CONFIDENTIAL

REPORT

On

THE RIGHTS of the PROVINCES

Of

NOVA SCOTIA, NEW BRUNSWICK AND PRINCE EDWARD ISLAND

To

THE OWNERSHIP

OF

ADJACENT SUBMARINE RESOURCES

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Fredericton, N.B.
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CONCLUSIONS

1. I am clearly of the opinion that the provinces own the subsoil underlying all the bays and inlets.

2. I am equally convinced that the provinces own the territorial waters and subsoil for a distance of three marine miles (about three and one-half statute miles) measured from the shore or a line drawn across the headlands of bays.

3. While there is some international contention over the matter, in so far as Canada can claim the Bay of Fundy, New Brunswick and Nova Scotia each own up to the centre line of the Bay.

4. There is legal argument that the remainder of Northumberland Strait, beyond the three miles, belongs to New Brunswick, Nova Scotia and Prince Edward Island.

5. While there is an argument the other way, a legal argument can be made that the Maritime Provinces, Newfoundland and Quebec own the submarine subsoil under the continental shelf which stretches from the shore to about two hundred miles from Newfoundland.

6. There is the political argument in favour of the Provinces that most of the other provinces have had their boundaries extended by giving them vast tracts of the North-West Territories. The compensation for that land was paid for by Canada, consisting of the original provinces, New Brunswick, Nova Scotia, Quebec and Ontario. In any dealings with the Government of Canada, I would suggest that the matter be approached as if we had a clear legal right to the matters set forth in paragraphs 4 and 5.

7. While I do not specifically deal with Newfoundland in the study, their rights are quite similar to the Maritime Provinces.

Fredericton, N. B.
September 16, 1959.

Sgd: G. V. LaForest

INTRODUCTION

You have asked me to examine into and report upon the respective rights of the Federal Government and the three provincial governments to ownership of the natural resources in the subsoil of the seas surrounding the provinces of New Brunswick, Nova Scotia and Prince Edward Island. The problem is a complex one involving not only the application of the principles of our constitution to a novel situation, but also to no small extent the principles of international law. Of international law, it will be well to set forth certain matters at the outset. It is a term of two-fold meaning. It means, first of all, the customs of nations in their dealings inter se, when it is probably more aptly termed the law of nations. This law of nations is to be sought primarily in the general practice of states and in treaties made by them. Further, decisions of international tribunals, particularly the International Court of Justice and the Permanent Court of Arbitration, as well as less elevated international arbitral tribunals are of authority; but in this field it should be observed that there is no strict principle of stare decisis, though there is naturally a tendency to follow previous decisions. Of lesser, though by no means negligible, authority are decisions on international matters by the ordinary courts of the nations. Finally as a subsidiary source the writings of leading writers on international law may be resorted to, these writings

being particularly valuable when they purport to state what the actual practice of states is.[1] The whole may properly be authoritively summed up by Article 38 of the Statute of the International Court of Justice which provides that:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> (2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

In the following study then, authorities from all these sources will be cited. From the nature of these authorities, it will readily be surmised that rules of international law do not in general have the same definiteness or precision as those of a national system of law.[2]

The term international law, as I have observed, is also used in another, though closely related, sense. In this second sense, it means the principles guiding our own courts on matters involving other nations or

their citizens. The first point to note about international law in this sense is that as a general rule the law of nations in its fullest extent is and forms part of the law of England, to use the words of Lord Chancellor Talbot in Barbuit's Case[3] in 1735. This means that in disputes involving problems of international law, the courts will attempt to determine what the law of nations is and incorporate it into the common law, so that foreign authorities are frequently cited and applied.[4]

But the principle of incorporation is subject to a number of qualifications. The first, of course, is that under the British Constitution, Parliament is supreme.[5] This principle is imported into the Canadian constitutional system by the preamble of the B.N.A. Act, which gives us a constitution similar in principle to that of the United Kingdom. So that in this country, the Canadian Parliament and the provincial legislatures would appear to have power within their respective spheres to pass laws in contravention of the law of nations.[6] To this some doubt was expressed by Lord MacMillan in Croft v Dunphy[7] but that was before the development of Canada to full stature as a member of the family of nations.[8] In addition Lord MacMillan's doubt seems opposed to the views expressed in such cases as Hodge v The Queen[9] and would, it is submitted, not be relied upon today. However, though Parliament or the Legislatures may pass laws contrary to the principles

of the law of nations, statutes will where possible be construed in conformity with that law.[10]

A second important qualification is that our courts do not examine into the evidence on matters they consider to fall within the executive sphere but accept as conslusive the opinion of the proper executive authority.[11] For example, if in an action it was necessary to determine whether the Government of the People's Republic of China was the government of China, a court would be bound to hold that it is not on being advised by the Minister of External Affairs that that government has not been recognized. As we shall see this principle is of great importance to the matter at hand.

Again, the doctrine of stare decisis would appear to apply to international law cases in Canadian Courts as in other cases,[12] though perhaps not as strictly.[13] Another qualification of less importance here is that treaties to which this country has become a party do not automatically become the law of the land but require legislative implementation by the appropriate legislature.[14]

In the following study, references to international law will be chiefly to international law as applied by this country, either in its courts or by executive action. For the problem under study is an internal one, and as I have already observed it is that view of international law that is binding upon the courts of this country. But considerable attention will

also be given to the general law of nations.

With these preliminary remarks, I will now turn more specifically to the matter at hand. The first question I will examine is the rights of Canada to the resources under the waters adjacent to it without reference to the constitutional problem regarding the respective rights of the Federal and provincial governments. The latter question will then be looked into and this will be followed by a study of the legal rights of the provinces inter se. Finally, the moral and political claims of the provinces to the submarine resources will be examined.

II.

RIGHTS OF CANADA AS A SOVEREIGN STATE

We shall now examine the rights of Canada as a member of the family of nations to the resources under the waters surrounding its coasts. This is a branch of the international law of the sea which unfortunately is at the moment in a state of great flux. States are making more and more extensive claims to the waters and sea beds surrounding them, and a most important international conference has recently been held on the matter. In the discussion that follows much will be said of this conference, the Geneva Conference on the Law of the Seas held in 1958, and the conventions signed there. It will be useful, therefore, to say a few words about it.

As has been pointed out many aspects of the law of the sea are unsettled. The possibility of clarifying

some of these questions was early considered by the International Law Commission, the organ set up by the General Assembly of the United Nations to assist in the codification and progressive development of international law. At its first session in 1949 the commission was given the task of preparing a unified and integrated restatement of the law of the sea and territorial waters. After a number of intermediate drafts and reports, the commission in 1956 adopted a complete set of rules with commentaries on the law of the sea.[16] It was, however, difficult to distinguish those portions of the draft that codified existing law from mere proposals as to what the law should be, and for that reason the commission proposed that an international conference should be summoned to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate".[17] This proposal was adopted by the General Assembly on February 21, 1957,[18] and the conference met in Geneva from February 24 to April 27, 1958.

The conference was attended by representatives of 86 states, including Canada, the Big Four Powers and the other principal coastal nations, as well as by the specialized agencies of the United Nations. Not all disputed questions were settled, but the conference was on the whole very successful and four important con-

ventions were signed. Two of these, the Convention on the Territorial Sea and the Contiguous Zone[19] and the Convention on the Continental Shelf[20] are of great importance to the matter under study. These conventions are not ipso facto binding on all states. Strictly speaking they must be signed and ratified by a state to be binding on it, and moreover they are not, under their terms, binding on even such states until they have been ratified by at least 22 states.[21] Each has now been signed by over 30 states, including Canada.[22] But it should be observed that signature is not ratification.[23] However there is no doubt that most or all of the signatory states will ratify the conventions, so that for them the conventions will be law. Further, while non-signatory states are not strictly bound by the conventions,[24] the pursuasive authority of such multipartite agreements is such that they will become virtually a code of the law of the sea. That is what happened in relation to at least some portions of the 1919 Paris Convention on Air Navigation. And the moral sanction of the Geneva Conventions is far stronger in this case because each article thereof was adopted by a minimum 2/3 majority of the states represented at the conference which it will be recalled was held under the auspices of the United Nations and attended by most of its members.

It can, therefore, safely be assumed that the Geneva conventions will soon be a part of inter-

national law and Canada's rights to the submarine resources surrounding its coasts will have to be determined under them. It is, however, necessary to examine the law before the conference, not only because it is still the law, but also because, as will be seen, while Canada's rights as a member of the family of nations may be determined under the conventions, it is possible that the respective rights of the Federal Government and the provinces to these underwater resources may have to be determined under the pre-existing law.

Despite the changes taking place in the law of the sea, certain general remarks may be made. All bodies of water may be divided into the high seas, territorial waters and inland waters. Up to the seventeenth century it was usual for states to claim sovereignty over vast expanses of the sea, but following Grotius' Mare Liberum in 1609, these more extreme claims were gradually abandoned and by the middle of the nineteenth century it had become settled that the open seas were the property of no individual state but were free to all nations for navigation and trade.[25] Nevertheless all coastal states exercised over a belt surrounding their coasts considerable jurisdiction over the ships and citizens of other states. This belt is often called the territorial waters, the territorial sea or the marginal sea of the state. In addition some bodies of water are so intimately

connected with the territory of a state that they are considered as much the property of the state as if they were on dry land.[26] These are known as inland, interior or national waters. We will turn our attention now to inland waters.

(1) Inland Waters

Inland waters "consist of a State's harbours, ports and roadsteads and of its internal gulfs and bays".[27] In fact all waters between the land and the baseline from which the territorial waters are measured are inland waters.[28] This is now set forth in Article 5 of the Convention on the Territorial Waters and the Contiguous Zone,[29] which reads in part as follows:

> Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.

The extent of the inland waters in the Maritime Provinces will be seen in discussing the baseline of territorial waters.

Higgins and Colombos[30] have this to say of inland waters:

> In these waters, apart from special conventions foreign states cannot as a matter of strict law demand any rights...It is now generally admitted that the bed of the waters and the subsoil beneath....belong to an unlimited extent to the state which is sovereign of....the surface. It therefore possesses the right to carry out the exploitation of both the surface and subsoil by tunnelling or mining for coal and other minerals.

This statement is in accord with the common law rule, as may be seen from the many authorities collected by Sir Cecil Hurst which will be discussed hereafter.[31] It is also clearly assumed to be the law in Article 1 of the Convention on The Territorial Sea and the Contiguous Zone[32] which reads in part as follows:

> 1. The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

(2) Territorial Waters

It is universally recognized that a coastal state may exercise a wide measure of jurisdiction over a belt of water adjoining its coast, but there has been considerable controversy over the extent of this belt and the nature of the jurisdiction exercisable by the coastal state over this area. The problems involved naturally divide themselves into three headings:

(a) What is the breadth of the belt of territorial waters?

(b) What is the baseline from which the territorial waters are to be measured? and

(c) What is the nature of the right of the coastal state to the territorial waters?

Each of these questions must now receive examination.

(a) The Breadth of Territorial Waters

There is no definite rule under the law of nations respecting the breadth of territorial waters.[33]

Some states claim three miles, but others have claimed four, six, nine and twelve miles, and a number of South American states have claimed vast expanses of the sea.[34] The Geneva Conference on the Law of the Sea in 1958 could come to no agreement[35] and perhaps all that can be said with certainty is that a claim to a three mile zone is clearly valid.[36] Canada, in common with the United States[37] and Great Britain,[38] has always abided by the three mile limit.[39] This has appeared in numerous cases, and perhaps even more important, in statements by responsible officials of the Canadian Government.[40] These statements, emanating as they do from the Canadian executive, would appear to be binding on the courts.[41] So that for Canada the breadth of territorial waters measured from the base-line is clearly settled as three miles. The expression "three miles", however, needs clarification. It is three geographical or nautical miles[42] (or a marine league), not three statute miles. A nautical or geographical mile is approximately 2,025 yards as compared with the statute mile of 1,760 yards.[43] So that the breadth of the territorial sea around Canada from the baseline is in effect almost 3½ statute miles.

(b) The Baseline

(i) General Rule

The general rule is that the baseline of territorial waters is the line of low water mark following all the sinuosities of the coast.[44] The express-

ion "sinuosities of the coast" is, however, slightly misleading because it sounds as if it were necessary, to determine the extent of the territorial sea, to trace a line parallel to the coast at a distance of three miles. But this procedure is impracticable, and, the better view is that the rule means that a state is entitled to treat every position at sea within three miles from any point of land as within its territorial waters. To apply the rule you take a pair of dividers (compasses) open to give a three mile measurement and then draw a three mile arc, either from the land to the given position at sea or from the position at sea towards the nearest point of the land. The effect is that the points of land stretching furthest at sea are the only ones that need be considered.[45]

The above rules have now been adopted in the Geneva Convention on the Territorial Sea and the Contiguous Zone,[46] Articles 3 and 6 of which read as follows:

Article 3. Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Article 6. The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

(ii) Bays

The foregoing is the general rule; special

considerations apply to bays, islands and straits. As regard bays it is generally accepted that because of their intimate connection with the territory surrounding them, the sinuousities of the coast rule is inapplicable to them. But until recently no definite rule of general application had been laid down regarding where the baseline should be drawn in bays.[47] Indeed, there is the initial problem of determining what is a bay. As to this, it must clearly be more than a mere curvature of the coast; it must be a well marked indentation.[48]

Once it is determined that an indentation is a bay, it is agreed that a baseline may be drawn from shore to shore and the waters enclosed by that line and the land are inland, not territorial waters. The territorial waters are measured from this baseline. But there is no definite rule stating at what point in the bay this line may be drawn.[49] It is clearly settled that if the bay is less than six nautical miles in width the baseline may be drawn from headland to headland, thus enclosing as inland waters all the waters of the bay, and the belt of territorial waters will stretch for three miles beyond that line.[50] There is considerable support in state practice, especially British, and in the opinions of writers supporting the enclosure of bays of ten miles in width,[51] but it was clearly stated in the majority opinion of the Permanent Court of Arbitration in

the North Atlantic Fisheries Case[52] in 1910 that it had not yet matured into a definite rule.

The common law rule was to the effect that where one side could be observed from the other, the bay was territorial, but this rule is very indefinite because it is not clear what must be observed.[53]

The matter will henceforth be settled under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone.[54] That article defines a bay and then provides that the baseline may be drawn where the distance from shore to shore does not exceed 24 miles. The Article reads as follows:

1. This article relates only to bays the coasts of which belong to a single state.

2. For the purpose of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing

line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in Article 4 is applied.

Under this Article, most of the bays in the Maritime Provinces are "territorial bays", i.e., the whole bay belongs to Canada, the waters between the shore and the baseline being inland waters and the territorial waters extending three miles beyond a baseline drawn from headland to headland. But while it is true that Canada can claim these bays in its relations with other states, it may, as will be seen, be important to have regard to the pre-existing law to determine the respective rights of the provinces and the Federal Government.

It will be observed that in paragraph 6 of Article 7, above cited, it is provided that the Article does not apply to "historic" bays. To understand the meaning of this, it is well to recall that before the Geneva Conference it was not usual to regard most of the larger bays as territorial. But to this the historic bays constituted an exception. Historic bays are those over which the coastal state

has publicly claimed and exercised jurisdiction and this jurisdiction has been accepted by other states.[55] Among the other considerations to be borne in mind in determining the character of a bay, are those enumerated in the North Atlantic Fisheries Case[56] as follows:

> The interpretation must take into account all the individual circumstances which, for any of the different bays, are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate.[57]

Examples of historic bays are Chesapeake and Delaware Bays[58] in the United States, Conception Bay in Newfoundland and possibly Hudson Bay.[60] In New Brunswick the Bay of Chaleurs and Miramichi Bay are clearly historic bays. The Bay of Chaleurs, which opens into the Gulf of St. Lawrence through a passage 16 miles in width has been dealt with as a territorial bay by several British and Canadian statutes[61] and[62] in official statements of British officials.[63] Indeed a British statute of 1851 settles the boundary of New Brunswick and Quebec as a line in the middle of the bay,[64] and the Supreme Court of Canada has held it to be a territorial bay in Mowat v McPhee.[65]

Miramichi Bay has an entrance of 14½ miles in width and long before Confederation it was claimed by New Brunswick. In 1799 the province passed a statute treating the bay as being within the adjoin-

ing county of Northumberland, and subsequent statutes confirmed this claim.[66] In no case has this jurisdiction been questioned by any state other than the United States and the objections of that country were limited to the sole question of the extent of fishery rights granted under a treaty.[67] Both counsel for the United States and Great Britain and the judges in the North Atlantic Fisheries Case treated it as being of the same character as the Bay of Chaleurs.[68] It is dealt with by Jessup and Higgins and Colombos as a territorial bay,[69] and was held so to be by Judge Drago in his dissenting opinion in the North Atlantic Fisheries Case.[70][71]

The Bay of Fundy was also claimed by the British authorities when they had control of our foreign affairs as an historic territorial bay. As early as 1621 it was included in the grant of Nova Scotia by King James to Sir William Alexander.[72] Later, a line drawn in the centre of the bay was made the boundary line between Nova Scotia and New Brunswick in the Royal Commission to Thomas Carleton dated August 24, 1786.[73] And during the nineteenth century the British continually denied that the Americans had any right to fish there though the Americans protested.[74] The matter came up in an international arbitration in The Washington.[75] The American schooner, Washington, was seized by the revenue schooner, Julia, in the Bay of Fundy, ten miles from shore on May 10, 1843 on a charge

of fishing in a bay contrary to the treaty of 1818 and was decreed by the Vice-Admiralty Court of Nova Scotia to be forfeited to the Crown. The United States protested, claiming the value of the ship on behalf of its owner and the matter was referred to arbitration. The umpire, Mr. Bates, favoured the American claim stating as follows:

> The bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Manan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

It should be pointed out that in order to enclose a bay by a baseline running from headland to headland it is necessary under International Law that both shores belong to the same state. However, the line could be drawn between headlands that are both in Canada.[76]

Despite the decision in The Washington, Britain continued to claim the bay. This can be seen in the Case for the British in the North Atlantic Fisheries Arbitration[77] and in other statements. The Bay of Fundy was also discussed by the Supreme Court of New Brunswick in R. v Burt[78] in 1932, but it was not

necessary for the court to reach a definite decision.

It would appear, then, that there is some doubt whether the Bay of Fundy is a territorial bay under the law of nations, but it is submitted that the bay, having always been claimed as territorial by those charged with executive authority over it, must be considered a territorial bay under the law of the land.[79] In the Fagernes, the question was whether a certain point in Bristol Channel was within the realm of England. The Court of Appeal sought the opinion of the Attorney General of Great Britain, and the Attorney General having replied that the point in question was outside the realm, this was accepted as conclusive by two of the judges, Lord Atkin and Lawrence, L. J.; Bankes, L. J. did not think the court was bound to accept the Attorney General's information but having regard to the lack of authority and the then existing trend of limiting the width of territorial bays, he held the court should be guided by it. This does not mean that the Federal Government (which now controls our external relations) could extinguish the rights of the provinces to those waters by a declaration to that effect,[80] for it has been doubted by a legal writer whether the crown, even in England, can relinquish a claim to the detriment of a subject. And it is even more doubtful here because, though the Federal Government is supreme in its dealings with other nations, it cannot pass laws within the provincial legislative sphere to

implement treaties.[81]

Finally there is ground for arguing that all bays surrounding the Maritime Provinces are historic territorial bays, for before confederation each of the provinces passed and enforced statutes on the basis that the baseline of territorial waters should be drawn from the headlands of bays.[82] Thus in 1836 Nova Scotia passed a statute[83] (often called the "hovering" Act) empowering customs and excise officers to board any ship within any port or bay in the province as well as those hovering within three marine miles of the coasts, bays, etc., and to examine them and forfeit them to the crown if fishing within those waters. Similar Acts were passed by Prince Edward Island in 1843[84] and New Brunswick in 1853.[85] All three statutes were confirmed by British Orders in Council.[86] It is true that these Acts were considered by the Americans, in the case of larger bays, to be in contravention of the treaty of 1818 which permitted them to fish up to three miles of the coasts and bays.[87] They argued that bays meant such bays as did not exceed six miles in breadth. But this claim was rejected by the tribunal in the North Atlantic Fisheries Case[88] which held that the word "bay" in the treaty meant all bays. The court did not decide that all such bays were territorial for the general purposes of international law, but only under the terms of the treaty, but the case is not inconsistent with the view that these bays

are territorial and this is in accord with the British submissions in that case. Again, though the matter may not be settled by the law of nations, for internal purposes the matter should, for reasons already given, be considered as closed. As will be seen, Canada now claims far more extensive rights than these.

(iii) Islands

Islands also raise special problems. The general rule is that islands have their own three mile belt of territorial waters measured from the sinuosities of the coast.[89] If the island is more than 3 but less than 6 miles from the coast, the whole extent of water is territorial since it is inadvisable to have small strips of high seas between the coast and the island. If the island is only slightly more (possibly ½ mile) than 6 miles from shore, the coastal state may still claim the whole as territorial but where it is more distant, the island is treated as having its own territorial belt.[90] There is a difficulty however, of deciding what is an island. Are elevations, visible only at high tides, islands? There is a disposition so to treat them among most writers.[91] All this has now been settled by the Convention on the Territorial Sea and the Contiguous Zone,[92] Articles 10 and 11 of which read as follows:

Article 10. 1. An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11. 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

In addition to the foregoing there is a generally recognized rule that a group of islands or the mainland and islands forming part of an archipel-[93] ago should be recognized as a unit. It is conceivable that the three Maritime Provinces could be so regarded but consideration of this matter will be postponed until the system of measuring territorial waters by straight baselines is discussed.

(iv) Straits

The general rule as to straits is that the [94] three mile belt must be measured from each shore. If they are less than six miles broad, such as the Strait of Canso, they belong wholly to the coastal state, and if they exceed that width a strip in the centre is [95] part of the high seas. There are, however, some straits that, like historic bays, belong to the coastal state though exceeding six miles in width. Thus at one point

the boundary between the United States and Canada runs through the centre of the Strait of Juan de Fuca which is about 15 miles broad,[96] and Duff, J. (later Chief Justice of Canada) clearly held that the territory on the Canadian side of the line belonged to the Province of British Columbia.[97] It would also appear that Canada has long claimed the Northumberland Strait as can be seen from the following quotation from Moore's Digest.[98]

> In September, 1896, some American Fishing vessels were warned not to fish on a shoal known as Fisherman's Bank, in the Gulf of St. Lawrence, near the entrance to Northumberland Strait, between the eastern part of Prince Edward Island and the northern part of Nova Scotia, at a distance of nearly 7 miles from Cape Bear, the nearest land. In reply to an inquiry of the United States consul at Charlottetown, the Canadian minister of marine and fisheries stated, Oct. 2, 1896, that Fisherman's Bank had always been claimed as Canadian waters, but that no new orders had been given in relation to it. Referring to this statement, Mr. Olney said that the claim of jurisdiction over Fisherman's Bank seemed to be based on the "headlands" contention, since the place could be included within the Canadian jurisdiction only by drawing a line across the open approaches to the Strait of Northumberland from East Point, on Prince Edward Island, to Cape St. George, in Nova Scotia, a distance of 35 miles.

It is possible therefore, that the Strait of Northumberland may have been territorial at Confederation or should be so treated following the Fagernes.[99]

(v) Straight Baselines

A far more extensive exception to the rule that the territorial belt is to be measured from the

low water mark must now be examined, namely, what is often called the straight baselines system. The concept of straight baselines may perhaps best be explained by an examination of the case that firmly establishes it in international law, the Anglo-Norwegian Fisheries Case[100] decided by the International Court of Justice in 1951.

With a view to excluding foreign ships from fishing off the Norwegian coasts, a Norwegian Royal Decree laid down baselines that did not follow the low water mark, but consisted of imaginary straight lines, some as much as forty miles long, linking selected points, some being headlands on the mainland and others being situated on the many rock islands surrounding the coasts of Norway. The court held that this decree was not contrary to international law.

Some remarks in the judgment give the impression that the decision is of limited application. Norway has a very deeply indented coast line and the sinuousities of the coast rule would be very difficult to apply to it. Further, Norway has long attempted to exercise jurisdiction over these waters and may be held to have prescriptive rights to them. This is the official British interpretation of the case,[101] following the traditional approach of Great Britain. But there is much in the case that indicates that the rule is one of general application, subject to certain conditions laid down by the court. There

were, said the court, certain considerations to be borne in mind in the case, namely, that (1) the baselines follow the general direction of the coast; (2) there was a more or less close relationship between the sea areas and the land formation which divided or surrounded them; and (3) there were "certain economic interests peculiar to the region, the reality and importance of which had been evidenced by long usage".

Apparently relying on that case,[102] the then Prime Minister, Mr. St. Laurent, on February 8, 1949, shortly before the union of Newfoundland with Canada, stated:[103]

> We intend to contend, and hope to be able to get acquiescence in the contention that the waters west of Newfoundland constituting the Gulf of St. Lawrence shall become an inland sea. We hope that, with Newfoundland as a part of Canadian territory, the Gulf of St. Lawrence west of Newfoundland will all become territorial waters of Canada whereas before there would be only the usual off-shore portion that would thus become part of territorial waters. Of course that is a matter that is not governed by statutes; it is governed by the comity of nations. It is our intention to assert that position and it is our hope that it will be recognized as a valid contention.

This policy was reiterated for the Deifenbaker Government on November 14, 1957, by the Minister of Northern Affairs and National Resources,[104] Mr. Alvin Hamilton. This seems to be a reasonable policy. It is clear that a line closing off the Gulf of St. Lawrence would follow the general direction of the coast, and a look at the map

reveals the intimate relationship between the gulf and the land areas surrounding it. Further, the economic interests are certainly evident. The gulf is the chief means of communication between the Province of Newfoundland and the rest of Canada, and the fisheries therein have long been the main source of livelihood for many of the inhabitants of the four Atlantic Provinces. Whether the claim will be upheld however, depends on whether it is accepted by other states, but for internal purposes it is submitted, following the Fagernes[105], that the claim should be accepted as part of international law. The claim of Canada to the whole of the Gulf of St. Lawrence has been immeasurably strengthened as the Federal Government seems to be well aware, by the Convention on the Territorial Sea and the Contiguous Zone[106], for Article 4 of that convention seems to make the rule in the Anglo-Norwegian Fisheries Case[107] applicable to that situation. The Article reads as follows:

> 1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity; the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> 2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a state in such a manner as to cut off from the high seas the territorial sea of another state.

6. The coastal state must clearly indicate straight baselines on charts, to which due publicity must be given.

It is also expressly provided, and this was the law before,[108] that the waters on the landward side of the baseline are national waters.[109] Article 5 reads in part as follows:

> Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

(c) The Nature of the Right of a Coastal State to Territorial Waters

Before the Geneva Conference it was generally accepted that a coastal state exercises sovereignty over its territorial waters; that is, it owns them in the same way as any of its other territory, subject to the right of innocent passage by foreign merchant ships.[110] For the purposes of internal law

the matter is settled. The Crown owns the territorial waters and the subjacent land in the same way as other property. This was made clear by the Privy Council in [111] Secretary of State for India v Chelikani Rama Rao where it was held that islands arising in the seas within the 3 mile limit are owned by the Crown, and this applies to India. In giving the judgment of the Board, Lord Shaw cited with approval the following statement of Lord Kyllachy in the Scottish case of [112] Lord Advocate v Clyde Navigation Trustees.

> With respect to the nature of the Crown's right in what is acknowledged to be part of the territory of the kingdom - viz., the strip or area of sea within cannon-shot or three miles of the shore. Is the Crown's right in that strip of sea, proprietary, like the Crown's right in the foreshore, and in the land? Or is it only a protectorate for certain purposes and particularly navigation, and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent extra commercium; but none the less is it in my opinion a proprietary right - a right, which may be the subject of trespass and which may be vindicated like other rights of property.

And later he cited the following passage from another [113] Scottish case, Lord Advocate v Wemyss, decided by the House of Lords:

> I see no reason to doubt that by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile

limit, and also the minerals beneath it are vested in the Crown. //

This view has now been adopted in the Convention on the Territorial Sea and the Contiguous Zone,[114] Articles 1 and 2 of which read as follows:

Article 1. The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

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

Article 2. The sovereignty of a coastal state extends to the airspace over the territorial sea as well as to its bed and subsoil. //

(3) The Open Sea and the Continental Shelf

As we have seen, it is a universally recognized rule of international law that the open seas are not within the sovereignty of any one state, and until recent years it was tempting to assume that the bed of the sea was also a res nullius or a res communis.[115] But there has for long been some recognized rights of coastal states to exploit certain resources under the open sea. For example, coal mining has been conducted under the open seas beyond the three mile limit off Cumberland in Great Britain.[116] Again sedentary fisheries, such as oysters and chanks, living in close association with the sea bed are claimed by numerous coastal states, notably Great Britain and its colonies, even when these fisheries are found beyond territorial waters. This right is usually justified on the ground that the fisheries are appurtenances of the coastal

state or on the ground of prescription, but it would in any case seem to be limited to the coastal state.[117]

It has been only in recent years that more extensive exploitation of the resources of the bed of the sea has become practicable and the question of the ownership of these resources has acquired importance. This has resulted in the development of the doctrine of the continental shelf.[118]

The term "continental shelf" is in its origin a geological, not a legal term. On most coasts of the continents, the sea bed does not at once descend precipitously but slopes downward gradually for a considerable distance, and then more abruptly plunges to the great depths of the sea.[119] It is generally (though erroneously)[120] believed that this plunge often occurs when the sea reaches a depth of 100 fathoms (600 feet) or 200 metres. Actually this is an over-simplification. Sometimes the sea bed drops in a series of falls; often shortly after a space of deep sea there is higher ground forming a shelf; and some coasts have no shelf, the bed dropping almost immediately to the ocean floor. As the term is understood legally, the continental shelf includes not only the shelves of continents but those adjoining islands and places where, strictly speaking, there is no continental shelf, at all, such as the Caspian Sea. On the continental shelf as so understood it is now possible to extract oil by installations in the open seas. This has been done

in several places, including the Gulf of Mexico and the Persian Gulf. The importance of the matter to Canada can be seen from the fact that the continental shelf off the northeastern shores of Canada extends from its shores to a distance over 200 miles from Newfoundland.[121]

The first claim by a coastal state to ownership of its continental shelf was made by Great Britain on behalf of Trinidad when on August 6, 1942 it annexed to that colony the Gulf of Paria, an action that had been preceded by a treaty with Venezuela dividing jurisdiction over the bay.[122] Then on October 1, 1945, President Truman of the United States issued a proclamation[123] in which the continental shelf off the coast of the United States was described as "appertaining" to that country and subject to its "jurisdiction and control", a claim that seems difficult to distinguish from sovereignty.[124] Since that time well over 30 proclamations have been issued by coastal states claiming their continental shelves or adjacent submarine areas and no protest has been made by other nations except where the superjacent waters have been claimed as well.[125]

There is much in reason to support the claim of a coastal state to its continental shelf. It seems unthinkable that a coastal state would readily permit the construction of installations close to its shores, giving rise to possible hind-

rances to navigation and so to the trading patterns of the state, to say nothing of possible interferences with national defence. Further, the deposits under the sea bed will often be a continuation of resources situate on dry land and there is a possibility that the exploitation of the submarine resources might interfere with or exhaust those on land. And finally, the refining of the resources will often be connected with the coastal state.[126]

From the unprotested claims and the above reasoning, it has become generally accepted that a coastal state, and it alone, is entitled to exploit the resources of the continental shelf adjacent to its coast.[127] The view has now been accepted by the Convention on the Continental Shelf,[128] Article 2 of which reads as follows:

> 1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural recources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.
>
> 3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the

> seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

To prevent any difficulty regarding the meaning of the term "continental shelf", it is defined in Article 1[129] in the following term:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

(4) Summary of Canadian Rights

It is clear under the law of nations and the law of the land that Canada owns the subsoil and resources under her inland waters. At a minimum, this includes all bays having an entrance of less than six miles and perhaps 10 or 12 miles. It includes all "historic bays" among which the Bay of Chaleurs and Miramichi Bay are clearly included. And claims have long been made to the Bay of Fundy. It is also eminently arguable that all bays and inlets in the Maritime Provinces are historic bays. When the Geneva convention on territorial waters is ratified, Canada will also own all bays having an entrance up to 24 miles.

In addition Canada owns the subsoil under its territorial waters. These territorial waters include all waters within three marine miles of land and of the baselines across bays. It having been claimed that the whole of the Gulf of St. Lawrence is inland waters, it may well be that the three mile territorial belt must be drawn from a line enclosing the gulf.

Finally, Canada owns the continental shelf extending from its coast to a distance some two hundred miles from the coast of Newfoundland and the resources therein.

III

RIGHTS OF PROVINCES

(1) B. N. A. Act Provisions

In order to determine the proprietary rights of the Federal Government on the one hand and the governments of the Maritime Provinces on the other, it is necessary to refer to the British North America Act, 1867. Several sections are
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revelant, and three, are so important as to merit quotation. They read as follows:

> 7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act.
>
> .....
>
> 108. The public works and property of each Province enumerated in the third schedule to this Act, shall be the property of Canada.

> 109. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

In the Provincial Fisheries Reference[131] the Privy Council decided that the effect of section 109 was that whatever proprietary rights were at the time of the passing of the B.N.A. Act possessed by the provinces remained vested in them except those expressly transferred to the Dominion by any of the Act's express enactments (such as section 108). It is therefore necessary to determine the extent of the provinces at Confederation. 1595

(2) Provincial Boundaries

At its inception, Nova Scotia comprised not only what is now within the bounds of that province but also what are now New Brunswick, Prince Edward Island and a part of Quebec and Maine. It was clear, too that the Bay of Fundy (therein called "that Great Bay, etc.") was considered an integral part of the colony. The boundaries of Nova Scotia as found in the grant of that colony by King James to Sir William Alexander of September 10, 1621,[132] reads as follows:

> All and singular, the lands, continents,

> and Islands, situate and lying in America, within the head land or promontory called Cape Sable, lying near the latitude of forty three degrees, or thereabout, from the Equinoctial line towards the North, from which promontory stretching towards the shore of the sea by the west, to a bay commonly called St. Mary's Bay, and then towards the North by a direct line, passing the Entrance or mouth of that Great Bay, which runs into the Eastern Quarter between the Territories of the Souriqois and Etchemins, to a River commonly called by the Name of St. Croix, and to the most remote Spring or Fountain thereof from the Western Quarter which first mingles itself with the aforesaid River, thence by an imaginary direct line, which may be conceived to go through the Land, or Run towards the North to the nearest Bay, River or spring, discharging itself in the Great River of Canada, etc. etc. which certain lands shall in all future times enjoy the name of Nova Scotia in America.

Following the conquest of Canada in 1763 the northern boundaries of Nova Scotia were altered so that the boundary between that Province and Quebec became "highlands" north of the St. Croix. But the important point for our purposes is that the Bay of Fundy was still treated as part of the Province as can be seen from this portion of the boundaries contained in the Governor's Commission:[133]

> As bounded on the Westward by a line drawn from Cape Sable across the Entrance of the Bay of Fundy to the mouth of the River Saint Croix by the said River to its source, and by a line drawn due North from thence to the Southern Boundary of the Colony of Quebec; to the Northward by the said boundary .....

The next important matter following the Conquest was the Letters Patent to Governor Patterson of August 4, 1769 creating Prince Edward Island (then[134]

called the island of St. John) a separate colony. That the sovereign could by royal prerogative so deal with British Colonies is firmly established by the Privy Council in Re Cape Breton[135] in which it adjudicated upon the severance of Cape Breton from Nova Scotia in 1784 and its subsequent reunion in 1820. In Governor Patterson's commission, Prince Edward Island is described as follows:

> Our island of Saint John and territories adjacent thereto in America, and which now are or which heretofore have been dependent thereupon.

The next document affecting the boundaries of Nova Scotia is the treaty of peace of 1783 between Great Britain and the United States.[136] That treaty is important in so far as water boundaries are concerned in that it declares that the mouth of the St. Croix shall be the boundary (what the St. Croix was was later settled by Commissioners as it exists today)[137] and it further declares that all islands within 20 leagues of the shores of the United States belonged to that country "excepting such islands as now are or heretofore have been within the limits of ....Nova Scotia". By an award of Commissioners of November 24, 1817[138] it was settled that Moose Island, Dudley Island and Frederick Island in Passamaquoddy Bay belong to the United States; all other islands in that bay and the island of Grand Manan belong to her

Majesty, and by that time those islands were under the administration of New Brunswick. In a treaty of May 21, 1910 the water boundaries between the United States and New Brunswick around these islands were further elaborated.[139]

Following the American Revolution came the creation of New Brunswick in 1784.[140] The original description of the province in the Letters Patent of June 18, 1784, was as follows:

> The tract of Country bounded by the Gulph of St. Lawrence on the East, the Province of Quebec on the North; the Territories of the United States on the West, and the Bay of Fundy on the South; should be erected into a Government under the Name of New Brunswick.

The description was soon altered however and in the Royal Commission to Sir Thomas Carleton of August 24, 1786[141] the province is so described as including the northern half of the Bay of Fundy. That description is as follows:

> Our Province of New Brunswick bounded on the westward by the Mouth of the River Saint Croix by the said River to its Source and by a Line drawn due North from thence to the Southern Boundary of our province of Quebec to the Northward by the said boundary as far as the Western Extremity of the Bay des Chaleurs to the Eastward by the said Bay and the Gulph of Saint Lawrence to the Bay called Bay Verte to the South by a line in the center of the Bay of Fundy from the River Saint Croix aforesaid to the Mouth of the Musquat River by the said River to its source, and from thence by a due East line

> across the Isthmus into the Bay Verte to join the Eastern line above described including all islands within six Leagues of the Coast with all the Rights, Members and Appurtenances whatsoever thereunto belonging.

From this time the boundaries of Nova Scotia became those described in the Royal Commission[142] to Lord Elgin of September 1, 1846, which read as follows:

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

Only one further alteration of the boundaries of any of the Maritime Provinces need be noted. In 1841, following a dispute between the Provinces of New Brunswick and Canada, the Imperial Parliament passed a statute settling the northern boundary of the Province of New Brunswick[143]. Under that statute New Brunswick now includes the southern half of the Bay of Chaleurs as can be seen from the following

portion of the boundary:

> Thence down the centre of the stream of the Restigouche to its mouth in the Bay of Chaleurs; and thence through the middle of that Bay to the Gulf of St. Lawrence; the islands in the said Rivers Mistouche and Restigouche to the mouth of the latter river at Dalhousie being given to New Brunswick.

Since the commission granted to the provinces the rights to administer the lands within their boundaries, the lands therein belong to the provinces. It seems clear from these that New Brunswick owns in addition to its territory on dry land half the bay of Chaleurs and the Bay of Fundy (which clearly includes the Canadian portion of Passamaquoddy Bay)[144], while Nova Scotia owns half the Bay of Fundy. We must now examine what other rights to the subsoil of waters adjacent to their coasts that these provinces may possess. I will deal first with inland waters.

(2) Inland Waters

It has long been settled that the shore, that is, the land between high and low water marks, belongs to the Crown[145], and it is equally well settled that in this country that means the Crown in right of the province[146], except in the case of public harbours which under section 108 of the B. N. A. Act belong to Canada[147]. The Crown may, it is true, grant the shore to a subject but it must do so expressly; a grant of land adjoining the sea, *prima facie*[148] extends only to high water mark. Even

if the shore is granted, at common law there is reserved to the Crown the gold and silver in lands granted by it unless they are expressly conveyed.[149] In addition, each of the provinces have passed statutes vesting in the Crown in right of the provinces any petroleum or natural gas lying under the ground,[150] and Prince Edward Island's statute expressly refers to petroleum and natural gas under its territorial waters. Further, in Nova Scotia and Prince Edward Island minerals (which are given a very broad meaning)are also reserved to the provinces.[151] New Brunswick's position is somewhat different. Radio active substances are reserved by statute,[152] but ordinary minerals must be reserved by the grant. However, the original instructions to Governor Carleton required him to exempt minerals in Crown grants and I understand the practice of the Department of Lands and Mines is to reserve them.[153] Such a reservation is then given a broad construction by section 8 of the Mining Act.[154] In addition, the Lieutenant Governor in Council may under the Ownership of Minerals Act order any minerals to vest in the Crown in the right of the province but provision is made for compensation to persons suffering damages.[155]

Coming now to waters beyond low water mark, we saw that under the law of nations inland waters are considered part and parcel of the country surrounding it. At common law, these waters (or as they are

sometimes called, waters intra fauces terrae) have from a very early period been considered to form part of the county they adjoin. Thus Lord Hale in De Jure Maris[156], says:

> That arm or branch of the sea which lies within the fauces terrae where a man may reasonably discerne between shore and shore is, or at least, may be, within the body of a county and therefore within the jurisdiction of the sheriff.

And in R. V. Cunningham[157] it was held that a point in Bristol Channel about ten miles from land was intra fauces terrae and formed part of the County of Glamorgan. This case was followed by the Privy Council in Direct United States Cable Co. v Anglo American Telegraph[158] in 1877 where it was held that Conception Bay was an historic bay within the jurisdiction of Newfoundland.

There is also post-Confederation Canadian authority. The leading case is the Provincial Fisheries Reference[159] where the Supreme Court of Canada was asked inter alia the following question:

> Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate withinthe territorial limits of the several provinces, and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &.. and the other lakes, or the so-called great rivers, such as the St. Lawrence

> River, the Richelieu, the Ottawa, &., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

To this the court replied that the beds of all waters (other than those specifically granted by section 108 of the B.N.A. Act) belonged to the provinces without any distinction between the various classes of waters. We have already seen the similar answer of the Privy Council.[160] 1595 Fishing Cases

Cases dealing even more specifically with the matter are not wanting. Thus in Capital City Canning Company v Anglo Packing Company[161] the plaintiff sought to establish exclusive claims to fisheries granted to him under a statute. The grant was part of the foreshore of the Strait of Juan de Fuca (which is about 15 miles wide and the centre line of which forms the boundary between Canada and the United States), together with the right to take salmon "in the territorial waters adjacent thereto". It was common ground that the waters of the strait were inland waters. Speaking on this point, Duff J.[162] (later Chief Justice of Canada) said:

> It was not disputed, and I assume for the purpose of this application, that this site is intra fauces terrae. The bed of the sea in such places is part of the territorial possessions of the

> Crown; and - except in the case of public harbours, within the disposition of the Provincial Legislature - is comprehended within the terms of the description, "lands of the province held by the Crown".
>
> 163

Again in Mowat v McPhee it appears to have been accepted by the Supreme Court of Canada that the southern half of the Bay of Chaleurs forms part of Restigouche County, and the Supreme Court of New Brunswick held in R. v. Burt[164] that a point in the northern half of the Bay of Fundy within the three mile zone was part of New Brunswick.

It is therefore clear that waters that were considered inland waters at the time of Confederation belong to the provinces. It therefore remains to determine what waters were so considered. As we saw earlier it is clear that the Bays of Chaleurs and Miramichi and, for internal purposes, the Bay of Fundy as well, were territorial at Confederation. It is equally certain that the bays and straits having an opening not exceeding six marine miles were also inland waters as well as all waters where the opening of a bay is reduced to six marine miles. There is also some evidence that Northumberland Strait has always been considered an inland waterway.

As to other bays the matter was perhaps uncertain in 1867, there being no clearly established rule regarding larger bays under international

law, and the common law rule was only the vague one that where a man could discern from shore to shore the bay was within the county. But from the pre-Confederation "hovering Acts" previously discussed, the better view would appear to be that all bays in the Maritime Provinces were inland waters, and so within the provinces. Further, because of this uncertainty the recent Convention on the Territorial Sea and the Contiguous Zone settling the rule of 24 miles for territorial bays should be treated as a mere clarification of a disputed rule. So that all waters in Maritime bays where the distance from shore to shore does not exceed 24 miles should, it is submitted, be treated as inland waters of these provinces.

(3) Territorial Waters

We now turn to provincial rights over territorial waters. On November 14, 1957, Mr. Jean Lesage asked the following question in the House of Commons:[165]

1. Are the waters of the Gulf of St. Lawrence Canadian waters?

2. If so, are the seabed and subsoil of the Gulf of St. Lawrence the property of the Crown (a) in the right of Canada; (b) in the right of Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland; (c) if the answer to (b) is in the affirmative, what part is respectively within each jurisdiction?

To the first part of the question, the Hon. Alvin Hamilton, Minister of Northern Affairs and National Resources replied by expressing his agreement with the statement of Mr. St. Laurent above cited. Of the second part of the question he said:[166]

> According to international law the sea-bed and subsoil under the territorial sea is vested in the littoral state. The law officers of the Crown have advised that the administration and control of the sea-bed and subsoil of the territorial sea is vested in the crown in right of Canada.

The most charitable remark one can make of this opinion is that it must have been hastily prepared. Before Confederation all three provinces had exercised jurisdiction over a zone of territorial waters three miles in width measured from their coasts, bays, and creeks.[167] A reference to the "hovering Acts" of these provinces will suffice to demonstrate this. And these Acts, it will be remembered, were specifically approved by Order of the Queen and Council,[168] it being thereby recognized that the administration and control of these waters were within colonial jurisdiction. Further instances of the provinces' control over the territorial waters can be seen in the Case for Great Britain in the North Atlantic Fisheries Case.[169] That the courts at the time of Confederation also thought the colonies exercised jurisdiction over the three mile belt can be seen from the statement of Hoyles, C. J. of the Supreme Court of Newfoundland in Anglo-American Telegraph Company v Direct

U. S. Cable Company[170] in 1875 where he said:

> I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to headland of the bay... that the local government, representing and exercising within the limits of the Governor's commission, which contains nothing restrictive upon this point, her authority and jurisdiction is, in this respect, the same with the Imperial government... and that, subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have full effect and operation to the full extent of that territorial jurisdiction.

The statement was quoted with approval a few years later in the Queen v Delepine[171] which was concerned with the arrest of a fisherman within the three mile limit.

It would seem, therefore, that the three provinces had jurisdiction over there territorial waters at Confederation. Is there anything in the B. N. A. Act affecting the matter? It is submitted that the clear effect of section 109 of that Act is to retain in the Provinces all pre-existing property rights, except those expressly transferred by section 108, and this submission is abundantly supported by authorities. Here again reference to the Provincial Fisheries Reference[172] may be made. It will be recalled that one of the major questions asked was who owned the beds of every conceivable type of water, including waters "directly and immediately connected with the sea-coast and the waters not so connected". The latter expression

clearly includes territorial waters as can be seen not only from the language used but also from the arguments of counsel for both sides before the Supreme Court of Canada,[173] and for that matter one of the judges, Girouard, J., expressly dealt with territorial waters.[174] So that when the Supreme Court replied that the beds of all waters, without any distinction between the classes of waters belonged to the provinces, they were definitely thinking of territorial waters as well as inland waters.

The Privy Council reply is similar.[175] It said that whatever belonged to the provinces before Confederation continued to be their property unless conveyed under section 108, and we have already seen that the provinces then exercised jurisdiction over territorial waters.

It may be argued, however, that while the provinces exercised jurisdiction over territorial waters, it was not clear that this jurisdiction amounted to a proprietary right, and the statement of the Privy Council in the British Columbia Fisheries Case[176] in 1914 and the Quebec Fisheries Case[177] may be cited in which the Privy Council refused to say anything about the ownership of territorial waters. It should be observed that their Lordships raised no doubt as to the correctness of the Supreme Court's decision that the subsoil in such waters belonged to the provinces rather than the Dominion.

What the Board was reluctant to commit itself upon was whether under the law of nations territorial waters were within the sovereignty of any one state. The reason for this reluctance is difficult to understand. For, as we saw earlier, both the House of Lords (in 1900)[178] and the Privy Council (in 1916)[179] had no difficulty in holding that the beds of territorial waters around British coastal states belonged to those states. This is clearly pointed out by Chief Justice Baxter giving the unanimous opinion of the Supreme Court of New Brunswick in R. v Burt[180] where the question was whether certain persons were rightly convicted of having intoxicating liquor within the jurisdiction of the province, they having been taken on board ship within three miles of the coast. In the course of his judgment Chief Justice Baxter said:[181]

> On the grounds both of property and jurisdiction there can be no doubt that the province of New Brunswick includes the territory in which the offence is alleged to have been committed.

That Great Britain owned the waters off its coast has always been the attitude of the common law. This can be seen in the writings of Coke and Lord Hale though these authorities were speaking of much larger expanses of waters, Englands narrow seas.[182] But it can also be seen in several British Cases during the nineteenth century after the three mile limit had been established, but

before Confederation. Thus in A.G. v. Chambers[183] in 1854, Lord Cranworth said:

> The Crown is clearly..., according to all the authorities entitled to the "littus maris" (i. e. the shore) as well as the soil of the sea adjoining the costs (sic) of England.

The ownership of the three mile zone by the Crown is also clearly recognized by Lord Wensleydale and to some extent by Lord Cranworth in the Scottish case of Gammel v Lord Advocate[184] decided by the House of Lords in 1859. So too in Whitstable Fishers v Gann[185] in 1861, Earl, C. J. said:

> The soil of the sea-shore to the extent of the three miles from the beach is vested in the Crown...

and on the appeal to the House of Lords, Lord Chelmsford[186] used the following language:

> The three mile limit depends upon a rule of international law, by which every independent State is considered to have territorial property and jurisdiction of a cannon-shot from the shore.

Lord Wensleydale's judgment in the case again indicates his belief that the Crown owned the subsoil under territorial waters. Reference may also be made to R. v. Manner[187] in 1858 where Lord Hale's statement that the King is the owner of the great waste of the sea is cited with approval.

The only authority I have found expressing the view that the territorial waters were not vested in the Crown are dicta by two of the

majority judges in R v Keyn[188] but seven of the thirteen judges were clearly of a contrary opinion. The case turned on the jurisdiction of the Court of Admiralty which was held not to extend to the territorial waters in the absence of statute. The judgments of Brett, Grove and Amphlett, J. J. are replete with authorities showing that the common law has always held that the subsoil of waters adjacent the shores of Great Britain belonged to the Crown.

In addition to these judicial authorities, there were before 1867 clear exercises of property rights by the British Parliament over the three mile zone, and if this sphere, as we have seen, such action is of great importance in settling the law. Thus on August 2, 1858, the Cornwall Submarine Mines Act[189] declared that minerals under the sea beyond low water mark were vented in the Queen in right of her Crown as part of the soil and territorial possessions of the Crown. A number of local Acts collected by Sir Cecil Hurst contain similar exercises of sovereignty.[190] In this connection it is significant that the Federal Government has never seen fit to contest the right of Nova Scotia to regulate the submarine mines of that province. In addition as we have seen, Britain and her colonies have frequently claimed property in sedentary fisheries.

It seems clear, therefore, that at Confederation the Maritime Provinces had a proprietary interest in the belts of territorial waters surrounding them. These waters included all those within three marine miles of low water mark and the lines enclosing territorial bays and possibly Northumberland Strait.

As we saw, however, Canada now claims extensive territorial waters not claimed by the provinces at Confederation, namely the whole of the Gulf of St. Lawrence. The provinces may well have the right to this extended area. For it is because of the position of territory that is undoubtedly owned by the provinces that Canada can assert jurisdiction over it. Further, even if it should be held that the provinces have no claim to the waters in the gulf beyond the three mile zone, they have strong claims to the resources in the bed underlying these waters. But it is best to discuss this matter in connection with provincial rights to the continental shelf.

Something must now be said of the three American Supreme Court cases holding that the resources under the territorial sea are within the jurisdiction of the Federal, and not the state governments.

Paradoxically, a close examination of these cases favours provincial ownership of the subsoil of the three mile belt. The first of these cases,

U. S. v California[191], was decided in 1947. The question was whether the Federal Government or California had paramount rights in and power over submerged land between low water mark and the three mile limit and to take or authorize the taking of oil and gas underneath the land. Despite dicta in Pollard's lessée v O'Hagan[192] and other Supreme Court cases, the court decided in favour of the Federal Government.

There were two main grounds for the decision. The first was that the original colonies had not acquired jurisdiction over the marginal sea at the revolution, there being then no settled interantional custom that each nation owned a three mile belt. While Justice Reed dissented on this point (showing its importance in the case) there is much truth to the holding. Indeed the first official statement by a nation of the three mile rule was made by Jefferson, the American Secretary of State, in 1793.[193] But this situation was entirely different at the time of the Canadian Confederation. The three mile rule was perhaps more firmly established then than it is now, and as we saw the Maritime Provinces exercised jurisdiction over it - a jurisdiction that was immediately continued by the Federal Government.[194]

The second ground of decision in U. S. v California was in effect that the jurisdiction of the National Government over the

marginal sea was necessary for the protection of the nation and that navigation of the sea was a subject on which the nation might enter into and assume treaty obligations. This was in effect a policy decision and the danger of following such decisions in interpreting the B. N.A. Act is forcibly indicated by Lord Hobhouse in Bank of Toronto v Lambe [1887] in the following passage:

> Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may, by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General.

> And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament.

More specifically, it has been pointed out by the Privy Council in the Provincial Fisheries Reference[196] that proprietary rights and legislative powers are wholly separate concepts. The Federal Parliament clearly has power to legislate respecting national defence, navigation and shipping and other matters under section 91 of the B. N. A. Act, and in these matters its authority is paramount.[197] But this gives it no property right. To illustrate: a province might well give a company power to erect installations in its territorial waters, but such a company would also have to obtain permission to do so under the Navigable Waters Protection Act;[198] conversely permission under that Act could not be exercised without provincial grant.[199]

U. S. v California was followed in 1950 by U. S. v Louisiana[200] and U. S. v Texas.[201] The latter case is especially important because Texas joined the Union after the three mile rule was established. But the decision was based on a clause in the instrument admitting Texas to the Union which

provided that Texas joined the Union on an equal "footing" with the original states. It having been held in U. S. v California that the original states had no jurisdiction over the three mile zone at the revolution, Texas was in no better position. The inapplicability of this case to the Canadian situation is immediately evident.

(4) The Continental Shelf

As we have seen, it is now clear that a coastal state exercises sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources. This right is now set forth in the Geneva Convention on the Continental Shelf but it was already firmly established as a customary rule of international law.[202]

We must now examine whether under the B. N. A. Act the Federal or the provincial authorities have the proprietary right to the resources of the continental shelf.

The first point to observe is that the commissions establishing the provinces of New Brunswick and Nova Scotia describe them as including "all the Rights, Members and Appurtenances whatsoever thereto belonging". The commission creating the Province of Prince Edward Island includes "the territories adjacent thereto and which are... dependant thereon", which must be deemed to convey those rights possessed by the island as part of

Nova Scotia. Whatever proprietary rights were given by these words remained in the provinces by virtue of section 109 of the B. N.A. Act.

So far as I am aware, the meaning of "Rights, Members and Appurtenances" has never been judicially examined. But it is significant to note that jurisdiction over the three mile zone was considered to be a colonial right and so was the exploitation of sedentary fisheries adjacent to a colony even beyond the three mile zone. Sedentary fish, such as oysters and chanks, unlike free floating fish are considered as being in effect a resource of the subsoil of the sea and have long been considered to belong to the adjacent coastal state even where the fisheries are beyond three miles from the coast. This can be seen in the following
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passage from Jessup, which as will be seen expresses not only his own view but those of the authoritative Fulton and Vattel. He says:

> Of the coral, chank and pearl fisheries, Fulton says, "they may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil and bed of the sea than the sea itself. This is recognized in muniipal law and international law also recognizes in certain cases a claim to such fisheries when they extend along the soil under the sea beyond the ordinary territorial limit". Vattel asserted that these resources near the shore may be taken advantage of by the littoral state and subjected to its ownership, apparently without regard to the limit of cannon range. "who can

> doubt said Vattel, "that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership?" Apparently the British Government does not doubt it for they have asserted dominion over the Ceylon pearl banks far beyond the three mile limit which they so stoutly uphold. A colonial Act of 1811 authorizes the seizure and condemnation of any boat found within the limits of the pearl banks or hovering near them, and the anchoring of vessels in the vicinity so regulated.

It is submitted that the resources of the continental shelf must be held to fall within the description "Rights, Members and Appurtenances" and so belong to the provinces. It is true that the doctrine of the continental shelf has only been developed in recent years, but that is only because it is only recently that techniques have been developed to exploit certain resources. All exploitable resources were considered the property of the littoral state. We have mentioned the sedentary fisheries, but that was not all. For example, the Cornwall Submarine Mines Act of 1858[204] was not limited in its application to the three mile zone, and it is well known that mines in Cumberland extend beyond that limit.[205] Reference should also be made to The Anna[206] decided in 1805. There mud islands more than three miles from the coast that were formed by land floating from the Mississippi were held to be "appendant" to the coast and a "portico" to the mainland. If such islands could be considered as appendant to the mainland

in 1805, it is a mere development to speak in the twentieth century of the continental shelf in the same manner.[207] In short, then, all exploitable submarine resources contiguous to a coastal state have for many years been considered to belong to the coastal state. For this reason it is submitted that the right of a coastal state to the resources of the continental shelf that can be exploited by modern methods is a mere development of a right possessed by the provinces long before Confederation.

Further support for the proposition that the resources of the continental shelf must be considered as an apportenance of the coastal land may be found in the fact that the ownership of these resources by the littoral state in most frequently justified on the theory that they are appurtenant to the mainland.[208] The theory is consistent with the language of the majority of the proclamations made by states declaring their ownership of the resources of the continental shelf.[209] For example, the United States proclamation relates that "the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it".[210] The use of the words "naturally appurtenant" is of great importance; for they are often used to denote the relationship of territ-

orial waters to the littoral state[211] and we saw that the provinces have always been possessed of their territorial waters.

The cases of U. S. v Louisiana[212] and U. S. v Texas[213], deciding that the resources of the continental shelf of the United States are Federal-property, are inapplicable for reasons already discussed in connection with territorial waters.

IV

THE RIGHTS OF THE MARITIME PROVINCES INTER SE

It seems clear from the foregoing that each of the provinces owns the subsoil in its inland waters. These clearly include all bays, and straits where the opposite shores do not exceed six marine miles and it probably includes all bays. However that may be, it is certain that Miramichi Bay and the southern half of the Bay of Chaleurs are inland waters of New Brunswick. Further, New Brunswick and Nova Scotia each own up to a line drawn in the centre of the Bay of Fundy. As we saw the claim that the bay is territorial is open to doubt under the law of nations, but this should make no difference to the claims of the provinces to the subsoil; for as Chief Justice Baxter said in R. v Burt[214], the grant of a greater right would include the less and it is clearly established that the

coastal state owns the subsoil and its resources. The exact line of division between Nova Scotia and New Brunswick in the bay might possibly be drawn by markings on land and conceivably by buoys.[215] Once agreed upon it could legally be settled under section 3 of the British North America Act, 1871[216] which reads as follows:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

A similar arrangement could be made respecting the Strait of Northumberland between New Brunswick, Nova Scotia and Prince Edward Island.

In addition, each of the Maritime provinces owns the whole area extending from its shores to a distance of three marine miles as territorial water. If as has been suggested, the Gulf of St. Lawrence and the continental shelf belongs to the provinces, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Quebec would appear to have a common interest in them. What portion each of the provinces should have should perhaps be settled on an equitable basis at a Federal-provincial or inter-provincial conference. Once the provinces

gave legislative consent to a division, the Federal Parliament could, it is submitted, settle the boundaries under section 3 of the British North America Act, 1871.

V

POLITICAL AND MORAL CLAIMS OF THE MARITIME PROVINCES

In addition to the legal arguments advanced in this study, the Maritime Provinces have strong political claims to the resources of the subsoil of the sea. In the first place Canada's rights to these resources is based on the contiguity of these provinces to the sea. Again, most of the other provinces have had their boundaries extended by giving them vast portions of Rupert's Land and the Northwest Territories.[217] Alberta,[218] Saskatchewan,[219] and Manitoba were created out of these lands[220] and Quebec,[221] Ontario and Manitoba[222] were vastly extended in 1912. The natural resources originally reserved by the Federal Parliament were transferred to the western provinces in 1930.[223] Compensation for these lands was paid to the Hudson's Bay Company in the early days of Confederation by Canada, then consisting of four provinces, New Brunswick, Nova Scotia, Ontario and Quebec.[224] Ontario and Quebec have been well rewarded for their investment. The extension to their boundaries in 1912 has given them (as the

Federal Government was well aware[225] vast mineral resources, lumber and agricultural land as well as opening up the fisheries of Hudson Bay to these provinces. The Maritime Provinces have derived no benefit from these lands in the cost of which they shared. This has been pointed out on several occasions by Maritime statesmen. For example, Pugsley did so when the boundaries of Ontario and Quebec and Manitoba were extended[226] and Mr. MacLean, the present Minister of Fisheries, voiced similar sentiments in 1957.[227] It seems only equitable that the Maritime Provinces should be repaid for their assistance in building up central and western Canada by being granted any portion of the resources under Canadian territorial waters and the continental shelf that does not belong to them already. Such action is not without precedent. Not long after the American Supreme Court decisions awarding the territorial sea to the Federal Government, Congress in 1953 by the Submerged Lands Act[228] granted to the states ownership and proprietary use of all lands under their navigable waters for a distance of three geographical miles from their coasts. Because of the extension in boundaries granted to other provinces it is urged that lands under the whole of the Gulf of St. Lawrence and the continental shelf should be granted to the provinces

by the sea.

RESPECTFULLY SUBMITTED

Sgd: G. V. La Forest

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75. Moore's Digest, vol. 1.,pp 786; see also Moore's Arbitrations, vol. 4, p 4342.

76. See Fulton, op.cit., at p.624.

77. Proceedings in the North Atlantic Fisheries Arbitration - Case for the British.

78. (1932); 5 M.P.R. 112.

79. (1927) P. 311.

80. See a note by Hugh L. Bellot in (1928) 9 B.Y.I.L. 125.

81. A. G. Can v A. G. Ont. (1937) A. C. 327.

82. See the statutes mentioned below as well as the many statutes listed in the Appendix to the Case for Great Britain in Proceedings in the North Atlantic Fisheries Case. These proceedings also list the steps taken for enforcing these as well as the American protests. See also Moore's Digest, vol. 1, pp. 783 et seq.

83. 6 Wm. IV, c.8.

84. 6 Vict., c. 14.

85. 16 Vict., c. 69.

86. See Proceedings in North Atlantic Fisheries Case - Appendix to the Case for Great Britain.

87. See generally Proceedings in the North Atlantic Fisheries Case; see also Moore's Digest, vol. I, pp 783 et seq.

88. See footnote 52.

89. The King v The Schooner John J. Fallon (1916) 16 Ex. C.R. 332; 55 S.C.R. 348; see also Brierly, op. cit., p. 174; Briggs op.cit. p. 278, Higgins and Colombos, op.cit., p. 75.

90. Higgins and Colombos, p. 75.

91. See Higgins and Colombos, op.cit., p. 76.

92. U.N. Doc. A/Conf. 13/L.52; reprinted in (1958) 52 A.J.I.L. 834, at p. 836.

93. See Brierly, op.cit., p. 174; Higgins and Colombos, op.cit. p. 76.

94. R. v Furuzawa (1930) 42 B.C.R. 548; Higgins and Colombos, op.cit. p. 125; Brierly, op.cit. p. 179; see Hackworth's Digest, pp. 611-2.

95. See Higgins and Colombos, op.cit., p. 125; Brierly, op.cit. p. 179.

96. See Treaty of Washington, 1871, Art. 34 reprinted in Statutes of Canada, 1871, p. cxxi; See also 29 & 30 , Vict., c.67 s. 78. See Brierly, p. 179.

97. Capital City Canning Co. v Anglo British Columbia Packing Co. (1905) 11 B.C.R. 333. N.B.

98. Moore's Digest, vol. I, p. 788.

99. (1927) P. 311.

100. I.C.J. Reports, 1951, p. 116. For a full discussion of the case, see C. H. M. Waldock in (1951) 28 B.Y.I.L. 114.

101. See Brierly, op.cit. at p. 176

102. See the statement by Mr. St. Laurent on July 30, 1956 in Debates of the House of Commons, pp. 6700-3; see also Maxwell Cohen, "International Law and Canadian Practice" in Canadian Jurisprudence, The Civil Law and Common Law of Canada (Ed. by Edward McWhinney).

103. Debates of the House of Commons, Feb. 8, 1949, p. 368.

104. Debates of the House of Commons, Nov. 14, 1957, pp. 1168-9.

105. (1927) p. 311.

106. See Debates of the House of Commons July 25, 1958, at pp. 2680-1.

107. U. N. Doc. A/Conf. 13/L. 55; reprinted in (1958) 52 A.J.I.L. 834, at p. 835.

108. See Waldock, "The Anglo-Norwegian Fisheries Case" in (1951) 28 B.Y.I.L. 114.

109. U. N. Doc. A/Conf. 13/L.55; reprinted in (1958) 52 A.J.I.L. 834, at p. 835.

110. See Brierly, op.cit., p. 188; Oppenheim, op.cit. pp. 461, 462, 487; Briggs, op.cit., PP. 281, 282; see the Final Act of the Hague Codification Conference, League of Nations Doc. 1930, V. 7, p. 15.

111. (1916) 32 T.L.R. 652; 85 L.J.P.C. 222.

112. (1891) 19 Rettie 174.

113. (1900) A.C. 48; See also Fitzhardinge v Purcell (1908) 2 Ch. 139, per Parker J., at p. 166.

114. U. N. Doc. A/Conf. 13/L.52; reprinted in (1958) 52 A.J.I.L. 834.

115. See Brierly, p. 183; Borchard, "Resources of the Continental Shelf" (1946) 40 A.J.I.L. 52; Sir Cecil Hurst, "Whose is the Bed of the Sea" (1923-4) 4 B.Y.I.L. 34;

116. Brierly, op.cit. p. 181.

117. See Hurst, op.cit. (1923-4) 4 B.Y.I.L. 34; Jessup, op.cit., p. 14; Fulton, op.cit. p. 697; Borchard, "Recources of the Continental Shelf" (1946) 40 A.J.I.L. 52; Oppenheim, op.cit., pp. 628-631.

118. Among the many articles on the continental shelf, see Borchard, "Resources of the Continental Shelf" (1946) 40 A.J.I.L. 52; Vallat, "The Continental Shelf" (1946) 23 B.Y.I.L. 333; Lauterpacht, "Sovereignty over Submarine Areas" (1950), 27 B.Y.I.L. 376; For short accounts, see Brierly, op.cit, pp. 180-5; Oppenheim, op.cit., pp 631-635. See also Young, "The Legal Status of the Submarine Areas beneath the High Seas" (1951) 45 A.J.I.L. 225.

119. See, for example, Brierly, op.cit., p. 181.

120. See Young, "The Legal Status of the Submarine Areas beneath the High Seas" (1951) 45 A.J.I.L. 225; Lauterpacht (1950) 27 B.Y.I.L. 376.

121. Debates of the House of Commons, (1957) p. 1770, per James Sinclair, then Minister of Fisheries.

122. The Submarine Areas of the Gulf of Paria (Annexation) Order, 1942. B.T.S. No. 10 (1942). See Lauterpacht, op.cit. (1950) 27 B.Y.I.L. 376 and Vallat, op.cit., (1946) 23 B.Y.I.L.; pp 334-6.

123. 10 Fed. Reg. 12303. The proclamation is reproduced in (1946) 40 A.J.I.L. Suppl.; pp. 45-46 and in Briggs, op.cit., pp. 378-9.

124. See Brierly, op.cit., p. 184; Lauterpacht, op.cit., (1950) 27 B.Y.I.L. 376; Young, op.cit., (1951) 45 A.J.I.L. 225.

125. Young, op.cit. (1951) 45 A.J.I.L. 225, Oppenheim, op.cit., pp. 631-2

126. See Brierly, op.cit., p. 183; Oppenheim, op.cit., 632-3; Borchard, op.cit., (1946) 40 A.J.I.L. 53.

127. Lauterpacht, op.cit., (1950) 27 B.Y.I.L. 376; Oppenheim, op.cit., pp. 631-5; Brierly, op.cit., pp. 183-4; Borchard, op.cit., (1946) 40 A.J.I.L. 53; Young, op.cit., (1951) 45 A.J.Y.L. 225.

128. U. N. Doc. A/Conf.13/L.55, reprinted in (1958) 52 A.J.I.L. 858.

129. Ibid.

130. 30 & 31 Vict., c. 3, ss. 7, 91 (9), (10), (12), (13), 92 (5), (13), (16), 108-109, 117-119, Sch. 3.

131. (1898) A.C. 700.

132. See Moore's Arbitrations, vol. 1, pp. 33, 50.

133. Ibid. pp. 34, 51.

134. Can. Sess. Pap., 1883, No. 70.

135. (1846) 5 Moo. P. C. 259; 13 E. R. 489.

136. Moore's Arbitrations, vol. 1, p. 1.

137. This is discussed in Moore's arbitrations, vol. 1, c. 1; see also Ganong's New Brunswick Boundaries.

138. Moore's Arbitrations, vol. 1, p. 1., pp. 61-3.

139. United States Treaty Series No. 551.

140. Reproduced in an appendix to R.S.N.B. 1952, Vol. IV, p. 5.

141. Can. Sess. Pap. 1883, No. 70, p. 47; see for a more accurate reproduction: Collections of the New Brunswick Historical Society, No. 6, pp. 394-5.

142. This description was supplied by officials of the Department of the Attorney General of Nova Scotia.

143. (1851) 44 & 45, Vict., c. 63.

144. See Moore's Arbitrations, vol. 1, p. 45.

145. See Doe d. Fry v Hill (1853) 7 N.B.R. 587; The Queen v Taylor (1862) 10 N.B.R. 242.

146. British North America Act, 1867, s. 109; Provincial Fisheries Reference (1895) 26 S.C.R. 444; (1898) A.C.700.

147. British North America Act. 1867, s. 108, Sch. 3; Holman v Green (1881) 6 S.C.R. 707.

148. Lee v Arthurs (1919) 46 N.B.R. 185, 482; Lee v Logan (1919) 46 N.B.R. 502; Turnbull v Saunders (1921) 48 N. B. R. 502.

149. A. G. v Morgan (1891) 1 Ch. 432.

150. Mining Act, R.S.N.B., 1952, c. 146 ss 8 (3), 1 (o), (p); Oil and Natural Gas Act, R.S.N.B., 1952, c. 162, ss. 2, 1 (a); Petroleum and Natural Gas Act, R.S.N.S., 1954, c. 215, ss.2, 1 (b); The Oil and Minerals Act, R.S.P.E.I., 1951, c. 103, ss. 29 (1) (a) (b).

151. Lands and Forests Act, R.S.N.S., 1954, c. 145, ss. 18, 19; The Oil and Minerals Act, R.S.P.E.I., 1951, c. 103, ss.28, 1(c).

152. Mining Act, s. 8 (4) as enacted by 1954, c. 60, s. 4; see also s. 8 (5) as enacted by 1955, c. 61, s. 3.

153. See a discussion of this in Gesner v Gas Co. (1853) 2 N.S.R. 72.

154. R.S.N.B. 1952, c. 146.

155. An Act respecting the Ownership of Minerals, 1953, c.10.

156. Pt. 1, c. 4; see also Hurst, "The Territoriality of Bays" in (1922-3) 3 B.Y.I.L. 42 and the authorities there collected.

157. (1859) Bell's C. C. 72; 169 E.R. 1171.

158. (1877) 2 A. C. 394

159. (1895) 26 S.C.R. 444.

160. (1898) A. C. 700.

161. (1905) 11 B.C.R. 333.

162. Ibid. at p. 339.

163. (1880) 5 S.C.R. 67.

164. (1932) 5 M.P.R. 112.

165. Debates of the House of Commons, 1957-58, pp. 1168-9.

166. Ibid.

167. (1836) 6 Wm. IV, c.8 (N.S.); (1843) 6 Vict., c. 14 (P.E.I.); (1853) 16 Vict., c. 69 (N.B.)

168. Proceedings in the North Atlantic Fisheries Case - Case for the British.

169. Ibid.

170. (1875) Nfld. L. R. 28, at p. 33.

171. (1889) 7 Nfld. L. R. 378, at. p. 385.

172. (1895) 26 S.C.R. 444.

173. Ibid, at pp. 458-9, 490, 491, 510.

174, Ibid, at pp. 569 et seq.

175. (1898) A.C. 700.

176. (1914) A.C. 153

177. (1921) 1 A. C. 413.

178. Lord Advocate v Wemyss (1900) A. C. 48.

179. Secretary of State for India v Chelikani Rama Rao (1916) 32 T.L.R. 652; 85 L.J.P.C. 222.

180. (1932) 5 M.P.R. 112.

181. Ibid, at p.119. See also Re Quebec Fisheries (1917) 35 D.L.R. 1.

182. See Co. Litt., s. 439; Hale, De Jure Maris, c. 6, p.31; The early authorities are collected in R v Keyn (1876) 2 Ex. 63, esp. Lindley, L. J. and Brett, J.A. and in Hurst, "Whose is the Bed of the Sea" (1923-4) 4 B.Y.I.L. 34.

183. (1854) 4 De G.M. & G. 206, at p. 213; 43 E. R. 486, at p. 489.

184. (1859) 3 Macq. 419.

185. (1861) 11 C.B. (N.S.) 387; (1861) 142 E.R. 847.

186. (1865) 11 H. of L. 192, at p. 217; see also at p. 219; 11 E.R. 1305, at p. 1315; see also at p. 1316.

187. (1858) 6 W. R. 804.

188. (1876) 2 Ex. 63.

189. (1858) 21 & 22 Vict., c. 109.

190. Hurst, "Whose is the Bed of the Sea?" (1923-4) 4 B.Y.I.L. 34, at p. 37, n. 2. See the Norfolk Estuary Act 9 & 10 Vict., c. CCCL XXX VIII and Lincolnshire Estuary Act 14 & 15 Vict., c. CXXXVI.

191. (1947) 332 U. S. 19.

192. 3 How. 212; 15 U.S. 391

193. See Balch "International Arbitrations" (1915) 15 Col. L.R. 662; Jessup, op. cit. p. 7.

194. See (1868) 31 Vict., c. 61 (Can.)

195. (1887) 12 A.C. 575, at p. 587

196. (1898) A. C. 700.

197. See, inter alia, A. G. for Alberta v A. G. for Canada (1943) A. C. 356.

198. R. S. C., 1952, c. 193.

199. Irving Oil Co. Ltd. v Rover Shipping Co. (1935) 36 M.P.R. 180.

200. (1950) 339 U. S. 699.

201. (1950) 339 U. S. 707.

202. U. N. Doc. A/Conf. 13/L.55; reprinted in (1958) 52 A.J.I.L. 858; see Article 2.

203. See Jessup, op.cit., at p. 14; see also Fulton, op.cit., at pp. 367-8. Borchard, op.cit., (1946) 40 A.J.I.L. 52; Hurst, op.cit., (1923-4) 4 B.Y.I.L. 34; Vattel, Le Droit des Gens, Lib. I, c. XXIII. See Oppenheim, op.cit. pp. 631-5; Young in (1951) 45 A.J.I.L. 225.

204. 21 & 22 Vict., c. 109.

205. See Brierly, op.cit., p. 181.

206. (1805) 5 C. Rob. 373; 165 E. R. 809.

207. See Young, op.cit., (1951) A.J.I.L. 225.

208. See Borchard, "Resources of the Continental Shelf" in (1946) 40 A.J.I.L. 52; Young, "The Legal Status of the Submarine Areas beneath the High Seas" in (1951) 45 A.J.I.L. 225; Lauterpacht, "Sovereignty over Submarine Areas" in (1950) 27 B.Y.I.L. 376; Oppenheim, op.cit. pp. 631-635.

209. See Young, "The Legal Status of Submarine Areas Beneath the High Seas" in (1951) 45 A.J.I.L. 225.

210. The proclamation is reproduced in (1946) 40 A.J.I.L. 45.

211. See for example Young, op.cit., (1951) A.J.I.L. 225, at p. 231, esp. n. 18.

212. (1950) 339 U. S. 699.

213. (1950) 339 U. S. 707.

214. (1932) 5 M. P. R. 112.

215. Boggs, "Delimitation of the Seaward Areas under National Jurisdiction" (1951) 45 A.J.I.L. 240.

216. 34 - 35 Vict., c. 28, s. 3.

217. The Alberta Act (1905) 4 & 5 Edw. VII, c. 3. (Can.)

218. The Saskatchewan Act (1905) 4 & 5 Edw. VII, c.42. (Can.)