at 362-66. *See* Harrison, *Jurisdiction Over the Canadian Offshore: A Sea of Confusion*, 17 OSGOODE HALL L.J. 469, at 476 (1979), where doubts are raised concerning the Supreme Court's decision because it ignored the authoritative Privy Council decision in Secretary of State for India in Council v. Rao, L.R. 43 Ind. App. 192, 85 L.J.P.C. 222 (1916), which rejected the view that the *Keyn* case had established that the territory of the realm ended at the low-water mark.

[15] *See* G. LAFOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION 92-103 (1968); G. MARSTON, THE MARGINAL SEA BED: UNITED KINGDOM LEGAL PRACTICE 114-51 (1981).

[16] The drafters of the Petroleum Resources Act have come to just the opposite conclusion, and have stated that the broad nature of s. 7 was necessary to declare jurisdiction and meet the test of *Keyn*: S. McInnes, *supra* note 8, at 2. With due respect, this conclusion appears illogical. If Nova Scotia can meet the Supreme Court's test of a

was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the colony rights to which the British Crown was entitled under international law . . . .''[17] The Court found that in British Columbia's case, there had been no such grant of rights.[18]

A. *The Alexander Grant*

Nova Scotia had a much different history than British Columbia. As early as 1621, James I had made a large grant of territory, known as Nova Scotia, to Sir William Alexander.[19] The grant not only included vast tracts of land, but large areas of the territorial sea as well. The terms of the grant were as follows:

> [A]ll and singular the lands upon the continent and the Islands situate, lying, and being in America, *within the head or promontory, commonly called Cape Sable* in the latitude of forty-three degrees nearly or thereabouts, *from that promontory along the shore, stretching to the west to the bay commonly called Saint Mary's Bay, thence to the north, by a direct line crossing the entrance or mouth of the great bay, which extends eastward*, between the countries of the Suroquois and Etchemins, so commonly called, to the river commonly called by the name of the Holy Cross or the St. Croix, and to the furthest source or spring upon the western branch of the same, which first mingles its waters with those of the said river, thence by an imaginary direct line, to be drawn or run through the country, or over the land to the north, to the first bay, river or spring emptying itself into the great river of Canada, and from thence running to the east along the shores of the said river of Canada to the river, bay or harbour, commonly called and known by the name of Gachepe, or Gaspee, and *from thence South East to the Islands called Baccalaos or Cape Breton*, leaving the same Islands upon the right, and the gulph of the said river or bay of Canada and Newfoundland with the Islands thereunto belonging upon the left, *and from thence to the head or promontory of Cape Breton aforesaid*, lying near the latitude of forty-five degrees or thereabouts, and *from the said promontory of Cape Breton to the southward and westward to Cape Sable aforesaid the place of beginning, including and comprehending within the said coasts and shores of the Sea, and the circumferences thereof from Sea to Sea, all the lands upon the continent with the rivers, torrents, bays, shores, Islands or Seas, lying near to, or within six leagues from any part thereof, on the western, northern or eastern parts of the said coasts and precincts of the same, and to the southeast where Cape*

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historical grant of territorial rights referred to subsequently in this paper, then there is no need to declare jurisdiction. Conversely, if Nova Scotia cannot meet the historical test, then her position would be that of British Columbia, and any attempt to increase her territorial jurisdiction would fail. It is therefore arguable that s. 7 actually weakens Nova Scotia's case.

[17] *Offshore Minerals Reference*, *supra* note 12, at 808, 65 D.L.R. (2d) at 367. This statement represents the best argument against the historical claims made by Nova Scotia and referred to later in this paper. If it could be demonstrated that the broad grants of offshore jurisdiction granted by the British Crown to Nova Scotia were not valid in international law, Nova Scotia's claims would fail.

[18] *Id.*

[19] N. NICHOLSON, THE BOUNDARIES OF CANADIAN CONFEDERATION 14-15 (1979).

> *Breton lies, and to the southward thereof where Cape Sable lies, all the Seas and Islands to the south within forty leagues of the said shores, including the great island commonly called the Isle of Sable or Sablon, lying south-southeast in the Ocean about thirty leagues from Cape Breton aforesaid, and being in the latitude of forty-four degrees or thereabouts.* All which land aforesaid, shall at all times hereafter be called and known by the name of Nova Scotia or New Scotland in America . . . . *And if any questions, or doubts shall hereafter arise upon the interpretation or construction of any clause in the present Letters Patent contained, they shall all be taken and interpreted in the most extensive sense*, and in favor of the said Sir William Alexander, his heirs and assigns aforesaid. Moreover we of our certain knowledge, our own proper motion, regal authority, and royal power, have made, united, annexed, erected, created and incorporated; and we do by these our Letters Patent, make, unite, annex, erect, create, and incorporate, the whole and entire Province, and lands of Nova Scotia aforesaid, *with all the limits thereof, Seas, etc.*, Offices and Jurisdictions, and all other things generally and specially above mentioned, into one entire and free dominion and barony, to be called at all times hereafter by the aforesaid name of Nova Scotia.[20]

As with the rest of the above quote, the phrase "including and containing within the said coasts and their circumference," is translated from the original Latin of the grant which in this case reads as "*includens et comprehendens intrà praedictas maris oras littorales ac earum circumferentias . . . .*" The American representatives in the Arbitration of the Title to Islands in Passamaquoddy Bay and Bay of Fundy were prepared to concede in 1817 that the word "*circumferentias*" is synonymous with the English word "appurtenances."[21] This latter word, as will be demonstrated, can be interpreted to include all of the marine territory encompassed by the Alexander boundary description. In addition, the references in the grant to "including and comprehending" all the "Seas" and to interpreting the clauses of the Letters Patent "in the most extensive sense," provide strong evidence that the drafters of the grant intended it to include jurisdiction over the offshore area contained within its boundaries.[22]

Large grants of territory by the British Crown including inland and territorial seas were not unusual in the seventeenth century. For example, the grant by Charles II to what became the Hudson's Bay Company included "all these seas, straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they shall be, that lie within the entrance of the straits, commonly called Hudson's Straits . . . ."[23] To understand the

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[20] 6 INTERNATIONAL ADJUDICATIONS 136-37 (J. Moore ed., modern ser. 1929-33) [emphasis added]. For an alternative translation, *see* J. BOURINOT, BUILDERS OF NOVA SCOTIA 105-21 (1900). A maritime league equals three nautical miles so a grant of 40 leagues jurisdiction would equal 120 nautical miles.

[21] 6 INTERNATIONAL ADJUDICATIONS, *id.* at 134-36, 252.

[22] C. MEYER, THE EXTENT OF JURISDICTION IN COASTAL WATERS 90-91, 54 (1937).

[23] STATUTES, DOCUMENTS AND PAPERS BEARING ON THE DISCUSSION RESPECTING THE NORTHERN AND WESTERN BOUNDARIES OF THE PROVINCE OF ONTARIO, ETC. (1878), as quoted in N. NICHOLSON, *supra* note 19, at 16.

nature of these grants one must examine the history of the period. In the latter half of the sixteenth century, authors such as Dr. John Dee were claiming very large areas of the sea as being under the fisheries jurisdiction of the English Crown, based on principles expounded by Italian jurists.[24] He argued that English sovereignty extended to the mid-line between England and foreign coasts, except for the English Channel which he considered to be completely under English jurisdiction.[25] The specific nature of this jurisdiction is exhibited by the fact that Dee held that while the territorial sea would be free for navigation, foreigners could only fish in those waters with permission and must pay duty on all fish caught.[26]

The principle of extended fisheries jurisdiction for England was, of course, in complete contradiction to the theories of the Dutch scholar Grotius[27] concerning freedom of the seas which were later to gain wide acceptance in international law. However, at the time Grotius' famous treatise was published, James I had inherited the throne of England and was in the midst of a serious fisheries dispute with the Netherlands.[28] In 1616, a vessel of the King's exacted a tax from Dutch fishermen off the coast of Scotland, and the fishermen were told that the King had this right for a distance of 100 miles from the coast.[29] Similarly, the Scots refused to allow foreigners to fish within seventy-eight miles of their coast on pain of confiscation of goods and death.[30] Charles I, who inherited the throne in 1625, maintained and expanded James I's claims to the territorial seas, and, in particular, fisheries jurisdiction and reserved waters.[31]

B. *Treaty Law and its Interpretation*

The original Alexander Grant conflicted with French claims, and, in fact, the Treaty of St. Germain-en-Laye restored Acadia (Nova Scotia) to France in 1632.[32] Between 1654 and 1713, parts or all of the Acadian territory were constantly in dispute until the Treaty of Utrecht finally ceded all of Acadia, except for Cape Breton, to Great Britain.[33]

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[24] T. FULTON, THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND OF THE DOMINION OF THE BRITISH SEAS, AND OF THE EVOLUTION OF THE TERRITORIAL WATERS, WITH SPECIAL REFERENCE TO RIGHTS OF FISHING AND THE NAVAL SALUTE (1911) (reprinted 99-100 (1976)).

[25] *Id.* at 100-02.

[26] *Id.* at 101.

[27] H. GROTIUS, THE FREEDOM OF THE SEAS (R. Van Deman Magoffin transl. 1916).

[28] T. FULTON, *supra* note 24, at 165-208.

[29] *Id.* at 169.

[30] *Id.* at 218.

[31] *Id.* at 209.

[32] N. NICHOLSON, *supra* note 19, at 15.

[33] M. SAVELLE, THE DIPLOMATIC HISTORY OF THE CANADIAN BOUNDARY 1749-1763, at 1-2 (1940); N. NICHOLSON, *supra* note 19, at 15-16.

Throughout this period, the French claims to the Acadian territory, and the grants of James I to Alexander and of Oliver Cromwell to Thomas Temple and two associates all included the territorial seas. Such was also the case with the Treaty of Utrecht in 1713 which positioned the marine boundary off the Atlantic coast of mainland Nova Scotia at ten leagues closer to shore than the original grants with the Treaty ceding over the following territory to the British Crown:

> Nova Scotia, otherwise called Acadia, in its entirety, conformably to its old limits ["anciennes limites"]; as also the town of Port Royal, now called Annapolis Royal, and generally all the dependencies of the said lands and isles of that country, with the sovereignty, propriety, possession and all rights acquired by treaty or otherwise, that the most Christian King, the Crown of France or their subjects have had up to the present . . . *in such a manner that it shall not be permitted in the future to the subjects of the Most Christian King to fish in the said seas, bays and other places within thirty leagues of the coast of Nova Scotia, south-eastwardly, commencing from the isle vulgarly called Sable and drawing [a line] toward the south-west.*[34]

One of the primary causes of the constant conflict between France and Great Britain in the territories of Nova Scotia and Newfoundland was control of the fisheries and access to the beaches for drying fish,[35] so it is not surprising that on maps of the period showing the boundaries of the territorial sea of Nova Scotia, the fishing banks are clearly indicated. Conflict in this area continued until the Treaty of Paris was signed in 1763, ceding a vast area of French territory, including Nova Scotia and Cape Breton, to Great Britain.[36] With regard to the fisheries, Article V of the Treaty permitted the French to fish in the Gulf of St. Lawrence, except within three leagues of the shores of the continent and the islands in the gulf. Outside the Gulf, the French would be permitted to fish at a distance of fifteen leagues or greater off the coast of Cape Breton, and in every other case off the coast of Nova Scotia the provisions of the Treaty of Utrecht would continue to apply to France.[37] The Treaty of Paris also excluded the Spanish from the bank fisheries.[38]

Article III of the treaty of 1783 between Great Britain and the United States granted American fishermen the "liberty" to continue to fish off the coast of Nova Scotia as they had before the Revolutionary War.[39] However, neither the British, nor the Nova Scotians appeared then, or subsequently, to relinquish their claim to the province's territorial

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[34] M. SAVELLE, *id.* at 36 [emphasis added].

[35] *Id.* at 115-16, 119, 153.

[36] *Id.* at 125-46; N. NICHOLSON, *supra* note 19, at 27-29.

[37] 1763, February 10: Extract from Translation of Treaty between His Britannic Majesty, France, and Spain (the Treaty of Paris), as quoted in *Appendix to British Case*, 4 PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION 11-17 (1912); *see also* M. SAVELLE, *supra* note 33, at 144.

[38] The Case of Great Britain, 4 PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION 7 (1912).

[39] 1783, September 3: Treaty between His Britannic Majesty and the United States, as quoted in *Appendix to British Case*, *supra* note 37, at 20-23.

waters. For example, in the case of the American fishing vessel "Nabby" in 1818, Advocate General Richard Uniacke stated:

> This claim [to maritime jurisdiction] on the part of Great Britain extends to the Shore Fishery of Nova-Scotia. France it is true, claimed it, but the Treaty of Utrecht fixed it completely, and limits the Atlantic Shore Fishery of Nova-Scotia, to the Eastern Extent of the Isle of Sable, and which has ever since been considered as a part of the Territorial Rights of Great Britain.[40]

Judge Crofton Uniacke of the Court of Vice-Admiralty in the *Nabby* decision, interpreted Article III of the Treaty as follows:

> As respects the latter part of this article, it would be confounding all ideas of common sense, and throwing obscurity over the ordinary perspicuity of language to contend that the word liberty, here used, can be conceived to convey an absolute unqualified right. That it was received as a privilege at the time, and has been exercised as much until the late war cannot be doubted.[41]

Judge Uniacke concluded by holding that the acceptance of the fishing privilege by the United States constituted an acknowledgement of Great Britain's rights to the fisheries.

Similarly, in the case of the 1818 Convention which allowed Americans to fish outside the three-mile limit off the coast of Nova Scotia,[42] Nova Scotians denied that Britain had abrogated her claims to jurisdiction beyond three miles. In his letter to the Right Honourable E.G.S. Stanley, M.P., and Secretary of State for the Colonies, George R. Young of Halifax wrote in the early 1830's:

> It has been argued, however, Sir, that the privileges granted to the Americans by this conventions, . . . is no concession on our parts, but might be enjoyed, without such permission, by virtue of the law of nations. Without pretending to enter at large into the vexed inquiry conducted by Seldon and Grotius, . . . I hold it to be established by the practice, as well as by the law of nations, that a property can be claimed in the sea, as much as in the shores which bound it. It is a right which has been claimed and enforced in account as well as modern times.[43]

Young continued in this letter by discussing the various historical precedents for maritime jurisdiction beyond three miles and the legal arguments for and against such a claim. He concluded by arguing that Joseph Chitty's doctrine that "the dominion of the State over the neighbouring sea, extends *as far as her* SAFETY *renders it necessary, and her power is able to assert it*," should be considered as the correct statement of the law, and that therefore the important question was how far the inhabitants of Nova Scotia can maintain their exclusive rights.[44]

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[40] *The 'Nabby'*, Acadian Recorder (Halifax), 5 Sep. 1818, at p. 1.

[41] *The 'Nabby'*, Acadian Recorder (Halifax), 12 Sep. 1818, at p. 2.

[42] 1818, October 20: Convention between United States and His Britannic Majesty, as quoted in *Appendix to British Case*, *supra* note 37, at 52-55.

[43] G. Young, Letters to the Right Hon. Lord Stanley, H.M. Secretary of State for the Colonies (London 1834).

[44] *Id.* at 42-44. *See also* J. CHITTY, A TREATISE ON THE LAW OF COMMERCE AND MANUFACTURERS AND THE CONTRACTS 88-101 (1824).

C. *Governors' Commissions — The Meaning of Appurtenances*

In addition to the various aforementioned treaties and conventions, the commissions to the various governors of Nova Scotia from 1763 onwards also described and asserted a claim over the maritime boundaries of Nova Scotia. For instance, in Governor Wilmot's commission of 21 November 1763, the boundaries of Nova Scotia were described as follows:

> Our said Province shall be bounded . . . to the eastward, by the said Bay [of Chaleurs] and the Gulf of Saint Lawrence to the Cape or Promontory called Cape Breton in the Island of that name, including the Island, the Island of Saint John's, [Prince Edward Island] and all other Islands within six leagues of the Coast: to the southward, by the Atlantic Ocean, from the said Cape to Cape Sable, including the Island of that name and all other islands within forty leagues of the Coast, with all the rights, members and appurtenances wouldsoever thereunto belonging in the westward. . . . [I]t shall be bounded by a line drawn from Cape Sable across the eastward the Bay of Fundy to the mouth of the River Saint Croix. . . .[45]

Subsequently, in the commissions of 11 August 1765 to Lord William Campbell and of 22 July 1773 to Francis Legge, the same definition of the boundary was preserved except that in the latter commission, the island of St. John (Prince Edward Island) was removed from Nova Scotia's jurisdiction as it had attained separate colonial status.[46] It should also be noted that the commissions resurrected the forty league boundary for the seas off the mainland Atlantic coast as it was originally asserted in the Alexander Grant.

As recently as 1846, in the commission to Lord Elgin, the description of the boundaries of Nova Scotia continued to include the offshore area:

> Our said Province of Nova Scotia in America, the said Province being bounded on the westward by a line drawn from Cape Sable across the entrance to the centre of the Bay of Fundy; on the northward by a line drawn along the centre of the said Bay to the mouth of the Musquat River by the said river to its source, and from thence by a due East line across the Isthmus into the Bay of Verte and the Gulf of St. Lawrence to the Cape or Promontory called Cape Breton in the Island of that name, including the said Island, and also including all Islands within six leagues of the Coast, and on the Southward by the Atlantic Ocean from the said Cape to Cape Sable aforesaid, including the Island of that name, and all other islands within forty leagues of the Coast, with all the rights, members and appurtenances whatsoever thereunto belonging.[47]

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[45] 6 INTERNATIONAL ADJUDICATIONS, *supra* note 20, at 16, 118-21, 250.

[46] PROCEEDINGS OF THE GENERAL ASSEMBLY UPON THE CONVENTION CONCLUDED BETWEEN HIS MAJESTY AND THE UNITED STATES OF AMERICA 2 (Halifax Jun. 1819). Although the various descriptions of Nova Scotia's boundaries do not specifically include Sable Island, it is an island "within forty leagues of the coast" and in 1785 the Council of Nova Scotia included it within the limits of Halifax County: *see* Minutes of Her Majesty's Council of Nova Scotia [P.A.N.S.] (16 Dec. 1785).

[47] Quoted in Memorandum to F.H. Peters, Surveyer General, Topographical Survey of Canada, Dept. of the Interior from the Deputy Attorney General of N.S., 10

The aforementioned commissions are extremely important as precedents, for within the domestic context the declaration of boundaries by such commissions or by proclamation has the same force as statute law.[48] In setting out the boundaries, the commissions incorporated the phrase, "rights, members and appurtenances whatsoever thereunto belonging." As was previously mentioned, the word "appurtenances" suggests that in addition to jurisdiction over the islands within the stated boundaries, the drafters of the commissions also intended Nova Scotia to possess the offshore marine area.

An indication of the interpretation placed on the word appurtenances and its derivatives during the period of the commissions is found in the joint committee report of the Legislative Council and Assembly of Nova Scotia in 1819 concerning the 1818 Convention. The Committee stated:

> Your Committee [the Sovereign's] could not enter into the consideration of the important objects referred to it, without painfully feeling the constant sacrifices which this Province has been called unto make, not only in the extent of its Provincial Territory on the land, but also in the valuable Fisheries, which ever since the Treaty of Utrecht, were considered as *exclusively appertaining* to NOVA SCOTIA. That a proper estimation can be made of the extent of these sacrifices, your Committee deem it expedient here to insert a description of the boundaries of the Province of Nova Scotia, as settled and established by his Present Majesty after the peace of 1763, when they were regulated and permanently fixed by the Commission dated in September, 1763 . . . [the commission to Governor Wilmot was subsequently quoted in its entirety].[49]

Clearly, at least the members of the government of Nova Scotia believed that the "appurtenances" or "appertaining" territory described in the commissions to the governors of Nova Scotia included the offshore fisheries.

Both the Supreme Court of Canada[50] and the International Court of Justice[51] have described the territorial seas as an appurtenance, thus giving further credence to this line of argument. The late L. Oppenheim, the great international jurist, has written that "it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded

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Sep. 1934. The Deputy Attorney General was of the opinion that this boundary description was applicable with regard to s. 7 of the B.N.A. Act.

[48] *Re* Cape Breton, 5 Moo. P.C. 259, 13 E.R. 489 (1846). *See also* The King v. McMaster, [1926] Ex. C.R. 68; St. Catherine's Milling and Lumber Co. v. The Queen, 13 S.C.R. 577 (1887), *aff'd* 14 App. Cas. 46 (P.C. 1888); Regina v. White, 50 D.L.R. (2d) 613 (B.C.C.A. 1964) (Norris J.A.); Attorney-General of Canada v. George, 45 D.L.R. (2d) 709 (Ont. C.A. 1964); *Re* Dominion Coal Co. and County of Cape Breton, 48 M.P.R. 174, 40 D.L.R. (2d) 593 (N.S.S.C. *in banco* 1963); Taylor v. Attorney-General, 8 Sim. 413, 59 E.R. 164 (V.C. 1837); Campbell v. Hall, 1 Cowp. 204, 98 E.R. 1045 (K.B. 1774).

[49] PROCEEDINGS, *supra* note 46 [emphasis added].

[50] The Ship "North" v. The King, 37 S.C.R. 385, at 401 (1906).

[51] United Kingdom v. Norway (Fisheries Case), [1951] I.C.J. Rep. 116 at 128.

depth belongs to the State which *owns the territory on the surface and the territorial waters appurtenant to the territory of the State*."[52] He further stated that "it is evident that the territorial waters are as much inseparable appurtenances of the lands as are the territorial subsoil and the atmosphere."[53] It would appear that the use of the word "appurtenance" may be quite indicative of an intention to include the territorial waters.[54]

D. *The Offshore Cases of Australia and the United States*

When the offshore claims of Nova Scotia or the other coastal provinces are given serious consideration, it is frequently the case that those claims are compared with similar disputes in the federal unions of the United States and Australia, where the courts of each of those nations have decided that the respective federal governments have jurisdiction over the offshore.[55] Careful analysis of these cases indicates that they can be clearly distinguished from Nova Scotia's position. For example, the High Court of Australia in the case of *New South Wales v. Commonwealth*,[56] held that the Imperial Parliament could have authorized the Imperial Executive to place the colonial territorial seas under the control of the colony, but no statute of the Imperial Parliament did so.[57] The court found that in establishing the individual colonies and in giving them self-government, there was no evidence that either proprietary rights or legislative power in the specific areas of sea and subjacent soil were expressly or impliedly granted to the colonies.[58] Furthermore, the Australian Court held that dominion over the territorial sea is an international, not a domestic question, and therefore any claim to colonial territory offshore would be decided by the Imperial Parliament, which in turn did not make such a decision until the enacting of the Territorial Waters Jurisdiction Act in 1878.[59] The Court accepted the *Keyn* doctrine, and the decisions of the American cases, and held that

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[52] L. OPPENHEIM, 1 INTERNATIONAL LAW 426 (8th ed. H. Lauterpacht 1955) [emphasis added].

[53] *Id.* at 463.

[54] *Contra* New South Wales v. Commonwealth, 8 A.L.R. 1, at 102 (H.C. 1975), where Jacobs J. refers to Celler's patent of 1862 whereby "so much of New South Wales as lay north of 26° South and between 141° and 138° East, 'together with all and every the adjacent islands, their members and appurtenances in the Gulf of Carpentaria' was annexed to Queensland." Jacobs J. interpreted this phraseology as adding only land to the colony. *See also* his decision, at 99-103, where he also concludes that colonial boundaries established by referring to lines of latitude or longitude, do not incorporate the territorial seas located within the boundaries.

[55] Anderson, *Offshore Mineral Resources: Legal Aspects*, CURRENT ISSUE REV. 80 (11 Apr. 1980).

[56] *Supra* note 54.

[57] *Id.* at 12.

[58] *Id.* at 12-13.

[59] Id. at 6-7.

prior to Australian independence, only Britain had the competence to claim territorial seas, and after independence, only the nation state of Australia had such power.[60] Finally, the Court held that the ability to exercise jurisdiction in the territorial sea was not synonymous with saying that the sea had been included within the boundaries of the realm.[61]

With regard to Nova Scotia, the issues are different. The boundaries of the province, as delineated by the commissions to governors appointed by the British Government, did include the territorial seas. It is arguable that whether or not Nova Scotia, prior to Confederation, exercised jurisdiction over this area is largely irrelevant since the B.N.A. Act incorporates the boundaries and defines jurisdiction and proprietary rights. However, as will be demonstrated later, Nova Scotia as a colony did enact a variety of legislation dealing with its territorial seas.

The United States Supreme Court,[62] in deciding the claims to the territorial seas of various states, also relied on historical and constitutional factors which differ from Nova Scotia's situation. The Court held that when the United States gained its independence from England, no settled international custom or understanding among nations existed concerning a three-mile territorial sea. In addition, the Court stated that: "Neither the English charters granted to the settlers, nor the treaty of peace with England, nor any other document to which it had been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership." The Court commented that the settlers were interested in navigation and fishing, but there was no evidence that they attempted to claim or block off areas of the ocean's bottom.

Nova Scotia, as has been demonstrated, does possess documents which provide for a territorial sea. The three-mile belt, which many States did not recognize in 1776, did have international acceptance at the beginning of the nineteenth century, and so prior to Canadian Confederation.[63] Finally, in Canada, any claim to proprietary rights in the seabed should be resolved in favour of Nova Scotia pursuant to sections 7 and 92(13) of the B.N.A. Act once the province establishes that its offshore territory was within its boundaries when it entered Confederation.

Two other arguments that the United States Supreme Court put forward on behalf of federal jurisdiction were the "equal footing" clauses admitting states to the Union, and the doctrine of paramountcy. The "equal footing" clause, such as the one found in the resolution admitting Texas to the Union, provided that the new state would be on an

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[60] *Id.*

[61] *Id.* Anderson, *supra* note 55, at 6-7. Philip C. Jessup, probably the most respected American jurist in international law, while questioning the extent of territorial waters, argued forcefully that a state's rights over territorial waters are sovereign and essentially the same as its rights over its land territory: P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927) (reprint 115-208 (1970)).

[62] United States v. California, 67 S. Ct. 1658, at 1665 (1947).

[63] T. FULTON, *supra* note 24, at 21.

equal footing with all other states. Since none of the original thirteen states had a valid claim to their territorial seas, neither could subsequent ones.[64] While this clause has no application to the Nova Scotia case, the doctrine of paramountcy may. In *United States v. Louisiana*,[65] the Supreme Court stated that the marginal sea was a national, not a state concern. Since the area involved problems and interests of national scope, such as commerce, defence, relations with other powers, war and peace, national rights had to be paramount.[66] These same arguments could be quite applicable in the Canadian context to justify federal legislative interference in provincial areas of jurisdiction, as provided for by the Peace, Order and Good Government provisions of the B.N.A. Act.[67]

Ivan Head has suggested that, while the Supreme Court of Canada in the *Offshore Minerals Reference* did not put forward any argument similar to the latter doctrine in the United States, "considerations of national defence, of frontier relations, and of international responsibilities apply equally to Canada . . . ."[68] However, Head noted that, unlike the United States or Australia, the Canadian Federal Government, as a result of judicial interpretation of the constitution, does not have unrestricted authority over treaty-making or external affairs.[69] This fact should be kept in mind when it is argued that due to the international questions which arise in the administration of the offshore, it is better placed in the control of the federal government. It is possible that the *Offshore Minerals Reference* altered the famous interpretation of the constitution[70] given by Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*,[71] where he stated:

> [N]o further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions . . . . There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion

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[64] United States v. Texas, 70 S. Ct. 918, at 922-23 (1950).

[65] 70 S. Ct. 914, at 916-17 (1950).

[66] For a more recent decision upholding this view, *see* United States v. Maine, 95 S. Ct. 1155 (1975). *See also* Swan, *Remembering Maine: Offshore Federalism in the United States and Canada*, 6 CALIF. W. INT'L L.J. 296 (1976).

[67] *See also* Hubbard, *Note*, 2 OTTAWA L. REV. 212, at 215 (1967).

[68] Head, *The Canadian Offshore Minerals Reference — The Application of International Law to a Federal Constitution*, 18 U. TORONTO L.J. 131, at 150 (1968).

[69] *Id.* at 150-56.

[70] *Id.* at 155. *See* Hubbard, *supra* note 67, at 213; F. VARCOE, THE DISTRIBUTION OF LEGISLATIVE POWER IN CANADA 165 (1954); MacKenzie, *Canada and the Treaty-Making Power*, 15 CAN. B. REV. 436 (1937).

[71] [1937] A.C. 326 (P.C.).

> cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.
>
> . . . .
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> While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.[72]

However, Head argues that if the Supreme Court did alter the law with respect to the treaty-making power, it erred.

E. *The International Case*

In the *Offshore Minerals Reference*, the Supreme Court of Canada allowed that if, while a province was a colony, the British Crown had conferred upon it rights to the offshore "to which the British Crown was entitled under international law," then that province would now have a valid claim to such territory.[73] It has been demonstrated here that the Crown did confer commissions to the governors of Nova Scotia with boundaries stretching as far as 120 nautical miles offshore in the case of the province's eastern coast. As a result of both the use of the word "appurtenances" and the perceived intention of the British Crown, it would appear that the commissions included the rights to offshore resources. These rights in turn were passed on to, and jealously guarded by, the Legislative Council and Assembly of Nova Scotia. Therefore, the question which remains is whether the grant by the Crown was valid in international law.

There are two possible interpretations which can be placed on the Supreme Court's "international test." The first is that a grant had to be valid in international law at the time that it was made. At the time of the Alexander Grant there was no clear practice in international law with regard to claims to territorial seas. In effect, a sovereign could make any claim that it could enforce, as did James I. The assertion by Great Britain that large areas of the offshore were included in the territory of Nova Scotia was repeated many times in both treaties and conventions which the British were a party to, and in the commissions to the governors of Nova Scotia by the British Crown. It is also interesting to note that in the Saint Croix River, Lubec Narrows, Passamaquoddy Bay-Fundy Arbitrations, the Alexander Grant figured prominently in the legal cases put forward, with varying degrees of success, by Great Britain.[74]

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[72] *Id.* at 352-54.

[73] *Supra* note 12, at 808, 65 D.L.R. (2d) at 367.

[74] *See* 1 INTERNATIONAL ADJUDICATIONS, *supra* note 20, at 169-331; 2 INTERNATIONAL ADJUDICATIONS, *supra* note 20, at 143-45, 243-44, 315-30; 6 INTERNATIONAL ADJUDICATIONS, *supra* note 20, at 171-86, 307-49; F. CHRYSLER, ADDITIONAL STATEMENT OF FACTS AND ARGUMENT ON BEHALF OF HIS BRITANNIC MAJESTY, BOUNDARY BETWEEN THE PROVINCE OF NEW BRUNSWICK, CANADA, AND THE STATE OF MAINE, UNITED STATES OF AMERICA, NEAR LUBEC NARROWS 3 (1909).

The concept of provincial boundaries which are valid for domestic purposes but not necessarily so in international law, has already been implicitly accepted by the Canadian courts. For example, the Supreme Court of Canada in the *Offshore Minerals Reference*,[75] and the Appeal Division of the Supreme Court of New Brunswick in *Rex v. Burt*,[76] acknowledged that the southern boundary of New Brunswick was the centre line of the Bay of Fundy, even though the United States had not yet recognized all of the Bay as being Canadian inland waters. Therefore, if the Alexander Grant was valid when it was made, modern international law may not affect Nova Scotia's claim within the domestic context.

The second interpretation of the Supreme Court's "international test" is that the grant of marine territory had to be valid in international law at the time Nova Scotia entered Confederation. Ivan Head has written, with regard to the unilateral extension of a state's marine boundaries, that:

> Should a State attempt to extend unilaterally its boundaries and claim to enlarge the territorial extent of its sovereignty, the legality of its acts would be assessed by reference to the applicable principles of international law. If the claim when made was of a sort not in accord with the then law, it would not be recognized by other States. Because international law is no more static than is the common law, claims and concepts acceptable in 1967 may not have been recognized a century earlier, just as some 19th century principles are no longer acceptable today.[77]

Similarly, the International Court of Justice in the *Fisheries Case* held that the unilateral act of delimitation of sea areas undertaken by a state has to be valid in international law.[78] It continued by listing several criteria by which the validity of such an act might be determined. These criteria included a close dependence of the territorial sea upon the land domain, a more or less close relationship existing between certain sea areas and the land formations which divide or surround them, and finally, certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage. The Court also held that it is important that a state's method of delimitation be consistently applied without opposition on the part of other states.

Nova Scotia's land mass juts far out into the Atlantic Ocean, and it continues underwater in the form of prominent fishing banks. It is clear from the various treaties and conventions, and from the maps presented in the memorials of both the English and French commissioners in the boundary commission created pursuant to Article XVIII of the Treaty of Aix-la-Chapelle,[79] that the fisheries located on the Scotian Shelf were

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[75] *Supra* note 12, at 809, 65 D.L.R. (2d) at 368.

[76] 5 M.P.R. 112 (N.B.C.A. 1932).

[77] Head, *The Legal Clamour Over Canadian Offshore Minerals*, 5 ALTA. L. REV. 312, at 316-17 (1966-67).

[78] *Supra* note 51, at 133, 136-37.

[79] TREATY OF AIX-LA-CHAPELLE, 18 Oct. 1748, England-France; *see also* M. SAVELLE, *supra* note 33, at 21-42.

considered to be an extension of, and included within, the territory of Nova Scotia. Since the first settlement of Acadia, Nova Scotians have depended on the fisheries for a large percentage of their income. The joint Committee of the Legislative Council and Assembly made the importance of the fisheries clear in its report of 1819.[80] Lastly, between 1621 and 1867, the governments of Nova Scotia and Great Britain continually asserted their claims to the offshore territory of Nova Scotia as was recognized internationally in the Treaty of Utrecht, the Treaty of Paris, the Anglo-American Treaty of 1783 and in the 1818 Fisheries Convention. As recently as 1910, the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration held that Great Britain had neither given up sovereignty to her marine territory or fisheries, nor the right to regulate the latter, in the 1818 agreement with the United States.[81]

Prior to, and just after Confederation, many published works seriously disputed the doctrine of "freedom of the seas" as expounded by the Dutch scholar Grotius, while still others differed greatly concerning its application. Writers such as Chitty[82] and Von Martens[83] argued that a state could claim dominion of the seas to the extent that other nations would acknowledge it, and the former state could enforce its claim. Hall, in 1830, resurrected the historical claim of Britain over the "British seas," being the seas surrounding the British Isles, and in the second edition of his book in 1875, his editor Loveland did nothing to qualify this claim.[84] Other prominent jurists either allowed that there were exceptions or qualifications to the doctrine of Grotius based on long usage or treaty law,[85] or as in the case of the American legal scholar James Kent, agreed that generally, jurisdiction extended three miles, but that dominion over the contiguous sea could stretch as far as was requisite for the state's safety or some other lawful end.[86] Summing up this situation, Fulton maintained that the English writers on the law of England (from which Canadian law was modelled) "clung tenaciously" to the old English claims to the sovereignty of the seas right up until the *Keyn* case of 1876.[87]

While evidence exists which supports the international case for Nova Scotia as required by the second interpretation of the *Offshore*

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[80] PROCEEDINGS, *supra* note 46.

[81] Award of the Tribunal, 1 PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION 75-79, 82 (1912).

[82] J. CHITTY, *supra* note 44, at 90-93.

[83] G. VON MARTENS, THE LAW OF NATIONS 160-61 (4th ed. 1829).

[84] Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* (1830); as cited in T. FULTON, *supra* note 24, at 580.

[85] R. PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW 179 (1854); E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT OF AFFAIRS OF NATIONS AND SOVEREIGNS 125-28 (1834).

[86] J. KENT, 1 COMMENTARIES OF AMERICAN LAW 29 (6th ed. 1848).

[87] T. FULTON, *supra* note 24, at 580.

Minerals Reference, the weight of mid-nineteenth century international law does not assist the provincial argument. For instance, the Permanent Court of Arbitration at the Hague in the North Atlantic Coast Fisheries Arbitration stated, with regard to the fisheries legislation passed by the British North American colonies between 1663 and 1834, that "[the] fact that these Acts extend the prohibition over a greater distance than the first marine league from the shore may make them non-operative against foreigners without the territorial limits of Great Britain, but is certainly no reason to deny their obligatory character for foreigners within these limits . . . ."[88] However, even in the latter case, the court did not rule out the possibility of jurisdiction greater than three nautical miles.

Prior to Confederation, Nova Scotia appears to have met the majority of the requirements for extended maritime jurisdiction established by many international jurists of the period, and by the International Court of Justice in recent years. Nova Scotia can demonstrate both long usage verified by treaty law, and that Britain's unilateral extension of Nova Scotia's marine boundaries was a means of protecting that province's fisheries and environment,[89] a purpose which even today would justify unilateral action.[90] The possibility of historic boundaries claimed for specialized purposes also remains to be canvassed. It is submitted that a comprehensive study of the international marine law of the nineteenth century is required before a final determination of the validity of Nova Scotia's case concerning the second possible interpretation of the Supreme Court's "international test" can be made.

Before concluding the international case for offshore territory, brief mention should also be made of a possible claim relating to the Continental Shelf. It is clear that any claim based on the Alexander Grant or the governors' commissions, could not extend beyond forty leagues. Therefore, the only claim Nova Scotia might make of territory beyond that distance would have to be based on the Continental Shelf doctrine. When Nova Scotia entered Confederation, the Continental Shelf doctrine was far from established in international law and, therefore, outside the "international test" established in the *Offshore Minerals Reference*. The converse may be true in the case of Newfoundland which joined Confederation in 1949, after events such as the Truman Proclamation, the United Kingdom-Venezuela Gulf of Paria offshore oil agreement and

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[88] Award of the Tribunal, *supra* note 81, at 77-78.

[89] *E.g.*, An Act to restrain the trade and commerce of the provinces of Massachuset's Bay and New Hampshire, and colonies of Connecticut and Rhode Island, and Providence Plantation, in North America, etc., 15 Geo. 3, c. 10, ss. 7-13 (1775), as quoted in *Appendix to the Case of Great Britain, Part III*, 5 PROCEEDINGS IN THE NORTH ATLANTIC FISHERIES ARBITRATION 985-87 (1912).

[90] Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2. R. BILDER, THE ROLE OF UNILATERAL STATE ACTION IN PREVENTING INTERNATIONAL ENVIRONMENTAL INJURY (1973).

the various national claims of 1946-48 had established that coastal states could assert claims over their respective continental shelves.[91]

III. The Three-Mile Zone

Prior to Confederation, the three-mile limit for territorial seas was internationally recognized,[92] and in the case of British colonies with legislatures, was under colonial jurisdiction.[93] Throughout the self-governing colonial period of its history, the Nova Scotia government exercised that jurisdiction, primarily through the enactment of statutes dealing with fishing and smuggling, such as the "hovering act" of 1836 which authorized the seizure and forfeiture of any ship, vessel or boat found fishing illegally within three miles of the coast, bays, creeks or harbours of the province.[94] Mining leases were also issued prior to Confederation for mineral reserves located under the sea off Cape Breton.[95] A number of Canadian cases recognized the claim of the Atlantic provinces to a three-mile territorial sea,[96] which the United States also conceded following the Convention of 1818.[97]

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[91] *See* Government of Newfoundland, Heritage of the Sea. . . . Our Case on Offshore Mineral Rights (1977).

[92] T. Fulton, *supra* note 24, at 21.

[93] W. Forsyth, Cases and Opinions on Constitutional Law 24-25 (1869).

[94] An Act relating to the Fisheries, and for the prevention of illicit trade in the Province of Nova Scotia, and the Coasts and Harbours thereof, 6 Wm. 4, c. 8 (1836); An Act for the benefit of the Fishery of the Coasts of this Province, 10 Geo. 3, c. 10 (1770); An Act for the Prevention of Smuggling, 4 Wm. 4, c. 50 (1834). *See also* An Act to enable His Majesty to make Regulations with respect to the taking and curing of Fish on certain Parts of the Coasts of Newfoundland, Labrador, and His Majesty's other possessions in *North America*, according to a Convention made between His Majesty and the United States of America, 59 Geo. 3, c. 38 (1819). The 1836 "hovering act" was expressly approved by the British Crown by order-in-council; *see Appendix to the Case of Great Britain*, *supra* note 89, at 962, and, in an opinion given by law officers of the Crown to the Colonial office in 1863, Sir William Atherton and Sir Roundell Palmer stated that American fishermen are bound to obey the laws and regulations enacted by, or under, the authority of the respective Colonial Legislatures within the territorial waters of the colonies: *see* Hodgins, *Fishery Concessions to the United States in Canada and Newfoundland*, in Contemporary Rev. (2d ed. 1907). *See also* An Act for the Preservation of His Majesty's Rights in Coal Mines, 4 Geo. 4, c. 25, s. 2 (1823), respecting the seizure of illegally mined coal from vessels or boats found within one league of the shore.

[95] An Act relating to Submarine Coal Mining Areas in the County of Cape Breton, S.N.S. 1908, c. 11; An Act to Legalize and Validate an Order-in-Council respecting a Certain coal area in the County of Cape Breton, S.N.S. 1919, c. 18. *See Re* Dominion Coal Co. and County of Cape Breton, *supra* note 48, at 618-19.

[96] *Burt*, *supra* note 76, at 115. *See also* Filion v. New Brunswick Int'l Paper Co., 8 M.P.R. 89, [1934] 3 D.L.R. 22 (N.B.C.A.); Regina v. Delepine, 7 Nfld. L.R. 378 (S.C. 1889); Rhodes v. Fairweather, 7 Nfld. L.R. 321 (S.C. 1888); Anglo-American Telegraph Co. v. Direct U.S. Cable Co., 6 Nfld. L.R. 28 (S.C. 1875).

[97] Treaties and Conventions, concluded between the United States of America and Other Powers since July 4, 1776, at 415 (1889).

The *obiter* opinion of MacDonald J. in *Re Dominion Coal Co. and the County of Cape Breton*, has been cited as authoritative support for the *Keyn* doctrine.[98] However, MacDonald stated in his decision that the solum within the three-mile limit would belong to Nova Scotia if it was situated in Nova Scotia in 1867.[99] He also relied on *United States v. California*[100] which has already been distinguished from the Nova Scotia situation. It is important to note that the Municipality in *Dominion Coal* was arguing that the three-mile belt of territorial waters belonged to Nova Scotia as a matter of international law.[101] To the contrary, this writer has argued that Nova Scotia's claim is based on historical grants and section 7 of the B.N.A. Act. The *Dominion Coal* case can be further distinguished on the ground that the question as to whether the solum of that part of the territorial sea which is adjacent to a particular county is within that county, is not the same as asking whether it is part of the adjacent state.[102] Additionally, G.V. LaForest, who is critical of this decision, has pointed out that confusion also exists as to the exact nature and location of Spanish Bay, which is of major relevance to the case.[103]

Criticism may also be directed against the four-to-one majority decision of the Nova Scotia Supreme Court, *in banco*, for failing to either consider or distinguish *The King v. Conrad*, a 1938 decision of the Nova Scotia Supreme Court, *in banco*.[104] In an unanimous decision delivered by Chief Justice Chisolm, the five justices of the latter court held that for the purposes of criminal jurisdiction, the magistrates of Lunenburg County could try an offence which occurred less than three miles off the coast of Big Duck Island.[105] Of particular interest is the fact that in *Conrad*, the court cited *Keyn* as authority for the existence of the three-mile territorial sea.[106]

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[98] *Offshore Minerals Reference*, *supra* note 12, at 802-03, 65 D.L.R. (2d) at 362-63.

[99] *Re* Dominion Coal Co. and County of Cape Breton, *supra* note 48, at 199-201, 212, 40 D.L.R. (2d) at 618-19, 630.

[100] 67 S. Ct. 1658 (1947).

[101] *Supra* note 48.

[102] LaForest, *The Delimitation of National Territory. Re Dominion Coal Company and County of Cape Breton*, [1964] 2 CAN. Y.B. INT'L L. 233, at 242; Direct United States Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394, 46 L.J.P.C. 71 (1877); G. MARSTON, *supra* note 15, at 85-111, 288-93.

[103] LaForest, *supra* note 102, at 234-36.

[104] 12 M.P.R. 588 (N.S.S.C. 1938).

[105] *Id.* at 594-95.

[106] *Id.* Chisholm C.J. quoted from *Keyn*, *supra* note 13, at 216. A nation is entitled to take such measures as it may deem necessary for the protection of its revenue, within a *reasonable* distance from its shores. *Keyn*, too, was a very controversial case in which the court of the Exchequer Division allowed an appeal from a manslaughter conviction on the basis that the court had no jurisdiction because the realm of the common law ended at the low-water mark. The court made the decision with a narrow majority of seven to six with a 14th judge dying prior to the decision. The Chief Justice, *id.* at 238, stated, however, that the deceased had concurred with the majority. This decision was made in contradiction to decisions of the House of Lords. *See* Gammell v.

Keyn was a case which considered the jurisdiction of the Central Criminal Court in England. Although for a few years, several English cases gave it a broader interpretation,[107] *Conrad*, deciding the same jurisdictional issue, resulted in exactly the opposite conclusion. Unlike *Dominion Coal*, the court in *Conrad* did make a definite finding as to jurisdiction within the three-mile limit. It is unfortunate that the Supreme Court of Canada chose to refer to the *obiter* opinion of a single judge in *Dominion Coal*,[108] rather than to the contrary unanimous decision in *Conrad*, when it wished to illustrate the law of Nova Scotia relating to *Keyn* in the *Offshore Minerals Reference*.

LaForest, in a 1959 report on the rights of the Maritime provinces to adjacent submarine resources, concluded "that the provinces own the territorial waters and subsoil for a distance of three marine miles (about three and one-half statute miles) measured from the shore or a line drawn across the headlands of bays."[109] Twenty-two years later, the arguments for control of this marine belt remain strong despite intervening adverse cases. On the basis of the historical grants of Nova Scotia, the reports of the governors' commissions, international law, the relevant sections of the B.N.A. Act and the exercise of jurisdiction of both the legislature and the courts of Nova Scotia, the province would appear to have a valid claim to the three-mile belt.

IV. INLAND WATERS

It has been argued, "that the decision in the *Offshore Minerals Reference* leaves untouched the provincial contention that the term 'inland waters' refers to what is currently recognized as inland waters by international law."[110] In the common law system, the English courts made no distinction between constitutional and international law when determining the criterion of a bay and whether it was under national or international jurisdiction.[111] However, the definition of a bay is unsettled

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Woods, 3 Macq. 419 (H.L. 1859); Gann v. Free Fishers, 11 H.L. Cas. 192, 11 E.R. 1305 (1865); Attorney-General v. Chambers, 4 De G.M. & G. 206, 43 E.R. 486 (Ch. 1854).

[107] G. LAFOREST, *supra* note 15, at 95-98.

[108] *Offshore Minerals Reference*, *supra* note 12, at 802-04, 65 D.L.R. (2d) at 362-63. Hubbard, *supra* note 67, has argued that the centralistic nature of the decision may be related to the growth of decentralization forces in Canada and, in particular, the growth of the separatist movement in Quebec.

[109] G. LAFOREST, REPORT ON THE RIGHTS OF THE PROVINCES OF NOVA SCOTIA, NEW BRUNSWICK AND PRINCE EDWARD ISLAND TO THE OWNERSHIP OF ADJACENT SUBMARINE RESOURCES, at A (1959).

[110] Beauchamp, Crommelin & Thompson, *Jurisdictional Problems in Canada's Offshore*, 11 ALTA. L. REV. 431, at 467 (1973).

[111] D. O'CONNELL, 1 INTERNATIONAL LAW 488 (2d ed. 1970). However, Canadian federal statutory law appears to distinguish between inland and internal waters: *see* Herman, DAL. L.J. [forthcoming].

in both systems of law, leading to confusion in the case of larger bays such as Fundy,[112] or shallow bays or indentations in the coastline such as Spanish Bay.[113] This section of the paper will examine the various theories for determining what constitutes inland waters.

A. *Inland Waters as Defined by the Common Law*

The first question that arises is when inland waters form part of the adjoining province. In the recent British Columbia Court of Appeal decision in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, Farris C.J. after an examination of the implications and consequences of the *Offshore Minerals Reference* and the Australian case of *New South Wales v. Australia*, determined that the lands covered by the waters of the Straits of Juan de Fuca, Georgia, Johnstone, and Queen Charlotte were the property of the Queen in right of the province of British Columbia.[114] However, Farris C.J. relied in a rather misleading fashion, on a Privy Council decision when he stated: "The word 'lands' in s. 109 [of the B.N.A. Act] includes all waters, rivers, bays, gulfs and straits that are within the boundaries of the provinces. See *St. Catherine's Milling & Lumber Co. v. The Queen* (1888) . . . ."[115] In fact, the quote from *St. Catherine's Milling*, which follows in the text of *Re Strait of Georgia*, constitutes the only authority in the former judgment for the broader conclusion of Farris C.J. Lord Watson had simply stated that the province had received

> the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired the right to under sect. 108, or might assume for the purposes specified in sect. 117 [of the B.N.A. Act].[116]

With due respect to Farris C.J., it is submitted that there is nothing in the decision of Lord Watson which directly supports the argument that bays, gulfs and straits are lands within the boundaries of the province.

Farris C.J. appears to be on firmer ground in his analysis of the applicability of the *Offshore Minerals Reference* and *New South Wales v. Australia* to the case of inland waters. Both cases concerned jurisdiction over territorial waters, and international law has long recognized the distinction between the territorial sea and inland waters.[117] Farris C.J. noted that the Supreme Court of Canada indicated in its decision "that

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[112] LaForest, *Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident*, 1 CAN. Y.B. INT'L L. 149 (1963).

[113] LaForest, *supra* note 102, at 233.

[114] 1 B.C.L.R. 97 (C.A. 1976) [hereafter referred to as *Re Strait of Georgia*].

[115] *Id.* at 103.

[116] St. Catherine's Milling & Lumber Co. v. The Queen, 14 App. Cas. 46, at 57-58, 58 L.J.P.C. 54, at 59 (1888). *See Re Strait of Georgia*, *supra* note 114 at 103.

[117] *See, e.g.*, D. O'CONNELL, *supra* note 111, at 483-95.

the territorial sea begins where the realm abuts upon the open sea.''[118] The Supreme Court also accepted as authority *Direct United States Cable Co. v. Anglo-American Telegraph Co.*,[119] *Rex v. Burt*[120] and *Re Dominion Coal Company and County of Cape Breton*,[121] which recognized that bays of a particular geographic description or which had been claimed historically, were inland waters, and *Capital City Canning Co. v. Anglo-British Columbia Packing Co.*,[122] which held that, except for public harbours, that part of the seabed which is *intra fauces terrae* is within the disposition of the provincial legislature.[123]

Farris C.J. distinguished *New South Wales* by arguing that the language of the colonial grant in the Australian case was intended to include only land within the term ''territory.'' With respect to British Columbia, no reference was made in the grant to structures on the land, and the boundary was given as the Pacific Ocean so as to include the alleged inland waters in question.[124]

Re Strait of Georgia is the most recent Canadian case regarding inland tidal waters. However, there were two powerful dissenting judgments,[125] and part of the majority opinion was based on questionable authority. It does appear, though, on the basis of older common law, that inland waters are considered to be part of the adjacent county,[126] and, therefore, part of the province.

B. *Inland Waters as Defined in International Law*

In international law, the terms ''inland'' and ''internal'' are used synonymously to describe the parts of the sea which lie to the landward side of the baseline of the territorial sea.[127] The latter definition has been confirmed by the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone[128] and the recent Draft Convention on the Law of the Sea (Official Text).[129] In both the Geneva Convention and the Draft Convention, comprehensive rules are set out for drawing baselines

[118] *Re Strait of Georgia*, *supra* note 114, at 105.

[119] *Supra* note 102.

[120] *Supra* note 76.

[121] *Supra* note 48.

[122] 11 B.C.R. 333, at 339 (S.C. 1905).

[123] ''That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a country . . . .'' LORD HALE, DE JURE MARIS, ch. 4, at 1.

[124] *Re Strait of Georgia*, *supra* note 114, at 106-09.

[125] *Id.* at 110-26 (Seaton J.A.), and 126-41 (McIntyre J.A.).

[126] *Re* Dominion Coal Co. and County of Cape Breton, *supra* note 48; United States v. Maine, *supra* note 66; The Fagernes, [1927] P. 311 (C.A.); *Direct United States Cable Co.*, *supra* note 102; Regina v. Cunningham, Bell, C.C. 72, 28 L.J.M.C. 66 (C.C.R. 1859).

[127] D. O'CONNELL, *supra* note 111, at 483.

[128] U.N. Doc. A/Conf. 13/L.52, art. 5(1) (29 Apr. 1958) (reprinted in 52 AM. J. INT'L L. 834-35 (1958)) [hereafter cited as Geneva Convention].

[129] DRAFT CONVENTION, *supra* note 7, art. 8(1).

consisting of straight lines joining appropriate points "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity . . . ."[130] Special articles also exist in both documents for delimiting baselines in relation to river mouths, reefs, permanent harbour works which are part of port installations, roadsteads, low-tide elevations and bays.[131] All of the former provisions are material for defining Nova Scotia's inland waters, but the articles concerning bays are probably the most important.

Historically, various theories have been used to define a bay in international law. For example, the visual test relied on being able to see from headland to headland, while the effective control test was based on the range of a cannon.[132] In 1910, the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration took into account the following characteristics in establishing the territoriality of bays and drawing baselines: (a) the relative depth of the bay to the width of its mouth; (b) the economic and strategic importance of the bay to the coastal state; and (c) the seclusion of the bay from the highways of nations on the open sea.[133] The court continued by applying this test to the coasts of Atlantic Canada and, with the exception of Fundy, summarized the status of all of Nova Scotia's bays after the 1818 Fisheries Convention and existing at the time of the Arbitration. Although the latter summary does not specifically refer to historic bays, and in the majority of cases it provides that the width of the mouth of a bay where a baseline is drawn cannot exceed ten miles, it still constitutes authority for claiming the majority of the province's inland waters.[134]

The aforementioned concept of a geographical test is now the prevailing theory in international law[135] and has been codified in both the Geneva Convention and the Draft Convention.[136] This modern test sets out the geographical characteristics of "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast," which legally define a bay without regard to the distance between headlands. Both agreements also establish the maximum distance a country would be permitted to draw a baseline between the headlands of a bay as twenty-four nautical miles, except in the case of historic bays.

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[130] Geneva Convention, *supra* note 128, art. 4; DRAFT CONVENTION, *supra* note 7, art. 7.

[131] Geneva Convention, *supra* note 128, arts. 7-11; DRAFT CONVENTION, *supra* note 7, arts. 6, 9-13.

[132] D. O'CONNELL, *supra* note 111, at 484-86; L. OPPENHEIM, *supra* note 52, at 505.

[133] D. O'CONNELL, *supra* note 111, at 486; *see also* Award of the Tribunal, *supra* note 81, at 97.

[134] Award of the Tribunal, *supra* note 81, at 97-98.

[135] D. O'CONNELL, *supra* note 111, at 486.

[136] Geneva Convention, *supra* note 128, art. 7; DRAFT CONVENTION, *supra* note 7, art. 10.

Therefore, with the exception of the historic Bay of Fundy, all of Nova Scotia's bays would appear to fit the modern international definition. Unfortunately, controversy still exists over the definition of a "bay" or "gulf" because there is no single geographical conception of either.[137]

Brief mention should also be made concerning the case of straits, which has already been discussed indirectly in relation to *Re Strait of Georgia*. At the time of Confederation when the three-mile limit was favoured, straits like bays were considered inland waters as long as their opening was not in excess of six nautical miles.[138] Today, with the twelve mile territorial limit accepted in international law, straits of up to twenty-four miles in width may be considered as such.[139] With regard to the Northumberland Strait, in addition to the new twenty-four mile test, there have also been a number of historical precedents for considering it to be an inland water.[140] The question remains whether or not the boundary line between Nova Scotia and Prince Edward Island should be drawn up the centre of the Strait, like it is in the Bay of Fundy, dividing the water territory equitably between the two provinces.

If the argument is not accepted that provincial inland waters are those currently recognized by international law, a problem concerning Nova Scotia's claim may arise because at the time of Confederation the geographical limitations for bays may have included only those with an entrance six miles or less in width. LaForest has commented that "[waters] that have become inland waters of Canada since Confederation would . . . appear to belong to the Dominion. Among these may be mentioned bays between six and twenty-four marine miles in width . . ."[141] In his opinion, waters which were inland waters by historic title at Confederation would be an exception to this case. It is now necessary to consider historic bays and the special case of the Bay of Fundy.

C. *Historic Bays*

LaForest contends that all of Nova Scotia's bays are "historical bays."[142] This section will briefly outline the merits of LaForest's thesis, with particular regard to the Bay of Fundy.

Both Article seven of the Geneva Convention and Article ten of the Draft Convention provide for a special exception from their respective requirements in the case of historic bays. D.P. O'Connell has expounded a theory that historic bays are not, in fact, determined on any historical criteria, but rather are the result of a unilateral act, which was acquiesced to because at the time, no other state had a sufficient economic interest to

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[137] D. O'CONNELL, *supra* note 111, at 487.
[138] G. LAFOREST, *supra* note 109, at 44.
[139] D. O'CONNELL, *supra* note 111, at 495-503.
[140] LaForest, *supra* note 112, at 169-71.
[141] G. LAFOREST, *supra* note 15, at 91.
[142] *Supra* note 112.

protest. O'Connell described the two forms which such an act takes as a specific act of sovereignty or an act by judicial construction.[143] The majority of the International Court of Justice in *United Kingdom v. Norway (Fisheries Case)*, described the necessary acquiescence referred to by O'Connell as a "general toleration of foreign States . . . ."[144] In Norway's case there had been a general toleration by the United Kingdom of her application of a well-defined and uniform system of delimitation decrees. The latter decrees constituted "the basis of a historical consolidation which would make [the system] enforceable as against all States."[145] The Court also indicated that a notoriety of the facts relating to the historical claim over the bay must also exist.[146]

As previously demonstrated, Nova Scotia, through numerous statutes, rules, proclamations, orders, *etc.*, clearly asserted a claim over all of its bays and inlets, including the Bay of Fundy. The original territorial grants and the governors' commissions confirmed the original claims that the British had made over all of Nova Scotia's bays. Subsequent treaties and conventions gave international recognition to this jurisdiction, and the North Atlantic Coast Fisheries Arbitration provided American agreement on Nova Scotia's and Canada's claims, except with regard to the Bay of Fundy.

Nova Scotia's and Britain's assertion of jurisdiction over Nova Scotian bays constituted a specific act of sovereignty which, although it was disputed on occasion by the United States, has been generally tolerated by that nation and all others.[147] In fact, with the exception of the United States, it appears that even the Fundy claim has been accepted internationally.[148] Judicial construction at the international level in the case of the North Atlantic Coast Fisheries Arbitration, and in the domestic courts, particularly in the numerous cases involving the seizure of American fishing boats,[149] has upheld Nova Scotia's claims to her bays other than Fundy. Finally, it should be noted that O'Connell states that "[in] a federal State it would seem that only the federal government may claim a bay to be historic waters."[150] However, prior to Confederation, Nova Scotia was not a federal state and the colonial legislation of Nova Scotia dealing with its bays was officially approved by the British Government.[151]

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[143] D. O'CONNELL, *supra* note 111, at 490-93.

[144] *Supra* note 51, at 138.

[145] *Id.*

[146] *Id.* at 138-39.

[147] LaForest, *supra* note 112.

[148] *Id.* at 150.

[149] *See, e.g.*, Record of Court of Vice Admiralty at Halifax 1817-1851, as quoted in *Appendix to the Case of the United States*, Part II, 3 PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION 1076 (1912).

[150] D. O'CONNELL, *supra* note 111, at 493.

[151] LaForest, *supra* note 112, at 153; *see also* D. SWINFEN, IMPERIAL CONTROL OF COLONIAL LEGISLATION 1813-1865 (1970).

The Bay of Fundy presents a special case because there are two sources of dispute. Firstly, the Americans have not been prepared to concede that it is or was Canadian inland or territorial waters, either now or at the time of Confederation. Secondly, there is the argument that if it is Canadian inland or territorial waters, it is under federal, not provincial jurisdiction. Philip C. Jessup, the great American international jurist, adopted the conclusion of Bates, the Umpire in *The Washington*, that Fundy was not a territorial bay.[152] In the latter case in which an American fishing schooner was seized by the British in the Bay of Fundy, ten miles from the shore, Bates concluded that the Bay was a "great body of water", sixty-five to seventy-five miles wide and 130 to 140 miles long, with several bays on its coasts. Bates held that it was similar to the Bays of Biscay and Bengal over which no nation could claim sovereignty, and therefore not a "bay" within the meaning of the word as used in the treaties of 1783 and 1818.[153]

Jessup also argued that the British Government never pressed its claim to Fundy and acquiesced to Mr. Bate's decision.[154] The aforementioned proposition is somewhat misleading, for in the North Atlantic Coast Fisheries Arbitration, the British Government contended that it had not raised the particular case of Fundy because it viewed it as being in the same category as the other bays referred to generally in the renunciation clause of Article one of the 1818 Convention. If the drafters of the Convention had intended the term "bays" to apply to only a limited class of waters, then an express limitation would have been inserted to give effect to that intention. Furthermore, the British claimed that it was strictly for policy reasons that they had not pressed their arguments.[155]

LaForest has argued that *The Washington* was wrongly decided for several reasons. According to the North Atlantic Coast Fisheries Arbitration, Fundy would clearly come within the international definition of a bay, although it might not necessarily constitute territorial waters. The great extent of the body of water does not, in itself, exclude it from the definition of a territorial bay as can be seen from the cases of Conception, Chaleurs and Miramichi. Fundy is also much smaller than Bates thought though, ranging from thirty to about forty-five miles in width.[156] Bates, in his decision, commented that Fundy was not a territorial bay because its headlands were not in the same country.[157] In fact, LaForest points out, if a line is drawn in the most reasonable location, from Nova Scotia to the mouth of the St. Croix, both headlands

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[152] P. JESSUP, *supra* note 61, at 565-66, 410-11. *See also* CALVO, 1 LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE s. 361 (5th ed. 1896).

[153] The "Washington", referred to in full in *Appendix to British Case*, *supra* note 37, at 356, 365-66.

[154] P. JESSUP, *supra* note 61, at 411.

[155] THE CASE OF GREAT BRITAIN, *supra* note 38, at 91-94.

[156] LaForest, *supra* note 112, at 162-64.

[157] *The "Washington"*, *supra* note 153.

are in Canada and the greatest distance would be twenty-five and a half marine miles or less.[158]

With the modern advent of the 200 mile exclusive economic zone, much of the discussion concerning Canada's international claim to the Bay of Fundy is probably irrelevant. However, once again one is forced to return to the "international test" of the Supreme Court of Canada which makes the historic legality of the claim the deciding factor, as in the case of the other marine boundary questions. At the international level, the various grants, governors' commissions and treaties, such as Utrecht which uses the word "bays" to describe the British territory,[159] have established the earlier claim of Great Britain to the Bay of Fundy, a claim which Canada has continued to assert to the present day.[160]

Within the domestic sphere, the commissions to Sir Thomas Carleton in 1786[161] and Lord Elgin in 1846[162] describe the boundary line between the provinces of Nova Scotia and New Brunswick as being the centre of the Bay of Fundy. Both provinces had enacted statutes prior to Confederation which appeared to deal with the Bay as if it were inland waters.[163] The Appeal Division of the Supreme Court of New Brunswick in *Burt* stated, *obiter*, that the northern half of Fundy was part of New Brunswick's territory.[164] Thirty-five years later, the Supreme Court of Canada, in the *Offshore Minerals Reference*, interpreted *Burt* as being based on the aforementioned Carleton commission, in which the southern boundary of New Brunswick was the centre line of the Bay of Fundy, and appeared to approve of this finding of law.[165] The Supreme Court had also previously held that a similar boundary drawn in the centre of the Bay of Chaleurs between New Brunswick and Quebec was valid.[166] Given that the Elgin and Carleton commissions have the force of law,[167] and that section 7 of the B.N.A. Act maintains the pre-Confederation boundaries of Nova Scotia, the province's claim to the southern half of Fundy rests decidedly on firm ground.

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[158] LaForest, *supra* note 112, at 163-64.

[159] M. SAVELLE, *supra* note 33.

[160] LaForest, *supra* note 112.

[161] Royal Commission to Sir Thomas Carleton, 24 Aug. 1786, as quoted in CAN. SESS. PAP. 1883, No. 70, at 47; *see*, for a more accurate reproduction, COLLECTIONS OF THE NEW BRUNSWICK HISTORICAL SOCIETY, No. 6, at 394-95.

[162] *Supra* note 47.

[163] *See, e.g.*, An Act to Provide for the support of a Lighthouse on Briar Island, at the entrance of the Bay of Fundy, 49 Geo. 3, c. 9 (1809); An Act to provide for maintaining Lighthouses within the Bay of Fundy, 2 Wm. 4, c. 9 (1832) (*amended by* 3 Wm. 4, c. 30 (1833)).

[164] *Supra* note 76, at 117-19.

[165] *Supra* note 12, at 809, 65 D.L.R. (2d) at 368.

[166] Mowat v. McFee, 5 S.C.R. 66 (1880).

[167] *Supra* note 48.

V. CONCLUSION

At the time of the writing of this paper, the federal government has just introduced legislation into the House of Commons, asserting a claim for control over the offshore.[168] Considering the legislative moves that Nova Scotia has made in the past year, it is clear that the two governments are on a constitutional collision course. The purpose here has been to demonstrate that if the Nova Scotia offshore dispute does end up before the Supreme Court of Canada, Nova Scotia will at least have the foundation of a case, both historically and legally. In conclusion, Nova Scotia would appear to have a solid claim to her inland waters and the three-mile belt surrounding the province. With regard to the offshore, a great deal of research still needs to be completed, but it seems clear that Nova Scotia's case must now be given the same serious consideration which the Newfoundland claim has received.

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[168] The Canada Oil and Gas Act, Bill C-48, 32d Parl., 1st Sess., 1980 (2d reading 15 Jan. 1981).