ANNUAL SURVEY OF CANADIAN LAW
PART 3

INTERNATIONAL LAW

Donat Pharand *

TABLE OF CONTENTS

I. Introduction

During the period covered by this Survey [1] Canadian legislation and court decisions touching on one aspect or another of international law related mainly to four areas: the law of the sea; immunities; human rights; and treaties.

As is to be expected because of Canada's legislative initiatives concerning the protection of the marine environment and the establishment of a 200-mile fishing zone, an appreciable portion of this Survey, the first part, is devoted to the law of the sea. The second part deals with the three traditional types of immunities: sovereign immunity, with particular emphasis on a recent case before the Ontario High Court involving an agent of a foreign State; and diplomatic and consular immunities, on which the federal government introduced legislation in 1976 incorporating some of the provisions of the Vienna conventions covering such immunities. The third part deals with human rights and more specifically with two questions: first, the granting of political asylum or refugee status under the Immigration Act; and second, the implementation of the International Covenants on Human Rights which came into force in 1976 and to which Canada has acceded. The final part deals with the treatment given by the Supreme Court in the *Chateau-Gai Wines* case [2] to the questions of ratification and entry into force of treaties as well as the evidentiary force of a certificate from the appropriate Minister on that question.

II. Law of The Sea

A. *Protection of the Marine Environment*

Canada has been very active—both at home and at the ongoing Law of the Sea Conference, now in its sixth session—in ensuring that adequate measures are taken to protect the marine environment. At the 1969 Brussels Conference [3] Canada had opposed both conventions adopted because they did not go far enough in protecting the interests of coastal States. More specifically, the Convention on Civil Liability for Oil Pollution Damage did not provide for the joint liability of ship and cargo owners, and the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution

---

* Faculty of Law, University of Ottawa.

[1] A period of nearly five years, from 1972 to mid-1977.

[2] Château-Gai Wines Ltd. v. Institut National des Appellations d'Origine des Vins et Eaux-de-Vie, [1975] 1 S.C.R. 190, 51 D.L.R. (3d) 120 (1974).

[3] The conference had been triggered by the stranding of the "Torrey Canyon" tanker on the Seven Stones' reef in the English Channel, which caused millions of dollars of damage to both the English and the French coasts.

Damage was essentially remedial rather than preventive in nature.[4] Consequently, Canada proceeded to incorporate these two features into its own national legislation, by adopting special pollution prevention measures for the Arctic waters and amending existing legislation to include similar preventive provisions for waters south of the sixtieth parallel. Both sets of measures will now be reviewed and their international validity briefly discussed.

1. *Pollution Prevention Regulations in the Arctic*

In 1970, following the discovery of vast oil reserves at Prudhoe Bay on the north slope of Alaska and the voyage of the "S.S. Manhattan", the Canadian Parliament unanimously adopted the Arctic Waters Pollution Prevention Act.[5] This legislation, designed to protect the delicate Arctic marine environment while permitting its economic development, imposed stringent preventive measures directed against the possibility of oil spills, either from water transportation by tanker or from land-based and off-shore resource development activities. Commercial shipping was required to meet special standards of design, construction, equipment, manning and navigation, and joint liability was imposed on ship and cargo owners. The Act, however, was not sufficiently complete in a number of respects for it to be brought into operation immediately, and its proclamation was postponed until August 2, 1972, when the Arctic Waters Pollution Prevention Regulations and the Shipping Control Zones Order were brought into effect. A third preventive measure, the Arctic Shipping Pollution Prevention Regulations, was brought into force on October 10 of the same year.

The Arctic Waters Pollution Prevention Regulations of 1972[6] contain two parts: Part I, applicable to the exploration for and exploitation of natural resources on land and the continental shelf, and Part II, applicable to ships. Part I specifies the limitations applicable to the deposit of both domestic and industrial waste,[7] and imposes an obligation to report prohibited deposits of waste to a Pollution Prevention Officer at Whitehorse or Yellowknife.[8] The Regulations list the names of those officers responsible for the non-shipping activities coming under the jurisdiction of the Minister of Indian Affairs and Northern Development. They also provide for the

---

[4] For a discussion of the 1969 Brussels Conventions and Canada's position at the conference, see D. PHARAND, THE LAW OF THE SEA IN THE ARCTIC, WITH SPECIAL REFERENCE TO CANADA 213-24 (1973).

[5] R.S.C. 1970 (1st Supp.), c. 2. This legislation has been discussed in a number of legal periodicals and was briefly reviewed by Chen, *Annual Survey of International Law*, 4 OTTAWA L. REV. 534-36 (1971).

[6] S.O.R./72-253, Canada Gazette Part II, Vol. 106, No. 14, p. 1033 (July 26, 1972).

[7] Ss. 5 and 6.

[8] S. 7.

manner of determining the maximum amount of liability for the deposit of waste resulting from either a domestic or an industrial operation. Having regard to the present exploration activities in the Beaufort Sea area, it is interesting to note that the liability of an industrial operator engaged in the exploration for or exploitation of oil and gas is calculated by multiplying ten million dollars by the number of wells from which the deposit of waste originates, and may reach a maximum of fifty million dollars. [9]

Part II of the Regulations relates to the proof of financial responsibility on the part of ship and cargo owners. Since the Act envisaged absolute liability not based on fault or negligence, it was necessary for the owners to obtain insurance and this proved most difficult. Indeed, it seems that no insurer was willing to accept this risk, and it was necessary for the Regulations to water down considerably the principle of absolute liability provided for in the Act. Consequently, the Regulations incorporate four major exceptions to this principle: (a) force majeure, (b) the intentional act of a third party, (c) the act or omission of a government or authority responsible for navigational aids, and (d) the wilful misconduct of the ship owner. [10] With all these possible defences, it is obvious that it is no longer accurate to characterize the liability of the ship and cargo owners as being "absolute": it is basically strict liability, coupled with exceptions. As for the limits to the joint and several liability of the ship and cargo owners, they are determined by multiplying 2,000 gold francs by the ship's tonnage, the maximum amount being 210 million gold francs. [11]

The Shipping Safety Control Zones Order [12] divides the area covered by the Act, extending to one hundred nautical miles north of the mainland and Arctic islands, into sixteen different "shipping safety control zones" (see Chart No. 1), which are described by means of geographic coordinates. The safety standards to be observed in those zones are defined in the shipping regulations.

The Arctic Shipping Pollution Prevention Regulations [13] cover some thirty-four pages of fine print. They set out the standards ships must meet before they may navigate through the Arctic waters, specifying the types of ship admissible in each of the sixteen zones, as well as the time of year when they may be admitted. Only ships complying with the construction standards specified as "Arctic Class 10" are admissible in Zone 1, which includes M'Clure Strait, north of Banks Island at the western end of the

---

[9] S. 8(c).

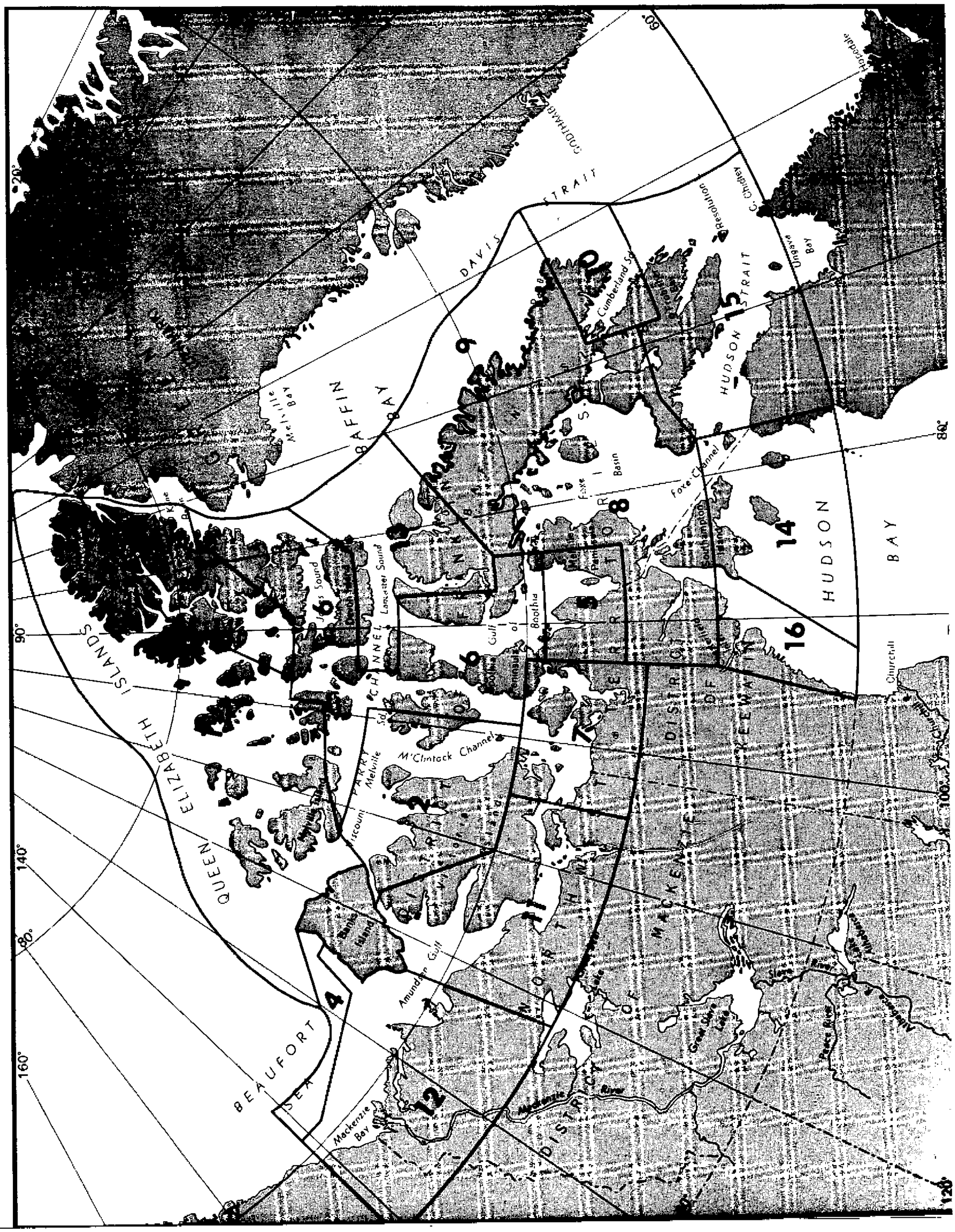
[10] S. 11(1)(a).

[11] S. 14(2).

[12] S.O.R./72-303, Canada Gazette Part II, Vol. 106, No. 16, p. 1468 (Aug. 23, 1972).

[13] S.O.R./72-426, Canada Gazette Part II, Vol. 106, No. 20, p. 1847 (Oct. 25, 1972).

Chart No. 1


BAFFIN BAY
DAVIS STRAIT
HUDSON BAY
HUDSON STRAIT
Ungava Bay
Foxe Channel
Foxe Basin
Cumberland Sd.
Lancaster Sound
Jones Sound
Gulf of Boothia
M'Clintock Channel
PARRY CHANNEL
QUEEN ELIZABETH ISLANDS
BEAUFORT SEA
Amundsen Gulf
Banks Island
Mackenzie Bay
Mackenzie River
Peace River
Great Slave Lake
Churchill
Melville Bay
DISTRICT OF KEEWATIN
DISTRICT OF MACKENZIE
DISTRICT OF FRANKLIN
NORTHWEST TERRITORIES
60°
80°
90°
100°
120°
140°
160°
4
5
6
7
8
9
10
11
12
13
14
15
16

Northwest Passage and leading to Beaufort Sea. Canada has not yet built a ship of that class and will probably not have one in operation before the mid-1980's. [14]

The standards contained in the Regulations cover such features as construction, navigation equipment, ship station radio, navigation personnel, quantity of fuel and water, and bunkering stations. With respect to the latter, it is provided that each side of the deck should have a bunkering station to which may be connected a bunkering hose with a flange of specified dimensions. [15] This is an important requirement since the absence of such a flange on the Liberian tanker "Arrow", permitting the link-up of a hose from one ship to another, was the cause of extensive damage in the oil spill in Chedabucto Bay, which otherwise could have been avoided. The Regulations also specify that, before the owner or master of any ship may enter any Arctic zone, he must obtain a Certificate in the form set out in a schedule to the Regulations. No tanker may navigate within any of the zones without the aid of an ice navigator who has had previous experience in the capacity of master while the ship was in ice conditions. [16] Only three exceptional circumstances make oil deposit permissible: (a) saving life or preventing the immediate loss of a ship; (b) a leakage resulting from stranding, collision or foundering, if all reasonable precautions have been taken to avoid such mishap; and (c) deposit through the exhaust of an engine or by leakage from an under-water machinery component where this is minimal and unavoidable. [17]

2. *Pollution Prevention Regulations South of 60*

In 1971, Canada amended the Canada Shipping Act by inserting a new part on pollution. [18] This amendment incorporates a pollution prevention scheme applicable to oil pollution arising from shipping in Canadian waters south of the sixtieth parallel and complements the Arctic Waters Pollution Prevention Act, which applies to waters north of that parallel.

---

[14] *See* Langford, *Marine Science, Technology, and the Arctic Some Questions and Guidelines for the Federal Government*, in THE ARCTIC IN QUESTION 163-92, at 166 (E. J. Dosman ed. 1976). American Class 10 ice breakers may be ready before Canadian ones. *See* R. FAYLOR AND S. FISHBEIN, ARCTIC MARINE COMMERCE STUDY (U.S. Dept. of Commerce 1973).

[15] *Supra* S.O.R./72-426, s. 10(a).

[16] S. 26.

[17] S. 29.

[18] R.S.C. 1970 (2nd Supp.), c. 27, ss. 727-61. Canada's pollution prevention scheme was supplemented in 1975 by the enactment of the Ocean Dumping Control Act, S.C. 1974-75-76 c. 55. Finally, in 1977, fishery officers were given powers of peace officers to enforce fisheries legislation in general and provisions relating to the protection of the marine environment of fishery zones in particular. *See* Bill C-38, 13th Parl., 2nd sess., 1976-77 (as passed by the House of Commons June 28, 1977).

Regulations were also adopted [19] providing in particular that prior to and during a transfer operation of oil or oily mixture, all scuppers of a ship engaged in such an operation shall be plugged so as to prevent leakage. [20] The British Columbia Court of Appeal had to decide recently how to apply this particular provision in the case of *Regina v. The Vessel "Westfalia"*. [21] The West German ship had engaged in an oil transfer operation in Vancouver Harbour during which its scuppers were not plugged as required. Since no person had been charged along with the ship, the point which the court had to decide was whether it could convict the ship alone for failure to comply with the regulation in question as required by the Canada Shipping Act. [22] It was pointed out to the court that many of the sections of these Regulations specifically designate "the owner", "the officer in charge", "a person in charge", "the master of every ship" or "every ship" as being responsible for complying with the Regulations, whereas section 20 made no such specific imposition on anyone to comply and therefore, it was argued, could not be made applicable to the ship itself. The court rejected this argument and convicted the ship of a breach of the regulation in question. Carrothers J.A. stated that he did "not consider it essential that a specific designation or imposition of the onus to perform or comply be stipulated in the particular Regulation itself in order to find applicability of that Regulation under the offence s.755." [23] The report does not state the amount of the fine which had been imposed upon summary conviction, but this decision does show that Canadian courts will not hesitate to uphold a strict application of the Oil Pollution Prevention Regulations to foreign ships during their stay in Canadian waters.

3. *International Validity of Pollution Prevention Regulations*

As was shown in the *Anglo-Norwegian Fisheries Case,* [24] the international legal validity of national legislation may be tested when such legislation affects other States. Canada was, of course, well aware of that possibility in 1970 when it adopted the Arctic Waters Pollution Prevention Act, and it modified its acceptance of the jurisdiction of the International Court so as to exclude disputes which could have arisen from the application of that legislation. As was to be expected, the United States, against which the legislation was primarily directed, objected very strongly to the provisions of the Canadian Arctic legislation, which it alleged went far beyond existing

---

[19] Oil Pollution Prevention Regulations, S.O.R./71-495, Canada Gazette Part II, Vol. 105, No. 19, p. 1723 (Oct. 13, 1971).

[20] S. 20.

[21] 21 C.C.C. (2nd) 217, 54 D.L.R. (3d) 412 (B.C.C.A. 1974).

[22] R.S.C. 1970 (2nd Supp.), c. 27, s. 755 provides that "[a]ny person who and any ship that contravenes any regulation made under any of paragraphs 730(1)(*c*) to (*o*) that is applicable to him or it is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred thousand dollars".

[23] *Supra* note 21, at 224, 54 D.L.R. (3d) at 419.

[24] [1951] I.C.J. Rep. 116, at 132.

conventional law and was contrary to the well-established principle of exclusive jurisdiction of the flag State on the high seas. [25] Canada has been very active ever since at international conferences in attempting to gain recognition for the right of coastal States to establish anti-pollution regulations that are more stringent than generally accepted international norms, particularly in relation to ecologically sensitive and hazardous areas such as the Canadian Arctic. These efforts met with partial success at the 1972 Stockholm Conference on the Human Environment and at the 1973 London Conference on Marine Pollution. However, Canada has had considerably greater success in the ongoing Law of the Sea Conference, where it managed to have a special provision on "ice-covered areas" included in the Revised Single Negotiating Text, [26] which text is the equivalent of a Draft Convention. Article 43 of the Text provides:

> Coastal States have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. [27]

It is quite obvious that this provision is meant to cover Arctic waters and unquestionably justifies the Canadian Arctic legislation. Two things in particular must be noted: first, coastal States may apply such legislation within the limits of the economic zone, which means 200 nautical miles; and, second, coastal States have the right not only to establish but also to enforce such regulations. In other words, an exception is made to the traditional rule that enforcement is left to the flag State. The Revised Single Negotiating Text in question has not yet been adopted, but there is not much doubt that this particular provision will be agreed upon, since it has the support of the other Arctic States, including apparently the United States. In the unlikely event that such a provision is not incorporated in the Convention adopted by the Third Law of the Sea Conference, Canada would have to justify its legislation on the basis of customary law, relying on the principle of self-preservation, or possibly, self-defence. [28]

B. *Two-Hundred-Mile Fishing Zone*

On January 1, 1977, Canada extended its fishing jurisdiction to 200 nautical miles on the East and West coasts, and it did the same for the Arctic on March 1. It should be emphasized that Canada did not suddenly decide to assume this fishing control of over 600,000 square miles

---

[25] *See* text of the U.S. Press Release reproduced as Appendix A in 6 H.C. DEB., at 5923 (28th Leg. 2nd sess., April 15, 1970).

[26] THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, A/CONF. 62/WP, 8/Rev. 1, Parts I, II and III, 5-140 (May 6, 1976).

[27] *Id.*, Part III.

[28] *See* this writer's discussion of this question, *supra* note 4, at 235-44.

of high seas off the East and West coasts alone. It did so after considerable preparation going back to at least 1964. The Second Law of the Sea Conference in 1960 having failed to reach agreement on a uniform breadth of territorial waters, Canada was among the first countries in 1964 to establish its fisheries limits at twelve miles. In 1970, it amended its Territorial Sea and Fishing Zones Act to authorize the Governor in Council to create exclusive Canadian fishing zones in areas of the sea adjacent to the coasts of Canada. By virtue of this enactment, fisheries closing lines were established in 1971 across the Gulf of St. Lawrence, the Bay of Fundy, Queen Charlotte Sound, Dixon Entrance and Hecate Strait, and these bodies of water were declared to be exclusive Canadian fishing zones (see Zones 1 and 2 on Chart No. 2, and Zone 3 on Chart No. 3). At the same time, Canada negotiated phasing-out agreements with all the countries having traditional or conventional fishing rights in those areas. With the exception of those of France and the United States, nearly all of the phasing-out agreements have run out and foreign fishing has practically ceased in those areas. Before adopting its 200-mile fishing zone on January 1, 1977, Canada proceeded in essentially the same way and concluded bilateral agreements with five countries responsible for about ninety per cent of foreign fishing off its coasts, namely Norway, Poland, the U.S.S.R., Portugal and Spain. More will be said later about the legal effect of these agreements.

1. *Fishing Zones on East and West Coasts*

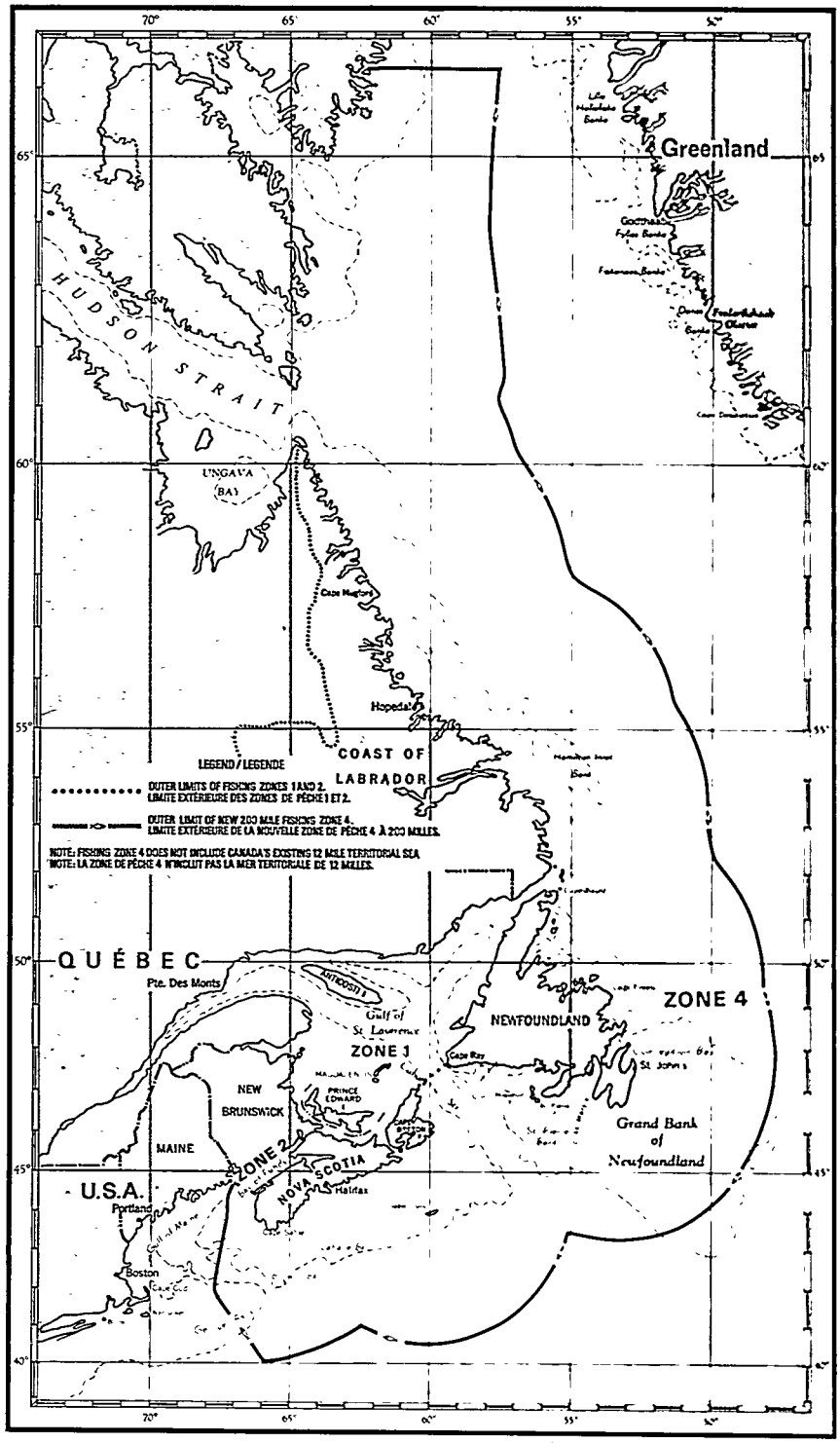
On January 1, 1977, the Fishing Zones of Canada (Zones 4 and 5) Order,[29] made pursuant to the Territorial Sea and Fishing Zones Act, [30] came into force. This Order contains a description of the fishing zones being established. On the East coast, fishing zone 4 (see Chart No. 2) begins at the mouth of the Bay of Fundy, crosses the Gulf of Maine, following the median line between Nova Scotia and the State of Maine, and then follows geodesic lines and arcs of circles 200 nautical miles from the coasts of Nova Scotia, Newfoundland, Labrador and the Arctic islands, as far North as the 66° 15' 00" parallel. Canada took full advantage of the presence of Sable Island, the 200-mile line being drawn by an arc of circle measured from that island. On the West coast, the outer limit of the new fishing zone (see Zone 5 on Chart No. 3) begins at the median line at the entrance of Juan de Fuca Strait out to 200 miles following the median line, then runs northwest along the coast of British Columbia following the outer perimeter of the zone made up of geodesic lines and arcs of circles 200 miles from the coast, and then continues East to the northernmost point of Dixon Entrance (Cape Muzon, Alaska), which is also the beginning of the boundary line between Alaska and Canada.

---

[29] S.O.R./77-62, Canada Gazette Part II, Vol. III, No. 1, p. 115 (Extra, Jan. 12, 1977).

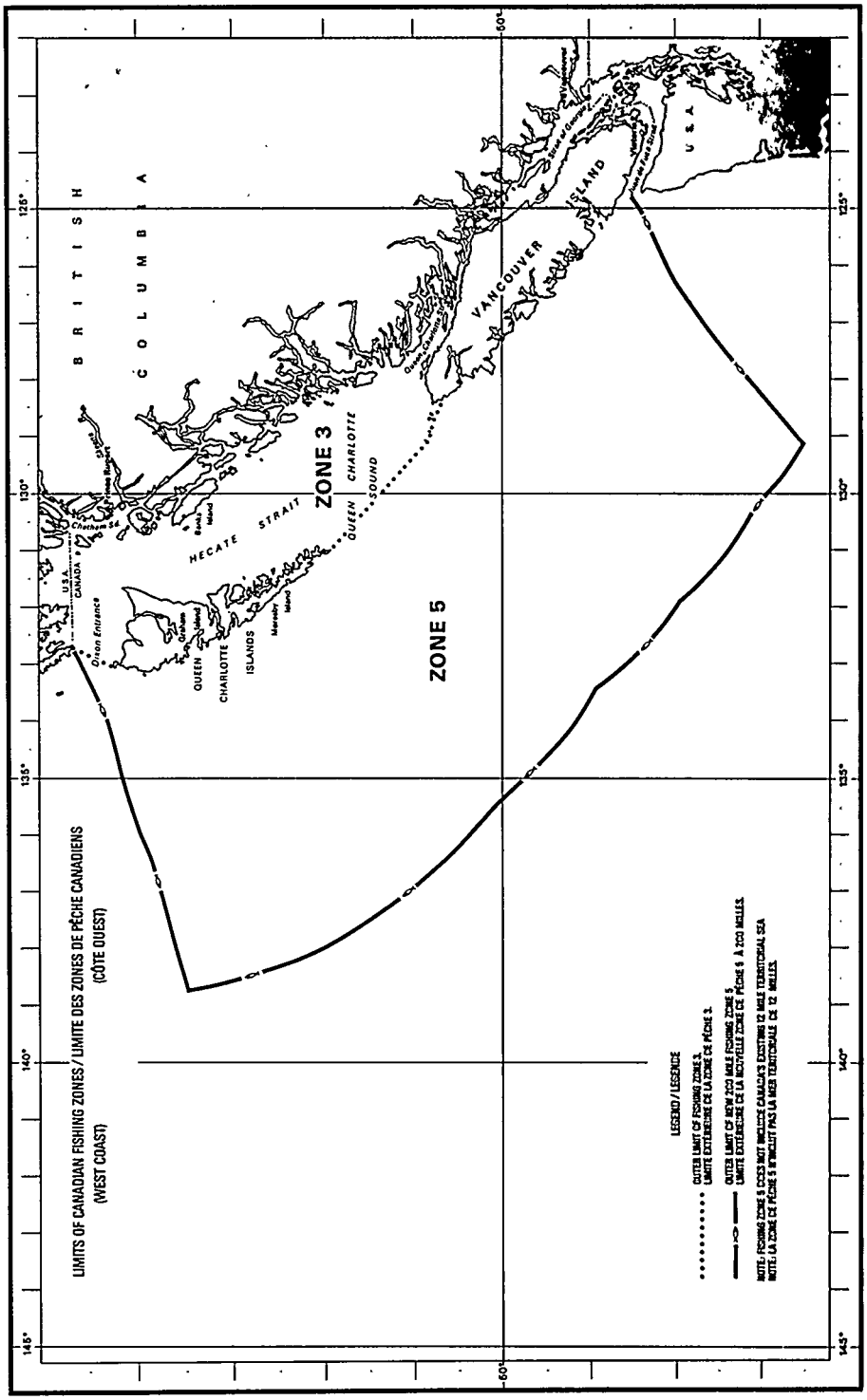
[30] R.S.C. 1970, c. T-7.

Chart No. 2



LIMITS OF CANADIAN FISHING ZONES / LIMITE DES ZONES DE PÊCHE CANADIENS
(EAST COAST) (CÔTE EST)

Chart No. 3


LIMITS OF CANADIAN FISHING ZONES / LIMITE DES ZONES DE PÊCHE CANADIENS
(WEST COAST)
(CÔTE OUEST)
ZONE 3
ZONE 5
BRITISH COLUMBIA
HECATE STRAIT
QUEEN CHARLOTTE SOUND
QUEEN CHARLOTTE ISLANDS
VANCOUVER ISLAND
U.S.A.
CANADA
Dixon Entrance
LEGEND / LÉGENDE
OUTER LIMIT OF FISHING ZONE 3.
LIMITE EXTÉRIEURE DE LA ZONE DE PÊCHE 3.
OUTER LIMIT OF NEW 200 MILE FISHING ZONE 5.
LIMITE EXTÉRIEURE DE LA NOUVELLE ZONE DE PÊCHE 5 À 200 MILLES.
NOTE: FISHING ZONE 5 DOES NOT INCLUDE CANADA'S EXISTING 12 MILE TERRITORIAL SEA.
NOTE: LA ZONE DE PÊCHE 5 N'INCLUT PAS LA MER TERRITORIALE DE 12 MILLES.

The Coastal Fisheries Protection Regulations, [31] also effective on January 1, 1977, provide for the issuance of fishing licences to foreign fishing vessels. No foreign fishing vessel may enter Canadian fisheries waters unless it is so authorized by a fishing licence or a special permit, the latter being for disabled fishing vessels. [32] The only circumstance where a foreign fishing vessel may enter either Fishing Zone 4 or Fishing Zone 5 without the authority of a licence or permit is "for the purpose of passing through such waters in the course of a voyage to a destination outside Canadian fisheries waters". [33] This latter exception is, of course, in recognition of the right of innocent passage which continues to exist in favour of foreign ships. The Regulations provide that every licence issued to a foreign vessel will specify the terms and conditions under which the licence is granted. [34] In particular, the licence will specify the stocks or groups of stocks which may be fished, oblige the foreign vessel to maintain written records of its catch and require the master to make periodic reports of the position of his vessel and of his catch statistics. [35]

The Foreign Vessel Fishing Regulations, [36] which also came into force on January 1, 1977, list the countries which are allowed to fish and specify the quota allowed to each country, as well as the species or group of species which they may take. [37] The Regulations also cover such things as incidental catch limits, mesh size, closed areas and seasons, and size limits. [38] Enforcement rests with Canadian fisheries officers, whose powers include boarding, searching, taking samples of cargo and requesting the master to provide all reasonable assistance to enable them to carry out their duties. [39] The quota tables contained in the Regulations specify not only the permitted species, but also the fishing areas and the quantity of catch permitted in metric tons. The United States and France have been exempted by special regulations from the necessity of obtaining fishing licences for the moment. [40]

---

[31] S.O.R./76-803, Canada Gazette Part II, Vol. 110, No. 24, p. 3318 (Dec. 22, 1976).

[32] S. 3.

[33] S. 15(1).

[34] S. 11.

[35] *Id.*

[36] S.O.R./77-50, Canada Gazette Part II, Vol. III, No. 1, p. 68 (Extra, Jan. 12, 1977).

[37] *See id.* at 87-92 for Schedule II covering the Atlantic coast and at 95 for Schedule VII covering the Pacific coast. The countries which may be allowed to fish on the Atlantic coast are Bulgaria, Cuba, Denmark, France, the Federal Republic of Germany, the German Democratic Republic, Japan, Norway, Poland, Portugal, Romania, Spain, the U.S.S.R., the United Kingdom and the United States. On the Pacific coast, the countries listed are Japan, the Republic of Korea, Poland and the U.S.S.R.

[38] Ss. 9, 11, 14 and 17.

[39] S. 28.

[40] For the United States, *see* Transitional United States Fishing Vessel Licence Exemption Regulations, S.O.R./77-51, Canada Gazette Part II, Vol. III, No. 1, p.99 (Jan. 12, 1977). For France, *see* Transitional French Vessel Licence Exemption Regulations, S.O.R./77-52, Canada Gazette Part II, Vol. III, No. 1, p. 101 (Jan. 12, 1977).

2. *Fishing Zone in the Arctic*

On March 1, 1977, Canada's 200-mile fishing zone was extended to the Arctic waters, by the Fishing Zones of Canada (Zone 6) Order. [41] The zone covers a 200-nautical-mile strip along the coast of the mainland and the Arctic islands, commencing at 141° W. longitude (boundary line between Yukon and Alaska) and terminating at 59° 51' 57" W. longitude, [42] thus traversing part of the Beaufort Sea, the Arctic Ocean and the Lincoln Sea. There was no foreign commercial fishing being done in those regions and therefore no necessity for Canada to conclude prior bilateral arrangements with other countries, as it had done for the East and West coasts. Indeed, although the Preamble states that the establishment of the Arctic fishing zone is essential "to ensure the proper conservation and management of the living resources of the sea in areas adjacent to the coast of Canada in the Arctic regions", [43] the Order is limited to a description of the zone and no conservation or management measures are provided for in other regulations.

3. *International Validity of Fishing Zones*

There are basically two aspects to the question of the international validity of a 200-mile fishing zone which should be discussed: the validity of the concept itself, and the mode of delimitation of that zone.

(a) *Concept of fishing zone*

The concept of a 200-mile fishing zone is part and parcel of a wider concept, that of the exclusive economic zone, on which there has already been a very wide consensus within the Law of the Sea Conference. Indeed, perhaps this is the area in which consensus has been the most firmly established at the Conference. Part II of the Revised Single Negotiating Text provides that the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone, taking into account the best scientific evidence available in order to ensure that those living resources are not endangered by over-exploitation. [44] At the same time, the coastal State is to promote the objective of optimum utilization of the living resources in its exclusive economic zone and, to attain that objective, shall determine its harvesting capacity; if it does not have the capacity to harvest the entire allowable catch, it shall give other States access to the surplus by making agreements with them. [45]

This is exactly what Canada has done with five countries whose aggregate fishing totals some ninety per cent of the foreign catch off our coasts.

---

[41] S.O.R./77-173, Canada Gazette Part II, Vol. III, No. 5, p. 652 (March 9, 1977).
[42] S. 4(b).
[43] Preamble.
[44] *Supra* note 26, Part II, art. 50.
[45] *Id.*, art. 51.

The terms of those five bilateral agreements are basically the same, and the Agreement between Canada and Norway concluded on December 2, 1975 [46] is a good example. This Agreement provides that Canada shall determine annually the total allowable catch for individual stocks or complexes of stocks, the Canadian harvesting capacity for such stocks and, after appropriate consultations, the allotment to Norwegian vessels in parts of the surplus of such stocks. [47] Norway also agrees to co-operate closely with Canada and comply with Canadian conservation measures. [48]

It is interesting to note that the terms of the Agreement cover fishing within the 200-mile zone and provide for the co-operation of both countries "to ensure proper management and conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction". [49] There is also a special provision on anadromous species, which are of particular interest to Canada because of its salmon. The Agreement provides that both governments recognize that "states in whose rivers anadromous stocks originate have the primary interest in and responsibility for such stocks and agree that fishing for anadromous species should not be conducted in areas beyond the limits of national fisheries jurisdiction". [50] A similar provision is found in the Revised Single Negotiating Text [51] and both countries agree to continue to work together for the establishment of permanent multilateral arrangements reflecting this position. [52]

In light of the above, it can be stated that Canada's newly established 200-mile fishing zone has been expressly recognized by the States mainly affected and is in conformity with a wide consensus which has emerged at the Third Law of the Sea Conference. Consequently, its international validity can hardly be in doubt and is not going to be challenged.

(b) *Delimitation of fishing zone*

The international legal validity of the mode of delimitation of the Canadian fishing zones is open to question and might well be challenged by the United States. The difficulty of delimiting fisheries zones between two adjacent or opposite States is essentially the same as that involved in delimiting the economic zone and the continental shelf. The Continental Shelf Convention of 1958, to which both Canada and the United States are parties, provides that delimitation shall be made in accordance with the equidistance principle, unless there are special circumstances which would warrant otherwise. [53] Consequently, Canada relies on the median line in the Gulf

---

[46] Agreement between Canada and Norway on their Mutual Fisheries Relations *dated* Dec. 2, 1975, *in force* May 11, 1976, [1976] Can. T.S. No. 4.

[47] Art. II.

[48] Art. I.

[49] Art. IV.

[50] Art. III.

[51] *Supra* note 26, Part II, art. 55.

[52] *Supra* note 46, art. III.

[53] A/CONF. 13/38, Art. 6 (April 28, 1958).

of Maine, whereas the United States contends that the geological continuation of Georges Bank across the equidistance line constitutes a special circumstance and that the delimitation line ought to be in the middle of Fundian Channel at the edge of the bank. Good arguments may be made on both sides, although it would appear that the United States has a weaker case since it is invoking an exception to what is generally considered to be the principal rule. The Revised Single Negotiating Text has not improved the legal situation any in its formulation of a new rule, since it provides that the delimitation of the continental shelf "shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances".[54] The same rule is made applicable for the delimitation of the economic zone between adjacent and opposite States[55] and, by definition, the economic zone includes fishing rights.[56] As for the delimitation difficulty on the West coast, it arises mainly in Dixon Entrance, although there is a slight difference of opinion as to exactly where the equidistance line should be from the Strait of Juan de Fuca. In Dixon Entrance, the difficulty arises primarily out of a difference of interpretation of the 1903 Alaska Boundary Award, which lays down the southern boundary of Alaska across the northern part of Dixon Entrance. Canada contends that this boundary line, known as the A-B line, constitutes a boundary for all purposes, whereas the United States alleges that it was intended only as a land boundary. Consequently, Canada starts drawing its equidistance line from the northernmost point of the mouth of Dixon Entrance, whereas the United States draws an equidistance line from the middle of the mouth.

In the Arctic, the western boundary of the new fisheries zone (the 141st meridian of longitude) is the same as that invoked by Canada for the delimitation of its continental shelf. Here, Canada does not rely on the equidistance line, which would result in a delimitation more favourable to the United States because of the convex coast of Alaska and the concave coast of the Yukon. Instead, Canada would seem to invoke the 141st meridian as a "special circumstance", on the basis of history and prior use. In support of this position it may rely on the 1825 boundary treaty between Russia and Great Britain, which provided that the boundary between their possessions was the 141st meridian "dans son prolongement jusqu'à la Mer Glaciale".[57] Canada may also rely on the 1867 Alaska cession treaty between Russia and the United States, which incorporates, by reference to the 1825 treaty, the same boundary line.[58] In addition, Canada used the 141st meridian as the western boundary of it pollution prevention zone established in 1970.[59] Canada might even intend to invoke the sector theory to justify the delimitation of its new fisheries zone,

[54] *Supra* note 26, Part II, art. 71.
[55] Art. 62.
[56] Art. 44.
[57] Art. III, Recueil De Martens, N.S. II, at 428.
[58] Art. I, Recueil De Martens, N.R. 2e Série, I, at 39.
[59] Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2, s. 3(1).

since the eastern boundary (59° 51' 57" W. longitude) is virtually the same as the 60th meridian used to describe the eastern boundary of the Canadian sector. [60] Although the sector theory would be a convenient, and perhaps even equitable, way of delimiting maritime jurisdiction among Arctic States, it has been objected to by the United States and Norway and cannot be considered to have acquired strong legal validity. However, the 141st meridian as such, and not as part of the sector theory, might find a stronger legal basis in its use as a maritime boundary. It is basically a question of the interpretation to be given to the 1825 and 1867 boundary treaties and the weight to be attached to Canada's practice of using the 141st meridian for various jurisdictional purposes. The matter is not yet settled and, after referring to ongoing consultations with Denmark and the United Sates, the preamble of the Fishing Zones of Canada (Zone 6) Order is careful to specify that the limits of the newly established fishing zone "are intended to be without prejudice to any negotiations or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas". [61]

C. *"Understanding" on Off-Shore Mineral Rights*

On February 1, 1977, the federal government concluded a preliminary agreement with the Maritime provinces (Nova Scotia, New Brunswick and Prince Edward Island) relating to the long-standing question of revenue-sharing from off-shore mineral rights. What follows is a brief review of the historical background, a summary of the main provisions of the agreement and a few words as to how this agreement is to be viewed within the international perspective of the Third Law of the Sea Conference.

1. *Historical Background*

After consultation with all of the provincial governments concerned, the federal government decided, in 1965, to refer to the Supreme Court the matter of jurisdiction over and ownership of the off-shore mineral resources off the West coast of Canada. All of the provincial governments concerned with this question, except Quebec, were represented at the Reference. In 1967, the Supreme Court of Canada handed down its advisory opinion [62] that Canada, as a State and not the province of British Columbia, had legislative jurisdiction and proprietary rights over the mineral resources in the seabed within the territorial sea of Canada (which at the time was still only three miles), as well as legislative jurisdiction over and the right of exploration for and exploitation of the natural resources of the continental shelf beyond the territorial sea.

---

[60] For a discussion of this theory, *see supra* note 4, 123-27, 123 n. 85.

[61] Preamble to S.O.R./77-173.

[62] Reference re Offshore Mineral Rights of B.C., [1967] S.C.R. 792, 65 D.L.R. (2d) 353.

In March 1969, Prime Minister Trudeau made a two-part offer to the provinces. First, the provinces would administer and receive all of the revenues accruing from mineral resources landward of an administrative line, which coincided roughly with the limit of the three-mile territorial sea. Second, the provinces would receive half of the revenues accruing from off-shore exploitation seaward of the line, and the federal government would continue to administer those seaward areas. This offer was not accepted by the provinces, but intermittent discussions continued with the provinces on the East coast and in August 1972, it was agreed that the question of jurisdiction and ownership would be set aside and an effort made to agree on the practical question of administration and revenue-sharing. In September 1973, Newfoundland made a separate submission to the federal government asking for full control and administration over mineral resources off Newfoundland and Labrador. Being unable to settle the matter, they agreed, in April 1976, to prepare a joint reference to the Supreme Court of Canada, and work on this reference is still being completed.

After Newfoundland's separate submission in 1973, causing it to withdraw from group discussions among the East coast provinces, the remaining provinces, including Quebec, tried to agree on a common position but were unable to do so, and Quebec has not taken part in the discussions since. In early 1976, discussions resumed between the Maritime provinces and the federal government, leading to the Memorandum of Understanding which was signed on February 1, 1977.

2. *Main Provisions*

The document is entitled "Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Off-Shore of the Maritime Provinces".[63] The reason for its being called an "understanding" rather than an agreement properly so-called is found in the first paragraph, which states that the parties "will jointly proceed, on the basis of this Understanding, to the preparation of a detailed and comprehensive Agreement providing for the administration and management of the mineral resources of the Area".[64] The Memorandum of Understanding then goes on to define the Area as being the seabed and subsoil seaward from the low water mark on the coasts of the provinces to the edge of the continental margin or to the limits of Canada's jurisdiction, whichever may be farther, and, where applicable, to the Inter-provincial Lines of Demarcation agreed upon in 1964 by those provinces.[65] The reason for mentioning two possible limits to the off-shore area in question is that the matter of the limits of the legal continental shelf has not been settled at the Law of the Sea Conference.

---

[63] Mimeographed text of six pages provided by the Department of External Affairs.

[64] Para. 1.

[65] Para. 2.

As was the case with the 1969 proposal, this Understanding on revenue-sharing is based on a delimitation line called the Mineral Resources Administration Line [66] (see Chart No. 4). This line will be fixed precisely in the agreement envisaged but will be at least five kilometres seaward from the ordinary low water mark. [67] In other words, it coincides roughly with the administration line of the 1969 Proposal.

By virtue of this Understanding, the provinces will now receive not only 100 per cent of the revenues landward of the Line, but also 75 per cent, instead of the 50 per cent previously offered in 1969, seaward of that Line. [68] Thus, the federal government retains only 25 per cent of the total revenues to be derived from all mineral resource exploitation off the coast of those three provinces. Special treatment is given to Sable Island, "which Island is acknowledged to be within Nova Scotia", [69] and 100 per cent of the revenues within a revenue-sharing line, to be fixed at a distance of not less than five kilometres around the island, will go to Nova Scotia. [70] The fact that the island is acknowledged to be within Nova Scotia does not necessarily resolve the question of jurisdiction over the island itself as between Canada and the province of Nova Scotia, but it certainly seems that it would assist the provincial case if ever the matter of legislative jurisdiction and proprietary rights is pursued.

Insofar as the administration and management of those offshore mineral resources are concerned, a Maritime Offshore Resources Board will be established and will oversee such administration and management in the area seaward of the Line and, at the option of each province, landward of the Line as well. [71] The Board will be composed of six members, three representing Canada and one representing each province. [72] The actual administration and management of the mineral resources will be carried out on behalf of the Board by a federal body, probably the Resource Management and Conservation Branch of the Department of Energy, Mines and Resources. This will be done through its regional office located at Dartmouth, Nova Scotia, where there is already an administrative and geological staff.

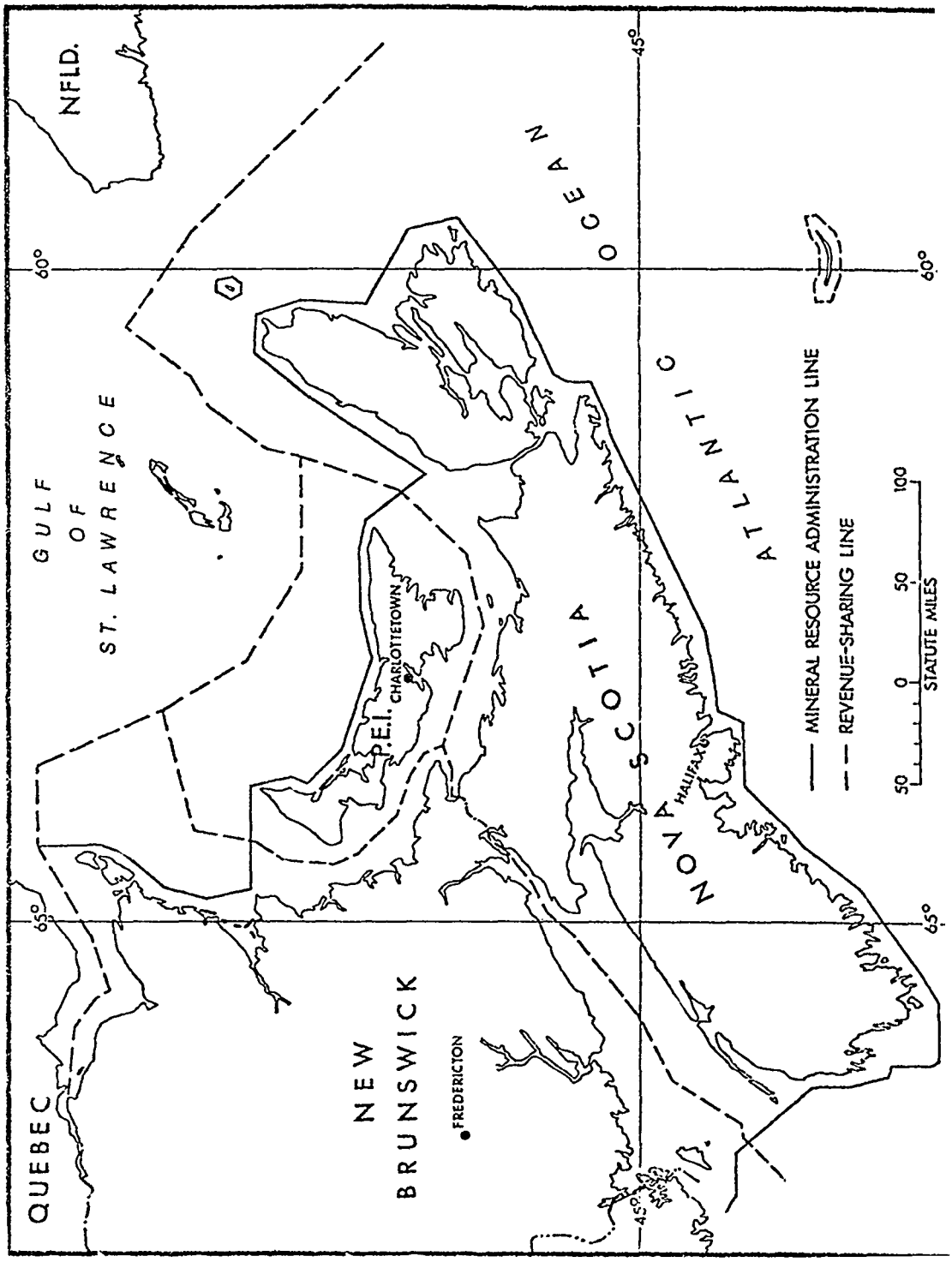
As for the costs of administration and management, they will be borne 100 per cent by the federal government, whereas the costs of the Board will be borne in the same proportion as the revenue-sharing, namely 25 per cent by Canada and 75 per cent by the provinces. [73]

On the question of the duration of the agreement, it will provide that each party will be able to withdraw upon giving five years' notice, and detailed provisions will be made for the effects of such withdrawal. [74]

---

[66] Para. 3.
[67] *Id.*
[68] Para. 11.
[69] Para. 12.
[70] *Id.*
[71] Para. 5.
[72] Para. 6.
[73] Para. 9.
[74] Para. 13.

Chart No. 4


NFLD.
60°
45°
OCEAN
ATLANTIC
GULF
OF
ST. LAWRENCE
QUEBEC
NEW
BRUNSWICK
FREDERICTON
P.E.I.
CHARLOTTETOWN
NOVA SCOTIA
HALIFAX
65°
MINERAL RESOURCE ADMINISTRATION LINE
REVENUE-SHARING LINE
50 0 50 100
STATUTE MILES

As stated in the Introduction to the Understanding, the federal government and the three Maritime provinces recognize the importance of setting aside jurisdictional differences in order to encourage mineral resource exploitation off the East coast. It has been suggested that "the real reason for this sudden bounty for Nova Scotia and the Maritimes is nothing less than the election of the Parti Québecois in Quebec and Prime Minister Pierre Trudeau's evolving strategy in dealing with it". [75] Be that as it may, these same terms and conditions are presumably open to the other provinces, including Quebec and Newfoundland, and it might well turn out to be in the best long-term interests of all concerned to conclude an agreement on the basis of this formula, which does appear to be an equitable one.

3. *International Perspective*

There are two points in this agreement which relate to international law and the ongoing Law of the Sea Conference. The first point concerns the question of the extent of the area seaward of the Mineral Resources Administration Line, within which the parties have agreed on a revenue-sharing formula. No international agreement has yet been reached on this question. The 1958 Continental Shelf Convention, to which Canada is a party, describes the continental shelf as extending to a point where the waters reach a depth of 200 meters or to the point where the superjacent waters will permit exploitation of the natural resources of the seabed and subsoil. [76] This alternative criterion of exploitability has permitted Canada to claim to the outer edge of its continental margin, which includes the geological continental shelf, the continental slope and the continental rise. In acceding to the Convention in 1970, Canada attached a Declaration to its instrument of accession saying that "the presence of an accidental feature such as a depression or channel in a submerged area should not be regarded as constituting an interruption in the natural prolongation of the land territory . . . under the sea". [77] Consequently, Canada is in a position to claim as far out as the Flemish Cap, in spite of the Flemish Pass depression, which means more than four hundred miles East of Newfoundland. Canada, along with other wide-shelf countries, has been pushing for recognition of its claim to the continental margin, but this has not yet been achieved, although the Revised Single Negotiating Text does define the continental shelf as extending "to the outer edge of the continental margin, or to a distance of 200 nautical miles . . . where the outer edge of the continental margin does not extend to that distance". [78] However, judging by the state of the debates in the Law of the Sea Conference at the moment, it would seem that the only way in which wide-shelf countries will be able to obtain

---

[75] R. Surette, Offshore Victory Unusual, The Globe and Mail (Toronto), Feb. 19, 1977, at 8.

[76] *Supra* note 53, art. 1.

[77] *See* Instrument of Accession, T.I.A.S. 5578 and U.N.T.S. 499/311 (1970).

[78] *Supra* note 26, Part II, art. 64.

recognition of their rights to the full continental margin will be to agree on a revenue-sharing formula beyond the 200-mile limit.

On the question of the revenue to be shared seaward of the Mineral Resources Administration Line, the Memorandum of Understanding is careful to specify that this will be the revenue derived directly from the administration and management of the mineral resources in that area, such as royalties, fees, bonuses and rentals.[79] This would not include "any part of that revenue which is equivalent to any payment by Canada in respect of any international agreement whether negotiated before or after the coming into force of the Agreement".[80] Indeed, the Revised Single Negotiating Text, presently before the Law of the Sea Conference, does provide for coastal States to make "payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles . . . ".[81] When discussing this question at the Conference, the Canadian delegation has been careful to maintain that it has acquired exclusive rights to the non-living resources of its full continental margin and that any payment or contribution to the international community could not be considered as a royalty, since those resources belong to Canada and not to the international community. Consequently, the revenue which will be shared between the federal government and the Maritime provinces will not include the amounts paid by Canada to the international community.

III. Sovereign, Diplomatic and Consular Immunities

A. *Sovereign Immunity*

The question of sovereign immunity has received considerable attention from commentators in recent years, in particular since the decision of the Supreme Court of Canada in the case of *La République démocratique du Congo v. Venne*[82] in 1971. This question, as well as the related one of *locus standi,* has also again been the subject of adjudication by our courts recently.

1. *Absolute or Qualified Immunity*

In deciding that the Government of the Congo Republic was immune

---

[79] *Supra* note 63, para. 10.

[80] *Id.*

[81] *Supra* note 26, Part II, art. 70, para. 1.

[82] [1971] S.C.R. 997, 22 D.L.R. (3d) 669. For a discussion of this decision *see* Chen, *Annual Survey of International Law,* 3 Ottawa L. Rev. 573-74 (1969), as well as in 4 Ottawa L. Rev. 526-28 (1970) and in 5 Ottawa L. Rev. 499-501 (1971). *See also* Castel, *Exemption from the Jurisdiction of Canadian Courts,* 9 C.Y.I.L. 158, at 168-72 (1971); Lee and Vechsler, *Sovereign, Diplomatic and Consular Immunities,* in Canadian Perspectives on International Law and Organization 184, at 191-93 (R. Macdonald, G. Marvin, D. Johnston eds. 1974); and McRae, *Le Gouvernement de la République du Congo v. Venne, Sovereign Immunity—The Role of the Courts,* 11 Osgoode Hall L.J. 326-34 (1973). [*See also* M. L. Marasinghe, *A Reassessment of Sovereign Immunity,* 9 Ottawa L. Rev. 474 (1977)—Ed.]

from the jurisdiction of our courts, on the basis that its employment of an architect for the preparation of sketches for the Congolese pavilion at Expo 67 was done in performance of a sovereign act of State, the Supreme Court of Canada left unanswered the question of whether the doctrine of restrictive or qualified sovereign immunity had been adopted by our courts. The point was dealt with in 1976 by Cory J. of the Ontario High Court in *Smith v. Canadian Javelin Ltd.* [83] He was faced with an application brought on behalf of one of the defendants, the Securities and Exchange Commission, to dismiss the action against it on the ground that the Commission was an authorized agent of a foreign State and, consequently, was entitled to sovereign immunity. Cory J. quoted with approval from the judgment of Owen J. of the Quebec Court of Appeal in *Congo v. Venne,* where the latter had expressly repudiated the theory of absolute sovereign immunity as being "outdated and inapplicable to today's conditions". [84] Cory J. went on to adopt the principle formulated in 1975 by Lord Denning M.R. in the *Thai-Europe Tapioca Service Ltd. Case.* [85] In that case, the Master of the Rolls had laid down the general principle that "except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages". [86] Lord Denning had formulated four exceptions to the general rule of sovereign immunity, which Cory J. summarized as follows:

> First, that there is no immunity in respect of land situate in England.
>
> Secondly, in respect of trust funds lodged in England or money lodged for the payment of creditors.
>
> Thirdly, in respect of debts incurred in England for services rendered to its property here.
>
> Fourthly, when a foreign Sovereign enters into a commercial transaction with a trader in England and a dispute arises which is properly within the territorial jurisdiction of English Courts. [87]

Proceeding on the assumption that the doctrine of qualified immunity was applicable in Ontario, Cory J. held that the Securities and Exchange Commission did not come within any of the exceptions and, therefore, fell within the purview of the principle of qualified immunity. The relevant passage of his judgment reads as follows:

> Assuming that the doctrine of qualified privilege is applicable in Ontario, it becomes apparent that the Securities and Exchange Commission does not come within any of the exceptions to the general principle enunciated by Lord Denning.
>
> The act of SEC complained of in this action is scarcely a private or commercial act but is, in reality, a reflection of the legislation and legislative policy of the United States of America. In carrying out such policy, the

---

[83] 12 O.R. (2d) 244, 68 D.L.R. (3d) 428 (H.C. 1976).
[84] [1969] B.R. 818, at 827, 5 D.L.R. (3d) 128, at 138 (Que. 1968).
[85] [1975] 1 W.L.R. 1485, [1975] 3 All E.R. 961 (C.A.).
[86] *Id.* at 1490, [1975] 3 All E.R. 965.
[87] *Supra* note 83, at 247-48, 68 D.L.R. (3d) at 431-32.

> defendant must come within the purview of the principle of qualified immunity. [88]

It might be helpful to specify at this point that the plaintiff Smith, who was a shareholder and director of the defendant, Canadian Javelin Ltd., was attacking the binding effect of a judgment obtained in the United States by the defendant Securities and Exchange Commission against Canadian Javelin; that judgment prohibited Javelin from dealing in securities in any way other than in compliance with the appropriate securities legislation of the United States.

Mr. Justice Cory went on to say that there was no difference between bringing an action against a sovereign State as such and one against an admitted agent of a sovereign State. He added that "[t]he agent of the sovereign State in this situation was not acting in a private or commercial capacity or nature, but rather was seeking to enforce legislation of the sovereign State within the jurisdiction of that State". [89]

In spite of the fact that this decision proceeded on the assumption that the doctrine of qualified immunity was applicable in the province of Ontario, the question has still not been settled by the Supreme Court of Canada. Indeed, although the Supreme Court did not decide the question in *Congo v. Venne,* Ritchie J., delivering the judgment of the majority, seemed to be very reluctant to consider the doctrine of qualified immunity as having been adopted by our courts. After stating that the Congolese Government had employed the architect in the performance of a sovereign act of State, he concluded that "the appellant could not be impleaded in the courts of this country even if the so-called doctrine of restrictive sovereign immunity had been adopted in our courts". [90] There is obviously a considerable reluctance on the part of the Supreme Court to depart from the traditional absolute immunity doctrine and this reluctance, as suggested by Professor Donald McRae, [91] might very well be prompted by the consideration that this is a matter of foreign policy which should be solved by the Executive, followed by appropriate legislation. Such legislation could clarify the matter, as was the case in the United States, [92] so that the courts would be relieved from the necessity of making this choice between absolute and restrictive immunity without any firm guidelines.

2. *Locus Standi of Foreign Sovereign*

Regardless of whether or not a foreign sovereign may benefit from immunity of jurisdiction, he is always free to consent to such jurisdiction.

---

[88] *Id.* at 248, 68 D.L.R. (3d) at 432.

[89] *Id.*

[90] *Supra* note 82, at 1003, 22 D.L.R. (3d) at 673.

[91] McRae, *supra* note 82, at 334.

[92] *See Draft Legislation on the Jurisdictional Immunities of Foreign States,* 12 INT'L LEGAL MATERIALS 118-62 (1973), introduced as s. 566 on January 26, 1973.

The question arose in the case of *Puerto Rico v. Hernandez*[93] in 1975 before the Supreme Court of Canada, although this was not the central issue.[94] The respondent Hernandez had left the jurisdiction of Puerto Rico while on bail on a charge of murder and, during his stay in Canada, was brought before a County Court judge for a hearing under the Extradition Act. The judge discharged the respondent, holding that there was no probable cause to believe that he was guilty of the crime charged. An application for judicial review was made to the Federal Court of Appeal by counsel for the Commonwealth of Puerto Rico, and the Federal Court of Appeal dismissed the application, holding that it had no jurisdiction to review the decision of the extradition judge. An appeal was made to the Supreme Court of Canada, and in allowing the appeal and returning the case to the Federal Court of Appeal for hearing on the merits, the majority judgment of the Supreme Court of Canada, delivered by Pigeon J., dealt briefly with the question of the *locus standi* of a foreign State. After stating that the result of the decision by the County Court judge was to make it impossible for the Commonwealth of Puerto Rico to make a demand through the United States of America for the surrender of the respondent so that he could be tried in accordance with the laws of his country, Pigeon J. described the position of counsel for Puerto Rico as follows:

> Throughout the proceedings counsel for the State has enjoyed the status of counsel for a party in accordance with established practice and I can see no reason for which a foreign state would not have status for instituting proceedings under s. 28 of the *Federal Court Act* as well as under any other law. Foreign states may not as a rule be summoned before our courts against their will (*La République démocratique du Congo v. Venne*), but nothing prevents them from appearing as parties before our courts if they so desire. I can see no basis for the application in such cases of the rule that criminal prosecutions are instituted in the name of the Crown. This rule applies to prosecutions for crimes against our laws. In respect of crimes committed abroad, the proper prosecuting authority is the authority of the state in which the crime was committed.[95]

Laskin J. (as he then was), dissenting, did not address himself directly to this

---

[93] [1975] 1 S.C.R. 228, 41 D.L.R. (3d) 549 (1974).

[94] The basic question was the extent of power of judicial review possessed by the Federal Court under the new Federal Court Act of 1970. The Supreme Court, by a majority judgment delivered by Pigeon J., decided that the Federal Court was now a "superior court", in the sense of a court having a supervisory jurisdiction over "any Federal board, commission or other tribunal" (s. 18); that this supervisory jurisdiction included criminal matters (s. 3); that it was to be generally exercised by the appellate division of the Federal Court (s. 28); and that the County Court judge, who had acted under the Extradition Act, had done so as *persona designata* in his capacity as Extradition Commissioner and, therefore, was subject to judicial review by the Federal Court. The minority opinion, written by Laskin J., disagreed that the Federal Court had acquired such a wide supervisory jurisdiction in criminal matters. Indeed, he felt that this criminal jurisdiction was probably limited to that formerly possessed by the Exchequer Court under the 1960 amendments to the Combines Investigation Act, which the Federal Court inherited under section 3.

[95] *Supra* note 93, at 239-40, 41 D.L.R. (3d) at 558.

point, but he did state that Puerto Rico was entitled to make the request for extradition to the Minister of Justice under the Extradition Treaty in force between Canada and the United States. [96]

Spence J., who wrote a brief dissenting judgment, dealt with this point as follows:

> I am also of the view that the position taken by the respondent in the present case in this Court that the foreign state has no status to appear on an application for review, if such review were possible, is soundly taken and that the applicant for such review should have been either the informant or more probably the Attorney General for Canada. [97]

He made it clear that this statement was *obiter dictum,* since he had held that judicial review was not possible. He did not specify the basis for his view and it would appear difficult to find any in either domestic or international law.

B. *Diplomatic and Consular Immunities*

In 1976, the Diplomatic and Consular Privileges and Immunities Act was introduced in the House of Commons and it has now received Royal Assent. [98] It is not possible to understand this short statute, which incorporates by reference the greater part of two international conventions, without first recalling what has been the traditional legal situation in Canada with respect to diplomatic and consular immunities.

1. *Historical Background*

Traditionally, a very important distinction was made between the immunities and privileges enjoyed by diplomatic agents and those of consular agents. Indeed, it was considered that only diplomatic agents represented their country and could act in a representative capacity. In Canada, diplomatic immunities were considered to form part of our body of law, in the same way as they were part of customary international law in general. In 1943, the Supreme Court of Canada decided that foreign embassies were immune from local taxation on properties owned and occupied by them. [99] However, the decision is limited to the question of immunity from local real property taxes and does not cover other types of immunity, although the justices of the Supreme Court did discuss immunities in general during the course of their judgments.

Consular agents were considered to be agents of their government only in the sense that they were concerned with the commercial interests of their country and nationals abroad; they took no part in the actual political

---

[96] *Id.* at 242, 41 D.L.R. (3d) at 560.
[97] *Id.* at 249, 41 D.L.R. (3d) at 551.
[98] S.C. 1976-77 c. 31.
[99] Foreign Legations Case, [1943] S.C.R. 208, 2 D.L.R. 481.

representation. Consequently, they enjoyed only limited immunity from local jurisdiction, and the extent of that immunity was not clear. [100]

The whole question of diplomatic and consular immunities was clarified, at least at the international level, in the early 1960's. At that time, two international conventions were adopted: the Vienna Convention on Diplomatic Relations, [101] adopted in 1961 and in force as of April 24, 1964, and the Vienna Convention on Consular Relations, [102] adopted in 1963 and in force since 1967. These are two very detailed conventions, particularly the Convention on Consular Relations, which recognizes a certain representative capacity in consular agents and the consequent immunities they must enjoy to perform their functions. However, if these Conventions clarified the situation in international law, they did not do so in Canadian law. True, the Convention on Diplomatic Immunities was ratified by Canada in May 1966, but it cannot be considered part of our domestic law until an implementing statute is enacted. This is so in spite of the fact that the Convention was basically a codification of customary law and its provisions were generally followed in Canadian practice. As for consular immunities, there was an even greater need for domestic legislation, both federal and provincial, in this area, particularly in light of certain events which had taken place in Quebec — the kidnapping of British Trade Commissioner Cross in 1970 and the bombing of the Cuban commercial premises in Montreal in 1972. [103] Indeed, the province of Quebec felt that the matter was so urgent that, in 1974, it introduced a Bill on Diplomatic and Consular Immunities and Privileges. [104] There was an obvious need here for co-ordinated action with the federal government, and the adoption of this Bill in Quebec was presumably delayed until the advent of federal legislation.

2. *Diplomatic and Consular Privileges and Immunities Act (1976)*

Basically, this short statute comprising six sections does two things: it repeals a 1953 law which was applicable to Commonwealth representatives in Canada [105] and it incorporates by reference certain provisions of the two Vienna Conventions, which are set out in two separate schedules. [106] Immun-

---

[100] For a discussion of consular immunities, *see* Castel, *supra* note 82, at 176-77; Lee and Vechsler, *supra* note 82, at 195-204, and Dufour, *La protection des immunités diplomatiques et consulaires au Canada*, 12 C.Y.I.L. 3, at 15-23 (1974).

[101] A/CONF. 25/12 (April 23, 1963). Twenty-two ratifications or accessions are necessary, and there are presently 119 ratifications and accessions.

[102] A/CONF. 25/13 (April 23, 1963). There are presently 84 states parties to this convention.

[103] For a discussion of the legal difficulties to which the Cuban affair gave rise, *see* Dufour, *supra* note 100, at 31-32.

[104] Bill 65, 30th Leg., 2nd sess., 1974.

[105] The Diplomatic Immunities (Commonwealth Countries) Act, R.S.C. 1970, c. D-4 was essentially confined to granting immunity from suit and legal process to the Head of Mission and his staff, and to guaranteeing inviolability of his residence, official premises and archives.

[106] S.C. 1976-77 c. 31, s. 2.

ities are accorded on the basis of reciprocity, and, consequently, if it appears to the Secretary of State for External Affairs that the immunities accorded to a Canadian diplomat or consul abroad are less than those accorded to foreign diplomats and consuls under this Act, he may withdraw such immunities as he deems proper. [107] This is in accordance with well-established practice and is permitted by the Conventions. [108] The inclusion of such a provision is also rendered necessary by the fact that the privileges and immunities being granted by this Act "have the force of law in Canada in respect of all countries (including Commonwealth countries), whether or not a party to the Conventions". [109]

A final provision which should be noted relates to the role of the Executive in the determination of the status of a diplomat or consul. The relevant provision reads as follows:

> If, in any action or proceeding, a question arises as to whether any person is entitled to a privilege or an immunity under this Act or any regulation or order, a certificate issued by or under the authority of the Secretary of State for External Affairs containing any statement of fact relevant to that question shall be received in evidence as conclusive proof of the fact so stated. [110]

It appears wise to have included such a provision, since otherwise the courts might have been in doubt as to the evidentiary force to be given to such a certificate. The Supreme Court of Canada found itself in exactly that situation in 1975, when it had to decide what weight it should attach to a certificate signed by the Secretary of State for External Affairs stating that a certain treaty between France and Canada was in force, in spite of the fact that the treaty called for ratification and had never been ratified. [111]

The provisions of the Vienna Conventions total nearly fifty pages, and a good number of them are incorporated in this implementing legislation. This review will be confined to the incorporated provisions relating to four types of immunity: inviolability of premises and archives, personal inviolability, immunity from jurisdiction and immunity from taxation. All of these immunities are accorded to both diplomatic and consular agents, but they vary in scope and any differences will be indicated.

(a) *Inviolability of premises and archives*

The premises of the diplomatic agent are inviolable and no one may enter them except with the consent of the diplomatic agent. [112] The inviolability of consular premises, however, is limited to that part of the premises

---

[107] S. 2(4).

[108] *See supra* note 101, art. 47 and *supra* note 102, art. 72.

[109] S.C. 1976-77 c. 31, s. 2(1).

[110] S. 5.

[111] The question arose in the *Château-Gai Wines Case*, *supra* note 2, and is discussed in a subsequent part of this survey. *See infra*, Part V, Treaty Ratification and Entry into Force.

[112] *Supra* note 101, art. 22.

used exclusively for the purposes of consular functions, and although consent is necessary to enter that part of the premises, such consent may be presumed in case of fire or other disaster requiring prompt protective action. [113] This comparison would suggest that, for the premises of the diplomatic agent, consent may not be presumed even in case of fire. [114] The archives of the mission of both the diplomatic agent [115] and the consular agent[116] are inviolable. The private residence of a diplomatic agent enjoys the same inviolability and protection as the premises of his mission, [117] but there is no similar protection for the consular agent.

(b) *Personal inviolability*

The person of the diplomatic agent is completely inviolable and he is free from any form of arrest or detention. [118] This personal inviolability extends to the members of the family of a diplomatic agent forming part of his household, as well as to the members of the administrative and technical staff of the mission, together with the members of their families forming part of their respective households, providing in the latter case they are not nationals of or permanently resident in the receiving State. [119] As for consular officers, their inviolability is limited to freedom from arrest or detention pending trial and, even then, they may be so arrested or detained in case of a "grave crime". [120] It is important to note that the implementing statute defines "grave crime" as meaning "any offence created by an Act of Parliament for which an offender may be sentenced to imprisonment for five years or more". [121]

(c) *Immunity from jurisdiction*

The diplomatic agent enjoys complete immunity from criminal jurisdiction, [122] and this immunity extends to the members of his family forming part of his household. [123] It also extends to members of the administrative and technical staff and the members of their families forming part of their respective households. [124] Diplomatic agents are also immune from civil and administrative jurisdiction, except in three types of actions: (1) a real action

---

[113] *Supra* note 102, art. 31.

[114] It will be recalled that in 1956 the Embassy of the U.S.S.R. objected when Ottawa firemen did not obtain consent before entering the premises of the embassy on Charlotte Street.

[115] *Supra* note 101, art. 24.

[116] *Supra* note 102, art. 33.

[117] *Supra* note 101, art. 30.

[118] *Id.*, art. 29.

[119] *Id.*, art. 37(1) & (2).

[120] *Supra* note 102, art. 41.

[121] S.C. 1976-77 c. 31, s. 2(3).

[122] *Supra* note 101, art. 31.

[123] *Id.*, art. 37(1).

[124] *Id.*, art. 37(2).

relating to private immovable property; (2) an action relating to succession in which the agent is involved as a private person and (3) an action relating to professional or commercial activity done outside the agent's official functions. [125] This immunity from civil and administrative jurisdiction also extends to members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, but does not extend to acts performed outside the course of their duties. [126] The immunity of consular officers and consular employees with respect to civil and administrative jurisdiction, however, is limited to acts performed in the exercise of consular functions. [127] Furthermore, this immunity does not apply in the case of a civil action arising out of a contract not concluded as an agent of the sending State or one for damages arising out of a motor vehicle accident. [128] Of course, both the diplomat [129] and the consul [130] may waive whatever immunity from jurisdiction they possess.

(d) *Immunity from taxation*

The immunity from taxation covers both real property and personal taxes. The exemption from real property taxes on the mission premises covers not only property owned by the foreign government, as was the case in the *Foreign Legations* case in 1943, [131] but also covers leased property. The relevant provision reads as follows:

> The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered. [132]

This exemption extends to the "consular premises and the residence of the career head of consular post". [133]

As for immunity from personal taxation, the diplomatic agent is exempt from all dues and taxes, personal or real, national, regional or municipal, except for certain specified taxes of an indirect nature for goods and services or taxes on private immovable property or private income. [134] This exemption also benefits members of the diplomatic agent's family forming part of his household, as well as members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households. [135] The same exemption from personal taxation

---

[125] *Id.*, art. 37(1).
[126] *Id.*, art. 37(2).
[127] *Supra* note 102, art. 43(1).
[128] *Id.*, art. 43(2).
[129] *Supra* note 101, art. 32.
[130] *Supra* note 102, art. 45.
[131] *Supra* note 99.
[132] *Supra* note 101, art. 23(1).
[133] *Supra* note 102, art. 32(1).
[134] *Supra* note 101, art. 34.
[135] *Id.*, art. 37(1) & (2).

applies to "consular officers and consular employees and members of their families forming part of their households". [136]

3. *Need for Further Co-operative Action*

With the legislative implementation of the treaty provisions just reviewed, the legal situation in Canada with respect to diplomatic and consular agents will be considerably more certain than has been the case. However, there is still a need for cooperative action between the federal government and the provinces. This applies particularly to the province of Quebec, where a number of foreign diplomats have their residences; and insofar as the consular agents are concerned, the co-operation of most of the provinces is of course of even greater importance than it is in the case of diplomats.

The provinces have control over their police forces and the administration of justice generally, and consequently the closest co-operation is required between the two levels of government for the proper application of the Conventions. The necessity for such co-operative action might explain in part why some of the provisions of those two international Conventions were not incorporated in the implementing legislation. This can only be a partial explanation, however, since a comparison with the corresponding legislation in the United Kingdom reveals that exactly the same provisions of the Conventions were omitted. Examples of Convention provisions omitted from the Canadian legislation are found especially in the Consular Convention. The following are a few of the provisions of that Convention that were omitted: Article 31, paragraph 3, which provides that the receiving State has a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage; Article 40, which contains a similar provision with respect to the consular officers themselves, by imposing a duty on the receiving State to take all appropriate steps to prevent any attack on person, freedom or dignity; Article 41(3), which provides that where criminal proceedings are instituted against a consular officer for "grave crime", they are to be conducted with the respect due to the officer by reason of his official position and instituted with the minimum of delay. It is further provided that, in the event of the arrest or detention pending trial of a member of the consular staff, the receiving State shall promptly notify the head of the consular post. It is interesting to note that these provisions, which were excluded from the federal implementing legislation, were also omitted from the corresponding Quebec provincial legislation of 1974. [137] There would therefore still appear to be a considerable need for co-ordinated action on the part of both levels of government.

Specific mention should also be made of an important provision excluded from the legislation, namely that ensuring freedom of movement and travel to both diplomats [138] and consuls. [139] This freedom is subject to

[136] *Supra* note 102, art. 49.
[137] *See* Bill 65, 30th Leg., 2nd sess., 1974.
[138] *Supra* note 101, art. 26.
[139] *Supra* note 102, art. 34.

the laws and regulations of the receiving State, which may prohibit or regulate entry into certain zones for reasons of national security, and this provision also requires the co-operation of the provinces for proper enforcement.

The explanation for the absence of a number of other treaty provisions may be that they establish rights and obligations strictly between governments. Examples are the provisions relating to the establishment of the mission, to its size, to the accreditation of its members and to their status and order of precedence.

IV. Human Rights

A. *Political Asylum*

It should be stated at the outset that the type of asylum we are concerned with here is territorial or political asylum and not diplomatic asylum. Except in Latin American countries, diplomatic asylum, that is, the granting of refuge in embassies, is not generally recognized in international law. Territorial or political asylum, however, is merely the exercise of a State's sovereignty in granting refuge within its own territory to persons fleeing a country in which they were persecuted. Since World War II, Canada has been involved to a considerable extent in the admission of refugees. Writing in 1975, the Deputy Minister of the Department of Manpower and Immigration stated that "[u]p to the present, more than 300,000 refugees have been admitted, that is, one out of ten settlers since 1945". [140] It was not until 1969 that Canada acceded to the Refugee Convention of 1951 [141] which had been in force since 1954. The Convention as such has still not been incorporated into Canadian law by implementing legislation, but the definition of a refugee contained in it has. Because of this incorporation in 1973 and of a recent decision [142] of the Federal Court of Appeal on the procedure to be followed for obtaining refugee status, these two points will be reviewed here

1. *Definition of a Refugee*

The definition of a refugee contained in the Refugee Convention of 1951, as amended by the Protocol of 1967, was incorporated into Canadian law by an amendment to the Immigration Appeal Board Act in 1973. [143] The amendment extends the right of appeal to the Board to "a person who claims he is a refugee protected by the Convention", [144] and "Convention"

---

[140] Gotlieb, *Canada and the Refugee Question in International Law*, 13 C.Y.I.L. 3, at 10 (1975).

[141] 189 U.N.T.S. 137.

[142] Minister of Manpower and Immigration v. Fuentes, [1974] 2 F.C. 331, 52 D.L.R. (3d) 436.

[143] An Act to Amend the Immigration Appeal Board Act, S.C. 1973-74 c. 271 (amending R.S.C. 1970, c. I-3).

[144] S. 5.

is defined as meaning "the United Nations Convention Relating to the Status of Refugees signed at Geneva on the twenty-eighth day of July, 1951 and includes any Protocol thereto ratified or acceded to by Canada". [145] The Convention's definition of a refugee reads as follows:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [146]

The substance of the above definition is now included in the new Immigration Act. [147]

It is up to each country to determine whether a particular person meets the requirements of the definition and to set up its own procedure to make that determination. This complete freedom on the part of the receiving State is understandable from a legal point of view, when one considers that "the right to seek and enjoy in other countries asylum from persecution" recognized in Article 14 of the Universal Declaration of Human Rights is not generally regarded as forming part of international law. Indeed, the Declaration of Asylum adopted by the General Assembly in 1967 provides that "it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum . . . which is granted by a State in the exercise of its sovereignty". [148] Furthermore, the Refugee Convention itself imposes no obligation to accept a refugee and the 1966 International Covenants on Human Rights, which will be discussed later, are absolutely silent on the question. It should be specified that the effect of being granted refugee status is not equivalent to being accepted as an immigrant, although this does follow in most cases. If the recognized refugee is not accorded immigrant status, the Refugee Convention does give him some protection in that he may not be expelled or returned "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". [149] However, he may be deported to another country willing to accept him and where he would not be persecuted, since he is not "lawfully" in the receiving country. [150] In any event, Canadian courts do not have to concern themselves with the interpretation and application of these provisions of the Refugee Convention, since they are not part of Canadian law. This was made quite clear by

---

145 S. 1.

146 *Supra* note 141, art. 1.

147 Immigration Act, S.C. 1976-77 c. 52, s. 2(1).

148 G. A. Res. 2312 (XXII), 1967.

149 *Supra* note 141, art. 33.

150 This would appear to be the interpretation to be placed on a combined reading of Articles 32 and 33 of the Convention. For a similar interpretation, *see* Gotlieb, *supra* note 140, at 13-16.

Pratte J., delivering the judgment of the Federal Court of Appeal in the *Fuentes* case, [151] when he stated that

> [T]he fact that the Immigration Appeal Board Act refers to the United Nations Convention Relating to the Status of Refugees does not have the effect of incorporating into Canadian domestic law the prohibition contained in that Convention against deporting refugees. Accordingly, a deportation order is not invalid merely by virtue of the fact that it was made against a refugee protected by the Convention. [152]

It is therefore quite apparent that, from a strict legal point of view, a recognized refugee cannot claim the benefit of the provisions of the Convention against deportation. Fortunately, Canadian practice appears to be more humane, [153] and the new Immigration Act gives a right to the Convention refugees, while lawfully in Canada, to remain in Canada. [154] This right is subject, however, to a number of exceptions related to national security and public order which are applicable to anyone seeking admission to Canada. Inadmissible persons include those who there are reasonable grounds to believe are likely to engage in criminal activity, espionage or subversive activity, or acts of violence. [155] The exceptions are quite numerous and are sometimes phrased in very general language that could virtually destroy the right being granted.

2. *Procedure for Obtaining Refugee Status*

Over the years, Canada has developed a fairly extensive and complex procedure for making a final decision on an application for refugee status. [156] As mentioned earlier, the 1973 amendment to the Immigration Appeal Board Act gives a person who claims he is a refugee protected by the 1951 Refugee Convention a right of appeal to the Board. After a deportation order has been made against a person claiming to be a refugee, that person may file a Notice of Appeal containing a declaration under oath setting out the nature of his claim, a statement of the facts on which his claim is based, a summary of the evidence in support and any other relevant representations. [157] This declaration is considered by a quorum of the Board, which, if it is satisfied that there are reasonable grounds to believe that the claim could be established, shall allow the appeal to proceed. [158] It is only after this preliminary decision by a quorum of the Board that a full appeal may be heard and it is then up to the full Board to dispose of the appeal. [159]

---

[151] *Supra* note 142.

[152] *Id.* at 338, 52 D.L.R. (3d) at 468.

[153] *See* Gotlieb, *supra* note 140, at 16-17.

[154] Immigration Act, S.C. 1976-77 c. 52, ss. 4(2) and 47(3).

[155] S. 19(1) (*d*), (*e*), (*f*) and (*g*).

[156] For a description of this procedure, *see* Gotlieb, *supra* note 140, at 16-18. *See also* extracts of a letter from the Legal Bureau of the Department of External Affairs dated October 22, 1974 and reproduced in 13 C.Y.I.L. 339-41 (1975).

[157] S. 11(2).

[158] S. 11(3).

[159] Immigration Appeal Board Act, R.S.C. 1970, c. I-3, s. 14.

The issue in the *Fuentes* case [160] was the nature of the respective roles to be played by the quorum of the Board and the Board itself. In deciding that issue, the Federal Court of Appeal clarified two important steps in the whole procedure.

In the case before the court, the respondent Fuentes, who was of Chilean nationality, had arrived at Dorval Airport on January 1, 1974 and applied to be admitted to Canada as an immigrant. A hearing was held by a Special Inquiry Officer, who, since the applicant did not appear to meet the requirements of the Immigration Act, made a deportation order against him. Fuentes then claimed to be a political refugee and filed the required Notice of Appeal with the Board, accompanied by the required sworn declaration. Instead of considering the refugee applicant's sworn declaration to determine if he had made out a prima facie case, the quorum of the Board held a full hearing, at which both the applicant and the Department were represented by counsel. The Immigration Appeal Board then handed down a two-part decision: first, that the appeal should proceed, and secondly, that the appeal against the deportation order be allowed. The reasons for the Board's decision were that Fuentes was in fact "a refugee protected by the Convention", and that the deportation order made against him was invalid.

The argument raised on appeal by the Department was that the only decision the quorum of the Board could make was to let the appeal proceed. It was further argued that a deportation order is not necessarily invalid because a person is declared "a refugee protected by the Convention". Counsel for Fuentes contended that the amendment to the Immigration Appeal Board Act had the effect of incorporating the Refugee Convention into Canadian domestic law. The Federal Court of Appeal agreed with the Department as to the procedure to be followed, reversed the decision of the Board to allow the appeal and referred the case back to the Board for the appeal to proceed in the proper manner in accordance with the Act. The contention that the Refugee Convention had been incorporated into Canadian law was rejected, however. The court stated that the Immigration Appeal Board could refer to the Refugee Convention for two purposes only: first, to determine if the applicant had a right of appeal because he was a refugee protected under the Convention, and second, to determine if there was any basis for the Board to grant the special relief under section 15(1). This section enables the Board to withhold execution of a deportation order against a refugee where there are reasonable grounds to believe that "if the execution order is carried out, he will suffer unusual hardship". [161] Under the new Immigration Act, a Convention refugee cannot be deported "where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political

---

[160] *Supra* note 142.

[161] S. 15(1)(b)(i), *as amended by* S.C. 1973-74 c. 27, s. 6.

opinion", unless he is judged to be an inadmissible person for reasons of national security or public order. [162]

The above discussion shows that although considerable efforts are made to ensure fair treatment to genuine refugees, the procedure for obtaining recognition of refugee status is long and complex. Under the present law and practice, a refugee applicant may take his claim for recognition of his status as a refugee right up to the Supreme Court of Canada, but he must have means, time and determination. The whole procedure will involve the following seven steps: (1) hearing before a Special Inquiry Officer; (2) study of the hearing transcript and recommendation by an Interdepartmental Advisory Committee; (3) decision by the Special Inquiry Officer; (4) preliminary hearing by a quorum of the Immigration Appeal Board; (5) full hearing by the Immigration Appeal Board; (6) judicial review on questions of law by the Federal Court; and (7) final decision by the Supreme Court of Canada. To reach the Federal Court and the Supreme Court, the applicant must obtain special leave. The procedure now envisaged in the new Immigration Act is basically the same except for changes in terminology and the fact that it is the Minister who makes the first determination as to refugee status, on the advice of a Refugee Status Advisory Committee. [163] The new procedure does not appear to have simplified or expedited matters.

B. *International Covenants on Human Rights*

The year 1976 marked an important step in the promotion of respect for and observance of human rights and fundamental freedoms, both on an international level and in Canada. The International Covenants on Human Rights, which were adopted by the General Assembly of the United Nations in December 1966 and then opened for signature and ratification, have finally come into force and Canada has acceded to both of them. It is important to note that Canada did so in spite of the fact that they both contain a special Federal State clause, making their provisions applicable to all component parts of federal states without any limitations or exceptions. Presumably, the federal government had obtained the necessary implementing assurances from the provinces at the Federal-Provincial Conference on Human Rights held in Ottawa in December 1975.

The purpose of this section of the Survey is not to review the scope of the various rights and freedoms protected by the Covenants, which are generally well-known, but rather to recall the more important ones and attempt to outline the implementing procedures provided for in the Covenants.

1. *Covenant on Economic, Social and Cultural Rights*

The International Covenant on Economic, Social and Cultural Rights [164]

---

[162] S. 55.

[163] Ss. 45 to 48.

[164] The Covenant is annexed to G. A. Res. 2200 (XXI), Dec. 16, 1966 and is reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, ST/HR/1 (1973). *See also* 61 A.J.I.L. 861 (1967).

came into force on January 3, 1976, three months after the thirty-fifth instrument of ratification or accession had been deposited. There are now over forty States bound by this Covenant, and it entered into force for Canada on August 19, 1976. The Covenant contains some thirty-one articles, setting out the rights guaranteed and the obligations of States to implement and enforce them.

(a) *Main substantive provisions*

The first right covered is that of self-determination. Article 1 provides that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This is the only collective right protected by the Covenant, and since it is basically a political right, the same provision also appears in the Covenant on Civil and Political Rights. The individual rights spelled out and guaranteed by the Economic, Social and Cultural Rights Covenant may be summarized as follows: the right to work, [165] the right of adequate conditions of work, [166] the right to join a trade union, [167] the right to social security, [168] the right of protection of the family, [169] the right to an adequate standard of living, [170] the right to enjoy the highest obtainable standard of health, [171] the right to education [172] and the right to take part in cultural life. [173]

The States Parties to the Covenant undertake to adopt the necessary legislative and other measures to progressively achieve the full realization of these rights. [174] States "may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". [175]

(b) *Enforcement mechanism*

The enforcement mechanism is normally referred to as a reporting system. States are obligated to submit reports on the implementing measures they have taken to ensure that the rights guaranteed in the Covenant are respected. These reports are to be submitted in accordance with a

---

[165] Art. 6.
[166] Art. 7.
[167] Art. 8.
[168] Art. 9.
[169] Art. 10.
[170] Art. 11.
[171] Art. 12.
[172] Arts. 13 and 14.
[173] Art. 15.
[174] Art. 2.
[175] Art. 4.

program to be established by the Economic and Social Council of the United Nations within one year of the entry into force of the Covenant. It is ECOSOC which has the principal responsibility for dealing with the reports together with the specialized agencies concerned and the Human Rights Commission.

The reporting system provided for in Part IV of the Covenant consists of four main steps. The first step is for States to submit reports on their implementing measures to the Secretary-General of the United Nations, who transmits copies to ECOSOC. [176] The reports may indicate certain factors and difficulties affecting the degree of fulfilment of the obligations under the Covenant. [177] In addition to these reports submitted by States, ECOSOC may ask its specialized agencies to report to it on the observance of human rights by States in areas within the scope of their activities. [178] Secondly, ECOSOC may transmit to the Human Rights Commission the reports submitted by States and by the specialized agencies; the Commission will study those reports and make a general recommendation in a report of its own to ECOSOC. [179] Thirdly, States and the specialized agencies concerned may submit comments to ECOSOC pertaining to any general recommendation made by the Human Rights Commission. [180] Finally, ECOSOC may submit reports containing recommendations of a general nature to the General Assembly; such reports shall contain a summary of the information received from States and specialized agencies on the implementing measures taken and the progress made in the observance of the rights guaranteed. [181]

2. *Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights[182] came into force on March 23, 1976, having been ratified or acceded to by thirty-five States. At the moment, there are about forty parties to the Covenant and Canada has been a party since August 19, 1976.

(a) *Main substantive provisions*

The first right protected, as mentioned earlier, is the collective right of peoples to self-determination. [183] The individual rights and freedoms may be summarized as follows: the right to life, [184] freedom from torture or

---

[176] Art. 16.
[177] Art. 17.
[178] Art. 18.
[179] Art. 19.
[180] Art. 20.
[181] Art. 21.
[182] The Covenant is annexed to G. A. Res. 2200 (XXI), Dec. 16, 1966 and is reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, ST/HR/1 (1973). *See also* 61 A.J.I.L. 870 (1967).
[183] Art. 1.
[184] Art. 6.

inhuman treatment,[185] freedom from slavery,[186] the right to liberty and security of the person,[187] the right to humane treatment for prisoners,[188] freedom from imprisonment for a contractual debt,[189] freedom of movement,[190] freedom from arbitrary expulsion for aliens,[191] the right to a fair trial,[192] freedom from retroactive criminal laws,[193] the right to legal personality,[194] the right to privacy,[195] freedom of religion,[196] freedom of opinion and expression,[197] the right of peaceful assembly,[198] freedom of association,[199] the right to family protection,[200] the right to protection of children,[201] the right to participation in public affairs,[202] equality before the law[203] and minority rights of culture, religion and language.[204]

The obligations of States Parties to this Covenant are extensive and stringent: each undertakes to respect and to ensure the recognition of these rights to all individuals within its territory.[205] This means that their obligations are not only toward their own citizens but also toward anyone who happens to be within their territory and subject to their jurisdiction. Respect for these protected rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" must be ensured by each party.[206] In addition, each party undertakes to adopt the necessary legislative and other measures to give effect to the rights guaranteed[207] and must ensure that any person whose rights or freedoms have been violated shall have an "effective remedy" to be determined by the competent judicial, administrative or legislative authorities.[208]

A State may derogate from its obligations under this Covenant only where there exists a "public emergency which threatens the life of the

---

185 Art. 7.
186 Art. 8.
187 Art. 9.
188 Art. 10.
189 Art. 11.
190 Art. 12.
191 Art. 13.
192 Art. 14.
193 Art. 15.
194 Art. 16.
195 Art. 17.
196 Art. 18.
197 Art. 19.
198 Art. 20.
199 Art. 21.
200 Art. 23.
201 Art. 24.
202 Art. 25.
203 Art. 26.
204 Art. 27.
205 Art. 2.
206 Art. 2, para. 1.
207 Art. 2, para. 2.
208 Art. 2, para. 3.

nation and the existence of which is officially proclaimed".[209] Even then, States may take such derogating measures only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law . . . ".[210] This provision was based on a similar one in the European Convention for the Protection of Human Rights and Fundamental Freedoms,[211] which was applied by the European Court on Human Rights in the *Lawless Case* in 1961.[212] The Court gave this earlier provision a strict interpretation and this will presumably influence the interpretation of its counterpart. It is important to note that none of the derogating measures are allowed to affect certain fundamental rights, namely, the right to life, freedom from torture or inhumane treatment, freedom from slavery, freedom from imprisonment for contractual debt, freedom from retroactive laws, the right to legal personality and freedom of religion.

As in the case of the Human Rights Covenant, the provisions of the Covenant on Civil and Political Rights extend to all component parts of Federal States without any limitations or exceptions.[213]

(b) *Enforcement mechanism*

The Covenant provides for three rather complex reporting systems: a general one, applicable to all States Parties; a second, applicable to States that have filed an Optional Declaration for State to State complaints; and a third for States having ratified or acceded to the Optional Protocol for individual complaints. There is a special body charged with the implementation of these reporting systems called a "Human Rights Committee".[214] It is composed of eighteen members, sitting in their personal capacity and chosen from among candidates nominated by Parties. The Committee has already been constituted and has begun its work. What follows is a brief outline of the major steps involved in the three reporting systems supervised by the Committee.

The first reporting system, applicable to all States Parties to the Covenant, involves three major steps. First, States make reports to the U.N. Secretary-General on the implementation measures they have taken, and the Secretary-General transmits these reports to the Human Rights Committee. The reports must indicate the factors and difficulties, if any, affect-

---

[209] Art. 4.

[210] *Id.*

[211] Art. 15, 213 U.N.T.S. 221; reprinted in [1950] U.N. YEARBOOK ON HUMAN RIGHTS 418 and 45 A.J.I.L. (Supp.) 24 (1951).

[212] Lawless' Case (merits), [1961] YEARBOOK OF EUROPEAN CONVENTION ON HUMAN RIGHTS 438.

[213] Art. 50.

[214] Art. 28. For an excellent study of the functions of the Human Rights Committee and of the mechanics of the reporting system, *see* Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 TEXAS I.L.J. 141-86 (1977).

ing the implementation of the Covenant. [215] States are obliged to submit these reports within one year of the entry into force of the Covenant and thereafter upon request from the Human Rights Committee. [216] Secondly, the Committee studies the reports submitted by States and then makes its own report, containing such general comments as it considers appropriate, and transmits them to the States. [217] Finally, States may submit to the Committee observations on the general comments contained in the Committee's report. [218]

The second reporting system, for States that have filed an Optional Declaration, applies only to a complaint by one State against another. This reporting system is not yet in force at present, since the required number of Optional Declarations has not yet been made. Ten such declarations are necessary and there are still two or three lacking. States are quite reluctant to accept the jurisdiction of the Human Rights Committee for this kind of complaint by other States, a reluctance generally believed to be based on the fear that such a complaint might be interpreted as an unfriendly act or that it might backfire on the complainant State if it does not have a sufficiently clean record itself. There are seven steps in this reporting system. First, a State sends a written complaint to another State, alleging violation of the Covenant, and the latter has three months in which to reply and furnish explanations. [219] Secondly, if the matter is not settled within a further three months, either State may refer the question to the Human Rights Committee. [220] Thirdly, the Committee examines the complaints and communications at closed meetings, and tries to arrange a friendly settlement. [221] It may require additional information from States and the latter may make submissions either written or oral. [222] The Committee has twelve months within which to make its report after the matter has been referred to it. [223] Fourthly, if a friendly solution is reached, the Committee makes a report to the Parties containing a brief statement of the facts and of the solution reached. If a friendly solution is not reached, the Committee makes a report to the Parties, confined to a brief statement of the facts, with the written submissions and the record of the oral submissions made by the Parties attached. [224] Fifthly, if the matter is still not resolved, the Committee may appoint an ad hoc Conciliation Commission with the prior consent of the Parties. [225] This Commission is composed of five members acceptable

---

[215] Art. 40, paras. 1 and 2.
[216] *Id.*
[217] Art. 40, para. 4.
[218] Art. 40, para. 5.
[219] Art. 41, para 1(a).
[220] Art. 41, para. 1(b).
[221] Art. 41, para. 1(e).
[222] Art. 41, para. 1(f).
[223] Art. 41, para. 1(h).
[224] *Id.*
[225] Art. 42, para. 1(a).

to the Parties. [226] The Conciliation Commission receives all the information which the Human Rights Committee has in its possession and may call upon the Parties to supply additional information. [227] It has twelve months from the date the matter was referred to it to make its report to the Chairman of the Human Rights Committee for transmittal to the Parties. [228] Sixthly, if a solution is reached the report of the Commission is confined to a brief statement of the facts and of the solution reached. [229] If a solution is not reached, the report must embody the findings on all questions of fact, the written submissions and a record of the oral submissions and, finally, the views of the Commission on the possibilities for solution. [230] Finally, if the matter is still not resolved, the Parties have three months from the receipt of the Commission's report to notify the Chairman of the Committee if they accept or reject the report of the Commission. [231]

It should be added that the "exhaustion of local remedies rule" applies, and the Human Rights Committee may deal with an alleged violation only after "all available domestic remedies have been invoked and exhausted". [232] The provision adds, however, that "this shall not be the rule where the application of the remedies is unreasonably prolonged". [233] In other words, it seems that the Committee will have considerable discretion in interpreting and applying this provision.

The third reporting system, for States that have ratified the Optional Protocol, applies to complaints by individuals against States. The Protocol has been in force since March 23, 1976, by which time it had received the ten necessary ratifications or accessions. It has now received at least sixteen such ratifications or accessions, and Canada acceded to it at the same time as it acceded to the two Covenants. This reporting system permits complaints to be made against a State by any individual, not necessarily a national. There are five principal steps in the system. Initially, a communication or complaint is sent to the Human Rights Committee by the individual. [234] Secondly, the Committee notifies the State concerned of the complaint made against it. [235] Thirdly, the State then has six months to submit to the Committee written explanations, clarifying statements and the remedy that might have been taken. [236] Fourthly, the Committee examines,

---

[226] Art. 42, para. 1(b).
[227] Art. 42, para. 6.
[228] Art. 42, para. 7.
[229] Art. 42, para. 7(b).
[230] Art. 42, para. 7(c).
[231] Art. 42, para. 7(d).
[232] Art. 41, para. 1(c).
[233] *Id.*
[234] Optional Protocol to the International Covenant on Civil and Political Rights, art. 1. The Protocol is annexed to G. A. Res. 2200 (XXI), Dec. 16, 1966 and is reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, ST/HR/1 (1973). *See also* 61 A.J.I.L. 887 (1967).
[235] Art. 4, para. 1.
[236] Art. 4, para. 2.

at closed meetings, the communications and all relevant information submitted to it by the individual and the State.[237] Finally, the Committee then makes a report of its views to both the individual and the State.[238]

Here again, as in the case of inter-State complaints, the Committee cannot consider complaints by an individual unless he has exhausted all available domestic remedies.[239] However, again as in the case of inter-State complaints, this condition does not apply where it would unreasonably prolong and delay matters.[240] As a final note on this reporting system, it should be specified that it differs from and is in addition to the right of individual petition established in the United Nations, under an ECOSOC resolution adopted in 1970.[241] That Resolution authorized the Sub-commission on the Prevention of Discrimination and the Protection of Minorities to study and report to the Commission on Human Rights on all complaints sent to the United Nations by individuals alleging violations of human rights which appear to reveal a consistent pattern of gross violations.

Canada has not yet submitted its first report on the implementing measures provided for in the Covenants. Presumably its reports will be prepared in consultation with the provinces, having regard to the responsibility assumed by Canada on their behalf under the Federal State clause. Similarly, the provinces will presumably be given an opportunity to have representatives on the Canadian delegation should Canada be required to appear before an international body to give explanations or make submissions relating to its implementing measures.

3. *Two Comments on the Covenants*

Before leaving the two Covenants, comparative comments should be made on two major aspects: the obligations of States Parties to the Covenants, and the nature of the reporting systems.

(a) *Obligations of States*

The obligations of the Parties are less stringent and compelling under the Covenant on Economic, Social and Cultural Rights than they are under the Covenant on Civil and Political Rights. Under the former Covenant, their obligations are limited to taking steps to achieve "progressively" the full realization of the rights guaranteed.[242] In addition, developing countries benefit from a special provision with respect to their obligation to guarantee

---

[237] Art. 5, paras. 1 and 5.

[238] Art. 5, para. 4.

[239] Art. 2 and art. 5, para. 2(b).

[240] Art. 5, para. 2(b).

[241] ECOSOC Res. 1503 (XLVIII). For the history of human rights communications in the United Nations, *see* Humphrey, *The Right of Petition in the United Nations*, 4 HUMAN RIGHTS JOURNAL 463 (1971).

[242] *Supra* note 164, art. 2, para. 1.

those economic rights to non-nationals:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals. [243]

Under the Covenant on Civil and Political Rights, the obligation of States to take the necessary implementing measures would appear to be an immediate one. Not only is there no mention of progressive implementation, but the obligation to take these measures applies "[w]here not already provided for by existing legislative or other measures", [244] and a reading of the full Article would definitely seem to suggest that no time allowance is envisaged, except for the one year within which States Parties have to submit their reports on the implementing measures. [245]

(b) *Nature of reporting systems*

The reporting system provided for under the Covenant for Economic, Social and Cultural Rights gives greater powers to the enforcement organ, the Economic and Social Council (ECOSOC), than the Human Rights Committee is given under the Covenant on Civil and Political Rights. The latter is not empowered to make reports and recommendations to the General Assembly, as is ECOSOC, and presumably it could only do so indirectly, if at all, in its annual report to the General Assembly, which is made through ECOSOC. Furthermore, the reporting system under the Covenant on Economic, Social and Cultural Rights provides for the actual involvement of a whole range of organs and institutions: specialized agencies, the Human Rights Commission, the General Assembly and, of course, ECOSOC itself. Under the Political Rights Covenant, aside from the General Assembly, to which the reports are directed, only the Human Rights Committee is involved in the process. ECOSOC does not come into the picture, unless the Human Rights Committee decides to send it a copy of its reports; [246] even then it would appear to be for its information only. This interpretation is reinforced by the fact that the annual report of the Human Rights Committee is submitted to the General Assembly "through the Economic and Social Council" rather than directly to it. [247]

Furthermore, the powers of the Human Rights Committee are limited to making "general comments" on the reports submitted by States on their implementing measures [248] and to expressing its "views" in its final report in the case of inter-State complaints under the Optional Declaration, [249] as well as in the case of individual complaints under the Optional Protocol. [250]

---

[243] *Id.*, art. 2, para. 3.
[244] *Supra* note 182, art. 2, para. 2.
[245] *Id.*, art. 40, para. 1.
[246] *Id.*, art. 40, para. 4.
[247] Art. 45.
[248] Art. 40, para. 3.
[249] Art. 42, para. 7(c).
[250] *Supra* note 234, art. 5, para. 4.

C. *Canadian Human Rights Act (1976)*

The Canadian Human Rights Act [251] was given Royal Assent on July 14, 1977. The purpose of the Act is to extend the present laws within the legislative authority of the Federal Parliament which prohibit discrimination and protect the privacy of individuals. In other words, the Act deals with two basic rights: freedom from discrimination and the right to privacy.

1. *Main Substantive Provisions*

Part I, dealing with non-discrimination, enumerates the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters relating to employment, physical handicap. [252] It will be noted that these various grounds do not include language and political or other opinion, protection of which may be found in the Universal Declaration of Human Rights and the European Convention on Human Rights. This is not an oversight, and the matter was discussed before the Standing Committee on Justice and Legal Affairs, as well as briefly in the House of Commons. The Minister of Justice, Mr. Basford, explained in moving third reading of the Bill that the French language was already adequately dealt with in the Official Languages Act and the Government's language policy. As for the other languages spoken in Canada, he thought that if they were made a prohibited ground of discrimination, then services, employment and accommodation would have to be provided in all of them. [253] The absence of political opinion as a ground of discrimination was raised in the House of Commons by Leonard Jones, who stated that he had been the victim of discrimination as the result of a political affiliation — or rather the lack of one — but he did not press the matter. [254] The Minister of Justice also stated that the possibility of including sexual orientation had been discussed and rejected in Committee. [255]

The important point is not whether the Act contains a long list of possible grounds of discrimination, but whether the Act should contain a closed or an open list. The list contained in the Act is a closed one, with the obvious disadvantage that a person who is being discriminated against on a ground not expressly mentioned in the Act cannot lodge a complaint. The advantage, on the other hand, is that there is more certainty as to what constitutes illegal discrimination, and those responsible for implementation of the Act will have less difficulty in determining whether or not there has been prohibited discrimination in any particular case. The Act mentions a number of specific areas where discriminatory practices might be found,

---

[251] S.C. 1976-77 c. 33.
[252] S. 2(a).
[253] *See* 120 H.C. DEB., No. 136, at 6199 (June 2, 1977).
[254] *See* 120 H.C. DEB., No. 134, at 6150 (May 31, 1977).
[255] *Supra* note 253.

such as services, facilities or accomodation customarily available to the general public, [256] commercial premises or residential accommodation, [257] employment, [258] employee organizations, [259] wages [260] and communications. [261]

Part IV of the Act, dealing with the protection of personal information, is based on the principle of the right of privacy and gives the individual access to his own personal records. This Part applies to all federal information banks, and requires the Government to publish at least once a year a list of these banks and the type of records stored in them. [262] Every individual is entitled to ascertain what records concerning him are contained in these banks and what uses are being made of them, and he may examine the records, request corrections and require a notation of such requests if the corrections are not made. [263] The consent of the individual must also be obtained before any non-derivative use is made of information supplied by him for a particular purpose. [264] This right of access to information on the part of the individual is qualified by a number of restrictions and exemptions, which are essentially of two types: one relating to publication of the list of information banks and the type of records stored therein, and the other pertaining to freedom of access to these records. These limitations are quite broad in scope and are based mainly on considerations of national security and the administration of justice. [265]

2. *Enforcement Mechanism*

There are two separate enforcement bodies provided for in the Act: a Human Rights Commission and a Privacy Commissioner.

The Commission, entitled the Canadian Human Rights Commission, is composed of a Chief Commissioner and a Deputy Chief Commissioner, both of whom are full-time officers, and between three and six members who may be either full-time or part-time. [266] It may be said that the Commission has a dual role, one aspect being the collection and dispensing of information and the other involving enforcement. On the information side, the Commission is to develop and conduct information programs, undertake or sponsor research, maintain close contact with similar provincial bodies, consider suggestions and recommendations and make recommendations to the Government. [267] The enforcement powers enable the Commission to study com-

---

[256] S. 5.
[257] S. 6.
[258] S. 7.
[259] S. 9.
[260] S. 11.
[261] S. 13.
[262] S. 51.
[263] S. 52(1).
[264] S. 52(2).
[265] S. 53.
[266] S. 21(1) and (2).
[267] S. 22.

plaints from individuals who have reasonable grounds to believe that a person is engaged in a discriminatory practice, and it may initiate a complaint on its own initiative.[268] The Commission is not itself involved in the investigation and conciliation processes. The Commission may designate an investigator, who makes a report of his findings, and the Commission may then adopt the report if the complaint has been substantiated, or, if not, dismiss the complaint.[269] If the matter is not settled, or if it chooses, immediately upon the filing of a complaint, the Commission may appoint a conciliator to attempt to bring about a settlement.[270] The Commission may also, at any stage after the filing of a complaint, appoint a Human Rights Tribunal consisting of not more than three members.[271] The Tribunal will then hold a full hearing, much in the same manner as in a court of law,[272] but under relaxed rules of evidence as to admissibility.[273] The Tribunal will either dismiss the complaint or make an order against the person engaged in discriminatory practice and award compensation to the complainant.[274] The order made by the Tribunal shall be deemed to be an order of the Federal Court of Canada and shall be enforceable in the same manner.[275] There is, however, no right of appeal to the Federal Court, except under Section 28 of the Federal Court Act, which provides for the possibility of judicial review. The legislators were considerably divided on this question of whether or not an ordinary right of appeal to the Federal Court ought to be expressly provided for. An amendment providing for such an appeal moved by Mr. Eldon Woolliams was defeated in the House of Commons by a vote of 111 to 56.[276] Finally, it should be mentioned further that the Act makes it an offence to fail to comply with the terms of a settlement approved by the Commission, and provides for fines of up to $10,000 in the case of an employer.[277] Finally, the Act provides that the Commission shall make an annual report to the Minister of Justice on its activities, which will then be laid before Parliament.[278]

The Privacy Commissioner is to be designated by the Minister of Justice from among the members of the Human Rights Commission and upon the recommendation of the Chief Commissioner.[279] The Privacy Commissioner has the powers of the Human Rights Tribunal for investigation purposes and, subject to certain limitations in the interests of national

---

[268] S. 32.
[269] S. 36.
[270] S. 37.
[271] S. 39.
[272] S. 40(3)(*a*).
[273] S. 40(3)(*c*).
[274] S. 41.
[275] S. 43.
[276] *See* 120 H.C. DEB., No. 136, at 6197 (June 2, 1977). There is, however, provision in s. 42.1 for appeal to a Review Tribunal if the Tribunal that made the order was composed of fewer than three members.
[277] S. 46.
[278] S. 47.
[279] S. 57.

defence or security, may enter premises occupied by government institutions to carry out his duties. [280] The Commissioner receives complaints from individuals and conducts his investigation in private. [281] He is not obliged to hold a hearing and no person has a right to be heard by him. [282] If during his investigation, however, it appears that there may be sufficient grounds for making a report or recommendation against a person or a government institution, he must then give that person or government institution full opportunity to be heard. [283] If the Privacy Commissioner concludes at the end of his investigation that the complaint is well-founded, he makes a report to the appropriate minister containing his findings and any recommendations. [284] This report may also contain a request that remedial action be taken within a specified time and that he be advised of that action. [285] The Privacy Commissioner shall also make a report to the complainant on the results of the investigation, but if he has requested any remedial action, he must wait until the expiration of the time specified for making this report. [286] Finally, he must make an annual report to the Minister of Justice, who will table it in Parliament. [287] Also included in the Act is a provision envisaging a possible expansion on its scope of application. The Privacy Commissioner is obliged to cause studies to be made with a view to extending the right to privacy of the individuals covered by the Act to non-governmental institutions that come within the legislative authority of Parliament. [288]

Whatever may be the shortcomings of the substantive and procedural provisions of the Canadian Human Rights Act, it represents an important step by Canada in the fulfillment of its international obligation under the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms.

V. Treaty Ratification and Entry Into Force

In 1975 the *Château-Gai Wines v. Institut National des Appellations* [289] case came before the Supreme Court on appeal from the Court of Appeal of Quebec, [290] which had upheld the judgment of a superior court condemning the appellant to pay damages in the amount of $75,000 and enjoining it to refrain from using the appellation "Champagne". There follows a summary of the Supreme Court decision and a comment on the two points of international law which the case raises: the meaning of ratification and the entry into force of a treaty.

---

[280] S. 58(5).
[281] S. 58(1), (2), and (3).
[282] S. 58(4).
[283] *Id.*
[284] S. 59(1).
[285] *Id.*
[286] S. 59(2).
[287] S. 60.
[288] S. 61.
[289] *Supra* note 2.
[290] [1973] C.A. 72.

A. *The Château-Gai Wines Case*

The case arose out of the Trade Agreement Between Canada and France, signed on May 12, 1933.[291] In that Agreement the Parties undertook to ensure, within their territorial limits, the respect for appellations of origin of wine, to accept for registration only names which were recognized and protected as appellations of origin and which had not become public property within the territory of the Party, and to register such appellations of origin with the competent services of the other Party. They had also agreed to ensure that such registered appellations should not be used commercially for the purpose of describing goods other than those which had a definite right to such names. Although the Agreement was described as a "provisional Agreement", pending the conclusion of a "Commercial Convention", it was drafted in very formal terms. The preamble recited that the Parties had appointed as their respective plenipotentiaries: for His Majesty the King of Great Britain in right of the Dominion of Canada, the Right Honourable R. B. Bennett, Prime Minister and Secretary of State for External Affairs, and the Honourable C. H. Cahan, Secretary of State of Canada; and for the President of the French Republic, Monsieur M. C. A. Henry, Envoy Extraordinary and Minister Plenipotentiary. The preamble concluded with a reference to their respective full powers and was followed by the substantive provisions (Articles 1 to 17), ending with the following stipulation with respect to ratification and entry into force:

> The present Agreement shall be ratified and the ratifications shall be exchanged at Ottawa as soon as possible.
>
> It shall come into force on the date which the High Contracting Parties shall fix by joint agreement.[292]

The Agreement also provided that it was "concluded for one year from the date of its coming into force and may be rescinded by three months' notice before the date of its termination".[293] It could be extended as well by tacit consent, each Party reserving the right to rescind by giving three months' notice.[294]

On the same day that this Agreement was signed, May 12, the French Minister Plenipotentiary, Henry, wrote to the Canadian Government saying that notwithstanding Article 16, which provided for ratification, France had power to "apply the agreement provisionally before ratification" and would be in a position to enforce the Agreement as soon as the Canadian Government could do so itself.[295] After receiving this letter, the Canadian Govern-

---

[291] Reproduced in a Schedule to The Canada-France Trade Agreement Act, S.C. 1932-33 c. 31.

[292] Art. 16.

[293] Art. 17.

[294] *Id.*

[295] *See* judgment of President Jackett of the Exchequer Court of Canada in Château-Gai Wines Ltd. v. A. G. of Canada, [1970] Ex. C.R. 366, where the facts are very fully set out and will be used for the present summary.

ment promptly proceeded to have an implementing statute adopted and, on May 23, Royal Assent was given to the Canada-France Trade Agreement Act, 1933, which incorporated the Trade Agreement set out in the Schedule. The Act provided that the Trade Agreement "is hereby approved, and shall have the force of law notwithstanding the provisions of any law in force in Canada". [296] It was further provided that the Act would come into force on a day to be fixed by proclamation.

On May 27, 1933, Dr. O. D. Skelton, the Under Secretary of State for External Affairs, wrote to the French Minister stating that if the French Government was not in a position to exchange ratifications in the near future, the Canadian Government would be prepared to conclude a joint agreement, by way of exchange of notes, specifying that the Trade Agreement would come into force on a given date. In that event, the implementing statute would be proclaimed and all of the provisions would become effective immediately. Dr. Skelton specified that upon the subsequent exchange of ratifications, the operation of the Agreement would be retroactive to the agreed date, and that "the actual result would be that the operation of the Trade Agreement would be provisional on both sides until the exchange of ratifications, because the failure to ratify on the part of either of the high contracting parties would terminate the arrangement". [297] In his reply of June 3, the French Minister regretted that he was "unable presently to proceed with the exchange of ratifications" and proposed a complete entry into force on June 10, from which date the term of one year would start to run. He pointed out that his government had always resorted to this procedure of provisional entry into force and had done so without inconvenience. [298]

On June 6, the Acting Secretary of State for External Affairs replied, noting the inability to exchange ratifications before the session of the French Chambers in November and agreeing to bring the whole Agreement into force as of June 10. [299] He stated that an Order-in-Council had been passed on that day bringing the Agreement into force for Canada on June 10, and added that, by virtue of Article 17, the period of one year would begin to run on June 10. [300] An Order-in-Council [301] was in fact passed on that date providing that the Canada-France Trade Agreement Act would come into force and take effect on June 10, 1933.

A second and final exchange of correspondence took place the following year with respect to the registration of the appellations provided for in the Agreement. On February 27, 1934, the French Minister wrote to the Secretary of State for External Affairs sending him a "liste des appellations d'origine concernant les vins français", and appearing on that list was the

---

[296] The Canada-France Trade Agreement Act, S.C. 1932-33, c. 31, s. 2.
[297] *Supra* note 295, at 372.
[298] *Id.* at 373.
[299] *Id.* at 373-74.
[300] *Id.* at 374.
[301] P.C. 1103.

word "Champagne". [302] A second letter followed on June 5, in which the French Minister specified that under a French law of 1919, the appellation "Champagne" was applicable to only two of the "vins récoltés et *entièrement manipulés* dans les limites de la Champagne viticole". He added that "[I]l en résulte que, seuls, les vins mousseux expédiés de France en bouteilles peuvent avoir droit à l'appellation d'origine 'Champagne'." [303] These letters were sent to the Commissioner of Patents, and on October 23, 1934, an entry was made in the Register of Trade Marks, under The Unfair Competition Act, inserting in the space provided for "Mark" the word "Champagne", and in the space provided for "Wares" the word "Vins". This entry was renewed on June 10, 1948, again under The Unfair Competition Act, and subsequently on June 10, 1963, this time under the Trade Marks Act.

The basic question of international law at issue was whether the ratification expressly provided for in the Trade Agreement constituted a condition precedent to its coming into force. In the comment which follows, ratification will be discussed separately from the question of entry into force.

The Supreme Court was split five to four in its decision to grant an injunction to the Institut National des Appellations, but all of the judges were of the view that the Trade Agreement in question had come into force in spite of the absence of ratification expressly provided for. In delivering the judgment for the majority, [304] Pigeon J. stated that "the Agreement does not state that it will only come into force after ratification". [305] He added that the Court had not been referred to any principle by which a stipulation of this nature should be regarded as a suspensive condition and that he knew "of no rule of law by which a promise stipulated in a treaty must be presumed a suspensive condition in the absence of any indication to that effect". [306] Pigeon J. then went on to make a comparison with contract law, stating that "the very nature of ratification is that it has a retroactive effect" [307] and referring to the *Traité pratique de droit français,* by Planiol and Ripert, in support of this proposition. [308] Pigeon J. was also of the opinion that the Parties had not envisaged that the Agreement would come into force only upon ratification, and he did not think that the lack of ratification could affect the validity of the Agreement.

> In the agreement under consideration here the parties did not see fit to stipulate that the agreement would only become in force after the ratifications had been exchanged. What they did agree on was that it would become in force on a date to be fixed by joint agreement . . . . I fail to see on what legal principle lack of ratification could have a bearing on the validity of the Agreement, in the absence of any action by the public authority to terminate or rescind it. [309]

---

[302] *Supra* note 295, at 374.
[303] *Id.*
[304] Fauteux C.J.C. and Martland, Ritchie, Pigeon and Dickson JJ.
[305] *Supra* note 2, at 197, 51 D.L.R. (3d) at 123.
[306] *Id.*
[307] *Id.*
[308] *Id.* at 197-98, 51 D.L.R. (3d) at 123.
[309] *Id.* at 198, 51 D.L.R. (3d) at 124.

In support of his conclusion, Pigeon J. relied on a certificate signed by the Secretary of State for External Affairs [310] and dated April 19, 1967, stating that although the exchange of instruments of ratification contemplated by the treaty had not taken place, "both countries fixed by joint agreement the date for the coming into force of the Agreement and, in their subsequent exchanges and practice, they have regarded the Agreement as having come into force as of June 10, 1933 and as having remained in force from that date". [311]

Pigeon J. stated that "in the interpretation of treaties the approach of the government, though not conclusive, must be given great weight" and quoted from a decision of the United States Supreme Court in support. [312] However, he added that in the case at bar, he did "not consider it is necessary to decide whether one should go so far as to say that a certificate from the appropriate Minister is conclusive proof that an agreement exists". [313] He was "inclined to the opinion that the question of whether the treaty is in force, as opposed to what its effect should be, is also wholly within the province of the public authority". [314] Pigeon J. concluded on this point by saying that he considered the proclamation fixing June 10, 1933 as the date of coming into force of the statute as having had at the same time "the effect of bringing into force the treaty provisions, so that it sufficed in obligating the courts to give them effect without any need for further evidence that the date in question was the agreed date". [315] He then went on to deal with the question of registration, and concluded by confirming the injunction granted by the courts below but reducing the amount of damages from $75,000 to $15,000.

Laskin J., delivering the minority judgment on behalf of Abbott, Judson and Spence JJ. and himself, would have refused to allow the injunction on the ground that the plaintiff had done nothing for thirty years even though he had known all this time about the improper use of the name "Champagne" and that it would therefore have been inequitable to grant this discretionary remedy of a permanent injunction. In such circumstances, he held, "the respondents should be left to their remedy at law in damages". [316] On the point of international law as to whether ratification was a condition precedent for the coming into force of the Trade Agreement, Laskin J. came to the conclusion that "[t]here was a ratification by Canada but not by France", [317] apparently based on the fact that there had been an exchange of notes purporting to bring the treaty into force as of June 10,

---

[310] Actually, it would seem that this first certificate was signed by the *Acting* Secretary of State for External Affairs and not by the Secretary, Paul Martin, who signed a subsequent one on November 10, 1967. *See infra* notes 357 and 358.

[311] *Supra* note 2, at 197, 51 D.L.R. (3d) at 123.

[312] *Id.* at 199, 51 D.L.R. (3d) at 124.

[313] *Id.*

[314] *Id.*

[315] *Id.* at 200, 51 D.L.R. (3d) at 125.

[316] *Id.* at 225, 51 D.L.R. (3d) at 144.

[317] *Id.* at 217, 51 D.L.R. (3d) at 138.

1933. He referred to two certificates, the 1967 one relied upon by Pigeon J. and a second one signed by the then Secretary of State for External Affairs Mitchell Sharp and dated December 19, 1969. The second certificate concluded that "the Treaty was ratified by the exchange of notes and the conduct of the parties". [318] Laskin J. did not think that the exchange of ratifications provided for in the treaty constituted a condition precedent for this coming into force, the reason being that "it would turn art. 16 into a substantive provision affecting the operation of the implementing statute instead of continuing as merely a procedural provision respecting the international force of the Treaty". [319] He added that "[t]he contracting states were entitled by mutual agreement to substitute a different method of arriving at a treaty arrangement for the one originally agreed upon in the Treaty". [320]

B. *Comment on the Château-Gai Wines Case*

The international law aspects of this decision are open themselves to criticism. In spite of the fact that counsel for the parties did plead international law, there is not a single reference in either the majority or the minority judgments, to international law sources. One would have expected the Court to have referred at least to Lord McNair's classical treatise "The Law of Treaties", if not to the Vienna Convention on the Law of Treaties or decisions of the International Court of Justice. There are at least three points that deserve comment: (1) the meaning of ratification; (2) the meaning of entry into force; and (3) the legal force of a certificate by the Executive as to the existence of a treaty.

1. *Meaning of Ratification*

It must be made clear at the outset that ratification in public international law does not have the same meaning it has in private contract law. Ratification may be defined as the act reserved to the treaty-making organ of the State whereby it expresses its consent to be legally bound by a treaty. Ratification no longer means a simple confirmation of the authority vested in the plenipotentiary, but rather a confirmation of the treaty itself. This is made quite clear by Lord McNair, formerly President of the International Court, in the following passage:

> Formerly in the days of absolute monarchs, the Full Power itself contained the monarch's promise to ratify whatever might be agreed upon by his plenipotentiary within the limits of his instructions; consequently, the subsequent exchange of instruments of ratification was little more than a formality. Today, however, a Full Power contains no such promise, and when the treaty negotiated by the plenipotentiary is of such a kind as to require ratification, *ratification is essential to bring the treaty into force.* [321]

---

[318] *Id.*
[319] *Id.* at 217-18, 51 D.L.R. (3d) at 138.
[320] *Id.* at 218, 51 D.L.R. (3d) at 138.
[321] A. MCNAIR, THE LAW OF TREATIES 130 (1961) (emphasis added).

On the significance of ratification, Lord McNair further states: "[I]n early days signature was the main act. Today, however, in the case of a treaty which requires ratification, *it is the exchange of ratifications which concludes the treaty and gives effect to it.*" [322]

On this same point, Professor Charles Rousseau of the University of Paris states that the old meaning of ratification had been borrowed from the mandate theory in private law and explains why it is no longer applicable.

> A l'origine la théorie dominante (théorie du mandat) ramenait le processus de conclusion d'un traité au schéma civiliste de la formation d'un contrat passé par mandataire. La ratification se présente alors comme la confirmation rétroactive de l'acte du mandataire (négociateur) par le mandant (chef de l'Etat), réserve faite de l'excès de pouvoir éventuellement commis par les plénipotentiaires; mais cette confirmation n'ajoutait rien au traité, qui était pleinement valable et par suite obligatoire dès sa signature.
>
> Cette explication est inacceptable. Il est impossible d'assimiler un plénipotentiaire, appelé à traiter au nom de l'Etat, à un mandataire privé, dont la fonction est limitée au commerce juridique de droit civil. Ni les intérêts représentés ni les buts poursuivis ne sont comparables. [323]

The International Court of Justice had occasion to state its view on the significance of ratification in a number of cases, in particular in the *Ambatielos* case of 1952, where it was stated that "[t]he ratification of a treaty which provides for ratification, as does the Treaty of 1926, is an *indispensable condition* for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance." [324] None of the fifteen judges sitting in that case questioned the necessity of ratification as a condition precedent for bringing the treaty into force. The point on which certain judges dissented related to the question of whether an accompanying declaration made at the time of ratification could also be considered to be covered by the instrument of ratification. Judge Basdevant, who dissented on this point but not on the necessity of ratification, expressed himself as follows:

> La rédaction et la signature d'un accord international sont les actes par lesquels s'énonce la volonté des Etats contractants; la ratification est l'acte par lequel la volonté ainsi exprimée est confirmée par l'autorité compétente en vue de lui donner force de droit. [325]

The law of treaties, although quite well established in customary law, was made more precise by the adoption of the Convention on the Law of Treaties on May 22, 1969, by a vote of 79 to 1 with 19 abstentions, to which Canada deposited its instrument of accession on

---

[322] *Id.* at 132 (emphasis added).

[323] C. ROUSSEAU, DROIT INTERNATIONAL PUBLIC, Tome I, at 89 (5th ed. 1970).

[324] [1952] I.C.J. Rep. 28, at 43. *See also* the Asylum Case, [1950] I.C.J. Rep. 266, at 276, where the Court held: "The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State."

[325] [1952] I.C.J. Rep. 28, at 69.

October 14, 1969. Since it is a formal convention, made subject to ratification, and the required number of ratifications has not yet been deposited, the Convention has not yet entered into force. However, it is essentially a codifying and not a law-making convention, incorporating a more precise formulation and a systematization of the relevant rules of customary international law;[326] consequently, it is now generally considered as the basic source of treaty law. It is significant in this regard that the International Court did not hesitate to invoke the relevant Convention provision to support its conclusion that there had been a material breach by the Union of South Africa of its international mandate over South West Africa or Namibia.[327]

The Vienna Convention makes it abundantly clear that ratification is the expression by a State of its consent to be bound by a treaty. The Convention provides that "[t]he consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification";[328] there follows an enumeration of three other cases where consent is expressed by ratification. In its commentary on this provision of the draft Convention, which it had prepared after a number of years of study, the International Law Commission traced the evolution of the meaning of ratification in this context and concluded that "it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding".[329] This is the rule of customary international law which was incorporated into the Convention.

It would appear from this analysis that it was the mandate theory of ratification rather than the public international law meaning of that term which was applied by Pigeon J. in the case under discussion. It is not surprising, therefore, that Pigeon J. quite logically, but falsely, concluded that he failed to see "on what legal principle lack of ratification could have a bearing on the validity of the Agreement, in the absence of any action by the public authority to terminate or rescind it".[330]

The Vienna Convention also incorporates the rule that the consent to be bound, as expressed by the ratification, is normally established by an exchange of instruments of ratification. The Convention provides that "[u]nless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon: (a) their exchange between the contracting States";[331] there follow two other possible ways which States may choose to establish their consent, applicable to multilateral treaties. The International Law Commission explains in its Commentary that it is from the moment of the exchange

---

[326] For a discussion of the relationship between codification and progressive development of international law in the Convention, *see* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 12-23 (1973).

[327] Namibia (South West Africa) Case, [1971] I.C.J. Rep. 16, at 47.

[328] Convention on the Law of Treaties, A/CONF. 39/27, art. 14, para. 1(a) (May 23, 1969).

[329] [1966] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION at 197.

[330] *Supra* note 2, at 198, 51 D.L.R. (3d) at 124.

[331] *Supra* note 328, art. 16.

and not before that the legal nexus is established between the contracting States. [332] In other words, the consent does not become effective and binding until the exchange of instruments of ratification: it is this manifestation of consent which is necessary to create legal consequences for the parties.

It would seem that the above rules were well understood by the contracting parties to the Canada-France Trade Agreement. It was a formal trade agreement, made expressly subject to ratification by both Parties and to the exchange of such ratifications. Each letter in the exchange of correspondence which followed the signing of the Agreement recognized the necessity of ratification. The French Minister's letter of May 12 suggested a provisional application "before ratification"; [333] Dr. Skelton's letter of May 27 referred to the future exchange of ratifications no less than three times, specifying that "the failure to ratify on the part of either of the high contracting parties would terminate the arrangement"; [334] the French Minister's letter of June 3 stated twice that the request for a provisional application was necessary due to the inability of the French Government to proceed immediately with the "exchange of ratifications", [335] which could not be carried out "before the session of the French Chambers in November"; and the Acting Secretary of State for External Affairs noted in his reply of June 6 that the French Government was "not in a position to effect the exchange of ratifications before the session of the French Chambers in November". [336]

This exchange of correspondence makes three points quite clear: first, that the Parties continued to consider that their consent to be bound was to be expressed by ratification; second, that France's consent needed prior approval of the French Assembly for its validity; and third, that the consent of both Parties was to be established by the exchange of ratifications as stipulated in the treaty.

2. *Meaning of Entry into Force*

The question of ratification must be distinguished from the question of entry into force. Ratification refers to the moment when the treaty becomes legally binding on the parties, whereas the entry into force marks the date on which the treaty begins to operate. [337] If the parties have not agreed on a separate date for entry into force, this will occur upon exchange of ratifications. [338] The Vienna Convention formulates this well established customary law rule as follows:

> 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

---

[332] *Supra* note 329, at 201.

[333] *Supra* note 295, at 370.

[334] *Id.* at 372.

[335] *Id.*

[336] *Id.*

[337] What confuses matters is that the expression "entry into force" is often used to characterize both events.

[338] *See* MCNAIR, *supra* note 321.

> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States. [339]

The International Law Commission concludes its Commentary on the above provision by stating that "the existing general rule . . . is undoubtedly that entry into force takes place at once upon the relevant consents having been established, unless the treaty otherwise provides". [340] In the Canada-France Trade Agreement it was otherwise provided as follows: "It shall come into force on the date which the High Contracting Parties shall fix by joint agreement." [341]

Of course, this entry into force of a treaty can not take place before ratification. To put it another way, the treaty has to become legally binding on the Parties, by a proper manifestation of their consent to be bound, before it can enter into force. Otherwise, there could be no binding document to enter into force.

The only possible exception to the above rule — and it is an apparent and not a real exception — is that the Parties may agree on a provisional application of the treaty pending ratification. This provisional application is sometimes referred to as provisional entry into force. As Lord McNair puts it, "cases occur in which parties may agree that a treaty requiring ratification or part of it shall come into force before ratification". [342] Of course, in such a situation, Lord McNair is careful to add, the treaty enters into force "only provisionally and subject to later ratification". [343] This customary law rule on the provisional application of a treaty is spelled out in the Vienna Convention in the following terms:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed. [344]

It should be noted that care is taken to distinguish between provisional application and entry into force, the latter expression being reserved to indicate that the treaty has acquired a definite legal status and not merely a provisional one. As explained by the International Law Commission in its Commentary, such a provisional application of the treaty may be agreed upon where it is necessary for States to bring the treaty before their constitutional authority for approval and there is some urgent reason for putting the treaty in motion. [345] This was the situation in which France found itself in the case under review. The above provision also makes it clear that the Parties may agree on a provisional application, either in the treaty itself or in some other manner.

---

[339] *Supra* note 328, art. 24.
[340] *Supra* note 329, at 210.
[341] *Supra* note 291, art. 16.
[342] *Supra* note 321, at 192.
[343] *Id.* at 193.
[344] *Supra* note 328, art. 25.
[345] *Supra* note 323, at 210.

In the present case, the Parties agreed on a provisional application by means of an exchange of letters immediately following the signing of the treaty. This was the stated purpose of the French Minister's first letter, on the day the Agreement was signed, in which he said that the French Government had "the power to apply the agreement provisionally before ratification by the President of the Republic". [346] Indeed, France was still operating under the 1875 Constitution, which required formal trade treaties to be submitted to Parliament for approval prior to ratification. However, a law was adopted on July 29, 1919, by virtue of which "certains arrangements commerciaux pouvaient recevoir application provisoire avant ratification". [347] Obviously, France wished to take advantage of this law, which permitted provisional application before ratification.

The provisional status of the Agreement appears to have been well understood by both sides. In his letter of May 27, Dr. Skelton took great care to specify that "the operation of the Trade Agreement would be provisional on both sides". [348] The French Minister's letter of June 3 does not seem to change this understanding. After stating that the French Government now wanted a total instead of a partial entry into force, as apparently had been discussed, the letter confirms that the French Government "has always without inconvenience had recourse to such a procedure of a *provisional putting into force*". [349] Nowhere in this letter is there any indication that a definite rather than a provisional entry into force was envisaged. And this seems to have been the way Canadian officials understood it, since in his last letter in the exchange, the Acting Secretary of State for External Affairs noted that the French Government, "while not in a position to effect the exchange of ratifications before the session of the French Chambers in November next, is prepared to bring the whole Agreement into force as from June 10th". [350] This confirms the previous understanding that the entry into force was to be provisional, pending approval by the French Chambers in November, to be followed by the exchange of ratifications stipulated in the treaty. In addition, the letter concurs in the total rather than partial entry into force, although still provisionally, of the Agreement. Canada agreed also in this last letter that "the period of one year for which the Agreement was concluded will begin to run from that date". [351] The date referred to was June 10.

The rather straightforward conclusion which follows from this analysis of the correspondence between the Parties, in light of the relevant rules of treaty law, is that they agreed (by way of exchange of letters) on a provisional application or entry into force of the Trade Agreement, pending its approval by the French Chambers expected to be obtained in November.

---

[346] *Supra* note 295, at 370.
[347] *See* ROUSSEAU, *supra* note 323, at 100.
[348] *Supra* note 295, at 372.
[349] *Id.* at 373.
[350] *Id.*
[351] *Id.*

The exchange of ratifications stipulated in the Agreement was to take place at that time, and this exchange, establishing the proper consent of the two States to be bound, would cause the Agreement to enter into force definitely. And, as quite correctly stated by Dr. Skelton in his letter of May 27, "[t]he operation and effect of the Trade Agreement would then be related back to the agreed date, and the period for both Parties to the Trade Agreement would extend for one year from that date". [352] The date which he tentatively suggested was June 1, but, as already seen, the date finally agreed upon was June 10. However, since the Agreement never entered into force definitely, but only provisionally, the term of the Agreement could not relate back and run its full course of one year from June 10. For the same reason, there could be no question of the Agreement having been extended indefinitely by tacit consent. The legal result of the non-ratification was very accurately described by Dr. Skelton when he wrote that "the failure to ratify on the part of either of the high contracting parties would terminate the arrangement". [353] Indeed, this is exactly what happened: the Agreement was never given more than a provisional legal status. This conclusion is fully reflected in the implementing statute, which contains a provision relating to the rates of duties which begins with the words "[a]fter the said Agreement is brought into force and so long as it remains in force". [354] The judges of the Supreme Court arrived at a different conclusion, however, relying heavily on certificates issued by the Secretaries of State for External Affairs.

3. *Force of an Executive Certificate*

Treaty-making in Canada, as in the United Kingdom, is strictly an executive act; it is only proper, therefore, for our courts to give considerable weight to a certificate issued by the responsible minister regarding the existence of a particular treaty. Whether the courts, however, should go so far as to consider the certificate conclusive proof that a treaty has been legally concluded is another question. [355] Courts should feel free to examine the legal basis of the certificate. Indeed, they have a duty to do so, for while the treaty-making power rests exclusively with the Executive, it remains within the normal role of the judiciary to determine if that power has been exercised. To put it succinctly, this is basically a legal question and should be decided by the courts.

Of course, nothing could prevent Parliament from legislating on the question and specifying what weight is to be given to such a certificate and in relation to what kind of matter. It has done so recently with respect to privileges and immunity. The Diplomatic and Consular Privileges and Immunities Act of 1976 provides that "a certificate issued by or under the

---

[352] *Id.* at 372.

[353] *Id.*

[354] S.C. 1932-33 c. 31, s. 3.

[355] For a discussion of this question, *see* A. JACOMY-MILLETTE, TREATY LAW IN CANADA 262-64 (1975).

authority of the Secretary of State for External Affairs containing any statement of fact relevant to the question shall be received in evidence as conclusive proof of the fact so stated". [356] Parliament has never adopted similar legislation with respect to the conclusion of treaties, and if it did, it would surely be careful to limit the scope of the certificate to questions of fact.

Concerning the content of the certificates in question here, it should be noted that there were three certificates altogether; two were issued in 1967 and one in 1969. The certificate relied upon by President Jackett of the Exchequer Court, which was signed by the Secretary of State for External Affairs, Paul Martin, and dated November 10, 1967, states that "it was agreed between the two countries that the Trade Agreement would enter into force on Saturday, June 10, 1933, and in their subsequent exchanges and practice, the two countries have regarded the agreement as having come into force as of June 10, 1933". [357] There is nothing inaccurate in this statement, providing it is understood that the coming into force as of June 10, 1933 was intended to be provisional only, pending ratification, as already shown. The certificate relied upon in the Supreme Court by Pigeon J. for the majority and Laskin J. for the minority was signed by the Acting Secretary of State for External Affairs [358] and dated April 19, 1967. This certificate states that "both countries fixed by joint agreement the date for the coming into force of the Agreement and, in their subsequent exchanges and practice, they have regarded the Agreement as having come into force as of June 10, 1933 and as having remained in force from that date". [359]

The substantive difference between the two certificates is considerable, in that the certificate of April 19 states that both countries regarded the Agreement as *having remained in force from June 10, 1933,* whereas the subsequent one of November 10 merely states that they regarded the Agreement as *having come into force as of June 10, 1933.* The Supreme Court of Canada does not refer to the last certificate, issued in 1967 and signed by the Secretary of State for External Affairs himself, and presumably that certificate was not produced in evidence. The consequence is all the more serious since the majority judgment, delivered by Pigeon J., relies on the certificate of April 19 exclusively, it would seem. There is no reference to the 1969 certificate, as there is in the minority judgment of Laskin J.

The certificate quoted from and relied upon by Laskin J. [360] is dated December 18, 1969 and signed by the Secretary of State for External Affairs,

---

[356] S.C. 1976-77 c. 31, s. 5.

[357] *Supra* note 295, at 382. The same certificate is reproduced by Beesley, *Canadian Practice in International Law during 1969,* 8 C.Y.I.L 336, at 369 (1970).

[358] No name is mentioned in the judgment of Laskin J., but he specifies that it was the Acting Secretary of State (at 217), and therefore not Paul Martin, who signed this certificate. Paul Martin signed the certificate issued on November 10 of the same year. *See supra* note 310.

[359] *Supra* note 2, at 197, 51 D.L.R. (3d) at 123.

[360] *Id.* at 217, 51 D.L.R. (3d) at 138.

Mitchell Sharp. This certificate states: "I certify that while the instruments of ratification referred to in Article 16 of the treaty were not exchanged, the treaty was ratified by the exchange of notes and the conduct of the parties." [361] What this certificate says in effect is that the Parties ratified the treaty in question, but did so by a different mode than that stipulated in the treaty, namely by an exchange of letters and by their conduct. In light of what has already been said about the exigencies of ratification and the content of the letters exchanged, it is difficult to see how those letters could have constituted ratification, either separately or together with the conduct of the Parties. Of course, nothing would have prevented Canada from concluding a substitute agreement by way of exchange of notes, since there was no constitutional requirement that treaties be submitted to Parliament for prior approval. This was not the case for France, however. In spite of its 1919 law which enabled that particular kind of trade agreement to receive provisional application, it still had to comply with its constitutional requirement of submitting the treaty to Parliament for approval before it could enter into force. Article 8 of the 1875 Constitution, which was still applicable, reads: "[L]es traités de paix, de *commerce,* les traités qui engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, *ne sont définitifs qu'après avoir été votés par les deux Chambres*". [362] There was never any doubt that the Trade Agreement in question, which covered a whole range of products subject to importation by France into Canada and vice versa, [363] could not be concluded by way of exchange of notes. Such a treaty, in the words of the French constitution, could become definitive only after a vote of the two Chambers.

As for the effect of the subsequent conduct of the parties, the matter was fully discussed in the judgment of the International Court in the *North Sea Continental Shelf Cases.* [364] The court emphasized two points that are relevant here. In the first place, such conduct must give rise to a situation of estoppel, [365] as this concept is understood in Common Law jurisdictions, and secondly, such conduct may not be invoked by a State claiming rights on its own behalf rather than alleging obligations on the part of another State. In the case before the court, Denmark and the Netherlands were alleging an obligation on the part of Germany to comply with the equidistance delimitation rule provided for in the 1958 Continental Shelf Convention, which Germany had signed but not ratified. The court stated that it was not lightly to be presumed that a State which did not manifest its consent to be bound in the prescribed way had nevertheless somehow become bound

---

[361] The full text of the certificate is reproduced in President Jackett's judgment, *supra* note 295, at 382; and in 8 C.Y.I.L. at 369 (1970). *See also* the last part of the certificate quoted by Laskin J. at page 217 of his judgment.

[362] Quoted by ROUSSEAU, *supra* note 323, at 99-100.

[363] The dual list of products covers some fourteen pages of very fine print appearing as schedules to the implementing statute.

[364] [1969] I.C.J. Rep. 4.

[365] *Id.* at 26.

in another way. Indeed, the court said, if it were a question of rights instead of obligations, the conduct of a State could not possibly be invoked in lieu of ratification or accession. The relevant passage of the judgment is reproduced here.

> Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form. [366]

If this principle is applied to the case under review, it simply means that France may not invoke its own conduct, in lieu of ratification, to claim rights under the Trade Agreement. Consequently, the second basis for the legal conclusion contained in the Sharp certificate of 1969 would appear to be of very doubtful validity.

Before ending the discussion of this case, it should be said that the above criticisms on points of international law do not necessarily affect the validity of the judgments in the case. The reason is twofold: first, this was not a case before an international tribunal, where the plaintiff would have had to rely on the treaty as such; and second, the Canadian implementing statute, which the plaintiff could and did invoke, incorporated all the treaty provisions. The fact that the provisions incorporated into the Canadian statute were taken from a treaty which was only provisionally valid and which lapsed because of non-ratification cannot affect the validity of the statute itself. In other words, the international validity of the Trade Agreement did not have to be established before the plaintiff could invoke its provisions, since these provisions had become Canadian statutory provisions. The implementing statute clearly states that "the Trade Agreement between Canada and France set out in the Schedule to this Act, is hereby approved, and shall have force of law". [367]

Even though the Trade Agreement never entered into force and thus remained simply a document bearing that title, the content of that document was nonetheless duly enacted and given force of law by Parliament. The result could only be different if the Canadian statute had been adopted subject to the international validity of the Agreement. The only relevant provision in this regard is the one referred to earlier, and its scope of application does not seem to encompass the subject matter of the dispute in the case. The section provides that "after the said Agreement is brought into force and so long as it remains in force, the natural and manufactured products mentioned in the said Agreement . . . imported into the Dominion of Canada . . . shall be admitted to the Dominion of Canada at the rates

---

[366] *Id.* at 25-26.

[367] The Canada-France Trade Agreement Act, S.C. 1932-33 c. 31, s. 2.

of duties provided for in the said Agreement".[368] This provision relates specifically and exclusively to rates of duties applicable to products imported from France into Canada, and consequently the continuing validity of the Agreement would seem to be a condition affecting only these rates of duties. More precisely, it would not seem to affect in any way the protection to be afforded to appellations of origin of wine which had been duly registered, and it was such an appellation which was in issue here. After that international law hurdle has been overcome the other points involved in the case relate to domestic law. They pertain mainly to the validity of the registration on the Trade Marks register and to the prerequisites for the granting of an injunction as an equitable remedy.[369]

---

[368] S. 3.

[369] Personally, I am in complete agreement with Laskin J. that, considering "the respondents' long and unexplained delay when fully aware of their legal rights and of the invasion thereof by the appellant and others, it would be inequitable to apply the drastic remedy of a permanent injunction against the appellant" (*supra* note 2, at 225, 51 D.L.R. (3d) at 132-44). Surely there is still some validity in the old maxim that "equity will help the vigilant and not the indolent". In this case the respondent had slept on its rights for over thirty years, somewhat too long for it now to invoke the discretion of the court and ask for an equitable remedy.