NEWFOUNDLAND'S CASE ON OFFSHORE MINERALS: A BRIEF OUTLINE*

*Cabot Martin***

I. INTRODUCTION

The Province of Newfoundland claims ownership of, and jurisdiction over, the mineral resources of its adjacent continental margin (i.e., continental shelf, slope and rise).[1]

The province claims that these minerals were vested in the Crown in Right of Newfoundland prior to Confederation, and the claim follows from the well-established principle that the ownership of natural resources not expressly transferred to the federal government by the British North America Acts (or, in the case of Newfoundland, by the Terms of Union) was retained by the provinces. This principle is embodied in Term 37 of the Terms of Union between Newfoundland and Canada:

> All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.[2]

Since Newfoundland did not expressly, or by implication, transfer its offshore resources to the federal government in the Terms of Union, Newfoundland claims to have ownership of, and jurisdiction over, the resources of its continental margin.

Behind this rather simple claim lies a web of history, politics and economics unparalleled in Canadian judicial history, both for its complexity and for its implications for the nation. The modest purpose of this paper is to

---

* A shorter version of this paper formed the basis of a presentation by the author to the Law and Policy Symposium on Energy sponsored by the University of Ottawa Common Law Student Society on March 2, 1974. The views are those of the author, not of the Government of Newfoundland.

** B.Sc., 1965, Memorial University of Newfoundland; LL.B., 1968, Queen's University; Legal Advisor to the Minister of Mines and Energy, Province of Newfoundland.

[1] See Newfoundland's Position on the Management of Energy Resources of the Continental Margin presented to the National Energy Conference, Ottawa, January 22-23, 1974 [hereinafter referred to as Newfoundland's Position on Offshore Management].

[2] Schedule of Terms of Union Newfoundland with Canada, British North America Act of 1949, 12 & 13 Geo. 6, c. 22.

interject a little law. It is said that the academic community writes after a fashion, and its neglect of the *legal* aspects of Newfoundland's offshore claim would seem to prove this point.

However, perhaps a rough outline of the problem will arouse some interest and help us pass Mr. Trudeau's seemingly mesmerising 1968 statements that, "[t]he Court [in the *B.C. Offshore Minerals Reference* [3]] thus confirmed the view previously reached by the Law Officers of the Crown that all rights held or acquired by Canada in submerged lands lying outside the boundaries of any Province accrue to Canada as a whole," [4] and that the Supreme Court's decision in favour of the Crown in Right of Canada in the *B.C. Offshore Minerals Reference* was "on the basis of principles that would appear to be substantially applicable to the east coast as well as the west coast." [5] That such bald statements could be taken as conventional legal wisdom in a matter of such importance and without serious academic challenge is curious to say the least.

II. The Legal Arguments

Any attempt to clarify this question must start with the nature of continental shelf rights and the manner in which they arise. Because Newfoundland became a part of Canada in 1949, the province's case is thought by some to hinge upon whether the continental shelf doctrine had become an accepted part of international law by that date. There are strong arguments supporting the contention that the nations of the world, including Canada, had acceped the concept of the continental shelf by 1949.

However, it does not appear necessary to enter into a detailed historical review of claim and acquiesence to continental shelf claims on an international level up to 1949 in view of the opinion of the majority of the International Court of Justice in the *North Sea Continental Shelf Cases.* [6] This judgment dealt explicitly with the fundamental nature of continental shelf rights and laid to rest much of the doctrinal controversy exhibited in the literature of the 1940's and 1950's, confirming as it did the position favoured by Lauterpacht and the International Law Commission. [7] The Supreme Court of Canada

---

[3] See the comments of the Supreme Court of Canada in *In the Matter of* a Reference by the Governor General in Council Concerning the Ownership of and Jurisdiction Over Off-shore Mineral Rights as set out in Order in Council P.C. 1965-750 dated April 26, 1965, [1967] Sup. Ct. 792, 65 D.L.R.2d 353. (Joint Opinion, Cartwright, C.J.C., Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.) [hereinafter referred to as *B.C. Offshore Minerals Reference*].

[4] D. Lewis and A. Thompson, I Canadian Oil and Gas Part 1, Section IV, at 29B (1960).

[5] *Id.*

[6] [1969] I.C.J. 3. Also reported in I.S. Lay, New Directions in the Law of the Sea 139-86 (1973).

[7] The nature of Continental shelf rights were under exhaustive study by both the International Law Commission and the International Law Association during 1948-49. See Feith, "Report" in *Rights to Sea Bed and Its Subsoil*, International Law Association at 125-32 (Report of the Forty-Fourth Conference, Copenhagen, 1950).

did not have the benefit of this authoritative judgment in the 1967 *B.C. Offshore Minerals Reference.*

The International Court of Justice stated that it entertained "no doubt" about what it considered to be

> . . . the most fundamental of all the rules of law relating to the continental shelf, enshrined in Art. 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the Coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. [8]

The I.C.J.'s view of the nature of continental shelf rights seems of fundamental importance. As Chief Justice Barwick noted in the High Court of Australia in *Bonser v. LaMacchia,* [9] the I.C.J. had in effect held that continental shelf rights always and naturally appertained to the Imperial Crown as of the creation of its colonies. [10] In Barwick's view, the question was—were these rights made available to the Australian colonies? There seems no need to look for some magic "crystallization" date at which the continental shelf doctrine arose.

Thus, we are led to an examination of the constitutional development of Newfoundland. While it will be *sufficient* to prove, as we can, that Newfoundland had all of the rights of a sovereign state when it joined Canada, such proof is *not necessary.* Any transfer of continental shelf rights by the Imperial Crown to the Crown in Right of Newfoundland at any stage of its development will be sufficient.

An examination of the ambit of the jurisdiction claimed by the Legislature of Newfoundland, as evidenced in its various Acts, should not lead commentators to forget the essential reason for such an examination—the identification of the province's constitutional competence and rights vis-à-vis the Imperial Crown and the other nations of the world. Continental shelf rights exist *ipso facto* and, as the I.C.J. stated, in order to exercise those rights, "no special legal process has to be gone through, nor have any special legal acts

---

The I.L.C. had chosen continental shelf rights as a priority area for codification at its first meeting (April-June, 1949). *See* CANADA AND THE UNITED NATIONS, 1949, at 126. By July, 1950, the I.L.C. had concluded that the seabed and subsoil of the continental shelf was subject *ipso jure* to the control and jurisdiction of the littoral state. See Briggs, *Jurisdiction over the Seabed and Subsoil beyond Territorial Waters,* 45 AM. J. INT'L. L. 338 (1951). At its third session in the summer of 1951, the I.L.C. adopted a series of draft articles which eventually formed the basis of the 1958 Convention on the Continental Shelf. Draft Article 2 read: "The continental shelf is subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and exploiting its natural resources." See Young, *The International Law Commission and the Continental Shelf,* 46 AM. J. INT'L. L. 123 (1951).

[8] [1969] I.C.J. at 10; Lay, *supra* note 6, at 154.

[9] 122 Commw. L.R. 177 (1968-69).

[10] *Id.* at 186-87.

to be performed." [11] They need not be constituted or exercised; they are inherent rights.

Lord Asquith stated that: "Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoeck or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist." [12] Ironically, this is equally applicable to the continental shelf.

In short, the evidence sought of Newfoundland's international rights or, alternatively, of a "transfer" of continental rights from the Imperial Crown need not be related to offshore minerals, but to the general relationship between the Crown in Right of Newfoundland, the Imperial Crown and the international community.

However, a search for acts of jurisdiction is both natural and useful in view of the way in which the constitutional competence of entities within the British Empire evolved. Usually no single document can be pointed to as evidencing the constitutional competence of a Colony or Dominion at any specific point in time; hence, the necessity of lengthy examinations of the territorial ambit of acts of the legislature, statutes regulating the development of marine resources, the manner in which local courts exercised jurisdiction, external relations, and so on. Such an examination is particularly fruitful in the case of Newfoundland prior to the 1920's. In fact, Newfoundland's case, at least with respect to the territorial sea, could undoubtedly be successfully supported by her many acts of jurisdiction prior to 1920 and the clear transfer by the Imperial Crown of jurisdictional competences of all types and of all sovereign and property rights. Certainly the doctrine of *The Queen v. Keyn*, [13] whatever its original merits, had been completely superseded by events in relation to Newfoundland's territorial sea by the 1920's. The jurisdiction of the Legislature of Newfoundland over its territorial sea, as measured from a headland to headland baseline, was well-established by this time and judicially recognized in such cases as *Anglo-American Telegraph Co. v. Direct United States Cable Co.*, [14] *The Queen v. Delepine*, [15] and *Rhodes v. Fairweather*. [16]

In answer to this evidence, the federal government would presumably raise the view that, prior to 1919, jurisdictional rights claimed by the Imperial Crown under the Territorial Waters Jurisdiction Act of 1878 [17] were a clog and fetter upon a claim by a Dominion to sovereignty and property rights in its territorial sea. [18] However, such arguments had ceased to have weight

---

[11] Lay, *supra* note 6, at 154.

[12] Lord Asquith of Bishopstone, *Re Abu Dhabi Arbitration*, 1 INT'L. & COMP. L.Q. 247, at 253 (1952).

[13] 2 Ex. D. 63 (1876).

[14] 6 Nfld L.R. 28 (1875).

[15] 7 Nfld L.R. 378 (1889).

[16] 7 Nfld L.R. 321 (1888).

[17] 41-42 Vict., c. 73.

[18] [1967] Sup. Ct. at 803, 65 D.L.R.2d at 365.

with respect to a Dominion by the mid-1920's.[19] Professor Waldock of Oxford has noted that, after the 1930 Codification Conference, no doubt remained that a state possessed sovereignty over the seabed and subsoil under its territorial sea.[20]

The Supreme Court of Canada in the *B.C. Offshore Minerals Reference*[21] noted that the change from use of the term "British Waters" to the term "territorial waters of Canada" in 1928[22] signified that Canada had obtained sovereignty over its territorial sea. The Customs Act of 1933[23] defines "territorial waters of Newfoundland" as "the waters forming part of the territory of the Dominion of Newfoundland, and the waters adjacent to the Dominion, within three nautical miles thereof in the case of any vessel not registered in Newfoundland, and within twelve nautical miles thereof in the case of any vessel registered in Newfoundland."[24] Insofar as Newfoundland's pre-Confederation three-mile territorial sea, as measured from a headland to headland baseline is concerned, the evidence produced to this point would seem to satisfy the Supreme Court's criteria for distinguishing Newfoundland's case from that of British Columbia.[25]

The Newfoundland Legislature also exercised its jurisdiction—where necessary—beyond its territorial sea in concert with the decline of the doctrine of extra-territorial legislative incompetency as it applied to self-governing Dominions.[26] However, the validity of Newfoundland's case with respect to the continental shelf can be more concisely shown by considering the province's accession to all of the rights of a sovereign British Dominion during the 1920's, and the provisons of the Terms of Union of Canada and Newfoundland in 1949. Newfoundland, like Canada, as a self-governing Dominion, attained full international legal status as a result of a process of constitutional evolution during the 1920's. The Supreme Court of Canada in the *B.C. Offshore Minerals Reference* was content to point out that Canada became a sovereign state sometime between 1919 and the Statute of Westminster in

---

[19] See A. KEITH, DOMINION AUTONOMY IN PRACTISE 13 (1929).

[20] Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 TRANSACTIONS OF THE GROTIUS SOCIETY 115 (1950).

[21] [1967] Sup. Ct. at 805-06 & 815, 65 D.L.R. at 365 & 374.

[22] This reference is presumably to section 1 of An Act to Amend the Customs Act, Can. Stat. 1928 c. 16.

[23] An Act to Amend and Consolidate the Law Relating to the Customs, Nfld Stat. 1933 c. 57.

[24] *Id.* § 2. Canada recognized Newfoundland's sovereignty over her territorial sea under the terms of the Agreement between Canada, Newfoundland and the United Kingdom respecting Defence Installations in Newfoundland, [1946] Can. T.S. No. 15, which came into force on March 31, 1946. Article 1 stated: "In this agreement the expression 'Newfoundland' shall mean Newfoundland and its Dependencies and the territorial waters thereof."

[25] [1967] Sup. Ct. at 805, 65 D.L.R.2d at 367.

[26] For an early example of this development, *see* Atlantic Steam Service Act, Nfld Stat. 1907 c. 15 which exercised jurisdiction over the subsoil of the Straits of Belle Isle beyond the three-mile limit by granting a company the exclusive right to tunnel beneath the strait. A more comprehensive extra-territorial jurisdiction was claimed out to twelve nautical miles in the 1933 Customs Act amendment cited above at note 24.

1931.[27] It is generally conceded that the Statute of Westminster is *declaratory* of the constitutional status of the self-governing Dominions (Canada, Australia, New Zealand, Union of South Africa, Irish Free State and Newfoundland) rather than *constitutive*. In fact, if a constitutive act is to be pointed to, the approval by all Dominions and Great Britain of the *Report of the Inter-Imperial Relations Committee* to the Imperial Conference of 1926[28] is generally held to be the formal announcement to the nations of the world that the Dominions had reached the status of equal sovereign states.

Newfoundland's Dominion status was evidenced not only by the passage of legislation creating a Department of External Affairs,[29] providing for a national flag[30] and altering the title of Colonial Secretary to Secretary of State but also by the nature of its inter-imperial relations which included entering into commercial "treaties" with the United Kingdom and the other Dominions, including Canada, and maintaining a High Commissioner in London.[31]

Some commentators emphasize the fact that Newfoundland freely chose not to apply certain sections of the Statute of Westminster[32] to Newfoundland as an indication that Newfoundland did not become a "true" Dominion. But clearly what is important is that the preamble of the Statute of Westminster recognized Newfoundland's status as an equal, independent and sovereign Dominion with the right to take the steps set out in those sections without reference to the Imperial Crown. Such an arrangement was certainly no more derogatory to Newfoundland's sovereignty than section 7 of the Statute which prevents Canada from amending the British North America Acts, 1867 to 1930, thus depriving it of the full benefit of section 2(2) which provides that Dominions can repeal or amend any Act of the Parliament of the United Kingdom insofar as it applies to that Dominion. Nor was such an arrangement any more derogatory to Newfoundland's sovereignty than the present arrangement whereby the Constitution of Canada continues to be, in part, an Act of the Parliament of the United Kingdom. In fact, such arguments would also be applicable to New Zealand until its adoption of these sections in 1947, and to Australia until its adoption in 1942. Were both these countries "senior" but "incompetent" Dominions during this period and unqualified members of the League of Nations without the status of sovereign states?

Like all British constitutional conventions, the Statute of Westminster was a unique and flexible response to the separate situations in each of the Dominions. The underlying principle, however, was not in doubt. As stated

---

[27] [1967] Sup. Ct. at 816, 65 D.L.R.2d at 375.

[28] Imperial Conference, Summary of Proceedings, CMD. 2768, at 13-30 (1926).

[29] An Act Relating to the Department of External Affairs, Nfld Stat. 1931 c. 14.

[30] An Act to Provide a National Flag for Newfoundland and Colours to be Worn by Vessels, Nfld Stat. 1931 c. 3.

[31] An Act Respecting the High Commissioner for Newfoundland in the United Kingdom, Nfld Stat. 1921 c. 6.

[32] 22 Geo. 5, c. 4 (1931).

in the *Report of the Inter-Imperial Relations Committee of 1926*, the self-governing Dominions and Great Britain were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs . . . ." [33]

The next episode in Newfoundland's constitutional saga has caused a great deal of ill-informed comment. In the early 1930's, Newfoundland, along with most other western nations, found itself in a desperate financial position. A Royal Commission was appointed in 1933 with British, Canadian and Newfoundland representatives. Upon recommendation of the Amulree Royal Commission, and as the price of financial assistance from Great Britain, the Newfoundland Legislature petitioned the Crown to *suspend* certain portions of Newfoundland's Constitution (the Letters Patent of 1876 and 1905 which provided for a parliamentary form of government) until she became economically self-sufficient again. The Petition asked that the new letters patent, "provide for the *administration* of the Island, until such time as it may become self-supporting again, on the basis of the recommendations which are contained in the Report of the Royal Commission, and of which a summary is set out in the Annex hereto." [34]

A Government was established by Letters Patent in 1934 consisting of a Governor and an appointed Commission of six members. Under the terms of the Newfoundland Act of 1933, [35] the United Kingdom was to undertake to provide "supervisory control" over the proceedings of the Commission of Government and to provide certain financial assistance while Newfoundland, by the Loan Act of 1933, [36] agreed to repay its public debt (held for the most part by Canadian and British investors) in a certain fashion. As set out in the Letters Patent of January 30th, 1934, [37] the new arrangement made "provision for the *administration* of the Island of Newfoundland and its dependencies *during the period* while the operation of the aforesaid Letters Patent (1876 and 1905) is suspended." [38] It is very important to note that Newfoundland's position under the Statute of Westminster was not altered. This was a financial-administrative arrangement only. This unique administrative arrangement continued until a *short time before* the Union of Canada and Newfoundland.

Some commentators have claimed that, upon entering into this arrangement, Newfoundland gave up her status as a sovereign state and transferred her rights to offshore minerals to Great Britain. From thence such commentators would say, offshore mineral rights flowed directly to the federal govern-

---

[33] *Supra* note 28, at 14.

[34] Address to the King, Nfld Stat. Second Session, 1933 (emphasis added).

[35] An Act to empower His Majesty to Issue Letters Patent Making Provision with Respect to the Administration of Newfoundland, to Authorise the Making out of Public Moneys of Advances to the Government of Newfoundland and the guaranteeing by the Treasury of Stock to be issued by that Government, and to Amend the Colonial Development Act, 1929, in its application to Newfoundland, 24 Geo. 5, c. 2 (1933).

[36] Nfld Stat. 1933 c. 1.

[37] Acts of the General Assembly of Newofundland 1933 (2nd Session).

[38] *Id.* (emphasis added).

ment upon the union of Newfoundland and Canada. Such arguments can hardly stand.

First, there is every reason to state that the *suspension* of Newfoundland's pre-1934 letters patent for a finite, though unfixed, period of time and for financial and administrative purposes did not revoke her sovereignty. Because international law is committed to the continuing sovereignty of territorial communities, the surrender of incidents of sovereignty is always interpreted restrictively. There is, in other words, a presumption against the giving up of sovereignty—it is presumed that only those powers expressly transferred are given up. This principle has been upheld by both the common law courts in the *Kelantan* [39] and *Johore* [40] cases and by the Permanent Court of International Justice in the case of *France v. United States of America.* [41] Thus, from 1934 to 1949, Newfoundland continued to be a sovereign state even though it delegated the performance of certain of its public functions to the United Kingdom. This position is further reinforced by the continued application to Newfoundland by the United Kingdom Dominions Office of the privileges of Dominion status during the Commission Government era. [42] Indeed, there is every reason to distinguish—in both international law and British constitutional law—between a change in government and the succession of sovereign states. [43]

Second, Newfoundland negotiators in 1948 obviously anticipated that if Newfoundland went directly from government by Governor and Commission to a province within the Canadian Confederation, constitutional questions might arise, and Newfoundland's rights obtained as a Dominion might be questioned. Thus, Term 7 of the Terms of Union expressly *revived* Newfoundland's pre-1934 constitution *prior to* the Terms of Union taking effect. [44] This constitution was then modified according to the Terms of Union. Term 7 states:

> The Constitution of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, is *revived at* the date of Union and shall, subject to these terms and the British North America Acts, 1867 to 1946, continue as the Constitution of the Province of Newfoundland *from and after* the date of Union, until altered under the authority of the said Acts. [45]

---

[39] Duff Development Company Ltd. v. Government of Kelantan, [1924] A.C. 797.

[40] Mighell v. Sultan of Johore, [1894] 1 Q.B. 149 (C.A.).

[41] Case Concerning Rights of Nationals of the United States of America in Morocco, [1952] I.C.J. 176.

[42] Canada has also recognized Newfoundland's residual sovereignty by the maintenance of a High Commissioner in Newfoundland right up to the date of Union, thus recognizing a relationship not possible with a colony and maintained only with the United Kingdom and other Dominions.

[43] See generally L. OPPENHEIM, INTERNATIONAL LAW 152-212 (8th ed. I. H. Lauterpacht 1955).

[44] *Supra* note 2. The express desire of Newfoundland's negotiator to achieve this result, and the reluctant agreement of Canadian negotiators to such an arrangement has been confirmed by personal communication with one of Newfoundland's negotiators.

[45] *Id.* (emphasis added).

The significance of the particular wording of Term 7 was explained by the then Prime Minister, Louis St. Laurent, in the House of Commons on February 8, 1949:

> The delegation from Newfoundland and its law officers insisted that they did not want the Province of Newfoundland to get a new constitution out of the union. They wanted to be in the position of the Provinces of Nova Scotia and New Brunswick, which had constitutions before union and retained all the powers of their constitutions, except those given to the central authority. It was for that reason that the dean of the law school was insistent upon having the constitution *revived an instant before union becomes effective.* It will be revived only because there will have been enacted an act by the United Kingdom agreeing to this. [46]

It should also be pointed out that the federal government is estopped, at least morally, from making the argument that Newfoundland's case is weakened by the Commission Government arrangement. Leading spokesmen for the Confederation movement from 1947 to 1949 repeatedly stated, with the tacit approval of the Government of Canada, that Newfoundland would not be better off if she first formally returned to her pre-1934 form of government before entering into confederation as proposed by many Newfoundlanders. The fear of the loss of ancient rights was such a major issue in the 1948 Referenda campaigns, that this assurance can almost be taken as a condition precedent to agreement. To now say that this is not so, that Newfoundland has been deprived of her offshore resources because of the manner in which she chose to enter Canada, would be to allege that Newfoundland was enticed by misrepresentation to agree to the Terms of Union.

Perhaps it would be appropriate to test our findings to this point by examining a hypothetical, but reasonable, situation. Assume that Newfoundland had complete sovereignty over her territorial sea including the seabed and subsoil thereof prior to Union. Assume also that Newfoundland, in March of 1949, either through its Governor-in-Commission or through its Governor-in-Council under its pre-1934 constitution, had declared that Newfoundland claimed sovereign rights for the purpose of exploring and exploiting the mineral resources of its adjacent continental "shelf". Would any country have protested?

Certainly not the United Kingdom, which together with the other major maritime power of the day, the United States, was the most active protaganist of the continental shelf doctrine. [47] The United Kingdom's position in 1949

---

[46] 1 H.C. DEB. 364 (1949) (emphasis added).

[47] See P. ANNINOS, THE CONTINENTAL SHELF AND PUBLIC INTERNATIONAL LAW (La Haye, Pays Bas 1953) for an analysis of British state practice to 1953. Prior to Confederation, the United Kingdom had claimed continental shelf rights off Trinidad (United Kingdom (Trinidad and Tobago) Submarine Areas off the Gulf of Paria (Annexation) Order in Council, August 6, 1942, Statutory Rules and Orders (1942), Volume 1, at 919); off the Bahamas (Bahamas Alteration of Boundaries) Order in Council, Statutory Instruments, 1948, Order in Council Number 2575, dated November 26, 1948); off Jamaica (Alteration of Boundaries) Order in Council, Statutory Instruments, 1948, Order in Council Number 2574, dated November 26, 1948.

is well set out in the text of the claim made by the British-protected Persian Gulf rulers in June, 1949. The Proclamations read in part: "Whereas the right of a littoral State to exercise its control over the natural resources of the seabed and subsoil adjacent to its coasts *has been established* in international practice by the action of other States." [48]

Certainly not Canada, which had, as one writer has pointed out, by its acquiescence to the various pre-1949 continental shelf claims (notably the 1945 U.S. Truman Proclamation of which it had special direct notification), been estopped from denying the validity of such claims. [49]

Would not Newfoundland have then retained any continental shelf rights (particularly those of a proprietary nature) so claimed, under the Terms of Union? And is it not quite settled (as confirmed by the I.C.J. in the North Sea Continental Shelf Cases [50]) that continental shelf rights exist ipso facto, are inherent, and need not be declared, claimed or exercised?

III. Policy Considerations

There is another approach which may be taken to help decide who has ownership of, and jurisdiction over, offshore minerals. It is the so-called policy approach. This approach, some feel, would tend to override all arguments of the type made above, and would decide which party *should* succeed on the basis of policy alone. However, this seems a distorted view of the role of policy considerations in legal decision-making. It is more easily maintained that the proper role of policy considerations is not to override clearly enunciated legal positions. Its more viable role is to guide the court where the law is uncertain and where new problems arise not anticipated by existing law. Such is not the case here. Moreover, there seems little room for stressing policy considerations in the interpretation of the constitution of a Confederation, where such stress would place the basic interests of a province in jeopardy. The essential bargain between constituent units should not be changed without recourse to the recognized constitutional process of obtaining the consent of all parties involved. As Professor Weiler has recently commented with respect to the role of policy decisions by the Supreme Court of Canada in constitutional questions:

> [t]hough the court may have the immediate legal capacity to formulate a

---

[48] *Id.* at 150-51 for the text of the Proclamation issued by the Ruler of Bahrain on June 5, 1949 (emphasis added). These proclamations should be given weight, not only because of the United Kingdom's involvement as Protecting State, but also because of the large petroleum resources of the area in question. Moreover, the major petroleum producing countries of Iran and Saudi Arabia had claimed continental shelf rights on March 19, 1949 and May 28, 1949, respectively.

[49] Cosford, *The Continental Shelf and the Abu Dhabi Award*, 1 McGill L.J. 109, at 125 (1953). At least some eight countries had claimed continental shelf rights by April 1, 1949, while Britain had claimed rights off three separate colonies. Within one year of Confederation, a further thirteen countries had been added to the list.

[50] [1969] I.C.J. at 3.

> new scheme of exclusive powers (under the guise of interpreting the old), it has neither the policy expertise nor resources to do this wisely, nor the political legitimacy to implement its controls over the strongly felt needs of the elected governmental units. It is very difficult to discover embedded in the existing federal structure a set of established legal principles which would provide a coherent and impersonal justification for a new set of constitutional rules the court might like to develop through adjudication.[51]

This principle seems particularly applicable to the offshore minerals dispute. Is it conceivable that "policy" arguments can provide the basis for overriding a constitutional principle which is one of the cornerstones of Confederation —provincial jurisdiction over natural resources? Is it conceivable that provincial property rights well founded in "law" can be thus extinguished? I hardly think so.

If the *B.C. Offshore Minerals Reference*[52] is to be taken as any indication, the consideration of policy arguments by a court is a dangerous game unless the full facts of the matter are placed before it and fully analyzed. This problem is exasperated even more where restrictive rules of evidence put conventional wisdom and bureaucratic bluffery at a premium.

With the above caveats in mind, an analysis of the policy considerations involved in the offshore minerals dispute appears to be in order. Indeed, it is these policy considerations which require that Newfoundland fight federal claims and insist on its legal rights. Basically, the policy considerations that are held to be crucial by Newfoundland can be grouped under five main headings:

(1) public revenue generation,
(2) industrial development,
(3) social disruption,
(4) provincial autonomy and
(5) effective administration.

Each will be analyzed in turn.

It is not to be thought that this listing indicates that other values relating to the fisheries, defence, external affairs, shipping and navigation, and pollution control are held to be of lesser importance by the province. For instance, the province has been highly active in attempting to promote the compatability of the fishing industry and the offshore petroleum industry. These are areas, however, which fall mainly within the federal sphere, and are ones, which, with respect to their treatment, Newfoundland would seem to anticipate no cause for anxiety. It is upon the conflicts arising from the five areas delineated above that the present dispute is based.

It must be remembered, however, that the treatment accorded to each of these areas by an offshore management system is interrelated. The goals

---

[51] Weiler, *The Supreme Court and the Law of Canadian Federalism*, 23 U. TORONTO L.J. 307, at 310 (1973).

[52] [1967] Sup. Ct. at 816-17, 65 D.L.R.2d at 375-76.

sought in this respect form a coherent, interdependent set of perspectives and solutions, which use, in many cases, a common regulatory device. On the other hand, accommodation of problems arising in the federally-oriented areas listed above tends to call mainly for co-ordination with decisions taken in the five provincially-oriented areas.

A. *Public Revenue Generation*

The following words of Premier Moores serve as a useful starting point in the analysis of the above area:

> [T]he [federal] regulations show no evidence of any thought having been given to maximizing the collection of the economic rent from these resources. Our estimates lead us to believe that billions of dollars of potential revenue would be lost if development took place under existing federal regulations. Clearly this situation is as unacceptable to the people of Newfoundland as it should be to the people of Canada generally. [53]

Newfoundland's continental margin covers some 300 million acres and stretches some 1,400 miles from the Tail of the Banks in the south to Cape Chidley in the North. This area comprises over 80% of the total area offshore eastern Canada and contains over 80% of the total offshore petroleum potential of the entire eastern Canadian continental margin. [54] The ultimate potential hydrocarbon reserves, according to the federal government, are 28.1 billion barrels of oil and 180.7 trillion cubic feet of gas or 58.4 billion barrels of oil equivalent. One would think that such patrimony would call for the most careful stewardship, and an examination of offshore petroleum regulatory systems around the world indicates that this would be the normal governmental reaction. The federal government, on the other hand, has chosen to take a different tack, seemingly on the theory that public resources are valueless and that the concept of "economic rent" is a theorist's pipedream. How else can one explain the granting of exclusive production rights covering the entire east coast continental margin to mainly foreign oil companies under the unbelievable terms of the Canada Oil and Gas Land Regulations. [55]

Although analyses of these regulations have appeared in other forums, [56] a brief look at some of their more damning features is always beneficial for its sobering effect. [57]

---

[53] Premier Frank D. Moores in his Opening Statement to the Federal-Provincial First Ministers Conference on Energy, Ottawa, January 22, 1974.

[54] 1 AN ENERGY POLICY FOR CANADA—PHASE 1, at 89. (The Minister of Energy, Mines and Resources, Ottawa, 1973). This analysis by the Geological Survey of Canada updated a similar analysis undertaken by the Survey in 1972.

[55] SOR/61-253 *as amended*. Made under Territorial Lands Act, CAN. REV. STAT. c. T-6 (1970), and the Public Lands Grants Act, CAN. REV. STAT. c. P-29 (1970).

[56] See A. R. Thompson, Canada's Petroleum Leasing Policy, A Cornucopia for Whom?, presented at the Canadian Arctic Resources Committee Seminar in Ottawa on March 22, 1973, and M. Crommelin, Allocation of Rights over Offshore Oil and Gas Resources: A Study of the legal systems in force in the United States, the United Kingdom, Canada and Australia, 1972 (unpublished LL.M. thesis, University of British Columbia).

[57] A more paranoid explanation of such a giveaway is that the near instant

During the period from 1961 to 1970, in order to obtain a federal exploratory permit, one needed only to select a portion of the continental margin for which a permit had not already been issued, to pay a 250 dollar filing fee, and to deposit a promissory note, drawn on a chartered bank and equivalent to five cents per acre. Each permit covered from 100 to 150 square miles and was valid for six years with provision for six automatic one-year renewals. The permittee's nationality or financial or technical capabilities were not considered. The promissory note secured the first three years of a so-called work commitment which increased with time. The promissory notes are returned to the permittee when work commitments are fulfilled.

Under such a free-entry system, no influence is exercised by the federal government over:

(i) the total acreage under permit at any time;

(ii) the particular areas in which exploration is to take place;

(iii) the nature and ownership of companies acquiring permits;

(iv) the kind of exploration work done; and,

(v) the use of Canadian personnel, services and equipment.

This system is a "first come-first served" giveaway of unbelievable proportions, for the permit, thus acquired, gives the *exclusive right to select production leases* covering one-half the permit area. These production leases would be given for an initial term of twenty-one years, with the right to twenty-one-year renewals. During the first term of twenty-one years, lease terms are not renegotiable. Thus the terms of leases selected under federal permits taken out from 1963 to 1970 cannot be renegotiated until the years 1996 to 2003 respectively. Moreover, if changes are not made in the regulations, the current low royalty rate is fixed indefinitely.

The following are a few of the deficiencies in the lease terms:

(i) there are no acquisition costs;

(ii) the regulations allow the permittee to choose 50% of the area of a permit in such a way that at least the major portion of every conceivable major hydrocarbon trap in a permit area is covered by the leases; [58]

---

creation of an all-encompassing blanket of federal rights has made provincial claims seem, in some quarters, less reasonable. It is noteworthy that, in the United States, the federal government has delayed leasing plans for areas off the coast of the Atlantic States until the settlement of state legal claims is settled—claims which seem to rest on a far weaker ground than Newfoundland's.

[58] Thompson, *supra* note 56, at 7-8 and 18-21 which also points out that Oil and Gas Land Order No. 1-1961, SOR/61-461 *as amended* by SOR/61-540 further weakened these regulations by giving lessees an exclusive option to leases over the remaining 50% of the permit area. Oil and Gas Land Order No. 1-1961 was revoked by SOR/70-184. However, oil industry sources indicate that plans are to reintroduce a modification of Land Order No. 1-1961 (OIL WEEK, October 9, 1971, at 9), but this has not been confirmed.

(iii) the royalty rate on production is 5% for the first three to five years and 10% thereafter—the lowest in the world; and,

(iv) contrary to common practice, the wellhead price upon which the royalty payment would be calculated would not be determined as in an arms-length commercial transaction, but as between two subsidiaries of the same multi-national oil company.

Perhaps a simple example will suffice to demonstrate the potentially disastrous effects of this policy.

In the development of an oil field with recoverable reserves of one-half billion barrels on the Grand Banks, 180 miles from shore, in 300 feet of water, with an average production of 70,000 barrels per day, assuming 1974 international wellhead prices and "North Sea"-type finding and production costs, discounted at 10%, the economic rent *not* collected under the federal regulations and, instead, accruing as corporate profits would be about a half billion dollars.[59] The potential revenue from the entire Continental Shelf which is lost by the federal government's permit system boggles the mind!

Apologists for the federal system have maintained that, in order to obtain an early secure supply of oil for the eastern Canadian public, revenue considerations were sacrificed in the interests of early development. Thus, it is said, the salvation of the federal system is in its system of work commitments. However, this is an *ex post facto* argument without foundation. Compare, for instance, the federal government's work commitment terms with those of Norway, where hard bargaining with the oil companies took place. To make the comparison favourable for the federal government, the terms of Norway's *first* licences issued in 1965 have been taken. It should be stressed that in 1965 there was little geological encouragement for drilling on the Norwegian continental shelf, and that conditions in the Northern North Sea are as severe as anything on the Canadian Continental Shelf outside the iceberg zone.[60] While mainland Norway has a continental shelf comparable in size with that of Newfoundland, Norway's first offshore licences issued in 1965 covered only eleven million acres (a small fraction of Norway's continental shelf). This was a normal, but prudent, step, as later events have shown, for it has enabled Norway to control the rate of development on its shelf. Companies in Norway agreed in 1965 to conduct seismic surveys and to drill over thirty exploratory wells within six years. This represented a required expenditure of approximately 100 million dollars or 9 dollars per acre. The

[59] Consultant studies conducted on behalf of the Government of Newfoundland. Assuming that Canadian crude prices were to be kept artificially depressed at 6.70 dollars/bbl., and that Ottawa were to "give" Newfoundland 50% of existing federal royalties, the total economic rent "generated" by the development of this field would be 965 million dollars. Of this 584 million dollars would accrue to consumers as a subsidy (largely in Ontario and Quebec), 157 million dollars to the oil company, 150 million dollars to the federal government and 74 million dollars to Newfoundland. Hardly an offer one cannot refuse.

[60] This comparison has been discussed with a senior oil official in the Norwegian Government of the day, and he has confirmed that it is valid.

amount of work required under Canadian federal regulations for eleven million acres over six years is 2.2 million dollars or twenty cents per acre. Even taken over the whole twelve years of a Canadian federal permit's initial term and six automatic renewals, the federal work obligation for eleven million acres is only 29.7 million dollars or two dollars and seventy cents per acre.

There is more direct proof that companies would have been willing to undertake more exploratory work on less acreage on Canada's continental shelf as a condition of obtaining production rights.

On December 24, 1966, the federal government (in its sole exercise of a section of the regulations applicable to all offshore lands) called for bids of work commitments prior to issuing exploratory permits over a relatively small area. It should be emphasized that this was before the 1967 oil and gas finds on Sable Island. Under this arrangement, companies submitted sealed tenders stating the amount of work they were willing to do on the permits. Permits for some 5.4 million acres were awarded under this system. Whereas the regular work commitment over the first six years would have been 1.1 million dollars, the successful bidder agreed to spend 5.3 million dollars. [61] It is evident that the federal government could have negotiated larger exploratory programs for rights covering a much smaller area of the continental shelf. Even if such an accelerated program in the 1960's had not already led to the discovery of the oil on the continental margin of eastern Canada, the whole of the continental margin would not now be in the hands of foreign oil companies.

From 1961 to 1970 anyone who suspected the presence of oil in areas off eastern Canada could have acquired very valuable petroleum rights on the terms described above. These terms are so attractive that federal permits have been issued which purport to grant rights to nearly the whole east coast continental margin. While the major oil companies acquired much of the acreage, a grab-bag of small-time operators and speculators also acquired permits covering millions of acres. Almost anyone could raise the twenty cents per acre needed to conduct a seismic program to meet the first six years work commitment.

These exploratory permits have great speculative value since, at any time, a permittee can farm-out part of his interest to a major oil company, keeping an overriding royalty on any oil or gas found. A permit holder could also sell his permit outright. For instance, in 1972 a company is reported to have sold a one-eighth interest in federal permits taken out in 1966 in an area between Newfoundland and Nova Scotia which was generally considered to have poor prospects. It covered 2.1 million acres and was sold for 1.25 million dollars (the equivalent of five dollars per acre). [62] This company also received a 750,000 dollar interest-free loan to enable it to conduct an ex-

[61] Tenders were called in *The Canada Gazette*, Part 1, December 24, 1966, at 4080. The amount of the successful bid was obtained from very reliable oil industry sources.

[62] OILWEEK, September 18, 1972, at 32.

ploration program. Therefore, the company, in return for spending twenty cents per acre or 420,000 dollars on seismic work, was put in a position to make 1.25 million dollars on the sale of a small interest in these permits without finding a drop of oil. Similar transactions regularly take place with regard to Arctic acreage. [63]

The question which must be asked is, at what stage should the federal government have realized its mistake and discontinued the permit system. A number of dates are pertinent:

(i) In 1961, the federal regulations under which these so-called rights were granted were issued;

(ii) In 1963, 1964 and 1965 federal permits covering over one hundred million acres of offshore eastern Canada were taken out;

(iii) In 1966 the presence of hydrocarbons on the Grand Banks was confirmed by the Pan American Tors Cove West D-52 well (the first well drilled offshore Eastern Canada);

(iv) In 1967, the Mobil Sable Island C-67 well tested gas and oil;

(v) From 1968 to 1970, oil companies acquired federal permits to approximately 60% of Canada's east coast continental margin;

(vi) To make matters worse, over the same period, oil rights covering the whole Canadian Arctic were acquired under similar terms; over 50% of the total area was acquired *after* the 1968 Prudeau Bay discovery which sparked the 1969-900 million dollar Alaska lease sale;

(vii) In spite of all this evidence, it was not until 1970 that the federal government finally announced a freeze on the issuance of permits and a review of the permit system as it applies to the small offshore area *not already under permit.*

All this represents a national scandal of major proportions. No other country in the world, with the slightest prospects for offshore petroleum, has alienated its entire continental shelf at once, much less upon such generous terms. This situation must surely evoke some doubt in the minds of even the strongest centralists as to whether federal resource management is synonymous with enlightened management.

Newfoundland, on the other hand, between 1961 and 1970, has issued four interim permits granting the right to explore and produce offshore petroleum over only some thirty-one million acres, all on the Grand Banks and St. Pierre Bank. [64] These interim permits entitle the Interim Permittee to obtain

---

[63] See for instance the transaction involving a "substantial but undisclosed cash payment" reported in THE FINANCIAL POST, January 12, 1974, at 4.

[64] See 1973 Budget of the Province of Newfoundland and Labrador, *Offshore Petroleum Industry of Newfoundland and Labrador*, Supplement No. 3, at 39-40. The interim permits are issued pursuant to section 8 of the Petroleum and Natural Gas Act, 1965 as amended NFLD REV. STAT. c. 294 (1970). Holders of Newfoundland interim permits, with minor exceptions, hold federal permits.

permits upon the promulgation of regulations. Clause 3 of these interim permits states that:

> The terms and conditions to be set forth in the permit issued under the regulations shall not be less beneficial to the interim permittee than the terms and conditions of permits previously issued to the interim permittee by the Government of Canada in respect of the same areas.

Consequently, in respect of the thirty-one million acres covered by these four interim permits, rights granted by Newfoundland are no more protective of the public interest than their federal counterparts. However, this relates to only 10% of the province's continental margin and does not affect the most prospective areas off Northeast Newfoundland and Labrador.

Since March, 1972, a freeze has been placed upon the issuance of further production rights pending the resolution of the offshore dispute.[65] Newfoundland's position has been that correction of the defects of the federal government's permit system is a condition precedent to a political settlement as the following excerpt from its position paper indicates:

> The defective management of the Federal Government has made negotiations between Ottawa and Newfoundland very difficult. Not only is Newfoundland attempting to obtain adequate control over the management of her own offshore resources, Newfoundland is also attempting to correct the defects of the Federal Government's permit system. The Government of Newfoundland has repeatedly told the Federal Government that, regardless of who manages Newfoundland's offshore resources, the regulations controlling offshore development must be changed.[66]

Parallel with its negotiations with the federal government, the Government of Newfoundland has conducted an exhaustive investigation of offshore regulatory systems in other parts of the world, involving personal visits with senior oil officials from the United Kingdom, Norway, the Province of Alberta, Trinidad, and OPEC. A sophisticated computer model has been developed which can analyse development costs on Newfoundland's continental margin and the developer's profitability situation under any of fifteen different regulatory systems. This model, and the accompanying independent economic studies, have demonstrated in objective form the total inadequacy of the existing federal system and have shown how a selective and flexible management system—which would maximize public benefits—can be developed.

These investigations have also demonstrated that the process of maximizing public benefits is not merely a financial matter. Considerations relating to industrial development, social disruption, provincial autonomy and effectiveness must also be incorporated in the design of an offshore regulatory system.

---

[65] *Id.* at 41.

[66] *Supra* note 1, at 4.

B. *Industrial Development*

In relation to the question of industrial development, the Minister of Finance has stated: "This Government has also laid important ground work [relating to] the potential central thrust of our future economic and social development, the offshore oil and gas industry . . . ." [67]

The use of provincial ownership of resources as a means of promoting the growth of secondary industry is recognized as a major reason why the provinces were given jurisdiction over natural resources under the British North America Act, 1867. [68] As long as all provinces had essentially natural resource-based economies, this provincial power seems to have been unchallenged. However, with the tremendous industrial growth of Southern Ontario and, to a lesser extent, southwestern Quebec, and their evolution as resource consuming centres, provincial jurisdiction over natural resources has increasingly come under attack as being against the "national" interest. Thus, a new "federal" interest has been created—that of guaranteeing raw materials at "reasonable prices" to feed the industrial juggernaught of central Canada. This interest, paradoxically, runs diametrically opposite to another professed federal interest—that of eradicating regional economic disparity.

How such a conflict of industrial objectives will be resolved in the case of east coast offshore petroleum is a matter of speculation. [69] However, if one notes the very unfavourable contrast between the reaction of the federal government and that of the Governments of the United Kingdom or Norway to the problem of maximizing the benefits from their respective offshore areas, one can hardly be encouraged. [70] These differing perspectives seem

---

[67] 1973 Budget of the Province of Newfoundland and Labrador at 1 (presented by the Hon. John C. Crosbie, Minister of Finance).

[68] G. LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION at xi-xiv (1969).

[69] The Government of Newfoundland has proposed a compromise based on achieving an early solution to the crude shortage in eastern Canada, but developing fields for export at a more moderate pace. These objectives, it is felt, can be met, while at the same time controlling the rate of development, the level of economic spin-off to Newfoundland and the collection of economic rent. The government position paper states:

> There is no validity in the suggestion that there exists a medium term oil or gas supply problem in eastern Canada which would demand that Newfoundland's offshore petroleum resources be developed at a rate not compatible with the interests of Newfoundland. Certainly, Newfoundland's legitimate desire to develop its offshore petroleum resources in harmony with its economic and social well-being should not be prejudiced by a federal policy which would seek to export, primarily to the United States, offshore petroleum, in addition to tar sands crude and Arctic gas.

Supra note 1, at 5-6.

[70] Compare for instance the positive reaction of the British government, as set out in NORTH SEA OIL AND GAS: A REPORT TO PARLIAMENT, U.K. Department of Trade and Industry at 13-14, (January 16, 1973), to the proposals made in the report entitled STUDY OF POTENTIAL BENEFITS TO BRITISH INDUSTRY FROM OFFSHORE OIL AND GAS DEVELOPMENTS, (1972), with the negative tone of the report entitled, THE IMPACT ON THE REGIONAL ECONOMY OF EASTERN CANADA RESULTING FROM THE POTENTIAL DEVELOPMENT OF OFFSHORE OIL AND GAS, prepared by E.I.U. Canada Ltd. for the

to reflect, only too well, the future problems which could be brought on by federal indifference and a central-Canadian bias, given federal management.

The inclusion of industrial development-oriented terms in offshore licences is a common practice outside Canada. This practice is not limited to developing countries, but forms a key basis upon which licences are awarded by the United Kingdom and Norway in the North Sea. [71] In addition to more general terms, control over the question whether any offshore petroleum that is found will be landed and processed within a jurisdiction is also a very important device whereby industrial-development goals are promoted. [72]

The Government of Newfoundland has conducted extensive studies of the possibilities of oil-related industrial development and has concluded that, *if* proper government policies are developed, major new sources of employment could materialize within the province. [73]

The realization of these opportunities, however, will require a very positive response by government in order to forestall loss of the major portion of employment and manufacturing benefits to central Canada or to foreign sources. The application of federal customs, immigration and coasting trade powers to all continental shelf activities is one policy response to such a situation, and it demonstrates the co-ordinate function which could be played by the federal government in concert with provincial offshore management.

It will be necessary, after a commercial discovery, to limit the rate of development to that somewhere near the capacity of the Newfoundland economy. This would allow the Newfoundland economy some time to develop the skills and resources needed to respond to these opportunities. One of

---

federal departments of Regional Economic Expansion, and Energy, Mines and Resources, (April 1972). The E.I.U. Report was endorsed by the Minister of Energy, Mines and Resources at the Canadian Bar Association's Atlantic Petroleum Offshore Seminar in Halifax, May 1973.

[71] See for instance, the notice of a fourth round of licence awards in the London Gazette on June 22, 1971:

> The considerations (*inter alia*) The Secretary of State will have in mind in examining applications will be:
> The extent of the contribution which the applicant has made or is planning to make to the economy of the United Kingdom including the strengthening of the United Kingdom Balance of Payments and the growth of industry and employment.

Also reported in OFFSHORE TECHNOLOGY, August, 1971, at 28-30.

For the Norwegian practice see OPERATIONS ON THE NORWEGIAN CONTINENTAL SHELF, REPORT No. 30 to the Norwegian Storting (1973-74), at 54 and following: and see also Section 54 of the Royal Decree of 8th of December, 1972, relating to the Exploration for and Exploitation of Petroleum in the Seabed and Substrata of the Norwegian Continental Shelf, in LEGISLATION CONCERNING THE NORWEGIAN CONTINENTAL SHELF 155-56 (with unofficial English Translation) (Royal Ministry of Industry and Handicrafts, Oslo, January, 1973).

[72] OPERATIONS ON THE NORWEGIAN CONTINENTAL SHELF, *supra* note 71, at 58-62. Note the conditions imposed by Norway on companies landing oil and gas pipelines from the Ekofisk offshore fields outside Norway.

[73] For an outline of this activity up to January, 1974, see *supra* note 1, at App. II, Formulating an Industrial Strategy for the Development of Newfoundland's Offshore Petroleum Resources.

the key means of achieving such a controlled rate of development is to limit the amount of acreage under exploration at any one time. This is a typical example of the interrelation of offshore management decisions with onshore industrial strategy. Given over, as North Americans are, to the "maximum growth" syndrome, an examination of Norway's "make haste slowly" attitude, whereby the rate of development is strictly controlled, is a most useful experience. [74]

The rate of development will also greatly affect the level of social disruption.

C. *Social Disruption*

In the government position paper it was noted that:

> Newfoundland is aware from observing at first hand the social and economic disruption which has occurred in Scotland that there is a great danger that offshore petroleum developments will severely disrupt the Province's economic and social structure. [75]

North Americans generally tend to look upon social change as being unquestionably good regardless of its rapidity or its direction. Why this should be so is a question for the social scientist. However, it is interesting to note that an exception is made for more "primitive" (i.e., different) societies or communities. Hence, it is academically (even politically) quite legitimate in Canada to consider the negative aspects of social change as a resource management parameter so long as the native or Innuit peoples are involved. Such considerations will then be valid in respect of the impact of offshore oil on the native peoples of coastal Labrador.

There is, however, an alternate view that "intermediate", or even highly industrialized, societies can suffer negative impacts from rapid social change. While this may be an academic truism, it is often political heresy. Observe, for instance, the importance of this factor in the planning response to the impact of North Sea oil developments on Scotland, especially in the "Highlands and Islands" areas. [76] However, Norway has taken consideration of the

---

[74] See PETROLEUM IN NORWEGIAN SOCIETY, PARLIAMENTARY REPORT NUMBER 25 (Royal Norwegian Ministry of Finance, Oslo, 1973-74). Interestingly, the Norwegian Government decreases the rate of development to increase the industrial benefits received.

[75] *Supra* note 1, at 2. Study of the negative social impacts of massive offshore developments is underway on several fronts. See Martin, The Onshore Consequences of Offshore Development, presented to the Canadian Bar Association's Atlantic Petroleum Offshore Seminar (Halifax, May, 1973); RESOURCES OF THE SEA CONFERENCE—FISH AND OIL, (2 volumes) (St. John's, May, 1973) (sponsored by the Extension Service of Memorial University of Newfoundland in co-operation with the Canadian International Development Agency); Gibbons and Voyer, *A Technology Assessment System: A Case Study of East Coast Offshore Petroleum Exploration*, SCIENCE COUNCIL OF CANADA BACKGROUND STUDY No. 30 (Information Canada, Ottawa 1974).

[76] See *Can Scotland Live with It*, OFFSHORE SERVICES 24-56 (November, 1973). The problems listed include shortages and increased costs of housing, exclusion of local labour from highly skilled jobs, foreign supervisory staff, general inflation, foreign ownership of oil and service companies, the establishment of massive oil-related in-

social consequences of offshore oil much further, and has recognised it, not only as a potential danger, but also as a potential tool for solving social problems. The Royal Norwegian Ministry of Social Affairs notes that: "The changes can be desirable, and can contribute to solving social tasks, but if they take place too rapidly, considerable social problems could evolve." [77] They further state:

> How deep the changes in local society and the living conditions of various groups of the population will be, will depend on which types of activity it is decided to develop on Norwegian soil, the choice of localization, the extent and tempo of the expansion, the domestic utilization of public incomes and the policy which is followed in other areas of society. [78]

In addition to regulating the general rate of development, the construction of onshore support facilities is only licenced under terms designed to minimize social disruption, and oil-related activities are deliberately channelled into areas of unemployment, out-migration and social problems. [79]

Newfoundland society, especially its rural sector, is an "intermediate" society caught midway between a traditional society based on self-sufficiency and the fishery, and the consumer society of North America. So long as change was accepted unequivocably, this characterization was only of relevance to a small group within Newfoundland and to certain academics. For the vast bulk of Newfoundlanders during the halcyon days of the fifties and sixties, change meant more, and more was good. However, as in other parts of Canada, many Newfoundlanders (no doubt spurred by the environmental and energy crises and by inflation) now perceive both a "limit to growth" and the precariousness of North American consumerism. Having placed only one foot in the grave, many Newfoundlanders are now re-emphasizing their alternate traditional society. This change is at present sometimes more symbolic than a matter of turning in ones 'Chev.' for a bicycle. However, the tremendous resurgence of interest in Newfoundland music and history and in the growth of an indigenous theatre and literature together with a renewed sense of pride are significant signs of a society on the rebound. More importantly, the people of rural Newfoundland no longer silently permit their governments to conduct social genocide by "resettlement" in the name of cutting the cost of public services, and young people no longer automatically flock to Toronto. That this renewal is taking place is not surprising. An independent Newfoundland, the product of a long and painful social evolution, is not history but the common experience of many living Newfoundlanders.

---

dustries in rural areas, increased crime and drunkenness, labour shortages for traditional industries, resistance of oil companies to unionization, manpower shortages, use of foreign technology and equipment, greatly increased demand on infrastructures such as schools and highways, conflict with the fishing industry, and environmental degradation. The situation in Scotland is constantly contrasted with that in Norway where development is taking place at a controlled rate. But Shetland is fighting back, see S. FRIENDENSON, OIL AND THE PEOPLE (Shetland County Council, Lerwick, 1974).

[77] *Supra* note 74, at 66.

[78] *Id.*

[79] *Id.* at 83-91.

That Newfoundland society should have been exposed to the traumatic experience of the heavy-handed industrial development efforts of the 1950's and 1960's is more a reflection of the prevalent norms of Canadian and Newfoundland society during the period than of a defect in the confederation mechanism. The failure of Newfoundland's negotiators to retain control over fisheries management could have been a fatal blunder, but the federal government was so inactive in this sector during the 1950's and 1960's that fisheries policy-making did not, of itself, constitute a major factor in escalating social change. Federal management of Newfoundland's offshore petroleum resources, on the other hand, would place Ottawa in an overwhelmingly dominant position with regard to determining the rate of social change within the province. It would hardly be paranoic to suggest that federal management would not place a high priority on minimizing social costs in Newfoundland. The rate, and perhaps the direction, of social change will be determined in part by the rate and type of offshore development permitted, and control of these parameters is inexorably related to control of offshore management generally. LaForest's observation that: "The raising of revenue is not the sole reason that public property is of fundamental importance to the provinces. It also provides them with a powerful instrument for the control of their economic and political destinies" [80] is doubly applicable to Newfoundland's offshore resources.

LaForest's observation also brings us to a fourth policy consideration—the issue of provincial autonomy within Confederation.

D. *Provincial Autonomy*

Again quoting from the Newfoundland position paper, it was noted:

> If Ottawa were to succeed in its present claims, it would control not only Newfoundland's offshore mineral resources, but also the level and kind of onshore activities required to develop these resources and, indirectly, the rate and kind of social change. With no control over these developments, Newfoundland's existing constitutional powers would be severely eroded. In essence, Newfoundland would exist as a province in name only. Such a development would not be in the national interest. The national interest would be better served if offshore resource development occurred in a manner which would contribute to regional development and promote the preservation of strong viable provinces—the cornerstones of Confederation. [81]

One might add that provincial ownership and administration would also lead, positively, to increased provincial revenues and industrial activity within Newfoundland, thus freeing Newfoundland from its present fiscal dependency on Ottawa. [82]

---

[80] *Supra* note 68, at xii.

[81] *Supra* note 1, at 2-3.

[82] Under the present system, Newfoundland's equalization grants would be decreased approximately on a "dollar-for-dollar" basis for any offshore petroleum revenues received.

It seems to be generally conceded that the purpose of a federation is to allow the union of political communities while at the same time establishing a constitutional framework which promotes the preservation of the diversity of the separate societies within the federation. This is done, of course, not by multi-cultural grants, but by providing some measure of provincial autonomy. Indeed, it was this provincial autonomy which was, in part, the sugar-coating on the otherwise bitter pill of Confederation for many voters in the 1948 Referenda.[83] Further, the Quebec experience seems to demonstrate that provincial diversity is a valued goal of Confederation, and that some price will be paid to maintain it. In the case of Newfoundland's offshore minerals, it is not apparent what the "price" of recognizing Newfoundland's claim would be. Quebec's moves towards an international presence in the 1960's gave rise to the statement that: "Had the provinces [sic] been accorded the territorial and administrative jurisdictions in issue [i.e., in the *B.C. Offshore Minerals Reference*], Canada in the form we know it would give way to something else."[84] And further, that, Canada had been "threatened" by British Columbia's claim.[85] Surely more rational views will prevail in respect of Newfoundland's claim.

The federal government argues that, as a matter of policy, its jurisdictional powers in such areas as fisheries, defence, external affairs and navigation mean that it *has and ought to have total control* over the development of these resources. Yet, such a philosophy would utterly destroy the flexibility of our federal system, its sensitivity to local concerns and the "watertight compartments" which the courts have consistently upheld. Adoption of such a doctrine would, in essence, be an admission that our present system of a division of legislative jurisdictions must give way to a centralized government and its bureaucracy. Certainly, such a "revolutionary development" in Canadian constitutional law can hardly be said to have been inadvertently introduced by the Supreme Court of Canada in the *B.C. Offshore Minerals Reference.*[86]

It is ironic that in this age of "co-operative federalism" such arguments

---

[83] This was put most eloquently by Mr. Smallwood himself:

> I am not one of those, if any such there be, who would welcome federal union with Canada at any price. There are prices which I, as a Newfoundlander whose ancestry in this country reaches back for nearly two centuries, am not willing that Newfoundland should pay . . . . I insist that as a self-governing Province of the Dominion, we should continue to enjoy the right to our own distinctive culture . . . . I will support Confederation if it gives us responsible government under conditions that will give responsible government a real chance to succeed.

Speaking before the National Convention on October 28, 1946. See J. SMALLWOOD, I CHOSE CANADA: THE MEMORIES OF THE HONOURABLE JOSEPH R. "JOEY" SMALLWOOD 256-57 (1973).

[84] Head, *The Canadian Offshore Minerals Reference*, 18 U. TORONTO L.J. 131, at 156-57 (1968).

[85] *Id.*

[86] *Id.* at 151-56. While Mr. Head confines his analysis to the federal government's limited "external affairs" power, the discussion seems generally applicable.

are being put forward to support the federal government's position, for they have been discredited for some seventy-five years. Less than thirty years after the birth of Confederation, the federal government disputed the ownership of certain provincial resources and a series of cases resulted. The resemblance to present federal machinations is remarkable.

In the case of *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario,* [87] the federal government claimed the title of the subsoil of all lakes, rivers, public harbours and other waters. In support of this claim, counsel for the federal government contended that:

> [t]he Dominion was, under the British North America Act, 1867, the exclusive legislative authority for trade and commerce, defence, navigation and shipping, and sea-coast and inland fisheries. The executive power of the Dominion was, in the absence of express enactment to the contrary, coextensive with the legislative power. Accordingly, the Act of 1867 must be construed as vesting the beds of all waters not granted before confederation exclusively in the Crown in right of the Dominion. [88]

This argument was struck down in full by both the Supreme Court of Canada and the Privy Council. The Privy Council noted that:

> It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada. [89]

Indeed, instead of making this sort of expansionist argument, it would be far more reasonable for the federal government to admit that these federal jurisdictions (complementary as they are to provincial resource ownership and dependent jurisdictions) must be exercised always with an eye to the maintenance and continuation of the diversity which is basic to the Canadian Confederation. While this would, it is true, admit of some situations where Newfoundland's proprietary rights would be prejudicially affected, that process of accommodation must not obscure the fact that, as was stated by the Supreme Court of Canada in the *Reference re Waters and Water Powers,* [90]

> [w]e must rigorously adhere to the radical distinction between these two classes of enactment: legislation in execution of the Dominion's legislative powers under section 91, which may, in greater or less degree . . . affect the proprietary rights of the provinces, and even exclude them from any effective control of their property; and, in contradistinction, legislation con-

---

[87] [1898] A.C. 700 (P.C.).
[88] *Id.* at 706.
[89] *Id.* at 709-10.
[90] [1929] Sup. Ct. 200.

> ceived with the purpose of intervening in the control and disposition of provincial assets, in a manner, which, under the enactments of that Act touching the distribution of assets, revenues and liabilities, is exclusively competent to the provinces. [91]

The process of dialogue and accommodation on political and administrative levels is basic to the Canadian federation and has been extremely well developed—witness the multitude of federal-provincial conferences. Consideration of this process leads us to the final area of policy considerations, that of effective management.

E. *Effective Administration*

The position paper states:

> We refer to the many defects in the Federal system to dispel the myth that federal management is synonymous with good management. This is important, as we have frequently been given the impression from statements by federal officials that opposition to Newfoundland's position [on offshore minerals] stems from a misguided paternalistic view that Newfoundland does not have the capability to manage its resources. [92]

If we assume that Newfoundland's presumed lack of competence does not flow from the technical nature of offshore oil, [93] then it must be presumed to be due to the power of some of the international oil companies involved—would not a weak Province fall beneath their political muscle? The power of the major international oil companies is well known, yet, there is no discernible correlation between a political unit's size, population or economic position, and its success in neutralizing that power. If there *is* any correlation, it is a recently developed inverse one. What did Canada's size, sophistication and economic strength matter when a massive giveaway was perpetrated under the Canada Oil and Gas Regulations? How could Norway (with one-fifth the population of Canada and no indigenous petroleum expertise) have done a far better job?

A "have not" province, such as Newfoundland, challenges the presumed supremacy of the federal bureaucracy advisedly. Yet, it would appear that it is the theoretical administrative neatness of a single federal regulatory agency which the federal government will attempt to portray as reflecting the "national" interest and as being "of concern to Canada as a whole and . . . beyond local provincial concern or interests." [94] As pointed out above, jurisdictional "neatness" is hardly the essential characteristic of a federation. It is, on the contrary, jurisdictional diversity and co-ordination which lie at its heart. In fact, in addition to the policy reasons presented above, there are even arguments of administrative "neatness" which support provincial ad-

---

[91] *Id.* at 219.

[92] *Supra* note 1, at 3-4.

[93] Offshore petroleum matters are, after all, hardly qualitatively more complicated than say hydro-electric generation and distribution—especially to a province which owns the largest hydro site in Canada—Churchill Falls.

[94] B.C. Offshore Minerals Reference, [1967] Sup. Ct. at 817, 65 D.L.R.2d at 376.

ministration. Provincial administration can better provide the intimate knowledge of local social, economic and physical conditions which is necessary to good management. In addition, there will be a far greater need to interrelate offshore management decisions with decisions taken in exclusively provincial fields (such as education, highways, industrial parks, housing, health, etc.) than with decisions taken in exclusively federal fields. [95]

The "problem" of jurisdictional diversity did not deter the governments of Australia from agreeing that each state would administer their respective adjacent offshore areas. [96] This arrangement seems to have worked well administratively, and the Senate Select Committee on Offshore Petroleum Resources found, for instance, that the Commonwealth government's defence power was not impaired by this arrangement. [97] Again, the State of Texas exercises jurisdiction over offshore petroleum operations in an area extending three marine leagues (approximately ten geographic miles) from the shore under the terms of the Submerged Lands Act, [98] an area which extends far beyond the United States three-mile territorial sea. In *United States v. Louisiana*, [99] the Supreme Court of the United States held that Florida had proved boundary claims of three maritime leagues in the Gulf of Mexico under the Submerged Lands Act. The court made it clear that it did not believe that federal ownership of the seabed was "required" by defense and foreign affairs considerations, and said that objections to state property rights in the seabed beyond three miles based on foreign affairs considerations were without foundation. Indeed, state control of offshore petroleum operations out to nine miles in the Gulf of Mexico evidently has provided no particular problems for the United States federal government. [100]

The federal government has also made much of the fact that, under Newfoundland's proposal, *each* coastal province would administer its adjacent continental margin. Five individual regulatory bodies, it is said, would present administrative problems—presumably for oil companies. Apart from the fact that oil companies do not seem to be unduly burdened by separate provincial jurisdictions on land, this objection is irrelevant from a practical point of view. Newfoundland's continental margin comprises over 80% of

---

[95] See the Norwegian and Scottish materials, *supra* notes 74 & 76.

[96] Agreement relating to the Exploration for, and the Exploitation of the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain territories of the Commonwealth and of certain other submerged Land, October 16, 1967. See, for the implementation of this agreement, Petroleum (Submerged Lands) Act, Commw. Stat. No. 118 (1967).

[97] "Put shortly, the Committee considers that the legislative scheme does not inhibit in any way the legislative power which the Commonwealth has in respect of the defence of the nation." REPORT FROM THE SENATE SELECT COMMITTEE ON OFFSHORE PETROLEUM RESOURCES 658 (Commonwealth Government Printing Office, Canberra, 1971).

[98] 43 U.S.C. §§ 1301-15 (Supp. 1952), 67 Stat. 29 (1953).

[99] 363 U.S. 121, 80A S. Ct. 961 (1960).

[100] *See* the evidence presented by the "Common Counsel" States in United States v. Maine, 90A S. Ct. 1864 [1970] (Brief for the Common Counsel States, Volume II, at 489-94).

the total offshore eastern Canadian petroleum potential, with offshore Nova Scotia accounting for a further 15%.[101] It would make little difference from an operator's point of view if Quebec, New Brunswick and Prince Edward Island had separate regulatory systems, because there will, in all likelihood, be little activity in their respective offshore areas in any event. Administration by each coastal province in practice would mean two regulatory systems —those of Newfoundland and Nova Scotia. And with its extensive sea-ice and icebergs, management of Newfoundland's large continental margin will call for a different regulatory response than that required in the management of Nova Scotia's small ice-free margin.[102] Certainly, it would be madness to forego a system of management which would accommodate Newfoundland's special needs in the pursuit of uniformity for uniformity's sake.[103]

Finally, Ontario exercises jurisdiction over, and has property rights in, the extensive producing gas fields under Lake Erie. The hydrocarbon resources beneath Lake Erie are not inconsiderable and underlie some 3.1 million acres in the Ontario sector. As of October, 1969, 597 "offshore" wells had been drilled off Ontario. It is important to note that the equipment and operational techniques utilized and the commensurate regulatory and administrative systems are similar to those necessary offshore Newfoundland.[104] Lake Erie is also subject to highly complex international obligations regarding pollution control, fisheries, navigational control and defence including the *Boundary Waters Treaty*,[105] and is within the jurisdiction of the Internation Joint Commission.[106] Indeed, it is hard to find a body of water anywhere in the world where two nations more closely interact. Yet, the federal government does not question Ontario's legislative and ownership rights with respect to these "offshore" resources, and their development has gone forward under the normal federal-provincial division of powers. In fact, there has been a high and very effective degree of co-operation and coordination between the two levels of government.[107]

---

[101] *Supra* note 54.

[102] A small portion of Nova Scotia's offshore area between Cape Breton and Newfoundland does experience some relatively light, single-year ice.

[103] In fact, present regulations point out the absurdity of such uniformity. Oil companies working in deep water in "iceberg alley" off Labrador fall under the same obligations as those working in shallow water off Sable Island. Either the former is being unduly penalized or the latter is laughing all the way to the bank.

[104] See Newton, *Offshore Exploration for Gas Under the Canadian Water of the Great Lakes*, 7 GEOLOGICAL CIRCULAR (Ontario Department of Mines, Toronto, 1958); and the Submission to the International Joint Commission with respect to Potential Oil Pollution Incidents from Oil and Gas Well Activities in Lake Erie, their Prevention and Control, Ontario Petroleum Institute Incorporated, Lake Erie Committee, Toronto, December 2, 1969 for a comprehensive description of Lake Erie activities; and Regulations Under the Petroleum Resources Act, 1971 (Exploration, Drilling and Production), Ont. Reg. 45/72 (especially § 27) for part of the regulatory response.

[105] Treaties and Agreements Affecting Canada, in Force Between His Majesty and the United States of America, at 312 (King's Printer, Ottawa, 1927).

[106] *Id.* (Article VII).

[107] See for instance Submission of the Ontario Department of Energy and Resources Management to the International Joint Commission, (December 2, 1969), giving its full support and endorsement to a complete review by the federal govern-

Why would such an arrangement not work off Newfoundland?

IV. Conclusion

Provincial ownership of offshore minerals, we are warned, would change the "form" of Canada. From the rocky advantage of Newfoundland, such thinking demonstrates that the change has already taken place—the ascendency of the federal bureaucracy to a position of independence is far advanced. For Newfoundland, as it struggles to preserve its distinctive culture and traditions in the face of the onslaught of modern technocracy, the loss of autonomy and self esteem implicit in this centralizing trend transcends the importance of all federal economic handouts.

If the values of economic and social justice and cultural diversity that are inherent in Newfoundland's claim are overlooked in favour of a centralized and inflexible federal management regime, is it not evident that, in the long run, Canada will be the poorer?

---

ment of drilling safety requirements and procedures in Lake Erie, and the Submission of the Ontario Petroleum Institute to the International Joint Commission, at 56-57, and 82-85, (December 2, 1969) for an indication of the role of the federal Ministry of Transport regarding drilling rig movements and navigational matters generally.