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Articles

Rowland J. Harrison*

The Offshore Mineral
Resources Agreement in the
Maritime Provinces

I. Introduction

On February 1, 1977, the Prime Minister of Canada and the Premiers of Nova Scotia, New Brunswick and Prince Edward Island signed a "Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces".¹ The Understanding removes a major impediment to potential development of any offshore petroleum resources of the Maritimes, after nearly ten years of federal-provincial negotiations, and more generally represents a quite unique development in Canadian constitutional relations. At the time of its execution, it was described variously as "a mile-stone in federal-regional relations"² and "federalism at its best".³

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This article is an expanded version of a paper entitled *Jurisdictional and Administrative Arrangements between Canada and the Maritime Provinces for the Development of Offshore Mineral Resources* by the present writer and Mr. J. Gerald Godsoe, Jr., of the Nova Scotia Bar. That paper was prepared for the Office of the Premier of Nova Scotia for presentation by the authors to the Fifth Annual Conference of the New England Governors and the Eastern Canadian Premiers held at Digby, Nova Scotia, June 23 to 26, 1977. Mr. Godsoe is Chairman of the Maritime Provinces Co-ordinating Committee on Offshore Resources to whom Professor Harrison has served as a consultant. The permission of the Office of the Premier and of Mr. Godsoe to develop that paper into this article is gratefully acknowledged. Responsibility for the opinions expressed and any errors is, however, exclusively that of the present writer.

1. Hereafter referred to as "the Understanding."

2. Dr. William Jenkins, then Executive Vice-President of the Atlantic Provinces Economic Council, as quoted in the *Halifax Chronicle-Herald*, February 2, 1977.

3. Premier Alex Campbell of Prince Edward Island, *id.* Premier Richard Hatfield of New Brunswick described the Understanding as "a good and innovative example of how the federal system can be made to work", *id.* Premier Gerald Regan of Nova Scotia commented that "the path of federal-provincial relations will be affected more by the display of flexibility achieved than by the event itself", and described the occasion of signing the Memorandum as "unquestionably the most satisfying day of my career in public life", *id.* The official Joint Communique released by the Parties on the occasion of signing the Memorandum said: "The Memorandum is a significant demonstration of federalism accommodating provincial needs and aspirations in a flexible structure that can work to the greater benefit of all parties."

In summary, the Understanding sets aside the competing claims to jurisdiction by Canada on the one hand and the Provinces on the other; provides that the Federal Parliament and the provincial legislatures will be asked to implement an administrative and management regime by joint legislative action; provides for the joint constitution of a Maritime Offshore Resources Board to issue rights in respect of off-shore mineral resources and to generally oversee their administration and management; and evidences the agreement of the parties that direct revenues — including, for example, royalties, fees, bonuses and rentals — will be shared on the basis of 25 per cent to Canada and 75 per cent to the adjacent province, subject to a regional revenue sharing pool.

Federal-provincial agreements are not, of course, new; there have been many instances where the federal government and the provinces have cooperated in the exercise of their respective constitutional powers. In some cases, the device of delegating the responsibility for administration of the legislation of one level of the federal system to an agency established by the other level has been employed to effectively provide for the implementation of a unified policy by one regulatory authority.⁴ In other cases, the various methods of incorporating legislation by reference have been used⁵ and in yet others, the several legal techniques for implementing federal-provincial agreements have been combined.⁶

In the past, however, in constitutional terms federal-provincial cooperation has been restricted to the exercise of the respective powers of the federal and provincial governments in complementary ways. The various devices through which federal and provincial laws can “interact” — to borrow the expression used by Professor Driedger in his excellent analysis⁷ — have been employed to deal with the hazy interface between federal powers and provincial powers,⁸ or, in effect, to hand over the determination of policy under a particular power from one unit of the federal system to the

4. *The Agricultural Products Marketing Act*, S.C. 1949, c.16, upheld by the Supreme Court in *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; [1952] 4 D.L.R. 146, is an example. See now R.S.C. 1970, c. A-7.

5. *The Importation of Intoxicating Liquors Act*, R.S.C. 1970, c.1-4, is given as an example by E. A. Driedger in *The Interaction of Federal and Provincial Laws* (1976), 54 Can. B. Rev. 695 at 703.

6. A clear example is the *Motor Vehicle Transport Act*, R.S.C. 1970, c. M-14, upheld by the Supreme Court in *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; 68 D.L.R. (2d) 384, as S.C. 1954, c. 59.

7. *Supra*, note 5.

8. The devices employed in the *Agricultural Products Marketing Act*, R.S.C.

other.⁹ But in none of these past cases have the Federal government and the provinces agreed to avoid the judicial resolution of claims that both were making to the same jurisdiction. It is in this aspect that the recent Memorandum of Understanding is so unique. Its implementation, through the ensuing formal agreement and supporting legislation, will apply a technique for the extra-judicial "resolution" of jurisdictional issues that is untested in Canada. The concept of that technique will be discussed in this article.

The technique is derived, at least in concept, from the method employed in Australia to resolve the federal-state dispute there with respect to jurisdiction over offshore petroleum resources. The Canadian Understanding will be compared with the Australian approach which was the subject of an exhaustive analysis by a Select Committee of the Senate of Australia. The merits of the technique will then be assessed. The details of the jurisdictional dispute between Ottawa and the eastern provinces are beyond the scope of the article, and in any event have been analysed elsewhere,¹⁰ but will be summarized briefly in the context of assessing the merits of the Understanding.

II. *An Outline of the Memorandum of Understanding*

The Memorandum of Understanding signed by Canada, Nova Scotia, New Brunswick and Prince Edward Island has three main purposes. First, as recognized in the preamble, the Understanding is concerned to set aside "jurisdictional differences in order to encourage resource exploitation in areas offshore their coasts . . ." Spokesmen for the oil industry had claimed that the dispute over

1970, c.A-7 and the *Motor Vehicle Transport Act*, R.S.C. 1970, c.M-14 were clearly aiming at this objective.

9. Again, the *Motor Vehicle Transport Act*, R.S.C. 1970, c.M-14 might be regarded as an example, albeit one promoted by the problem of determining, at the level of application of particular laws, where the interface between federal and provincial powers lay.

10. See, for example, Cabot Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline* (1975), 7 Ott.L.Rev. 34; George Steven Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law* (1976), 22 McGill L.J. 541; A. Kovach, *An Assessment of the Merits of Newfoundland's Claim to Offshore Mineral Resources* (1975), 23 Chitty's L.J. 18. The most thorough review of all aspects of the jurisdictional dispute is that by K. Beauchamp, M. Crommelin, and A. R. Thompson in *Jurisdictional Problems in Canada's Offshore* (1973), 11 Alta. L. Rev. 431, wherein the authors also advocated a joint solution to the problem somewhat along the lines in fact adopted in the Memorandum of Understanding and, very much to their credit, identified just what would be involved in implementing such a solution.

jurisdiction was hindering exploratory activity off the east coast.¹¹ During the exploration phase of their activities, the industry was able to cope with the competing claims to jurisdiction by the federal government and the provinces by taking permits from the former as well as licences from the latter. In effect, one work programme could be used by the companies to satisfy two obligations. But this means of living with uncertainty as to the validity of one's title could not realistically be carried forward to the production stage when the permittees and licensees would have to convert their interests to leases and would be required to pay royalties on any commercial production twice, once to each Government.¹² Concern for the future if commercial production became possible had a suppressive impact on exploration activity itself¹³ although the unresolved jurisdictional issue was certainly not the only — and probably not even the major — impediment to activity off the east coast. Nevertheless, it was clearly a factor and had to be resolved either by agreement or by a judicial determination before there could be any commercial oil or gas production.

The second main purpose of the Understanding, again as recognized in the preamble, is to “encourage . . . industrial and commercial development in the Maritime Region.” To this end, the Understanding proposes a mechanism through which the provinces will participate directly in the management of offshore mineral resources and spin-off developments. And thirdly, a further purpose of the Understanding is to provide for the sharing of revenues derived from the exploitation of offshore mineral resources.

The document is entitled a Memorandum of Understanding and provides that the parties will proceed jointly, on the basis of the Understanding, to the preparation of a detailed and comprehensive

11. See, for example, the remarks of the President of Mobil Oil Canada Ltd., Mr. Arne Nielsen, published in the *Proceedings of the Atlantic Petroleum Offshore Seminar*, sponsored by the Natural Resources and Energy Section of the Canadian Bar Association in Halifax, May 27-29, 1973, at 16, where he described the jurisdictional dispute as a “major political issue requiring immediate attention . . .”

12. Beauchamp, Crommelin and Thompson, *supra*, note 10 at 469, suggested that even the payment of double royalties might not be unreasonable in view of the allegedly low rate of royalty imposed by the respective regulatory regimes.

13. Exploration activity off the coast of Labrador has been undertaken mainly by Total Eastcan Exploration Ltd. which announced suspension of its efforts on the same day as the Maritime Provinces and Canada executed the Memorandum of Understanding, alleging the jurisdictional dispute between Newfoundland and Ottawa as the reason for its decision. See the further discussion of this issue, *infra*, [text at notes 96 to 97].

Agreement.¹⁴ It establishes the basic approach by the parties to dealing with the administration and management of offshore resources and the main points of agreement between them. Discussions are continuing on the detailed provisions that will be incorporated in the Agreement and on the legislation that will be necessary to implement it.

The area to be covered by the Agreement is the seabed and sub-soil seaward from the ordinary low water mark on the coasts of Nova Scotia, New Brunswick and Prince Edward Island to the continental margin or to the limits of Canada's jurisdiction to explore and exploit the seabed and subsoil, whichever may be further.¹⁵ As between the provinces, the area is divided on the basis of Interprovincial Lines of Demarcation that were negotiated by the provinces in 1964. As between Canada and the provinces, the area is then divided into two parts. Mineral Resource Administration Lines are to be fixed by the Agreement at least five kilometres seaward from the ordinary low water mark.¹⁶ The area on the landward side of these lines is effectively conceded to be within the jurisdiction of the provinces, although for the sake of administrative convenience a province may request the Maritime Offshore Resources Board to administer the area on its behalf.¹⁷

The area seaward of the Mineral Resource Administration Lines will be placed under the administration and management of the Maritime Offshore Resources Board.¹⁸ The Board — consisting of six members, three representing Canada and one from each of the three provinces¹⁹ — will perform the function that would be performed by the Federal Minister of Energy, Mines and Resources if the area were under exclusive federal jurisdiction, or by the provincial minister of mines or of energy if the area were under exclusive provincial jurisdiction. Specifically, the Board will issue rights in respect of the mineral resources of the area and set the terms and conditions pursuant to which those rights will be issued.²⁰ It will also have authority to commission economic, sociological and other studies relating to the exploitation of those resources and

14. Paragraph 1, hereafter referred to as "the Agreement".

15. Paragraph 2

16. Paragraph 3

17. Paragraph 5

18. *Id.*

19. Paragraph 6. The Agreement will contain detailed provisions dealing with the resolution of any tied vote that might arise in Board deliberations.

20. Paragraph 5(i) and (ii)

the optimization of regional benefits to be derived by the provinces.²¹ The day to day administration and management of the resources will be undertaken on behalf of the Board by the appropriate federal agency at the expense of the federal government.²²

A major responsibility of the Board of course will be to receive and distribute all revenue derived directly from the administration and management of the mineral resources in the area, such as royalties, fees, bonuses and rentals.²³ The Memorandum provides that these revenues will be distributed 25 per cent to Canada and 75 per cent to the province offshore from which the revenue is derived, the respective provincial offshore areas being determined in accordance with the agreed Interprovincial Lines of Demarcation mentioned earlier.²⁴ Thus, if developments should prove to be restricted to the area offshore from one province only, the other two provinces will not receive a direct share of the 75 per cent apportionment. The Memorandum, however, does provide that the 75 per cent share of each province shall be subject to a contribution to a "regional revenue sharing pool" of such portion of the 75 per cent as may be agreed upon between the provinces.²⁵ The details of this regional pool and of the portion of the 75 per cent to be contributed to it will be provided for in the Agreement. Offsetting this division of revenues, the Memorandum provides that the costs of the Maritime Offshore Resources Board will be funded 25 per cent by Canada and 75 per cent by the provinces.²⁶

The Memorandum acknowledges that Sable Island is within Nova Scotia and provides that 100 per cent of the revenues within a revenue sharing line to be fixed by the Agreement around the Island will accrue to Nova Scotia.²⁷

III. *The Constitutional Integrity of the Scheme*

So much, then, for the general provisions of the Memorandum of Understanding. But what of its constitutional integrity?²⁸ How can

21. Paragraph 5 (iii)

22. Paragraphs 8 and 9

23. Paragraph 10

24. Paragraph 11. See *supra*.

25. Paragraph 11 (ii)

26. Paragraph 9

27. Paragraph 12

28. The "constitutional integrity" to be discussed here does not refer to the legal nature of a "memorandum of understanding" or of "an agreement" between

the Federal and provincial governments simply set aside their jurisdictional differences?

To attempt an answer to this question the nature of the Understanding has to be explored further. Although the preamble thereof speaks of “setting aside jurisdictional differences”, on closer examination it becomes clear that in fact the Understanding amounts to an agreement that jurisdiction will be exercised by both Canada and the provinces. What really has been agreed is that neither will interfere with or challenge the claims of the other to jurisdiction over the offshore area for the purposes of exploring for and exploiting its mineral resources.

There are two aspects to this. First, there has to be agreement to, and implementation of, a single regulatory regime as an apparent exercise of federal jurisdiction and as an apparent exercise of provincial jurisdiction. Clearly, the federal government and the provincial governments could not maintain the integrity of their agreement not to interfere with each other’s exercises of jurisdiction by attempting to put in place different regimes.²⁹ Secondly, while the federal government and the provinces might be agreed that they will not challenge each other, their agreement would be of little consequence if it could be effectively challenged by any third party. Thus, the agreement contemplates implementation in such a way that there is no possibility of any third party challenge or, at least, that any such threat is minimized. Each of these aspects will be examined further.

The Memorandum of Understanding provides that the Maritime Offshore Resources Board will have authority to “issue rights” in respect of the mineral resources of the offshore area and to “set the terms and conditions pursuant to which such rights will be issued.”³⁰ Although not explicitly stated in the Understanding, clearly these powers will be exercised under the terms of enabling legislation and regulations. In fact the legislation and regulations will be those proposed by the federal government in its Statement of Policy on a proposed *Petroleum and Natural Gas Act* issued in May, 1976.³¹

Canadian Governments as such but rather the phrase refers to the integrity of the content and objectives thereof.

29. From the perspective of those operating under the regimes there would be a necessary conflict between regimes that were different.

30. Paragraph 5 (i) and (ii)

31. Statement of Policy, *Proposed Petroleum and Natural Gas Act and New Canada Oil and Gas Land Regulations*, Energy Mines and Resources Canada and

To achieve the necessary uniformity of legislation and administration, the Provinces will employ the already approved techniques of incorporation by reference and delegation. Specifically, the provincial acts implementing the Agreement will incorporate designated federal legislation and regulations made thereunder, as amended from time to time, as the law and regulations of the province for the purposes of exercising provincial jurisdiction over the offshore area. The Acts will then delegate the administration of that legislation to the Maritime Offshore Resources Board. At the same time, the federal legislation implementing the Agreement will delegate the administration of the designated federal legislation to the Board too, so far as that designated legislation applies in the offshore area subject to the Agreement. The effect of these various steps will be that the Board will have delegated to it the administration of federal legislation directly by the Federal Parliament and the administration of the same legislation *qua* provincial legislation by the respective provincial legislatures.

All of this is simply in accordance with the techniques for federal-provincial cooperation upheld by the Supreme Court of Canada in *Coughlin v. Ontario Highway Transport Board*.³² In that case, the Court was concerned with the provisions of the *Motor Vehicle Transport Act*³³ that was designed to, in effect, merge the exercise of federal jurisdiction over interprovincial transportation³⁴ with provincial jurisdiction over intraprovincial transportation. Section 3(1) was the key to the scheme and provided:

3. (1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate on extra-provincial undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like

Indian and Northern Affairs, May, 1976, Ottawa. In announcing changes to these proposals in a speech to the Association of Petroleum Landmen in Calgary on June 20, 1977, the Minister of Energy, Mines and Resources, the Honourable Alastair Gillespie implicitly acknowledged that the proposed new federal regulatory system will be the system to be applied by the Maritime Offshore Resources Board.

32. [1968] S.C.R. 569; 68 D.L.R. (2d) 384

33. *Supra*, note 9.

34. The specific purpose of the exercise was to implement a practical regulatory regime in the wake of the opinion of the Privy Council in *A. G. (Ontario) v. Winner*, [1954] A.C. 541; [1954] 4 D.L.R. 657.

terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.

In upholding the validity of the section, the Court made it clear, first, that Parliament can adopt “in the exercise of its exclusive power . . . the legislation of another body as it may from time to time exist . . .”³⁵ and, secondly, that the administration of that adopted legislation can then be delegated to a provincial subordinate agency.³⁶ There is nothing in the Court’s judgment to suggest that the reverse flow, as it were, would not be equally acceptable, so that a province could, just as validly, adopt federal legislation and then delegate to a federal subordinate agency.

Thus, the method proposed for the implementation of a single regulatory regime for the administration of offshore mineral resources would seem to be unimpeachable. But what of the second aspect to the agreement to avoid a determination of constitutional jurisdiction? How can the risk of a third party challenge to the scheme be avoided?

The answer, of course, is that the risk cannot be eliminated³⁷ but it can be minimized. Indeed, it can probably be minimized to such an extent as to become hypothetical by simply ensuring that no one has any real interest in challenging the scheme. Again it becomes necessary to explore further the nature of the proposed method of implementing the Memorandum of Understanding.

In commenting on *Coughlin*, Professor Driedger writes:

The result is that the provincial Board draws its powers from two sources, powers in relation to extra-provincial carriage from Parliament, and powers in relation to local carriage from the legislature. Or, it could be said that there are two Boards consisting of the same persons.³⁸

35. [1968] S.C.R. 569 at 575; 68 D.L.R. (2d) 384 at 388 *per* Cartwright J. for the majority.

36. This proposition had already been established in *Willis*, [1952] 2 S.C.R. 392; [1952] 4 D.L.R. 146.

37. The Canadian courts have consistently rejected any overt legislative attempts to prevent judicial review of the constitutional validity of legislation, as have the courts of all Anglo-American federal systems. See further the decision of the Supreme Court of Canada in *B.C. Power Corporation, Ltd., v. Royal Trust Company et al.*, [1962] S.C.R. 642; 34 D.L.R. (2d) 196, and the observations of Fisher and Masten J.J.A., in the Ontario Court of Appeal in *Ottawa Valley Power Co. v. H.E.P.C.*, [1937] O.R. 265; [1936] 4 D.L.R. 594. See also the comments of Laskin J. in *Thorson v. Attorney-General of Canada*, [1975] 1 S.C.R. 138 at 151-52; 43 D.L.R. (3d) 1 at 11 and the further passage cited *infra*, note 47.

38. *Supra*, note 5 at 712. The present writer made a somewhat similar observation

So too with the proposed Maritime Offshore Resources Board. The Board will have delegated to it by both the Federal Parliament and the provincial legislatures the powers of each to administer and manage the mineral resources of the offshore. The Board will exercise federal powers and provincial powers but always in the same way. Every Board action will rest on a federal "chain of title", as it were, and on a provincial "chain of title". In other words, from a provincial point of view, the Board will be acting on behalf of the Province and under provincial authorization, whereas from the federal point of view it will be acting on behalf of and under the authorization of Canada.

There is, however, an important distinction between the situation of the Resources Board and that of the Ontario Municipal Board in *Coughlin*, a distinction that highlights the uniqueness of the technique that will be employed in implementing the Offshore Agreement. As is clear from Professor Driedger's comment and the legislation itself considered in *Coughlin*, the powers exercised by the Ontario Municipal Board are not simply drawn from two sources but are two *different* powers. One power, drawn from the federal legislation, is that in relation to extra-provincial carriage, whereas the other, drawn from the provincial legislation, is that in relation to local or intraprovincial carriage. It is true that, as a result of the federal Act, the two powers are exercised in the same way but they are exercised in that same way in relation to two constitutionally distinct activities.

The Maritime Offshore Resources Board, however, will not purport to exercise two powers in relation to two different activities. Instead it will exercise power in relation to one activity — not knowing from whom its power is derived but knowing that it is derived from either the Federal Parliament or the provincial legislature and that it could not be derived from any other. Thus, a challenge to its authority could be met with the response that the Board has the same authority conferred on it by both Parliament and the legislatures — which chain of authority is the valid one is of purely academic interest.

in concluding that the Maritime Provinces Higher Education Commission, established by Acts of Nova Scotia, New Brunswick and Prince Edward Island, is in theory three Commissions "consisting in each case of the same members and exercising precisely the same powers in each province" in *Constitutional Implications of the Maritime Provinces Higher Education Commission*, Dalhousie Continuing Legal Education Series, No. 8, *The University and the Law*, Halifax, February 28-March 1, 1975, 162 at 164.

This analysis, of course, does not guarantee that a challenge to the scheme will not be made. But if such a challenge were made and the Supreme Court of Canada ruled that the implementing legislation at one level was not constitutionally valid, the legislation at the other level would then be valid automatically and would be determined to support the actions of the Board. In other words, a constitutional challenge would only result in a determination of which particular chain of title supported the Board's jurisdiction and would not of itself result in the dissolution of the Board, nor affect its past actions.

It is recognized that the legislation will have to be very carefully framed to ensure that the watertight compartments of the ship of state will be joined, "to carry the same cargo" in Professor Driedger's words,³⁹ but the ship will be sailing in uncharted waters. This however, is a problem of care and not of feasibility. If it is done properly a challenge to the constitutional validity of either the federal or the provincial acts would be a "zero-sum game."

Certainly, this consequence would be sufficient to deter a challenge to the scheme from the source whence it might otherwise be most likely to come — the operators in the offshore mineral play, say an oil company actively exploring or producing in the area and subject to the regulatory regime imposed by the legislation. There can be nothing to gain for such a company in establishing by judicial decision that it is subject to the same legislation thereafter determined to be valid, say, federal legislation.⁴⁰ It is also reasonable to assume that none of the Parties to the Memorandum of Understanding and the subsequent Agreement would challenge its own legislation or that of any other Party.

That leaves two other possible sources of constitutional challenge — other provinces and other individuals. A challenge by a non-party province is a distinct possibility at first glance. Such a province might argue that the mineral resources of the offshore area are an exclusive constitutional responsibility of the Federal government which it would be improper for it to, if not decline, at least share in a way not permitted by the *British North America*

39. *Supra*, note 5 at 695.

40. The distinction from *Coughlin*, [1968] S.C.R. 569; 68 D.L.R. (2d) 384 becomes clear again here. Coughlin of course hoped that a successful challenge to the federal legislation there in issue would leave the field vacant and him free of regulation. As an interprovincial carrier he would not have been subject to regulation by the Board under provincial legislation in the absence of the federal legislation.

Act.⁴¹ The argument might be motivated by financial considerations on the premise that the challenging province might participate more — albeit indirectly — in any revenues derived from the exploitation of offshore mineral resources if all those revenues went to the federal government rather than substantially to the Maritime Provinces.

This is certainly what happened in the United States when Congress enacted the *Submerged Lands Act*⁴² of 1953. Under this Act, parts of off-shore areas that had been determined by the Supreme Court to be within exclusive federal jurisdiction⁴³ were ceded by Congress to the littoral states. The legislation was challenged immediately on the ground that it was detrimental to the interests of those states to which there was no such cession. The Supreme Court denied the challenge⁴⁴ but it is the fact of the challenge that is of interest in the present context. Yet, even so, it is my view that the risk of such a challenge in Canada, if any, is minimal simply because the provinces that will benefit from the implementation of the Offshore Agreement are “have not” provinces which, it is accepted, are entitled to preferred financial treatment by the Federal Government.⁴⁵

There still remains, however, the possibility of a challenge to the constitutional validity of the legislation implementing the Agreement by some other third party. There is a clear trend in the Supreme Court of Canada towards greater flexibility in determining matters of standing,⁴⁶ it would seem at least partly on the ground that there is a public interest in insisting upon constitutional behaviour from Parliament and the legislatures.⁴⁷ But it is also clear

41. 30-31 Vict., c.31 (as amended) (U.K.); R.S.C. 1970, Append. II, No. 5

42. 43 U.S.C. 1301

43. *U.S. v. California* (1947), 332 U.S. 19; 67 S. Ct. 1658; *U.S. v. Louisiana* (1950), 339 U.S. 699; 70 S.Ct. 914; *U.S. v. Texas* (1950), 339 U.S. 707; 70 S. Ct. 918.

44. *Alabama v. Texas* (1954), 347 U.S. 272

45. This consideration was fairly obviously a major reason that the Federal Government was prepared to negotiate a joint arrangement with the Provinces at all.

46. See *Thorson v. Attorney-General of Canada*, [1975] 1 S.C.R. 138; 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; 5 N.R. 43; 55 D.L.R. (3d) 632. These developments are discussed in David Mullan, *Standing After McNeil* (1976), 8 Ottawa L. Rev. 32.

47. In *Thorson*, Laskin J. said ([1975] 1 S.C.R. 138 at 145; 43 D.L.R. (3d) 1 at 7):

A more telling consideration for me . . . is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the

that the matter is one for the exercise of discretion on the part of the Court. On the one hand, the almost certain outcome of any challenge — namely, that it would result only in the determination of which legislation constitutionally supported the Maritime Offshore Resources Board — would discourage any challenge. In the recent cases there standing to challenge the constitutional validity of legislation has been given, the plaintiff has had something to gain by seeking to have the challenged legislation struck down, if only the removal of legislation that implemented a policy he found offensive.⁴⁸ But, as discussed earlier, a successful challenge in the present context would not result in the defeat of any “offensive” policy but, on the contrary, would reinforce the validity of the legislation implementing the policy as enacted by one of either the Federal Parliament or the provincial legislatures. On the other hand, it cannot be ignored that the right to insist on constitutional behaviour as such has been a factor in the Supreme Court’s view in deciding that standing should be granted in any particular case. In summary, what this would suggest is that the risk of a third party seeking standing to challenge the legislation implementing the Offshore Agreement is minimal but if standing were sought it is quite possible that the Supreme Court would grant it. There is, of course, nothing that either Parliament or the legislatures can do about this but accept the risk.

For all practical purposes it would seem reasonable to assume that the federal government and the provinces have struck upon a technique whereby the issue of constitutional validity can be kept from judicial resolution for so long as there is a will to do so. By definition, it is not a technique whereby the distribution of legislative powers can be simply rearranged at the pleasure of the governments in the sense of one level taking some heads of power and the other level taking others, each to the exclusion of the other. On the contrary, the whole concept depends upon agreement to the

consequence of the judgments below in the present case. The substantive issue raised by the plaintiff’s action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, would be made the subject of adjudication.

48. In *Thorson*, [1975] 1 S.C.R. 138; 43 D.L.R. (3d) 1, there was no suggestion that the reason for the challenge was to ensure constitutional behaviour from Parliament for its own sake. Clearly the constitutional challenge was simply the particular means chosen to attack the policy of the *Official Languages Act*. So too in *MacNeil*, [1976] 2 S.C.R. 265; 55 D.L.R. (3d) 632 the target of the challenge was really film censorship.

joint exercise of legislative powers in such a way that the question of who in fact has the power becomes one of only academic interest.

The merits of the technique so understood will be discussed further but it is proposed first to digress to discuss briefly another constitutional aspect of the Memorandum of Understanding and then to examine a similar scheme in Australia where the technique of resolution by avoidance seems to have originated.

It will be recalled that the Memorandum of Understanding provides for the offshore area to be divided, as between the provinces, on the basis of Interprovincial Lines of Demarcation that were negotiated by the provinces in 1964.⁴⁹ What is the status of these offshore boundaries?

There is no provision in the *British North America Act*⁵⁰ whereby the provinces can establish their mutual boundaries simply by agreement between themselves. The *British North America Act* of 1871,⁵¹ however, provided:

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 and 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.

This section could be used by Parliament to define the inter-provincial boundaries in the offshore area in accordance with the agreed Interprovincial Lines of Demarcation and thus give some legal validity to what is at present nothing more than a "gentlemen's agreement". In stating this, it is recognized that the question of offshore boundaries between the Maritime Provinces only arises if those provinces in fact extend beyond the lower water mark,⁵² in which event there must already be an offshore interprovincial boundary, albeit undetermined.⁵³ This postulate, however, would not prevent the *redefinition* of those boundaries in

49. *Supra*, [text at notes 15 to 16]

50. 30-31 Vict., c.3 (U.K.); R.S.C. 1970, App. II, No. 5

51. 34 & 35 Vict., c. 28 (U.K.)

52. This would seem to be the only basis on which the Maritime Provinces could have any jurisdiction in the offshore area because of the restriction on their legislative competence by section 92 of the *B.N.A. Act* to matters "in each Province". See the further discussion, *infra*.

53. It would be extraordinary if these "natural" boundaries should happen to coincide with the agreed Lines of Demarcation. Presumably the "natural"

accordance with the 1964 Interprovincial Agreement. But even this step is unnecessary so long as the device employed to keep the matter of jurisdiction from judicial resolution is successful and so long as the three Maritime Provinces continue to be agreed on their respective shares of the offshore area. It would only be *after* a Supreme Court ruling in favour of exclusive provincial jurisdiction over the offshore area that the legal location of the offshore inter-provincial boundaries might provoke a challenge from someone claiming that a particular area was within the jurisdiction of one of the Provinces rather than another.

IV *The Australian Scheme Compared*

The underlying concept of the Canadian Memorandum of Understanding is that the problem of uncertain jurisdiction can be accommodated, not by seeking to clarify the uncertainty, but rather by discouraging — hopefully *preventing* — any challenge to the agreed policy and the legislative scheme to implement it. The approach seems to have emerged first in Australia in an attempt to deal here with the same issue of whether the petroleum resources of the continental shelf were subject to federal or state jurisdiction. As in Canada, there was considerable pressure to get the matter resolved but, at the same time, reluctance to submit to an all or nothing resolution in the High Court of Australia.

On October 16, 1967, the Commonwealth and the six States signed an Agreement,⁵⁴ the preamble of which provides, *inter alia*:

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their

boundaries would be established by a judicial application of the equidistant or some similar principle.

54. *An Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain Other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land*, dated October 16, 1967, hereafter referred to as the "Offshore Petroleum Agreement". The Agreement is printed as Appendix A to the *Report from the Senate Select Committee on Off-Shore Petroleum Resources*, the Parliament of the Commonwealth of Australia, Canberra, 1971, hereafter referred to as "the Senate Report". Some confusion might be avoided by explaining that the Australian Offshore Petroleum Agreement was really concerned only with petroleum. The Canadian Memorandum of Understanding on the other hand is concerned with *mineral* resources, although petroleum is the only mineral of immediate interest in the offshore area and the only mineral for which a detailed regulatory regime has been developed in any detail as yet.

respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands . . .

The Agreement went on to provide that the commonwealth government and each state government would submit to their respective parliaments bills in the form of the draft bills set out as Schedules to the Agreement⁵⁵ and would "use all reasonable endeavours to secure the passing and the coming into operation" of the bills.⁵⁶ The bills then, in identical terms, provided for a Common Mining Code to apply to the adjacent areas of each state and to be administered by the Designated Authority for each adjacent area.⁵⁷ The Designated Authorities were in fact the state mining authorities, with a proviso that the Commonwealth would be consulted by any state before granting, renewing, varying or transferring rights and would be able to prevail in any difference of opinion from the state where it, the Commonwealth, was of the opinion that its other express constitutional responsibilities required a different decision.⁵⁸ Inevitably, there was provision in the Agreement for sharing of royalty revenues — 40 per cent to the Commonwealth and 60 per cent to adjacent state.⁵⁹

All of the bills provided for in the Agreement were subsequently enacted by the respective parliaments with the consequence that the same Common Mining Code was in force in all of the offshore area as the result of Commonwealth legislation and, in each adjacent area, as the result of legislation of the adjacent state. The scheme came to be described, very aptly, as "mirror legislation"⁶⁰ on the ground that the legislation at one level of the federal system was reflected in every detail at the other level. As in Canada, it was assumed that if "the State law tomorrow were held to be invalid, The Commonwealth law will still be valid".⁶¹

55. The Offshore Petroleum Agreement, paragraph 3 and 4.

56. *Id.*, paragraph 5.

57. The Acts were enacted under the title the *Petroleum (Submerged Lands) Acts*, 1967.

58. The Offshore Petroleum Agreement, paragraph 11

59. *Id.*, paragraph 19

60. According to the Senate Report, *supra*, note 54 at 571, the description originated with Mr. J. Q. Evers, First Parliamentary Counsel for the Commonwealth.

61. *Id.* at p. 571, *per* Mr. C. W. Harders, Secretary, Commonwealth Attorney-General's Department. See further C. W. Harders, *Australia's Offshore*

The scheme has been successful in the sense that it has not been challenged before the courts in the nearly ten years since its implementation. However, it has not been free from difficulty, some of which is inherent in the scheme itself.

The Australian scheme, unlike the Canadian scheme, depends upon the *continuing, active* cooperation of all seven parties. For the scheme to succeed, the legislation at both the Commonwealth and State levels must reflect the legislation of the other level in every detail. Should any crack develop in the mirror, the possibility would arise that someone would have a real interest in challenging the legislation at one or other level. Thus, any change in the scheme has to first be agreed to by all seven parties and then enacted by all seven parliaments. It was, of course, a remarkable enough achievement to have all seven agree — and all seven parliaments act — in the first place but to expect this achievement to repeat itself every time an amendment might be proposed was overly optimistic. In the result, the scheme is excessively rigid.⁶²

This is not a problem of the Canadian scheme under which, it will be recalled, the provinces will adopt the designated federal legislation and regulations as amended from time to time,⁶³ thus permitting changes in the legislation or regulations to be carried through automatically without the necessity of prior consent. This approval solves the problem of rigidity built into the Australian scheme but, of course, at a price, namely, that changes could be implemented unilaterally by the federal government. In this respect it should be noted that the Maritime Offshore Resources Board will have authority to:

. . . review the administration and management of those mineral resources, including any policies, *legislation and regulations* in respect of such administration and management, and make recommendations in respect of any such matters to Canada and the Maritime Provinces;⁶⁴

The real effectiveness of this solution will depend upon the extent to which the Board's recommendations are accepted by the federal

Petroleum Legislation: A Survey of its Constitutional Background and its Federal Features (1968), 6 Melbourne U.L. Rev. 415.

62. There has in fact been one instance where agreement between the seven Governments involved was not translated into legislative amendments by all seven Parliaments. The circumstances and details are discussed in the Senate Report, *supra*, note 54, Chapters 6 and 16.

63. *Supra*, [text at notes 31 to 32]

64. Paragraph 5 (iv). Emphasis added.

government. Conceptually the approach would seem preferable to that adopted in Australia because of its greater flexibility.

There is a further distinction between the Canadian and Australian situation that should be pointed out. All of the Australian States are coastal and all were parties to the agreement with the Commonwealth. There is, therefore, in the Australian context no risk that a non-participating State might challenge the scheme.⁶⁵

The greatest benefit from a comparison with the Australian scheme comes from an examination of the Report of the Senate Select Committee on Off-Shore Petroleum Resources.⁶⁶ When the bills provided for in the Agreement⁶⁷ were transmitted to the Australian Senate on November 6, 1967, after passage through the House of Representatives, the Senate was not happy and a compromise was reached with the Government whereby it was agreed that, after the passing of the legislation, a Select Committee of the Senate would be set up to inquire into and report upon Off-Shore Petroleum Resources in Australia. The Committee submitted its exhaustive report in 1971 and included therein a detailed examination of "the constitutional conception underlying the legislation."⁶⁸

In brief, the Committee expressed serious reservations about the Australian scheme, not as to whether it would be effective to accomplish what the Commonwealth and the states had agreed to, but as to whether what they had agreed to was desirable. The Committee reported the following summary of its conclusions on this matter;

(1) The constitutional conception underlying the legislation is inconsistent with what should be the proper constitutional relationship between the Parliament and the executive.

(2) In the context of broad constitutional responsibilities there is a challenge to the exercise of the functions of Parliament in the conception of uniform legislation drafted by the executive arms of seven Australian Governments being presented to the Parliaments as a *fait accompli* requiring formal legislative approval. This cannot be regarded as strictly inconsistent with the 'proper constitutional responsibilities' of the Commonwealth and the States as the power always lies with the Parliaments of the Commonwealth and the States to reject or amend the legislation.

65. Cf., *supra*, [text at notes 40 to 42]

66. *Supra*, note 54

67. See *supra*, note 55

68. *Supra*, note 54, Chapter 6.

(3) The Committee does not regard the legislation as being inconsistent with the 'proper responsibilities' of the Commonwealth and the States because, as a result of the decision to avoid litigation which would have resolved the matter, it cannot say what is the measure of those proper constitutional responsibilities.

(4) The Committee considers that, notwithstanding the advantages to the national interest which the legislation and its underlying conception has produced, the larger national interest is not served by leaving unresolved and uncertain the extent of State and Commonwealth authority in the territorial sea-bed and the Continental Shelf.⁶⁹

Clearly the Committee thought that the question of jurisdiction should have been resolved, a course which, in its view, would not have precluded subsequent cooperation. In its own words:

The Committee does not believe that co-operation can only arise if the extent of constitutional authority is left unresolved.⁷⁰

Subsequent developments in Australia, however, challenge the wisdom of this view.

69. *Id.* at 202. The Committee, however, did acknowledge certain benefits to the scheme. It reported, at 198-9:

The scheme achieved, notably, the following objectives:

(i) It assured those who were interested in exploring for and exploiting petroleum resources in the off-shore areas of a security in their titles. It thereby facilitated the expenditure of large sums which were involved and has provided a basis for petroleum exploration of virtually the whole of the Australian off-shore areas.

(ii) It has avoided litigation, which could be time consuming and costly, between the Commonwealth and the States as to who had constitutional power over petroleum mining on the off-shore sea-bed. Specifically, it avoided the risk of the U.S.A. experience of protracted litigation to determine the seaward and landward boundaries of the territorial seas.

(iii) It secured and reflected Commonwealth and State co-operation in a manner which may not have been so readily secured if the extent of the constitutional powers of each in the off-shore areas had been judicially determined.

(iv) It permitted the development of a uniform mining code of operation throughout the whole of the off-shore sea-bed without regard to distinctions which separate and different control of the territorial sea-bed and continental shelf may have necessitated.

(v) It permitted the utilisation in the whole of the offshore areas of the experience of the mines administrations of the State Governments and avoided the possibility of a costly and duplicated Commonwealth administration having to be created if Commonwealth control over part of the off-shore area had been established and if, consequent thereupon, agreement had not been able to be reached by the Commonwealth and the States for a joint administration.

70. *Id.* at 199

The Australian scheme was designed — as is the Canadian scheme — to preclude any constitutional challenge to the legislation implementing the scheme itself. The scheme could not, however, preclude the possibility that the resolution of some *other* constitutional issue might have the *effect* of determining where the jurisdiction lay with respect to offshore resources.

To some extent that is what happened in Australia as a consequence of a prosecution of a fisherman for an offence under the Commonwealth Fisheries Act 1952.⁷¹ The defendant pleaded that no offence had been committed because the constitutional power of the Commonwealth with respect to fisheries was limited to waters within three nautical miles of the Australian coast. In rejecting this and other defences in *Bonser v. LaMacchia*⁷² in 1969, two of the judges of the High Court of Australia based their judgments on reasoning that clearly suggested that the Australian states had no rights in the sea-bed beyond the low water mark.⁷³ Commenting on the decision, and other less immediately authoritative developments,⁷⁴ the Senate Committee recognized “the weight of [the] contention” that the area of uncertainty has become clarified “so that it may be now argued that the Commonwealth has, and has always had, legislative power over the natural resources of the territorial sea-bed and the Continental Shelf.”⁷⁵ However, it concluded:

The Committee, therefore, considers that the constitutional authority of the Commonwealth and the States in respect of the natural resources of the off-shore seabed is still a matter of contention and doubt. Whatever the illumination which recent decisions have given to the areas of darkness, there would appear to be no way of resolving the issue of authority without an actual decision of the High Court.⁷⁶

Perhaps not surprisingly, the federal government did not,

71. Act No. 7, 1952, as amended

72. (1969) 122 C.L.R. 177; (1969), 43 Australian L.J. Reports 275

73. See the judgments of Barwick C. J. and Windeyer J.

74. The opinion of the Supreme Court of Canada in *Reference re Ownership of Off-Shore Mineral Rights*, [1967] S.C.R. 792; 65 D.L.R. (2d) 353; the decision of the International Court of Justice in the *North Sea Continental Shelf Cases*, [1969] I.C.J. 3; and a paper delivered by Sir Percy Spender, a former President of the International Court of Justice, *The Great Barrier Reef: Legal Aspects*, Australian Conservation Foundation Symposium on the Future of the Great Barrier Reef, May, 1969, Sydney.

75. *Supra*, note 54 at 188

76. *Id.* at 190

however, conduct itself as though there continued to be any uncertainty. In 1973, it introduced to Parliament a Bill for the *Seas and Submerged Lands Act, 1973*.⁷⁷ By section 6 of that Act, “the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth”. By section 11, “the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth”. Section 16 provides that the Act does not limit or exclude the operation of any law in force at the date of commencement of the Act, thus preserving the legislation implementing the Offshore Petroleum Agreement.⁷⁸ In 1975, in *New South Wales v. Commonwealth*,⁷⁹ all the States of Australia brought actions against the Commonwealth claiming that the Act was wholly or partly invalid. The High Court of Australia upheld the constitutional validity of the Act.

Thus, notwithstanding the care that was taken under the Australian scheme to avoid a judicial determination of the constitutional issue, in fact that issue has since been determined, and that at the instance of one of the parties to the original Agreement, although in a different setting from that of the Agreement itself. There are several observations to be made on these developments before an attempt is made to assess the merits of the Canadian Memorandum of Understanding in light of the Australian experience.

First, the Australian experience demonstrates quite clearly that there can be no guarantee against the judicial determination of issues of constitutional jurisdiction in a federal system. There is always the possibility that a matter will find its way into court somehow, perhaps, as happened in Australia, initially in an almost incidental way.

77. No. 161 of 1973

78. *Supra*, note 54. The long title is:

An Act Relating to Sovereignty in respect of certain Waters of the Sea and in respect of the Airspace over, and the Sea-bed and Subsoil beneath, those Waters and to Sovereign Rights in respect of the Continental Shelf and relating also to the Recovery of Minerals, *other than Petroleum*, from the Sea-bed and Subsoil beneath those Waters and from the Continental Shelf.

Emphasis added.

79. (1975), 8 Aust. L. Reports 1. See also the prior decision of the High Court of Australia in *R. v. Bull* (1974), 48 Australian L.J. Reports 232

But, secondly, there is nothing in the Australian experience yet to suggest that the insulation of *particular* legislation from constitutional challenge by the method of enacting it at both levels of the federal system is ineffective. It is to be noted that it was the actions of the Commonwealth that led to the decision in *New South Wales v. Commonwealth* and of an ordinary fisherman that led to *Bonser v. LaMacchia* — it was not a challenge by anyone affected by the legislation implementing the Offshore Petroleum Agreement to that legislation. True, it was a party to the Agreement that effectively precipitated that determination of the very issue that the Agreement sought to avoid, but it could never have been suggested that such an Agreement could preclude a change of heart by one of its signatories. This was recognized in the Australian Agreement, which provides:

The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof.⁸⁰

The Canadian Memorandum of Understanding recognizes the possibility of withdrawal too by providing that five years' notice of intent to withdraw shall be given.⁸¹ But any attempt to argue that this undermines the concept of the scheme in either Australia or Canada ignores the fact that the scheme is born of agreement and only purports to deal with that agreement. The issue it addresses is not whether a party to such an agreement can withdraw but whether, *given agreement*, that agreement can be effectively implemented. Of course, if there is no reason to believe that agreement can be maintained for any reasonable length of time the effort involved in the scheme may not be worthwhile, but that is a different issue. It must be assumed that if agreement can be reached at all there will be sufficient good faith to avoid a precipitous withdrawal.

This leads conveniently to the third observation on the Australian experience. Despite everything, the legislation implementing the Off-shore Petroleum Agreement stands and the Common Mining Code continues to be the regulatory regime under which the offshore petroleum industry is operating. The Agreement and the code have not been challenged even though the High Court decision in *New South Wales v. Commonwealth* makes it fairly clear that

80. The Offshore Petroleum Agreement, paragraph 26

81. Paragraph 13

their subject-matter is within the exclusive jurisdiction of the Commonwealth Parliament. The scheme has been successful in implementing, and insulating from judicial challenge, an agreed legislative and regulatory regime. And that, after all, was its purpose.

Finally, the enactment by the Commonwealth Parliament of the *Seas and Submerged Lands Act* casts serious doubt on the validity of the observation of the Senate Committee that cooperation ought not to be precluded by a determination of who in fact had constitutional authority.⁸²

V. *The Merits of the Approach*

What, then, can be said in light of all this of the merits of joint legislative actions as applied to the Canadian context through the Memorandum of Understanding?

It will be recalled that the main purpose of the Understanding was to set aside "jurisdictional differences" between the Parties.⁸³ The first step in any assessment of the merits of the scheme must be to examine these differences and their implications. It is not the purpose here to determine the merits of the respective positions on either side of the dispute. The question is simply "was there a *real* dispute?"⁸⁴

In 1967, the Supreme Court of Canada handed down a unanimous opinion that, as between British Columbia and Canada, Canada owned and had exclusive jurisdiction over the mineral resources of the territorial sea beyond the low water mark of the Pacific Ocean and also had exclusive jurisdiction over the mineral resources of the continental shelf beyond the territorial sea.⁸⁵ However, the reasoning of the Court left open the possibility that other provinces might be able to establish jurisdiction beyond their low water marks depending upon their particular histories. The federal government took the view that the principles on which the Court based its opinion in the *B.C. Reference* appeared "to be substantially applicable to the east coast as well as the west coast"⁸⁶ but this was

82. *Supra*, [text at note 70]

83. *Supra*, [text following note 28]

84. See references *supra*, note 10

85. *Reference re Ownership of Off-Shore Mineral Rights*, [1967] S.C.R. 792; 65 D.L.R. (2d) 353, the *B.C. Reference*

86. Statement by the Prime Minister of Canada to the House of Commons in Can. H. of C. Debates (December 2, 1968) at 3342

rejected by all the eastern provinces. And there was arguably some legal justification for this rejection — the principles of the *B.C. Reference* might be applicable but those very principles might lead to different results when applied to different circumstances.

Briefly summarized,⁸⁷ the reasoning of the Supreme Court was that, at common law, the jurisdiction of England and her territories ended at the low water mark. Although the realm might be extended to include the territorial sea, such an extension required a positive assertion of jurisdiction. In the case of British Columbia there had been no extension of the limits of the Province at the time of Confederation, nor since, and therefore the boundary ended at the low water mark of the Pacific Ocean.⁸⁸ The territorial sea was not part of the Province. As far as the continental shelf beyond the territorial sea was concerned the Court held that British Columbia had no jurisdiction because the legislative jurisdiction of the provinces is limited by the *British North America Act* to matters “in each Province.”⁸⁹ The boundary of British Columbia having been fixed at the low water mark by the Court’s answer to the question of jurisdiction over the territorial sea, it followed that the Province could not have jurisdiction over the continental shelf beyond that sea. The Court added to its reasons for this conclusion the opinion that the right to legislate on the continental shelf was a right acquired in international law and as Canada, and not the provinces, was the only unit of Confederation recognized in international law these rights must belong to it.

It is implicit in this reasoning that if the jurisdiction of a province could be shown to have been extended prior to the entry of that Province into Confederation it might continue to enjoy that jurisdiction. The problem with British Columbia’s claim was that it was unable to establish an extension of its jurisdiction prior to 1871. For the eastern provinces, however, the facts of history are different. Nova Scotia, for example, had exercised jurisdiction in its offshore area prior to its entry into Confederation in 1867⁹⁰ and its

87. The decision is commented on in more detail in Ivan L. Head, *The Canadian Offshore Minerals Reference* (1968), 18 U. of Toronto L.J. 131.

88. For a subsequent decision concerned with the location of the low water mark and the definition of the term “inland waters”, see *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97 (C.A.)

89. 30-31 Vict., c.3, s.92; R.S.C. 1970, App. II, No. 5, s.92

90. The particular instances are thoroughly reviewed in the dissenting judgment of Currie J. A. in *Re Dominion Coal Co. Ltd. and County of Cape Breton* (1963), 48 M.P.R. 174 at 200 ff.; 40 D.L.R. (2d) 593 at 619 ff.

border with New Brunswick is defined as extending to the middle of the Bay of Fundy.⁹¹ Newfoundland goes so far as to assert a claim to the whole of the adjacent continental shelf on the grounds that it had acquired sovereign rights to the area while it enjoyed the status of a self-governing dominion before it became a province in 1949 and did not surrender these rights under the Terms of Union.⁹² And quite independent of these arguments that would seek to distinguish the *B.C. Reference* is the claim of Nova Scotia to jurisdiction over the mineral rights of Sable Island, the centre to date of the oil and gas exploration effort in the Scotian Shelf. That issue was stated succinctly by Dr. LaForest as follows:

The transfer of Sable Island to the Dominion under item 3 [of the Third Schedule to the B.N.A. Act, 1867] raises the interesting problem whether the transfer included the minerals and royalties. The considerations advanced in connection with the similar problem in relation to public harbours would indicate that any base metals may belong to the Dominion but not precious metals or any other prerogative rights. In determining what was transferred by the term "Sable Island" it is relevant to note that the transfer is linked with the transfer of lighthouses and piers and the Dominion legislative power over the island [under section 91.9 of the B.N.A. Act, 1867] is coupled with "beacons, buoys and lighthouses." There is thus indicated a limited purpose for the transfer which is fortified by section 7 of the B.N.A. Act, 1867, which contemplates that the island shall remain within the limits of the Province.⁹³

This, it should be emphasized, is a matter that was not touched upon by the *B.C. Reference*.

As indicated, it is not the merits of these arguments that are important in the present context so much as the fact that they can be made on behalf of the east coast provinces. They have at least a sufficient basis that the *B.C. Reference* cannot be said to have determined the matter of jurisdiction over offshore mineral resources once and for all. This had raised the possibility, if not

91. Upon the separation of New Brunswick from Nova Scotia in 1784, the boundary between them was described in Governor Parr's Commission as follows:

To the northward by a line along the centre of the Bay of Fundy to the Missiquash River, by said river to its source, and thence by a line due east across the Isthmus to the Bay Verte.

See C. Fergusson, *The Boundaries of Nova Scotia and Its Counties* (1966), Bulletin of the Public Archives of Nova Scotia, No. 22 at 10

92. See Martin, *supra*, note 10

93. G. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 72-73

likelihood, that resolution of the problem would involve further Supreme Court rulings unless a settlement were negotiated. Indeed there was a "real" dispute. The implication was, in a word, delay.

In view of the nearly ten years that elapsed between the *B.C. Reference* and the signing of the Memorandum of Understanding, one immediately wonders whether the judicial route would have been such an encumbrance. Would it have taken any longer? The answer must lie in the realm of speculation. We do know that in the U.S. the issue of jurisdiction over offshore mineral resources was still being litigated by the States against the federal government as recently as 1975⁹⁴ — more than twenty-five years after the issue was first determined by the Supreme Court.⁹⁵ Admittedly the recent State challenge had negligible prospects for success but the U.S. experience does suggest that the matter is not one to be resolved once and for all in a single court decision. It is reasonable to speculate further that even if there were an unequivocal judicial determination of the issue in favour of the federal government in Canada the provinces would want to negotiate on the basis of their political and "moral" claims to the resources of the offshore area. Presumably the federal government would at least enter into negotiations, as it offered to do after the *B.C. Reference* at its own initiative.⁹⁶ So in fact the judicial route would probably involve any delay inherent to the litigation itself, *followed* by a period of negotiations.

In my view, the matter would probably have taken longer to resolve — at least to the point of enabling the "successful" government to implement a regulatory regime with sufficient security to satisfy the offshore oil and gas industry — if it had been referred to the Supreme Court of Canada. But the question is not just one of delay in resolving the dispute over jurisdiction to regulate. In the context of the oil and gas play off the east coast the question is what effect that delay has had in discouraging exploration. This is not to say that the uncertainty as to jurisdiction was not *an* impediment to exploratory activity but it probably became less of an impediment as it was realized that a negotiated settlement would be

94. *U.S. v. Maine* (1975), 420 U.S. 515; 95 S. Ct. 1155

95. See the authorities cited *supra*, note 43

96. See, Statement by the Prime Minister on Offshore Mineral Rights, in Can. H. of C. Debates (December 2, 1968) at 3342 and the statement by the Department of Energy, Mines Resources of the same date on Offshore Mineral Resources. Both statements may be found in D. Lewis and A. Thompson, *Canadian Oil and Gas* (Toronto: Butterworths, continuing) at Volume 1, Div. A., § 29B.

reached. Furthermore, the resolve of the Federal and Provincial Governments to reach agreement was probably a factor in making it at least possible for oil companies to comply with both federal and provincial laws pending the conclusion of the negotiations, and thus get on with the exploration phase of their activities⁹⁷ without serious risk as to the security of their titles. In sum, quite apart from whether the actual time involved in the negotiated solution has been longer or shorter, the negative impact on the offshore exploration effort has been less than would have resulted from litigation of the issue of jurisdiction.

To summarize to this point; it is my view that the Memorandum of Understanding⁹⁸ has resolved the problems arising from uncertainty as to jurisdiction over offshore mineral resources with probably the minimum of delay in the circumstances of competing jurisdictional claims and with minimal impediment to the oil and gas exploration effort. It will secure the titles of those exploring for and producing oil or gas, or other minerals, in the future. It has probably successfully avoided time-consuming and expensive litigation. It has also avoided any possibility, such as might have arisen from a judicial resolution of the issue in favour of the federal government, of the complete exclusion of the provinces from direct participation in the administration of a matter that is so obviously of direct interest to them. In other words, it has avoided the "all or nothing" consequence of a court ruling. Finally, it will result in a uniform system of administration of offshore mineral resources throughout an area that will be divided from other regulatory regimes by the natural and sensible line of the low water mark of each province.⁹⁹ A court resolution of the issue could conceivably have produced a jurisdictional boundary, such as the outer limit of the territorial sea, that would not make any practical sense, particularly in the context of oil and gas operations, and would probably have required a federal-provincial agreement for the effective administration of boundary areas anyway.¹⁰⁰

97. See further the discussion *supra*, [text at notes 11 to 13]. It is important in this context to bear in mind that the means employed by the oil industry to cope with the uncertainty as to jurisdiction could only accommodate exploration activities but would not be acceptable for the production phase of oil and gas exploitation.

98. I assume here of course that the formal Agreement and implementing legislation will in fact follow.

99. See the comments of Beauchamp, Crommelin and Thompson, *supra*, note 10 at 463-64

100. The foregoing advantages to the Memorandum of Understanding may be

But are these merits offset by any of the criticisms that were identified in discussion of the Australian scheme? First, it will be recalled that the system of mirror legislation is quite rigid. Rigidity will be avoided in the implementation of the Canadian Understanding by virtue of the automatic adoption of federal legislation and regulations as they may be amended from time to time, although this solution does raise the possibility of unilateral federal action.¹⁰¹

The second criticism that should be examined is that expressed by the Senate Select Committee when it found that there was a challenge to the exercise of the functions of Parliament in the presentation of legislation drafted by seven governments "as a *fait accompli* requiring formal legislative approval."¹⁰² To consider this observation in the Canadian context, it has to be remembered again that the Understanding does not contemplate mirror legislation. Parliament will not be asked to adopt a Common Mining Code drafted by the four governments involved, as the Australian Parliament was asked to do without any practical opportunity for amendment because of the nature of the Australian scheme.¹⁰³ The Canadian Parliament will be requested to simply agree to the delegation of the administration of its own independently-enacted

compared with the benefits of the Australian Offshore Petroleum Agreement cited *supra*, note 69.

101. See *supra*, [text at notes 63 to 64]

101. See *supra*, [text at notes 68 to 69]

103. The Senate Select Committee discussed the issue, *supra*, note 54 at 192-93, in detail as follows:

In the same context of broad constitutional responsibilities, the Committee also recognises a challenge to the exercise of the functions of the Parliament in the conception of uniform legislation drafted by the executive arms of seven Australian Governments being presented to the Parliaments as a *fait accompli* requiring formal legislative approval. The Petroleum (Submerged Lands) legislation is probably as striking an example as Australian experience can offer of the dominance of the executive arms and the relegation of the legislative arms to mere conduits for the effectuating of executive decisions. The role of Parliament is inevitably what members of Parliament choose to make it, but agreements and legislative schemes agreed upon by several Governments and presented to Parliaments for ratification appear to contemplate that the role of Parliament shall be to reject or accept in toto. There is no practicable opportunity of amendment for this would destroy the mutuality of what is proposed. And for Parliament to reject in toto what has been agreed upon imposes a responsibility in which the ramifications of its exercise extend beyond the legislative area of the Parliament concerned. A rejection would necessarily have far-reaching consequences. The tendency is, therefore, for the Parliament to accept what is proposed — in the manner of a resigned acknowledgement that what several Governments have in their collective wisdom agreed upon, one Parliament should not put asunder.

legislation to the Maritime Offshore Resources Board and even that only for the area within the terms of the Understanding. The issue for the provincial legislatures, on the other hand, will be the adoption of federal legislation as provincial legislation. It cannot be denied that this will amount to the presentation to the Legislature of a *fait accompli* so far as the provisions of the relevant federal legislation are concerned but that is what the technique of legislation by adoption must always involve. At least the technique puts that issue before the particular legislative body for debate on its own merits. Each Australian Parliament, on the other hand, was requested to debate the merits of the Common Mining Code in the knowledge that it must either accept the Code as presented to defeat the whole scheme.

The foregoing then are the merits, with some reservations, that I would submit are to be found in the Memorandum of Understanding. They are argued to be merits of the *approach* of the Understanding and not of any particular policy that might be implemented through the mechanism of the Understanding — those are not in issue here.¹⁰⁴

VI. Conclusion

The Australian Senate Select Committee concluded of the Australian Offshore Petroleum Agreement that “the larger national interest” was not served by leaving the question of jurisdiction unresolved.¹⁰⁵ The validity of this conclusion is the issue of real interest that now arises for consideration in Canada. The scheme contemplated by the Memorandum of Understanding would appear to be workable and will probably succeed in insulating the issue of jurisdiction from challenge before the courts, at least for so long as the parties are willing to continue the Understanding. But the question answered negatively by the Senate was not “Can it be

104. In May, 1977, the Government of Newfoundland issued *A White Paper and Draft Regulations respecting the Administration and Disposition of Petroleum belonging to Her Majesty in the right of the Province of Newfoundland*, reporting, at 4, that “in the near future, the Government will also make public a comprehensive document setting out why a political settlement along the lines of the recent Maritime Provinces Agreement would not protect this Province’s interests”. None of the criticisms that are then briefly outlined relates to the merits of the approach of the Understanding. Indeed the White Paper states, at 5, in reference to the Australian Offshore Petroleum Agreement, *supra*, note 54, that the “Australian Federation is much like ours and such a system could work here.”

105. See *supra*, note 69

done?" but "Should it be done?" It might be rephrased: "Is the calculated avoidance of the determination of constitutional responsibility proper?"

The purpose of this article has not been to attempt an answer to that question in the abstract. I shall, however, conclude by arguing for an affirmative answer in the context of the Memorandum of Understanding, but only in that context.

The *British North America Act*¹⁰⁶ clearly can provide an answer to the question of whether the Federal Parliament or the provincial legislatures have jurisdiction over the seabed and subsoil of offshore areas for the purposes of exploiting the resources of those areas. The problem is not one of whether the Act has *an* answer but one of determining what the answer is. Indeed it would seem that we do in fact have the answer to the question as between Canada and British Columbia. But the *British North America Act* has provided us with that answer, and will provide us with the answer as between Canada and any other province, only because of the general principle that all legislative power is assigned by that Act. Certainly, there is nothing in the subject matter of the exploitation of the resources of the seabed and subsoil itself that leads to any of the classes of subjects enumerated in either section 91 or section 92 of the Act.¹⁰⁷

Furthermore, it seems clear to me that we really are talking about a new subject-matter, new not only in the sense that it was obviously not contemplated as such by the *British North America Act*, but new also in the further sense that it is something more than a recent technological advance within a broader subject-matter, such as aeronautics might be said to be within transportation¹⁰⁸ or

106. Supra, note 41

107. In the *B.C. Reference*, [1967] S.C.R. 792 at 817; 65 D.L.R. (2d) 353 at 375, the Supreme Court of Canada, referring to the right to explore and exploit the seabed and subsoil of the territorial sea, stated:

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 91

Having reached this conclusion, the Court did not have to consider explicitly whether such jurisdiction might be a matter within the classes of subjects enumerated in section 91 itself but there is no suggestion even implicit in the Opinion that the Court regarded the matter as being within those classes of subjects either.

108. In *Re Regulation and Control of Aeronautics*, [1932] A.C. 54; [1932] 1 D.L.R. 58, the Privy Council seems to have so regarded aeronautics. The Board said, *id.* at 73-74; [1932] 1 D.L.R. at 67:

radio within communication or “telegraphs”.¹⁰⁹ The observations of Gibbs J. in the High Court of Australia in *New South Wales v. Commonwealth* are pertinent:

To say the rights of coastal States in respect of the continental shelf existed from the beginning of time may or may not be correct as a matter of legal theory. In fact, however, the rights now recognized represent the response of international law to modern developments of science and technology, which permit the seabed to be exploited in a way which it was quite impossible for governments or lawyers of earlier centuries to foresee. In this matter the arguments of history are stronger than those of logic. [The rights to the continental shelf which the Convention on the Continental Shelf now accords to coastal States], if theoretically inherent in the sovereignty of coastal States, were in fact the result of the operation of a new legal principle.¹¹⁰

It is submitted that in a somewhat unique sense the rights with which we are here concerned indeed are new.

What emerges from this is that the *British North America Act* would be called upon to determine the constitutional responsibility for a *new* subject-matter the likes of which it never contemplated and which it will only answer at all because it insists that it has an answer to any question of legislative competence. I appreciate that such reasoning would not persuade the Supreme Court to decline to apply the *Act* to the issue and perhaps most wisely such reasoning would not even be presented in that place.¹¹¹ However, it does seem to me to justify the avoidance of a judicial determination of the issue in the manner agreed to by Canada and the Maritime Provinces; all the more so when it is remembered that a court determination under the *British North America Act* must result in total victory for one party and total defeat for the other. A judicial determination under the terms of the *Act* is just not appropriate.¹¹²

In their Lordships view, transport as a subject is dealt with in certain branches both of S.91 and of S. 92, but neither of those sections deals specially with that *branch of transport* which is concerned with aeronautics.

[Emphasis added]

109. In *Re Regulation and Control of Radio Communication*, [1932] A.C. 304 at 314; [1932] 2 D.L.R. 81 at 85, the Privy Council expressed the opinion that radio was within the word “telegraphs”

110. 8 Aust. L.R. 1 at 49

111. See the comments of Laskin C.J. in the *Thorson Case* cited *supra*, note 47.

112. I am not persuaded of the validity, at least not in the Canadian context, of the concern expressed in the Senate Report, *supra*, note 54 at 199-200, in the following terms:

Perhaps in other circumstances the issue might be properly resolved by constitutional amendment.

In respect of matters such as protection and conservation of natural features and resources of the off-shore waters and the off-shore sea-bed, the question of who has authority or responsibility to act is unknown. In areas of public and political controversy — into which questions of conservation and pollution have moved — the inability to identify political responsibility is as unsatisfactory as the inability, because of disputed and uncertain power, to initiate action or authoritatively to disclaim responsibility. This must remain the situation while the constitutional question is unresolved.

The concern seems to be that uncertainty as to jurisdiction would result in disclaimers of responsibility and hence inaction. However, such a risk surely would be minimal. It would be surprising indeed if the Canadian Government should ever admit of any possibility other than it has exclusive jurisdiction in the offshore area for all purposes other than those expressly dealt with in the Memorandum of Understanding. With such a claim must go political responsibility for all of the implications of the claim.