1967

*Mar. 8, 9, 10, 13, 14, 15
Nov. 7

IN THE MATTER OF A REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL CONCERNING THE OWNERSHIP OF AND JURISDICTION OVER OFFSHORE MINERAL RIGHTS AS SET OUT IN ORDER IN COUNCIL P.C. 1965-750 DATED APRIL 26, 1965.

Constitutional law—Offshore mineral rights—Whether federal or provincial property—Territorial Sea and Fishing Zones Act, 1964 (Can.), c. 22—B.N.A. Act, 1871—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

The Governor General in Council, pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259, has requested this Court to give its opinion on questions concerning the respective proprietary rights and legislative jurisdiction of Canada and British Columbia in relation to certain lands adjacent to the coast line of that Province. [These questions are cited in full at the beginning of the joint opinion delivered by the Court]. Only Quebec, Manitoba, Saskatchewan and Alberta were not represented on this reference. The Attorney General for Canada submitted that the answer to all the questions should be "Canada". The province of British Columbia, whose position was supported by the other provinces, submitted that it possesses exclusive proprietary rights and sole legislative jurisdiction in relation to the lands in question and enjoys the sole right to exploration and exploitation within the limits defined by the terms of reference.

Held: All questions were answered in favour of Canada.

*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

As to the Territorial Sea.

The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands.

It is the sovereign state of Canada that has the right to explore and exploit these lands.

Canada has exclusive legislative jurisdiction in respect of these lands either under s. 91(1)(*a*) of the *B.N.A. Act* or under the residual power in s. 91. British Columbia has no legislative jurisdiction since the lands in question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province. Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada". The mineral resources of these lands are of concern to Canada as a whole and go beyond local or provincial concern or interests.

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Canada is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

As to the Continental Shelf.

The rights now recognized by international law to explore and exploit the natural resources of the continental shelf do not involve any extension of the territorial sea. The superjacent waters continue to be recognized as high seas. There is no historical, legal or constitutional basis upon which the province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf. There are two reasons why British Columbia lacks these rights: (i) the continental shelf is outside the boundaries of British Columbia, and (ii) Canada is the sovereign state which will be recognized by international law as having the rights stated in the 1958 Geneva Convention, and it is Canada that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by that convention.

Droit constitutionnel—Droits minéraux au large des côtes—Propriété fédérale ou provinciale—Loi sur la Mer territoriale et les zones de pêche, 1964 (Can.), c. 22—Loi de l'Amérique du Nord britannique, 1871—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 55.

Conformément à l'art. 55 de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259, le Gouverneur Général en Conseil a demandé à cette Cour de lui donner son opinion sur des questions concernant les droits de propriété respectivement du Canada et de la Colombie-Britannique ainsi que leur juridiction législative en regard de certains terrains adja-

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

cents au littoral de cette province. [Ces questions sont citées au long au commencement de l'opinion collective qui a été rendue par la Cour]. Seules les provinces de Québec, du Manitoba, de la Saskatchewan et de l'Alberta n'ont pas été représentées à l'audition. Le procureur général du Canada a soutenu que la réponse à toutes les questions devait être «Canada». La province de la Colombie-Britannique, dont la position est supportée par les autres provinces, a soutenu qu'elle possède des droits de propriété exclusifs et la juridiction législative exclusive en regard de ces terrains et qu'elle jouit du droit exclusif d'explorer et d'exploiter dans les limites définies par les termes des questions déférées.

Arrêt: Les réponses à toutes les questions doivent être en faveur du Canada.

Quant à la mer territoriale

L'état souverain qui a la propriété du lit de la mer territoriale adjacent à la Colombie-Britannique est le Canada. A aucun moment de son existence, soit comme colonie soit comme province, la Colombie-Britannique a-t-elle eu la propriété de ces terrains.

C'est l'état souverain du Canada qui a le droit d'explorer et d'exploiter ces terrains.

Le Canada a la juridiction législative exclusive en regard de ces terrains, soit en vertu de l'art. 91(1)(*a*) de l'*Acte de l'Amérique du Nord britannique* ou en vertu du pouvoir résiduaire dans l'art. 91. La Colombie-Britannique n'a pas la juridiction législative puisque les terrains en question sont au-delà de ses frontières. Les terrains sous la mer territoriale ne tombent sous aucun des sujets énumérés à l'art. 92 puisqu'ils ne sont pas situés dans la province. La juridiction législative à l'égard de ces terrains doit, en conséquence, appartenir exclusivement au Canada parce que la matière n'est pas une de celles tombant dans les catégories de sujets attribués exclusivement aux législatures des provinces dans le sens des mots que l'on trouve au début de l'art. 91 et que cette matière peut, en conséquence, être considérée avec raison comme étant une matière affectant le Canada généralement et tombant sous l'expression «la paix, l'ordre et le bon gouvernement du Canada». Les ressources minérales de ces terrains sont l'affaire du Canada entier et vont au-delà des intérêts purement locaux ou provinciaux.

De plus, les droits dans la mer territoriale proviennent du droit international et doivent être reconnus par les autres états souverains. Le Canada est un état souverain reconnu par le droit international et conséquemment a la compétence de passer des ententes avec les autres états concernant les droits dans la mer territoriale.

Quant au plateau continental

Les droits maintenant reconnus par le droit international d'explorer et d'exploiter les ressources naturelles du plateau continental ne comportent pas une extension de la mer territoriale. Les eaux surjacentes continuent d'être reconnues comme étant la haute mer. La province de la Colombie-Britannique ne peut s'appuyer sur aucune base historique, légale ou constitutionnelle pour réclamer le droit d'explorer et d'exploiter, ou pour réclamer la juridiction législative sur les

ressources du plateau continental. Il y a deux raisons pour lesquelles la Colombie-Britannique ne peut pas avoir ces droits: (i) Le plateau continental est au-delà des frontières de la Colombie-Britannique et (ii) le Canada est l'état souverain qui sera reconnu par le droit international comme ayant les droits définis à la Convention de Genève de 1958, et c'est le Canada qui devra repousser les réclamations des autres membres de la communauté internationale pour toute violation des obligations et des responsabilités imposées par cette convention.

Son Excellence le Gouverneur Général en Conseil a déféré à la Cour suprême du Canada, conformément aux pouvoirs conférés par l'art. 55 de la *Loi sur la Cour suprême,* S.R.C. 1952, c. 259, pour audition et examen, les questions citées au long au commencement de l'opinion collective qui a été rendue par cette Cour.

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act,* R.S.C. 1952, c. 259, to the Supreme Court of Canada for hearing and consideration of the questions cited in full at the beginning of the joint opinion delivered by this Court.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., D. S. Maxwell, Q.C., Marguerite E. Ritchie, Q.C., and *J. R. Houston,* for the Attorney General of Canada.

W. G. Burke-Robertson, Q.C., A. W. Hobbs, M. H. Smith, for the Attorney General of British Columbia.

F. W. Callaghan, Q.C., and *A.E. Charlton,* for the Attorney General of Ontario.

J. A. Y. Macdonald, Q.C., and *Graham D. Walker,* for the Attorney General of Nova Scotia.

A. W. Matheson, Q.C., for the Attorney General of Prince Edward Island.

Keith Eaton and *G. V. Laforest,* for the Attorney General of New Brunswick.

Hazen Hansard, Q.C., for the Attorney General of Newfoundland

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

THE JOINT OPINION OF THE COURT:—By Order in Council P.C. 1965-750 of April 26, 1965, the Governor in Council referred the following questions to this Court for hearing and consideration:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(*a*) Are the said lands the property of Canada or British Columbia?

(*b*) Has Canada or British Columbia the right to explore and exploit the said lands?

(*c*) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?

2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

(*a*) Has Canada or British Columbia the right to explore and exploit the said mineral and other natural resources?

(*b*) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?

Section 3 of the *Territorial Sea and Fishing Zones Act*, 1964 (Can.), c. 22, reads as follows:

3. (1) Subject to any exceptions under section 5, the territorial sea of Canada comprises those areas of the sea having, as their inner limits, the baselines described in section 5 and, as their outer limits, lines measured seaward and equidistant from such baselines so that each point of the outer limit line of the territorial sea is distant three nautical miles from the nearest point of the baseline.

(2) The internal waters of Canada include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada.

All the provinces of Canada, with the exception of Quebec, Manitoba, Saskatchewan and Alberta were represented on this Reference. Argument was heard from their counsel, who all supported the position taken by the Province of British Columbia. The Attorney General of Canada submitted that the answer to all the questions should be "Canada". British Columbia submitted it possesses exclusive proprietary rights and sole legislative jurisdiction in relation to the lands in question and enjoys the sole right to exploration and exploitation within the limits defined by the terms of reference.

Historical Outline

For some years before 1849, the Hudson's Bay Company carried on trading activities in various parts of the land area now known as British Columbia but it was not until July 16, 1849, that a Civil Government was established by the Queen by the appointment of Richard Blanshard as Governor and Commander-in-Chief of the Colony of Vancouver's Island. In the same month of the same year, the Imperial Parliament enacted a statute to provide for the administration of justice in Vancouver's Island. This statute is to be found in the Revised Statutes of British Columbia, 1911, vol. IV, p. 115, published in 1913.

On January 13, 1849, the Crown granted Vancouver's Island to the Hudson's Bay Company. On April 3, 1867, the Company reconveyed to the Crown whatever lands it had not disposed of.

On August 2, 1858, an Act was passed by the Imperial Parliament "to provide for the Government of British Columbia", that is, the mainland colony. Section 1 of this enactment defines the western boundary of the colony as "the Pacific Ocean".

On November 19, 1858, a proclamation by the then Governor, Sir James Douglas, introduced into the colony of British Columbia the law of England as of November 19, 1858, (Vancouver Island and British Columbia Statutes, 1858-1871).

On December 2, 1858, Sir James Douglas issued a proclamation making it lawful for the Governor of the colony

> by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony;

and providing that

> every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the land therein described. (Vancouver Island and British Columbia Statutes 1858-1871)

On February 14, 1859, Sir James Douglas issued a proclamation the first paragraph of which read as follows:

> 1. All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee. (Vancouver Island and British Columbia Statutes 1858-1871)

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

On July 28, 1863, the Imperial Parliament passed an Act to define the boundaries of the colony of British Columbia and to continue an Act to provide for the government of the said colony. Section 3 of this enactment again defines the western boundary of the colony as "the Pacific Ocean". (Revised Statutes of British Columbia, 1911, vol. IV, p. 266.)

On August 6, 1866, the Imperial Parliament passed an Act for the union of the colony of Vancouver Island with the colony of British Columbia. Again, the western boundary of British Columbia was defined in the same way. With the proclamation of this Act by the Governor of both colonies on November 19, 1866, the boundaries of British Columbia as we now know them came into being; no changes were made at the time of Confederation. (Revised Statutes of British Columbia, 1911, vol. IV, p. 273).

In 1866, when the present boundaries of British Columbia were established, the Crown in the right of the Colony owned in fee all the unalienated land in British Columbia and all the mines and minerals therein. This was the opinion of the Privy Council in *Attorney General of British Columbia v. The Attorney General of Canada*[1], where Lord Watson, in giving judgment at p. 301, used the following language:

> The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union.

In *Attorney General of British Columbia v. Pacific Railway* Co.[2], Sir Arthur Wilson, in giving the judgment of the Privy Council, at p. 208, makes the following statement:

> Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The *British North America Act* passed in 1867 contemplated the possibility of British Columbia being admitted into the Union. Section 146 of that Act reads as follows:

> 146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces,

[1] (1889), 14 App. Cas. 295. [2] [1906] A.C. 204.

or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

The Terms of Union whereby the Colony of British Columbia was admitted into and became part of the Dominion of Canada became effective on July 20, 1871. Paragraph 10 of the Terms of Union made the provisions of the *British North America Act, 1867,* applicable in the following language:

10. The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia, in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.

Section 109 of the *British North America Act, 1867* was thus made applicable to British Columbia. That section reads as follows:

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.

The Privy Council interpreted the above section and has held that whatever Proprietary Rights were vested in the Provinces at the date of Confederation remain so vested unless by the express provisions of the Act transferred to the Dominion: *Attorney General of the Dominion of Canada v. The Attorney General for the Provinces of Ontario, Quebec and Nova Scotia*[1].

An example of the express transfers referred to above is contained in s. 108 of the Act, which provided that "The Public Works and Property of each Province enumerated in the Third Schedule to this Act, shall be the Property of Canada."

[1] [1898] A.C. 700.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

The judgment of Chief Justice Rinfret in *Attorney General of Canada v. Higbie et al.*[1], is to like effect:

> Up to the time when British Columbia entered Confederation the title to public lands was in the Crown, and the latter's prerogative in respect thereof was in full effect. The Crown lands remained vested in His Majesty in right of the Province and His Royal prerogative to deal therewith remained unaltered, subject to any provincial statutory provisions binding the Crown, of which there were none.

This historical survey shows that:

1. Before Confederation all unalienated lands in British Columbia including minerals belonged to the Crown in right of the colony of British Columbia;
2. After union with Canada such lands remained vested in the Crown in right of the Province of British Columbia.

But it leaves untouched the problem that we have to face—whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation.

QUESTION 1—The Territorial Sea

It will be noted that Question 1(a) asks whether the lands are the "property" of Canada or British Columbia. The word "property" is susceptible of two meanings here. Canada says that it means rights recognized by international law as described in the Geneva Convention of 1958. The alternative meaning is property in the common law sense, i.e., ownership. British Columbia can only succeed on this branch of the case if it is found that the solum was situate in British Columbia in 1871 at the time of British Columbia's entry into Confederation. This is the whole purpose of the historical survey set out in the British Columbia factum. British Columbia takes the position that the Province of British Columbia included the territorial sea in 1871. Canada, on the other hand, argues that in 1871 at the time of British Columbia's entry into the Union, land below the low-water mark was regarded at common law as being outside the realm; that it was not part of the Colony of British Columbia in 1871, and that at, or following Union, it did not become part of the Province of British Columbia.

[1] [1945] S.C.R. 385 at 409, 3 D.L.R. 1.

The *British North America Act 1871*, 34-35 Vict., c. 28, makes provision in s. 2 for the establishment by the Parliament of Canada of new provinces. By s. 3 it provides for the alteration of the limits of the provinces in the following terms:

> 3. 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.

There has never been any alteration of the limits of the Province of British Columbia pursuant to this section and there is no provision for extending the limits in any other way. The history of the province affords no assistance in settling the problem whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation. Section 109 of the *British North America Act* 1867 affords no assistance in the solution of this problem. Therefore, to succeed on this Reference, British Columbia must show that the territorial sea was, in 1871, part of the territory of British Columbia.

The question was raised in the Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*[1], but it was left unanswered at p. 174:

> In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league... Their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low-water mark to what is known as the three-mile limit, because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries, and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land. They desire, however, to point out that the three-mile limit is something very different from the narrow seas limit discussed by the older authorities such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it... Until then the conflict of judicial opinion which arose in *R. v. Keyn*, 2 Ex. D., 63, is not likely to

[1] [1914] A.C. 153 at 174.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low-water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn C.J., in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

The question was again raised in *Attorney General for Canada v. Attorney General for the Province of Quebec*[1], but was left unanswered at p. 431:

> The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

The question came up again in *Re Dominion Coal Company Limited*[2]. That case had to do with the right of the County of Cape Breton to assess for municipal taxation under-sea coal workings of the company. Part of these workings were under inland waters and therefore within the County of Cape Breton and assessable by it. (There was no evidence that these workings formed part of a public harbour within the Third Schedule (s. 108) of the *British North America Act* so as to involve the Federal Crown Proprietary rights.) Other workings carried on under Spanish Bay were held not to be under inland waters. They were, therefore, outside the municipality and not subject to assessment by that authority. Currie J. dissented on this point and would have held that this part of the operations which was under Spanish Bay was also under inland waters and consequently within the county.

The ratio of the judgment was confined within the narrow limits that we have stated. There was, however, a wider discussion in the reasons of MacDonald J. and Currie J. which dealt with the issues with which we are concerned. MacDonald J. stated these issues, including the effect of the decision in *Reg. v. Keyn*[3] and the effect of the

[1] [1921] 1 A.C. 413 at 431.
[2] (1963), 40 D.L.R. (2d) 593, 48 M.P.R. 174.
[3] (1876), 2 Ex. D. 63.

enactment of the *Territorial Waters Jurisdiction Act* 1878, c. 73. He regarded *Reg. v. Keyn* as settling the common law rule that the territory of the realm ends at low-water mark and that territorial waters within three miles of this limit are not within the body of adjacent counties or of the realm (p. 629). The *Territorial Waters Jurisdiction Act* 1878, he said, was directed to redefining criminal jurisdiction as to offences in territorial waters and did not purport to affect, nor did it affect, the juridical character of those waters as being outside the territorial limits of the realm and the adjoining counties or confer property rights therein (p. 630). But he was careful to define the problem at p. 626 in these terms:

> Basically the problem is whether one or both of the submarine workings can be said to be within the limits of the municipality.

And again at p. 632:

> Accordingly this Court should refuse to be drawn unnecessarily into a pronouncement of such a nature as the proprietary interest in the maritime belt. Moreover, the *Assessment Act* in any case does not purport, expressly or by necessary implication, to bring such beds within the territorial limits of the county defined in the Order in Council of 1824, nor to authorize taxation of the property of others situate therein.

Currie J. also had an obiter opinion:

> Prior to Confederation, Nova Scotia exercised jurisdiction over territorial waters three miles in width measured from its coasts, bays and rivers, and under s. 109 of the *B.N.A. Act,* all property rights held by Nova Scotia before Confederation were retained. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act.*

We have already stated the obiter opinion of MacDonald J. delivered in the *Dominion Coal* case upon the effect of *Reg. v. Keyn.* This case was argued before the Court of Crown Cases Reserved and the reported judgments are lengthy and diverse. The facts were that the Commander of a foreign ship, the *Franconia,* was indicted for manslaughter before the Central Criminal Court arising from the loss of life on a British ship which was sunk by the *Franconia* within three miles of the Port of Dover. The accused was a German national and his ship was on a voyage to a foreign country and was merely passing through English territorial waters at the time of collision. The accused set up a plea of jurisdiction, saying that as

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

the offence was committed out of the United Kingdom by a foreigner on board a foreign ship, it was not within the jurisdiction of the English Criminal Courts.

The English Criminal Courts would have had jurisdiction if the act had occurred within the body of a county of England. The question whether the territorial sea was within the body of a county was, therefore, directly in issue. If it had been within the body of the county, the Court of Oyer and Terminer would have had jurisdiction. The majority decision of the court was that the territory of England ends at low-water mark. There was, therefore, no jurisdiction in the Court of Oyer and Terminer. The court also held that the case did not fall within the historical jurisdiction of the Lord High Admiral. That court would have had jurisdiction if the accused had been a British national. The jurisdiction of the Admiral, which begins at low-water mark, did not extend to foreign nationals on foreign ships.

The lengthy reasons of the majority are summarized on the branch of the case in which we are particularly interested in the brief judgment of Lush J., which we quote in full:

> I have already announced that, although I had prepared a separate judgment, I did not feel it necessary to deliver it, because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons upon which those conclusions are founded. I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the

Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament.

As a result of this decision, Parliament enacted the *Territorial Waters Jurisdiction Act* 1878, 41-42 Vict., c. 73. This Act declares that all offences committed on the open sea within one marine league of the coast of any part of Her Majesty's Dominions to be within the jurisdiction of the Admiral. The Act did no more than deal with what was regarded as a gap in the Admiral's jurisdiction. It did not enlarge the realm of England, nor did it purport to deal with the juridical character of British territorial waters and the sea-bed beneath them.

We have to take it, therefore, that even after the enactment of the *Territorial Waters Jurisdiction Act* the majority opinion in *Reg. v. Keyn* that the territory of England ends at low-water mark was undisturbed.

The application of the Act of 1878 is relevant to the problem under consideration here. The Admiral's jurisdiction was made to extend to all offences committed on the open sea within one marine league of the coast of any part of Her Majesty's Dominions. The term "offence" was defined in the Act as "any act of such a nature that it would, if committed within the body of an English county, be punishable on indictment according to the law of England at the time being in force". What would have happened in 1879 if an offence had been committed within one marine league of the coast of British Columbia? Had the case come up in a British Columbia court, the applicable law would not have been the criminal law of Canada but the law of England for the time being in force. If the territory of British Columbia had extended one marine league from low-water mark, the offence would have occurred within Canada and Canadian criminal law ought to have been applicable, but by the express terms of the *Territorial Waters Jurisdiction Act* it was the law of England that applied. The legislation is inconsistent with any theory that in 1878 the Province of British Columbia possessed as part of its territory the solum of the territorial sea.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

Equally inconsistent with any such theory is early Canadian legislation. The *Customs Act 1867,* 31 Vict., c. 6, s. 83, deals with vessels "hovering (in British waters) within one league of the coasts or shores of Canada".

An *Act respecting Fishing by Foreign Vessels,* 1868, 31 Vict., c. 61, s. 1, empowers the Governor to grant licences to foreign vessels to fish

> in British waters, within three marine miles of any of the coasts, bays, creeks or harbours whatever, of Canada, not included within the limits specified and described in the first article of the convention between His late Majesty King George the Third and the United States of America, made and signed at London on the twentieth day of October, 1818.

In contrast, *An Act to amend The Customs Act,* Statutes of Canada 1928, 18-19 Geo. V., c. 16, s. 1, speaks on two occasions of vessels hovering in "territorial waters of Canada" and proceeds to define for the purposes of the section and s. 207 of the *Customs Act* the territorial waters of Canada in the following terms:

> "Territorial waters of Canada", shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.

Regina v. Keyn was decided in 1876. In the following year it was considered in two reported cases: *Harris v. Franconia*[1] and *Blackpool Pier Co. v. Fylde Union*[2]. In *Harris v. Franconia* there was a motion to set aside an order for the service of a writ on a foreigner residing abroad in respect of a cause of action arising at sea below low-water mark though within three miles of the English coast. The judges were Lord Coleridge C.J., Grove J., and Denman J. These were three minority judges in *Reg. v. Keyn* and they were all of the opinion that that case decided that the territory of England and the sovereignty of the Queen stopped at low-water mark (except where under special circumstances and in special Acts, Parliament had thought fit to extend it).

In the *Blackpool Pier* case Lord Coleridge held that the pier extended 500 feet beyond low-water mark and was therefore beyond the realm of England and was not assessable to that extent for poor rate under the *Poor Law Amendment Act* of 1867. The other judge was Grove J.

[1] (1877), 2 C.P.D. 173, 46 L.J.Q.B. 363.
[2] (1877), 36 L.T. 251, 46 L.J.M.C. 189.

To express our conclusion up to this point, we adopt the summary in Coulson & Forbes on Waters and Land Drainage, 6th ed., 1952, at p. 12:

1. The realm of England where it abuts upon the open sea only extends to low water mark; all beyond is the high sea.

2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.

3. This concession is evidenced by treaty or by long usage.

4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the Legislature.

We do not intend to trace the history of the claims to the territorial sea in International Law. That history is conveniently summarized in the work, published in 1965, by D. P. O'Connell on International Law, vol. I, pp. 523-528. Very wide claims have been made from time to time. In *Attorney General for British Columbia v. Attorney General for Canada*[1], as we have observed, the Privy Council said:

They desire, however, to point out that the three-mile limit is something very different from the narrow seas limit discussed by the older authorities such as Selden and Hale, a principle which may safely be said to be now obsolete.

The logical starting point is now the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which may now be regarded as defining the present state of international law on this subject. We set out Articles 1 to 4(1). (The rest of Article 4 deals with methods of drawing baselines):

Article 1. 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 air space over the territorial sea as well as to its bed and subsoil.

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 4. 1. In localities where the coast line 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.

[1] [1914] A.C. 153.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

This Convention was signed by Canada on April 29, 1959, but not yet ratified. It came into force on September 10, 1964, upon ratification by a sufficient number of nations.

The Convention does not state the width of the territorial sea over which the sovereignty of the state is recognized. A second conference which was held in 1960 was unable to reach any agreement on this subject. The claims of the various states of the world as to the extent of the territorial sea are set out in D. P. O'Connell's International Law, Vol. I, pp. 531-2. Canada claims three nautical miles plus nine nautical miles for fishing. (*Territorial Sea and Fishing Zones Act,* 13 Eliz. II, Statutes of Canada 1964, c. 22, s. 3 (quoted at the beginning of these reasons) and s. 4 as to the extent of the fishing zones.)

We have already said that, in our opinion, in 1871 the Province of British Columbia did not have ownership or property in the territorial sea and that the province has not, since entering into Confederation, acquired such ownership or property. We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the colony rights to which the British Crown was entitled under international law but the historical record of the colony does not disclose any such action.

This brings us to the Conception Bay case, *The Direct United States Cable Company v. The Anglo-American Telegraph Company.*[1] The Supreme Court of Newfoundland had granted an injunction to prevent the appellant, The Direct United States Cable Company, from infringing certain rights which Newfoundland had granted to the respondent company, Anglo-American Telegraph. The appellant had laid a telegraph cable to a buoy more than thirty miles within Conception Bay, which is on the east coast of Newfoundland between two promontories which are slightly more than twenty miles apart. The average width of the Bay is fifteen miles. The distance from the head of the Bay to the two promontories is forty miles on one side and fifty miles on the other. The buoy and cable were more than three miles from the shore of the Bay.

[1] (1877), 2 App. Cas. 394, 46 L.J.P.C. 71.

The appeal was dismissed in the Privy Council and the injunction upheld. This was done for two reasons. First, there was legislation of Newfoundland, 17 Vict., c. 2, which authorized the prohibition of the laying of the cable. Second, there was legislation of the Imperial Legislature, 59 Geo. III, c. 38, which asserted exclusive dominion over the Bay. This legislation had never been questioned by any foreign state and, by 35-36 Vict., c. 45, the Imperial Legislature conferred upon the Legislature of Newfoundland the right to legislate with regard to Conception Bay as part of the territory of Newfoundland. This is the ratio of the case and it does not carry with it any general delegation by the British Crown over the territorial sea surrounding Newfoundland.

Rex v. Burt[1] was concerned with the seizure of a ship carrying a cargo of intoxicating liquor off Chance Harbour in the County of Saint John within approximately one and three-quarter miles from shore. The Appellate Division of the Supreme Court of New Brunswick held that the locus of the seizure was part of the Province of New Brunswick and that the offence, as set forth in the conviction under appeal, was committed within the Province of New Brunswick and within the body of a county.

This case is within the principle of the *Conception Bay* case. It is based upon the fact that

> by the Royal Instructions issued to Governor Carleton upon the separation of what is now the Province of New Brunswick from the Province of Nova Scotia, the southern boundary of the new Province was defined as "a line in the centre of the Bay of Fundy from the River Saint Croix aforesaid to the mouth of the Musquat (Missiquash) River" clearly indicating the claim of Great Britain at that time to the whole of the Bay of Fundy as a portion of her territory.

The place of seizure was therefore within the Province of New Brunswick. As in the *Conception Bay* case, this case did not involve a delegation by the British Crown of its rights in the territorial sea.

In *Capital City Canning and Packing Company, Limited v. Anglo-British Columbia Packing Company, Limited*[2], the British Columbia Court was concerned with a fishing lease granted by the province entitling the plaintiff to erect and operate traps for the purpose of taking salmon on certain foreshore and tidal lands. The defendant also had a similar lease. The decision of Duff J. was that there was no

[1] (1932), 5 M.P.R. 112. [2] (1905), 11 B.C.R. 333, 2 W.L.R. 59.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

right to grant these leases in the province because they did not come within the terms of the enabling legislation, but he did say at p. 339:

> By that clause it is enacted that, " 'Crown lands' shall mean all lands of this Province held by the Crown without incumbrance". The site of the defendant's trap is not, in my opinion, within this definition. 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 this Province held by the Crown". But this ownership of the soil, is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them; and I apprehend that property held under a title so weighted, cannot (in the ordinary meaning of the words or within any signification fairly to be imputed to them as they stand in the clause I am discussing) be said to fall within the qualification expressed by the phrase, "held without incumbrance".

The concession and assumption that the *locus quo* in the case was *intra fauces terrae* is fundamental to the judgment finding that this was Crown property in right of the province. It is no authority for any general statement that the territorial sea was ever within the limits of the Province of British Columbia.

Closely related to these cases is *Reg. v. Cunningham*[1], where the whole of the Bristol Channel was stated to be within the bodies of the Counties of Glamorgan and Somerset. In that case, the crime, which was tried at the Glamorgan Assizes, was committed on board an American ship in the Penarth Roads in Bristol Channel three-quarters of a mile from the coast of Glamorganshire at a spot never left dry by the tide but within one-quarter of a mile from the land, which is left dry by the tide. *The Fagernes*[2] is inconsistent with *Reg. v. Cunningham* as to the status of the Bristol Channel. *The Fagernes* was decided upon the admission by the Attorney General and the acceptance of that admission by the majority of the Court as conclusive that the spot where this collision was alleged to have occurred was not within the limits to which the territorial sovereignty of His Majesty extended. The spot in question was $10\frac{1}{2}$ to 12 miles from the English coast and $7\frac{1}{2}$ or $9\frac{1}{2}$ miles from the Welsh coast.

The Attorney General for British Columbia relied on certain dicta in some mid-19th century cases which are contrary

[1] (1859) Bell's C.C. 72 at 86, 169 E.R. 1171.
[2] [1927] P. 311, 96 L.J.P. 183.

to the majority judgment in *Reg. v. Keyn*. These dicta have all to be taken subject to the caution expressed by the Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*[1] and quoted above.

In *Attorney General v. Chambers*[2], Lord Cranworth said at p. 212-3:

> The Crown is clearly in such a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What then, according to the authorities in our law, is the extent of this *littus maris*?

The point at issue in the case was the ownership of certain coal seams lying under "that part of the Parish of Llanelly which was contiguous to the seashore and particularly under the land known by the name of Old Castle Farm." The actual decision was that in the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is prima facie limited by the line of the medium high tide between the springs and the neaps.

The *Cornwall Submarine Mines Act 1858*, 21-22 Vict., c. 109, is no authority of general application in support of British Columbia's claim of ownership of the territorial waters. The dispute was between the Crown and the Duchy of Cornwall concerning the ownership of mines below low-water mark. The Duchy of Cornwall extends to low-water mark. The mines had been carried out beyond the low-water mark. An arbitrator decided that the mines and minerals below low-water mark belonged to the Crown, on the landward side to the Duchy of Cornwall. The legislation above referred to was enacted to give statutory effect to the award. We adopt the analysis of Cockburn C.J. in the *Keyn* case, at p. 201, as follows:

> This was a bill for the settlement of the question as to the right to particular mines and minerals between the Crown and the duchy, a measure in which both the royal personages particularly concerned and their respective advisers concurred, and in which no other person whatever was interested . . . To whom would it occur that, in passing it, Parliament was asserting the right of the Crown to the bed of the sea over the three-mile distance, instead of settling a dispute as to the specific mines which were in question?

In *Gammell v. Woods and Forest Commissioners*[3], the question was the exclusive right of the Crown to the

[1] [1914] A.C. 153 at 174.
[2] (1854), 4 De G.M. & G. 206, 43 E.R. 486.
[3] (1859), 3 Macq. 419.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

salmon fishery on the coast of Scotland. Lord Wensleydale expressed the following opinion:

> That it would be hardly possible to extend fishing seaward beyond the distance of three miles, which, by the acknowledged law of nations, belongs to the coast of the country—that which is under the dominion of the country by being within cannon range—and so capable of being kept in perpetual possession.

The actual decision in the case was made on the following propositions:

1. The salmon-fishings in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the Crown, and form part of its hereditary revenue.

2. This right of the Crown is not merely a right of fishing for salmon, but "a right to the salmon-fishings around the sea-coast of Scotland".

3. It is not to be regarded simply as an attribute of sovereignty, but rather as a *patrimonium,* a beneficial interest constituting part of the regal hereditary property.

4. Salmon fishings in the open sea around the coast of Scotland may not only become the subject of a royal grant, but they may be feudalized.

5. The assertion that the sea is common to all, and that there can be no appropriation of it, except where it adjoins the shore, is an erroneous assertion.

6. The Statute 7 & 8 Vict., c. 95, recognizes and proceeds on these principles.

In *Gann v. Whitstable Free Fishers*[1], there are similar *dicta* on Crown ownership of the three-mile limit. The plaintiffs, who were the owners of an oyster bed in Whitstable Bay, claimed tolls for anchorage. The plaintiffs claimed as owners of a free fishery within the Manor of Whitstable. They proved their title from 1775 onwards. They were held not to be entitled to these tolls because whatever their grant was, they took subject to the public right of navigation, which included the right to anchor. Again, this case is no authority for any general proposition that, *contrary to Keyn,* the soil of the sea outside the body of a county and within the three-mile limit was vested in the Crown.

Between 1891 and 1916 there were four cases containing judicial *dicta* asserting Crown ownership of the territorial sea. These are: *Lord Advocate v. Clyde*[2]*; Lord Advocate v. Wemyss*[3]*; Lord Fitzhardinge v. Purcell*[4]*; Secretary of State for India v. Rao*[5].

1 (1865), 11 H.L. Cas. 192, 35 L.J.C.P. 29, 11 E.R. 1305.
2 (1891), 19 Rettie, 174 at 177, 183, 29 Sc. L.R. 153.
3 [1900] A.C. 48 at 66.
4 [1908] 2 Ch. 139 at 166, 77 L.J. Ch. 529.
5 (1916), 32 T.L.R. 652 at 653, 85 L.J.P.C. 222.

Lord Advocate v. Clyde dealt with Crown rights in Loch Long. The decision was that the solum of Loch Long was vested in the Crown, the loch being *intra fauces terrae*. The opinion of Lord Justice-Clerk at p. 180 was that it was unnecessary to consider ownership of the solum of the territorial sea. Two judges, however, stated their opinion on this matter to the effect that ownership was in the Crown.

In *Lord Advocate v. Wemyss*, a proprietor of estates adjoining the sea claimed the coal below low-water mark. The decision was in favour of the Crown that baronies of Wemyss, on an interpretation of the grants, included the minerals under the foreshore only. The case also held that the Crown lease granted to the trustees of a minor for the benefit of the minor could not be repudiated after the minor had obtained his majority and had affirmed the lease. Lord Watson's dictum is at p. 60:

> 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.

In *Fitzhardinge v. Purcell*, the defendant claimed the right to hunt for ducks on the foreshore of the River Severn, a tidal and navigable river. He was sued for trespass by the lord of certain manors adjoining the river. The judgment was that the plaintiff had proved his title to the foreshore as part of the manors. The rights of the public were confined to navigation and fishing on the foreshore. Mr. Justice Parker expressed the opinion that "the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown . . ." The manors were in the County of Gloucester. The river was tidal and navigable at this point. The waters were clearly inland waters and not part of the territorial sea.

In the *Indian* case, the dispute was over the ownership of three small islands which had appeared between 1840 and 1860 off the coast of Madras. They were within three miles of the shore. Certain parcels of the land were claimed by two zemindars. The High Court of Madras had awarded these parcels to the zemindars. The Privy Council based

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

its decision upon the following proposition taken from Hale's de Juris Maris:

> The lands in dispute fall under the third category, which is thus dealt with by Hale:—
>
> 3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water.

The reasons of Lord Shaw also quoted with approval all the dicta that we have referred to in the three previous cases and are undoubtedly based on the proposition that the islands were Crown land because located in the territorial sea. This is Hale's proposition. An alternative explanation is given in Oppenheim's International Law, vol. 1, 8th ed., p. 565:

> 234. The natural processes which create alluvions on the shore and banks, and deltas at the mouths of rivers, together with other processes, may lead to the birth of new islands. If they rise on the high seas outside the territorial maritime belt, they belong to no State, and may be acquired through occupation on the part of any State. But if they arise in rivers, lakes, or within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land.

So far, we are of the opinion that the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over the territorial sea following union with Canada.

After 1871, the extent of the jurisdiction of the Province of British Columbia is to be found in the *British North America Act*. The effect of the union was that the former Colony of British Columbia became part of the larger Dominion of Canada. At that date Canada was not a sovereign state.

As late as 1926, the Privy Council decided in *Nadan v. The King*[1] that s. 1025 of the *Criminal Code* of Canada if and so far as it was intended to prevent the King in Council from giving leave to appeal against an order of a

[1] [1926] A.C. 482, 95 L.J.P.C. 114, 28 Cox C.C. 167.

Canadian Court in a criminal case, was invalid. The ratio is contained in the following extract at p. 492 of the report:

> Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters". But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal.

On the other hand, in *Croft v. Dunphy*[1], the Privy Council decided that in order to support Dominion legislation enacted in 1928 against hovering in "Canadian waters" within twelve miles of the Canadian coast, it was unnecessary to argue that the Statute of Westminster had retrospective operation.

> It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy: cf. *Att.-Gen. for Canada v. Cain* (1906) A. C. 542. The *British North America Act* imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not in pari materia.

The rights in the territorial sea formerly asserted by the British Crown in respect of the Colony of British Columbia were after 1871 asserted by the British Crown in respect of the Dominion of Canada. We have already dealt with the *Territorial Waters Jurisdiction Act* of the Imperial Parliament in 1878. To summarize, its effect was that the United Kingdom clearly claimed jurisdiction over a territorial sea in respect of the Dominion of Canada. During the period prior to 1919, Canada had only limited

[1] [1933] A.C. 156, 102 L.J.P.C. 6.

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

rights to legislate in respect of the territorial sea. Legislation of the Dominion Parliament in 1867 and 1868, previously quoted, referred to these waters as "British waters". Not until 1928 did Canadian legislation refer to these waters as the "territorial waters of Canada".

There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931, 22 Geo. V., c. 4. Section 3 of the Statute of Westminster provides in an absolutely clear manner and without any restrictions that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia. Canada signed and implemented by legislation the Pacific Salmon Fisheries Convention and the Pacific Fur Seals Convention, 1957 (Can.), c. 11 and c. 31. The first of these was between Canada and the United States in respect of the salmon fisheries in the Fraser River system, and the second was a convention among the governments of Canada, Japan, the Union of Soviet Socialist Republics and the United States of America.

Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law. The territorial sea now claimed by Canada was defined in the *Territorial Sea and Fishing Zones Act* of 1964 referred to in Question 1 of the Order-in-Council. The effect of that Act, coupled with the Geneva Convention of 1958, is that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada.

The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands. It is the sovereign state of Canada that has the right, as between Canada and British Columbia, to explore and exploit these lands, and Canada has exclusive legislative jurisdiction in respect of them either under s. 91(1)(*a*) of the *British North America Act* or under the residual power in s. 91. British Columbia has no legislative jurisdiction since the lands in

question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province.

Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada".

The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests.

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

Canada is a signatory to the Convention on the Territorial Sea and Contiguous Zone and may become a party to other international treaties and conventions affecting rights in the territorial sea.

We answer Questions 1(a), 1(b) and 1(c) in favour of Canada.

QUESTION 2—The Continental Shelf

International law in relation to the continental shelf is a recent development. Lord Asquith said in the *Abu Dhabi Arbitration*[1] that in the year 1939 it did not exist as a legal doctrine. It was foreshadowed by the agreement between Great Britain and Venezuela—"Treaty Relating to the Submarine Areas of the Gulf of Paria", February 26, 1942,—and the Truman Proclamation of 1945 No. 2667, September 28, 1945, Code of Federal Regulations 12303, 1943-48, Title 3, p. 67. We will deal with these two briefly in order.

Venezuela had annexed certain parts of the submarine areas of the Gulf of Paria. The two states, Great Britain acting on behalf of Trinidad and Tobago, then made the

[1] (1952), 1 Int. & Comp. L.Q. 247

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

above recited agreement. Following the agreement, an Order-in-Council was issued (United Kingdom (Trinidad and Tobago) Submarine Areas of the Gulf of Paria (Annexation)) dated August 6, 1942. The Order-in-Council recites:

> . . . and whereas the Government of the Republic of Venezuela have annexed to Venezuela certain parts of the submarine areas of the Gulf of Paria: and whereas it is expedient that the rest of the submarine area of the Gulf of Paria should be annexed to and form part of His Majesty's dominions and should be attached to the Colony of Trinidad and Tobago for administrative purposes . . .

We set out the Truman Proclamation of 1945 in full:

PRESIDENTIAL PROCLAMATION 2667, SEPTEMBER 28, 1945, WITH RESPECT TO NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF

10 Federal Register 12303(1945)

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by

the United States and the state concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The 1958 Geneva Convention on the Continental Shelf defines the rights that a coastal state may exercise over the continental shelf for the purpose of exploring and exploiting its natural resources. Articles 4 and 5 deal with the obligations and responsibilities which must be assumed. Article 6 deals with the problem of delimiting the boundaries of the shelf when it is adjacent to the territories of two or more states which are opposite or adjacent to each other. We set out Articles 1 to 5.

Article 1. 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 areas adjacent to the coasts of islands.

Article 2. 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 resources, 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 sea-bed 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 sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 3. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 4. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.

Article 5. 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the

1967

RE: OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

The responsibilities of the coastal state under international law set out in Articles 4 and 5 are many and onerous.

This Convention has been signed by Canada but to date has not been ratified. It came into force on June 10, 1964, upon ratification by a sufficient number of states and it defines the present state of international law on these matters. The United States had anticipated the jurisdiction given by this Convention as early as 1953 by the *Outer Continental Shelf Lands Act*, Laws of 83rd Congress, First Session, 1953, ss. 2 and 3.

Sec. 3. Jurisdiction Over Outer Continental Shelf.—

(*a*) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

The United Kingdom enacted the *Continental Shelf Act* in 1964, (Imp.), c. 29. There was similar legislation enacted in New Zealand in the same year (Statutes of New Zealand, 1964, No. 28).

The rights now recognized by international law to explore and exploit the natural resources of the continental shelf do not involve any extension of the territorial sea. The superjacent waters continue to be recognized as high seas.

As with the territorial sea, so with the continental shelf. There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:

(1) The continental shelf is outside the boundaries of British Columbia, and

(2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.

There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.

We answer Questions 2(a) and 2(b) in favour of Canada.

Answers to the questions submitted on the Reference

Our answers to the questions submitted to the Court are, therefore, as follows:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(*a*) Are the said lands the property of Canada or British Columbia?
Answer: Canada.

(*b*) Has Canada or British Columbia the right to explore and exploit the said lands?
Answer: Canada.

(*c*) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?
Answer: Canada.

2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada

1967

OFFSHORE MINERAL RIGHTS OF BRITISH COLUMBIA

referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

(*a*) Has Canada or British Columbia the right to explore and exploit the said mineral and other natural resources?
Answer: Canada.

(*b*) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?
Answer: Canada.

We hereby certify to His Excellency the Governor General in Council that the foregoing are our reasons for the answers to the questions referred herein for hearing and consideration.