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Proof of Offshore Territorial Claims in Canada

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I. The Problem

The territorial sea of Canada consists of a 12-mile belt of maritime space extending seaward from the Canadian maritime coastline. By virtue of international law, this 12-mile maritime belt is considered to be part of the territorial domain of the littoral state. As a consequence, the legal limits of Canadian territory extend beyond the low water line along the coasts of Canada to include the area of the 12-mile territorial sea.

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   ...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 twelve nautical miles from the nearest point of the baseline.

The determination of the outer limits of the 12-mile territorial sea of Canada is in reality a more complex matter, as will be shown below, than merely measuring a distance of 12 nautical miles seaward from the low water line along the coast or from the baselines of the territorial sea.

2. Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S.205 (Geneva, 29 April 1958, Article 1.) Although Canada is not a party to the Convention, it is widely recognized that the Convention has codified customary law respecting the territorial sea. In its practice, Canada has accepted this view. Article 1 of the Convention provides that “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”. There is a wealth of literature on the origin and development of the concept of the territorial sea. For a useful summary, see: Brownlie, Principles of Public International Law (3rd ed., 1979) at 183-186.

3. It must be noted that Article 1 of the Convention on the Territorial Sea does not state the precise limits of (i.e., the breadth of) the territorial sea, due to the inability of the International Law Commission in its preparatory work leading up to the 1958 U.N. Law of the Sea Conference, and of the Conference itself, to agree on the matter. A subsequent Conference, convened in 1960 largely to deal with the unresolved issue of the breadth of the territorial sea, also failed to reach agreement on this issue. While the breadth of the territorial sea is left open under the 1958 Convention, the draft Law of the Sea Convention (A/Conf.62/W.P.10/Rev.3, 22
In addition to the territorial sea, there are vast maritime areas adjacent to and beyond the low water line along the east, west and arctic coasts of Canada that are deemed to be part of Canadian territorial domain under international law. These areas, legally distinct from the territorial sea, comprise: first, the bays, estuaries and other similar waters that are known as *inland* waters of Canada and that are found immediately beyond the low water mark; and second, the category of waters called *internal waters* of Canada. These latter areas — the non-inland, internal waters of Canada — in general terms consist of the Gulf of St. Lawrence, the Bay of Fundy on the east coast; Queen Charlotte Sound, Hecate Strait and Dixon Entrance on the west coast; and the waters of the Arctic archipelago in the arctic. It is these areas of water that are the primary focus of this article.

The issue addressed in this article is not the validity of Canada’s sovereignty over these coastal waters vis-à-vis other states as a matter of international law. Rather, the question which this article examines is the manner in which courts in Canada might deal with the proof of Canadian claims to these areas under the municipal (i.e., domestic) law of Canada.

Sept. 1980), Article 3, produced at the 3rd U.N. Law of the Sea Conference, sets the maximum breadth of the territorial sea at 12 nautical miles. Under international law, all waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state: Convention on the Territorial Sea, Article 5. Given the accepted method of drawing baselines as set out in Article 4 of the Convention, waters in deeply indented coastal areas (i.e., bays, gulfs, estuaries, etc.) would normally be on the landward side of the baselines of the territorial sea and hence subsumed within the category of internal waters. In addition, waters enclosed in bays, the natural entrance points to which are less than 24 miles across, and waters in historic bays are also part of the internal waters of a state, by virtue of Article 7 of the Convention. International law does not distinguish as such between “inland” waters and “internal” waters. Generally, international law recognizes all waters enclosed within the baselines of the territorial sea, or in bays the natural entrance points of which are less then 24 miles wide or in historic bays, to be internal waters of the state concerned, whether these consist of fresh-water lakes and rivers or salt-water coastal areas.

As explained below, the distinction between *inland* waters of Canada and *internal* waters of Canada derives not from international law but from Canadian statute.

The *Customs Act* definition of “internal waters” and the definition of the same term in the *Territorial Sea and Fishing Zones Act* are identical save in one important aspect, noted below. The definition of the term “inland waters” under the *Customs Act* — i.e., all the rivers, lakes and other *fresh water* areas of Canada — makes it clear that the waters off the east, west and arctic coast of Canada cannot fit the definition of “inland waters” and must therefore be in another category of waters under Canadian law. Are they internal waters?
Clear though the status of these so-called special bodies of water may appear to be under international law, the nature and extent of Canadian sovereign claims to these maritime areas under Canadian municipal law have never been made clear. Although various statements made by or on behalf of successive Canadian governments have indicated that Canada regards these areas as part of Canadian territory and under full Canadian sovereignty as a matter of national policy, existing Canadian statutes leave uncertain both the nature and extent of Canadian sovereignty and jurisdictional claims over these waters. Under such circumstances, what would be the likely result if the matter were ever squarely faced by a Canadian court?

In the event of litigation directly or indirectly requiring judicial interpretation of the extent of Canadian territorial domain over bodies of water adjacent to the several coasts of Canada, the courts will rely heavily on Canadian legislation. Given that Canadian statutes do not seem to provide a sufficient basis for determining either the nature or extent of Canadian sovereignty over the internal waters of Canada, as will be demonstrated below, the question arises as to how the matter of Canadian sovereignty over the above referred-to areas will be proven.

II. Canadian Claims to the Special Bodies of Water
The waters of the Arctic archipelago have long been claimed by the government of Canada as internal waters of Canada. Nevertheless, over the years, the exact position of the government on the matter of the legal status of Canadian arctic waters and on the precise limits of the arctic water areas claimed to be under Canadian sovereignty has not been as clear as one might have hoped. Statements by successive Ministers of the Crown have indicated that the arctic waters generally are deemed to be internal waters of Canada and are claimed to be part of Canadian territorial domain as a consequence.


8. For several years, however, there was considerable debate and discussion over
The most precise official statement on the legal status of Canadian arctic waters in recent years was made by the then Secretary of State for External Affairs, Mr. MacEachen, on May 22, 1975 before the House of Commons Standing Committee on External Affairs and National Defense, when he said, explaining the implications for Canada of the draft Law of the Sea Conference texts on transit passage through international straits:

...the provisions define the straits as only those which are used for international navigation and exclude straits lying within the internal waters of a state. As Canada's northwest passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the regime of transit does not apply to the Arctic. We are therefore able to continue to enact and enforce pollution control regulations in that area.9 (emphasis added)

The foregoing statement has clarified to a large degree the question of status: but it still leaves open the question of the geographic limits to Canada's sovereign claim to arctic waters. The area of the Canadian arctic claimed by Canada as internal waters would appear to be the waters within an imaginary line extending from the northern tip of Labrador across Hudson Strait and following the outer perimeter of the Arctic archipelago from east to west, across Lancaster Sound on the east and McClure Strait and Amundsen Gulf on the west until it meets the low water mark of the Northwest Territories at Cape Bathurst (see figure 1). It is not clear from the statements referred to, however, whether in law the exact extent of

whether Canada's arctic waters claims were based on the sector theory. This approach seems largely discredited today. As Head has pointed out (supra, note 7, at 210) after reviewing the history of ministerial statements regarding the Arctic: "Few Canadian policies have been so inconsistently or unhappily interpreted over the years as that pertaining to the Arctic frontiers. The most recent statements indicate that Canada now relies in the last instance upon effective occupation". When asked in the House of Commons in 1969 whether Canada accepted the sector theory, the Prime Minister replied: "I believe the sector theory applies to the sea bed and the shelf. It does not apply to the waters." (emphasis added). Can. H.C. Deb., Vol. VI, (1969), at 6396.

9. Statement of the Secretary of State for External Affairs before the House of Commons Standing Committee on External Affairs and National Defence, 22 May 1975. Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence, Issue No. 24, p.6. This statement should be contrasted with the words contained in a Canadian diplomatic note dated April 16, 1970, to the U.S. government, wherein it is stated, "With respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian." (emphasis added). Reproduced in (1971) 9 C.Y.I.L. 293.
the arctic area claimed by Canada is to be so delineated. Should the issue arise in the course of litigation, the initial question for any Canadian court to ask will be — what do Canadian statutes say?

Similarly, on the east coast, the Canadian Government has stated that it regards the waters of the Gulf of St. Lawrence as internal waters of Canada and hence under complete Canadian sovereignty. A press communiqué issued on March 6, 1975 on behalf of the government by the Secretary of State for External Affairs affirmed this position in clear terms.\(^\text{10}\) It can be assumed from the foregoing communiqué — although it is not expressly stated — that the waters of the Gulf of St. Lawrence claimed as internal waters of Canada are those waters enclosed by lines drawn across Cabot Strait between Cape Breton Island, Nova Scotia, and Cape Ray, Newfoundland, and across the Strait of Belle Isle, between Newfoundland and Labrador in the north (see Figure 2). In addition, on the east coast, the Bay of Fundy has long been claimed as internal waters of Canada largely on the basis of historic title.\(^\text{11}\) Although the geographic construction is somewhat more complex, the waters of the Bay of Fundy that are considered to be part of Canada’s internal waters could be said to be all those waters bounded by a notional straight line drawn across the mouth of the Bay from Brier Island to Machias Seal Island (see Figure 3). In the case of both the Gulf of St. Lawrence and the Bay of Fundy these notional lines would presumably follow the so-called fishery closing lines promulgated in 1971 when Fishing Zones 1 and 2 were created off the east coast of Canada under the \textit{Territorial Sea and Fishing Zones Act}.\(^\text{12}\)

On the west coast of Canada, certain coastal waters are also deemed to be internal waters of Canada and subject to similar treatment. Thus, the waters of Queen Charlotte Sound, Hecate Strait and Dixon Entrance are also claimed as part of Canadian territorial domain as internal waters of Canada, the outer limits of which would likely follow or be coterminous with fisheries closing lines used to create Fishing Zone 3.\(^\text{13}\) The waters of the Strait of

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\(^{10}\) Reproduced, in part, in (1976), 14 C.Y.I.L. 324.

\(^{11}\) The most useful review of the legal basis for Canada’s assertion of title over the Bay of Fundy can be found in Laforest, “Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident” (1963), 1 C.Y.I.L. 149; see also Laforest, \textit{Natural Resources and Public Property under the Canadian Constitution} (Toronto: U. of T. Press, 1969).

\(^{12}\) Fishing Zones of Canada (Zones 1, 2 and 3) Order, P.C. 1971-366, 25 February, 1971 (Canada Gazette Part II, Vol. 105, No. 5 (10/3/71)).

\(^{13}\) British Columbia contests the view that these west coast waters are internal
Juan de Fuca, Georgia Strait, Johnstone Strait and Queen Charlotte Strait would also fall under such a claim as internal waters of Canada.\(^{14}\) (see Figure 4).

None of the foregoing coastal areas has been specifically defined by Canadian statute as internal waters of Canada. Under Section 3(2) of the *Territorial Sea and Fishing Zones Act*, "internal waters of Canada" are merely defined in broad terms as follows:

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.

The Act does not go further than this. It does not specify the precise geographic areas adjacent to the coasts of Canada that are legally within the statutory definition of internal waters of Canada. It leaves the determination of those coastal areas that are internal waters of Canada to a complex set of deductions, supplemented by statements of government policy, some of which have been referred to above.

It is important also to bear in mind, as noted *supra*, that under the law of Canada the "internal waters" of Canada are legally distinct from "inland waters" of Canada, although the former include the latter. Inland waters are not defined under the *Territorial Sea and Fishing Zones Act*. As a statutory term, "inland waters" is defined in the *Customs Act\(^{15}\) to mean:

waters of Canada, beyond the limits of the province, and that their status was settled by the B.C. *Offshore Mineral Rights Reference*, [1967] S.C.R. 792. The B.C. government recently announced that it intends to exercise jurisdiction over the petroleum and gas resources in these areas. See: *Globe & Mail*, Toronto, June 3, 1981.

14. The question arises, of course, whether the west coast bodies of water can be subsumed within the classification of historic waters under international law. This is an extremely complex issue and requires separate consideration of the history of each of Dixon Entrance, Hecate Strait and Queen Charlotte Sound. The Dixon Entrance problem involves an examination of the legal status of the so-called A-B line, on which see: Bourne and McRae, "Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined" (1976), 14 C.Y.I.L. 175. There is the separate question as well as to whether straight baselines can be drawn across the west coast bodies of water under the doctrine enunciated by the International Court of Justice in the *Anglo-Norwegian Fisheries Case*, I.C.J. Reports 1951, p. 116, and now codified in Article 4 of the 1958 Convention on the Territorial Sea. As to the status of these waters under Canadian (as opposed to international) law, the matter is complicated by the fact that the British Columbia Court of Appeal on a reference, held (Seaton, J.A. and McIntyre, J.A. dissenting) that the waters of Georgia Strait et al. between Vancouver Island and the mainland were inside the boundaries of British Columbia and were therefore not subject to federal ownership: *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1977] 1 B.C.L.R. 97.

all the rivers, lakes and other fresh waters in Canada and includes the St. Lawrence River as far seaward as straight lines drawn,
(a) from Cap des Rosiers to the western-most point of Anticosti Island and
(b) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west.

Thus, internal waters of Canada as defined by the *Territorial Sea and Fishing Zones Act* include inland waters, the latter being, in general terms, all fresh water areas, the former, pursuant to the definition in the *Territorial Sea and Fishing Zones Act*, including *both* inland waters (i.e., all fresh water areas) and all other waters on the landward side of the baselines of the territorial sea of Canada. Internal waters therefore may include but are also distinct from and may extend beyond the limits of Canadian inland waters.

The *Customs Act* and the *Territorial Sea and Fishing Zones Act* make it clear that the term “internal waters of Canada” means *both* the areas of the sea that are on the landward side of the baselines of the territorial sea of Canada as well as the inland waters of Canada. Curiously, the definition of “internal waters of Canada” under the *Customs Act* differs from the definition of the same term under the *Territorial Sea and Fishing Zones Act*. Under the *Customs Act*, the “internal waters of Canada” are defined as follows:

. . .internal waters of Canada *means*
(a) any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada, and
(b) the inland waters of Canada. (emphasis added)

On the other hand, as noted *supra*, under the definition in the *Territorial Sea and Fishing Zones Act*:

. . .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 (emphasis added).

The discrepancy in the definition of “internal waters of Canada” in the two pieces of legislation is not without legal significance. If, as in the *Customs Act*, the term “internal waters of Canada” is found to *mean* — i.e., to be — those waters on the landward side of the baselines of the territorial sea of Canada, the coastal areas susceptible to fitting within the statutory definition is straightforward and precise: internal waters of Canada can only be those waters landward of territorial sea baselines. Conversely, in the
absence of baselines, there can be no waters which fit within the *Customs Act* definition of internal waters of Canada. On the other hand, the definition in the *Territorial Sea and Fishing Zone Act* is wider in scope, for under the latter, "internal waters of Canada" include waters on the landward side of the baselines, and *a fortiori* can also include waters where no baselines have been made. Thus, areas of the sea adjacent to Canadian coasts where no territorial sea baselines have been made may also come within the scope of the definition of internal waters of Canada depending upon whether one uses the definition of "internal waters" under the *Customs Act*, on the one hand, or under the *Territorial Sea and Fishing Zones Act*, on the other.

In the event of conflict between the two definitions, it is submitted that the definition of internal waters of Canada in the *Territorial Sea and Fishing Zones Act* should prevail. The purpose of this Act is to define the limits of offshore maritime areas over which Canada exercises sovereignty (internal waters and the territorial sea) and jurisdiction (fishing zones of Canada) and within which the laws of Parliament apply. The latter statute is thus more directly pertinent to defining the limits of Canada's internal waters than the *Customs Act* and would likely be so regarded by the courts in the event of conflict in respective definitions. Moreover, under Section 2 of the *Customs Act*, the definitions as set out are expressly declared to be definitions restricted to the *Customs Act* or to other laws relating to customs.¹⁶ The latter Act is therefore restricted in its scope to a particular subject matter (i.e., customs matters) and the definitions used therein should be restricted in similar fashion to customs-related purposes. The governing statute, therefore, for purposes of establishing the inner limit to the territorial sea — and hence the outer limit to internal waters of Canada — is the *Territorial Sea and Fishing Zones Act*.

Assuming, then, that the prevailing municipal law definition of internal waters of Canada — which are maritime areas under full Canadian sovereignty and part of Canadian territorial domain by virtue of international law — is the definition found in the *Territorial Sea and Fishing Zones Act*, the first question that arises in determining the limits of Canadian maritime sovereignty is whether there exists in any given maritime area a baseline of the territorial

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¹⁶. Section 2 of the Act reads, in part, "In this Act, or in any other law relating to customs..." and goes on to define several terms as set out.
sea of Canada. If a baseline exists, then the answer is simple: any area of the sea that is landward of (i.e., within) such baseline is, by statutory definition, an area of internal waters of Canada and part of Canadian territorial domain. In such case, problems respecting proof of territorial claims do not arise. It is only when statutory baselines do not exist that proof of sovereignty and of offshore territorial delimitation become much more complicated. The focus of this article is to examine the legal basis for proving that these waters — in the absence of territorial sea baselines — are by law internal waters of Canada.

III. Territorial Sea Baselines

What is meant by a baseline of the territorial sea? Baselines have been a term of art long used by hydrographers for constructing the landward (i.e., internal) limits of the territorial sea belt that surrounds the littoral state. The 1958 Convention on the Territorial Sea, which has been generally accepted as a codification of customary international law with respect, inter alia, to baselines, provides, by Article 3:

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

In addition, consistent with the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries Case, the Convention also provides, in 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.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

Although Canada is a signatory, it is not a party to the 1958 Convention on the Territorial Sea, not having ratified the Convention. Nonetheless, recognizing the fact that Articles 3 and 4 of the Convention have codified certain pre-existing rules of customary international law, baselines put in place by Canada by Order in Council under the Territorial Sea and Fishing Zones Act, first along the coasts of Labrador and Newfoundland in 1967, then along the coast of Nova Scotia, Vancouver Island, and the Queen Charlotte Islands in 1969, were drawn consistent with the method set out in the 1958 Convention (see Figures 5 and 6).

The baselines promulgated under the Territorial Sea and Fishing Zones Act in 1967 and 1969 (and consolidated in 1972) do not cover all coastal areas of Canada, as shown on the maps in Figures 5 and 6. Territorial sea baselines under the Act have not been drawn across the Gulf of St. Lawrence or across the Bay of Fundy, or across the special bodies of water on the west coast. Nor have territorial sea baselines been drawn around the perimeter of the Arctic archipelago to set out in legal terms that part of the waters of the arctic that the Canadian Government has claimed as internal waters of Canada.


Certain lines have been drawn across the mouth of the Gulf of St. Lawrence (in the Strait of Belle Isle and in Cabot Strait), across the mouth of the Bay of Fundy and across the areas of the west coast bodies of water in 1971. These lines are not baselines under the *Territorial Sea and Fishing Zones Act*. These lines have been drawn to define the limits of the fishing zones of Canada pursuant to the Act and not for purposes of delimiting the baselines of the territorial sea of Canada.\(^{24}\) The fishing zones thus created are largely coterminous with the coastal waters claimed as internal waters of Canada (see Figures 7 and 8). Nevertheless, because these bodies of water, as well as the waters of the Arctic archipelago, have not been enclosed by territorial sea straight baselines under the *Territorial Sea and Fishing Zones Act*, the issue of the proof of the sovereign character of these waters under municipal law of Canada may someday arise in litigation in the Courts of Canada.\(^{25}\) Here, the resolution of the issue will depend largely upon Canadian statute and, in the absence of clear statutory direction, upon proof of sovereignty which the courts will deal with under common law rules.

IV. *Proof of Fact by Means of a Crown Certificate*

Section 5, subsection 3 of the *Territorial Sea and Fishing Zones Act* provides that:

In respect of any other area and until such time as geographical

\(^{24}\) Under Section 5A of the Act, the Governor in Council prescribed as fishing zones of Canada certain areas of the sea adjacent to the coast of Canada bounded by straight lines joining the geographical coordinates as set out in the Order-in-Council: Fishing Zones of Canada (Zones 1, 2 and 3) Order, P.C. 1971-366, 25 February, 1971 (Canada Gazette, Part II, Vol. 105, No. 5 (SOR/71-81). These straight lines joining the said geographical coordinates are not defined as such in either the Act or the Order, but are commonly known as "fishery closing lines".

\(^{25}\) The status of Canadian arctic waters has indeed been raised in recent litigation wherein the jurisdiction of the Supreme Court of the Northwest Territories to permit service ex juris on the defendant and to grant several ex parte orders affecting exploratory permits in the Beaufort Sea was challenged: *BP Exploration Company (Libya) Limited v. Nelson Bunker Hunt*, unreported decision of Tallis, J. (June 23, 1980). One of the submissions of the defendant in this case was that the offshore area where the permits were located (40 to 50 miles offshore) were not part of the Northwest Territories and that the defendant therefore had no assets within the jurisdiction of the Court. Tallis, J. held that first, the offshore areas involved were within the statutory definition of Northwest Territories and, secondly, that the lands underlying the Beaufort Sea were in any case within the territorial limits of Canada on the basis of the decision of the Supreme Court of the Northwest Territories in *R. v. Tootalik E4-321* (1969), 71W.W.R. (N.S.) 435.
coordinates of points have, for such other area, been listed in a list issued pursuant to subsection (1), baselines remain those applicable immediately before the 23rd day of July, 1964.

The effect of the foregoing is that where an Order in Council making territorial sea baselines has not been made under Section 5, subsection (1) of the *Territorial Sea and Fishing Zones Act*, the applicable baselines are those existing prior to July 23, 1964. Is there anything to suggest that the baselines “applicable immediately before July 23, 1964” are not baselines following the low water line along the coasts? What other baselines existed under Canadian law prior to that date? Unless such baselines can be demonstrated to have been in existence prior to that date, it would seem to follow that the applicable baselines in the areas of the special bodies of water, including the waters of the arctic archipelago, would be the low water line along the coast. The result of such a line of reasoning would be that in the absence of proof to the contrary the territorial sea of Canada would extend outward from the coastline in these areas for 12 nautical miles. The area beyond the territorial sea clearly, therefore, would be high seas. As a consequence, there would be high seas areas in each of the special bodies of water, a view which is inconsistent with stated Canadian government policy.

Thus, recourse to legislation alone will not provide the complete answer in a case in which the issue to be determined by the courts is whether a given maritime area is part of the internal waters of Canada, whether it is part of the territorial sea of Canada or whether it is high seas beyond the territorial sea. Because there are good grounds upon which to argue that the areas claimed by the Crown in Right of Canada as part of the territorial domain of Canada (i.e., either as internal waters or as territorial sea) can exist independently of legislation, the issue thereby becomes one of proving the legal validity of such claims to the satisfaction of a Canadian court.

It is submitted that, in the absence of clear statutory direction, the word of the executive as to the extent of Canadian territorial domain when such a question is before the Courts is of great weight and in certain cases is sufficient in itself to answer the question of law and of fact. However, while this proposition seems supportable on the basis of judicial precedent, it is only sustainable up to a point, in light of the accepted doctrine in *R. v. Keyn* and in light of the limits to which statements by the executive have been applied in like

instances of offshore claims in the English courts.

At common law there is a long history of presentation by officials of certificates on behalf of the Crown which are accepted by the Courts as conclusive evidence of the facts therein stated, although, as Phipson has noted, the cases which have allowed such certificates or statements are neither uniform nor satisfactory.\textsuperscript{27} The modern line of cases admitting executive certificates as conclusive proof begins with \textit{Mighell v. Sultan of Jahore}\textsuperscript{28} and includes the well-known case of \textit{Duff Development Co. v. Kelantan}.\textsuperscript{29} In the latter, a certificate from the Secretary of State was held to be conclusive evidence of the independence of a foreign sovereign.\textsuperscript{30} In the famous case of \textit{Engelke v. Musmann},\textsuperscript{31} a statement made to the court by the Attorney General of England was found to constitute conclusive evidence of the status of a person claiming immunity from judicial process on the ground of diplomatic privilege.

In \textit{Chateau-Gai Wines Ltd. v. Institut National des Appellations d'Origine des Vins et Eaux-de-Vie},\textsuperscript{32} the Secretary of State for External Affairs of Canada provided the court with a certificate to the effect that even though the 1933 Canada-France Trade Agreement was never ratified by the two Governments, it was nevertheless considered by Canada and France to be in force between them. While not giving the matter of the evidentiary value of a certificate the analysis which the issue perhaps warranted, Pigeon, J., for the majority, gave the following opinion:

In the case at bar, I do not consider it necessary to decide whether one should go so far as to say that a certificate from the appropriate Minister is conclusive proof that an agreement exists.

\begin{itemize}
  \item 28. (1894) 1 Q.B. 149 (C.A.).
  \item 29. (1924) A.C. 797; [1924] All E. R. Reprint 1.
  \item 30. Viscount Finlay stated as follows:
  \begin{quote}
  There are a great many matters of which the court is bound to take judicial cognisance, and among them are all questions as to the status and boundaries of foreign Powers. In all matters of which the court takes judicial cognisance the court may have recourse to any proper source of information. It has long been settled that, on any question of the status of any foreign Power, the proper course is that the court should apply to His Majesty's government, and that, in any such matter, it is bound to act on the information given to them through the proper Department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country, through one of his Ministers, upon a matter which is peculiarly within his cognisance. \textit{Id.}, at 8.
  \end{quote}
  \item 31. [1928] A.C. 433.
  \item 32. [1975] 1 S.C.R. 190; (1975), 51 D.L.R. (3d) 120.
\end{itemize}
It is certain that such certificate has this result as regards the value of the signatories' powers and the authority of the government they represent. I am inclined to the opinion that the question of whether the treaty is in force, as opposed to what its effect should be, is also wholly within the province of the public authority.33

In a quite separate but related action, which also raised the issue whether the 1933 Canada-France Trade Agreement was in force, *Chateau-Gai Wines Ltd. v. Attorney General of Canada*,34 Jackett, P., went much further in examining the legal value of a certificate from the executive. In an important passage he said:

In my view, the certificate by Her Majesty's Secretary of State for External Affairs for Canada that 'it was agreed between the two countries that the trade agreement would enter into force on Saturday, June 10, 1933', and that 'the two countries have regarded the agreement as having come into force as of June 10, 1933' should be accepted by this court as conclusive that the agreement did come into force as a binding international agreement at that time. In principle, as it seems to me, a question, whether of fact or law or both, as to whether an international agreement between Canada and another country has come into force between Canada and another sovereign power so as to create international rights and obligations, must be determined, in case of doubt, in the same way as

(a) a question as to whether a person is a foreign sovereign power,

(b) a question as to what persons must be regarded as constituting the effective government of a foreign territory,

(c) a question as to whether a particular place must be regarded as being in Canada or as being under the authority of a foreign sovereign authority,

(d) a question as to whether Canada is at peace or at war with a foreign power, or

(e) a question as to whether a person in Canada is entitled to diplomatic privileges as being an ambassador of a foreign power or a member of the entourage of such an ambassador. All such questions are questions within the realm of responsibility of the executive arm of government and, being questions on which the state should speak with one voice, they are questions with regard to which the court should accept from the appropriate minister of the Crown a certificate as to Canada's position.35

As authorities for the foregoing view of the law, Jackett, P. cited, *inter alia, Mighell v. Sultan of Jahore, Duff Development, Engelke*

35. Id., at 382-383.
v. Musmann, all referred to supra, as well as, significantly, The Fagernes.36 Presumably, reference to The Fagernes was in support of point (c) of the passage quoted supra — that is, that a certificate from the executive in Canada is binding on the Courts as to whether a particular place must be regarded as being in Canada or as being under the authority of a foreign sovereign authority. This view, of course, is probably a correct statement of the law. But this proposition, based on The Fagernes and related cases, is only of use within carefully drawn limits. It will be for the courts of Canada to determine those limits, taking into account the factual situation that obtained in The Fagernes.

The Fagernes involved a collision in the Bristol Channel between two steamships, one owned by the plaintiffs, the other, the Fagernes, owned by the defendants. The plaintiffs brought an action in personam against the Italian owners of the vessel. The defendants moved to set aside the writ of service on the grounds that the collision occurred outside British territorial waters and that the English Admiralty court was therefore without jurisdiction. The collision occurred in the Bristol Channel, at a place 10½ to 12½ miles from the English coast and 7½ to 9½ miles from the Welsh coast. On the motion, Hill, J. held that the location in question was inter fauces terrae and therefore within the territory of Great Britain and that consequently the action was within the jurisdiction of the High Court. The defendants appealed to the Court of Appeal and were successful, the Court of Appeal holding itself bound by the views of the Secretary of State for Home Affairs that the spot where the collision was alleged to have occurred was not within the limits to which the territorial sovereignty of the Crown extended.

The decision of the Court of Appeal is interesting on several grounds. To begin with, the Court appeared reluctant to relinquish totally its judicial decision-making powers to the views of the government of the day. Bankes, L.J. was of the opinion that, quite apart from the statement made on behalf of the Crown, he would not have found the location in question to be part of the realm, distinguishing the Fagernes situation from the earlier decision in Cunningham's Case37 which had held that "the whole of the inland sea between the counties of Somerset and Glamorgan is to be considered within the counties by the shores of which its several

37. R. v. George Cunningham et al. (1859), Bell 71.
parts are respectively bounded.”

Bankes, L.J., in his words, "should have hesitated in accepting (Hill, J’s) conclusion, because it appears to me that the court in Cunningham’s Case had not to consider the circumstances of the present case, where the width of the channel is so much greater, and there is an entire absence of anything indicating effective occupation...". Having thus expressed his opinion, the learned judge went on to state that "it is not, however, necessary to express a decided opinion on this question" because it involved a matter on which it was necessary to seek the views of the Attorney General! The Attorney General having advised the Court that the Crown did not claim the particular point in the Bristol Channel as being part of the territory of Great Britain, Bankes, L.J. said:

This information was given at the insistence of the Court, and for the information of the Court. Given under such circumstances, and on such a subject, it does not in my opinion necessarily bind the Court in the sense that it is under an obligation to accept it. . .

Having regard, however, to the position given to the Court by the Attorney-General, to absence of authority and to the general trend of the more recent opinion on the question of limiting the width of the fauces terrae to which the rule of territorial jurisdiction should apply, I think the court ought to be guided by the information given to the Court by the Attorney-General. . ." (emphasis added)

Bankes, L.J.’s seemingly reluctant acquiescence to the “guidance” given to the Court by the Attorney-General was not matched by Atkin, L.J., largely for reasons of public policy. The learned justice, perhaps as a remonstrance to the views of his brother judge, held as follows:

What is the territory of the Crown is a matter of which the Court takes judicial notice... Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country... I consider that statement binds the Court, and constrain it to decide that this portion of the Bristol

38. Id., at 86.
39. Id., note 36 at 322.
40. Id., at 322.
41. Id., at 323.
Channel is not within British jurisdiction, and that the appeal must be allowed. 42 (emphasis added)

Not content with the foregoing, nor with the obiter dicta of Bankes, L.J., the learned justice went on and added his own obiter to those of his brother judge:

... if I had to decide this case upon the materials before Hill, J. and the further authorities brought before us, I should have been inclined to come to the same conclusions as he did. 43

Lawrence, L.J. agreed with his fellow justices as to the duty of the Court to follow the views of the Crown on whether the location in question was within the realm. He would not, however, have agreed with Hill, J.'s views in the court below in following Cunningham's Case.

The doctrine of The Fagernes languished for over forty years until it was given new life by the English Court of Appeal in Post Office v. Estuary Radio. 44 In that case, the defendant operated a radio station on an abandoned part in the Thames River Estuary more than 3 nautical miles from the opposite coasts. The Post Office sought and obtained an injunction against the defendants, the trial judge holding that the point in question was within the internal

42. Id., at 324.
43. Id., at 325.
44. (1968), 2 Q.B. 746. In the first of the series of cases involving Estuary Radio Ltd., R. v. Kent Justices, Ex parte Lye & others, [1967] 1 All E.R. 560, the Queen's Bench Division refused to quash the conviction of the appellants under the U.K. Wireless Telegraph Act, 1949, the majority holding that the expression "territorial waters", which was not defined in the Act, meant territorial waters as determined from time to time by the exercise of the Crown prerogative. The issue in this case was whether Red Sands Tower, being 4.9 nautical miles from the Kent Coast was within the territorial sea of the U.K. The Crown's position was that, under the Territorial Waters Order in Council, the territorial sea of the U.K. is to be measured from low tide elevations in accordance with the 1958 Convention on the Territorial Sea, and that on this basis, Red Sands Tower lies within the territorial sea. The conviction was upheld largely on the view that the extent of offshore territorial claims is a matter of Crown prerogative (per Lord Parker, C.J.). Following their conviction, the defendants continued to broadcast, and the Post Office sought an injunction. In this case, [1967] 3 All E.R. 663, the Crown argued that the Thames Estuary was a "bay" within the terms of the 1964 Order in Council and that Red Sands Tower was within a line joining the natural entrance points of the bay. The case centred on what were the natural entrance points of the Thames Estuary. The Court (per O'Connor, J.) accepted the evidence of the experts of the Crown on this point. The trial judge also found that, alternatively, Red Sands Tower was within the territorial sea on the basis that the territorial sea was measured from low tide elevations in the area. The matter of Crown prerogative or of Crown certificates proving offshore claims was not dealt with by the Court.
waters of the United Kingdom. The defendants appealed. The primary issue on appeal was whether the location of the radio station was within a line joining the natural entrance points to the Thames Estuary and hence situated in internal British waters. The Court of Appeal held that it was. Speaking through Lord Diplock, the Court stated as follows:

"It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. The Queen's Courts, on being informed by Order in Council or by the appropriate minister or law officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it." (emphasis added)

Does the foregoing judicial statement mean that the executive alone, in the absence of clear statutory direction, has the authority to provide conclusive answers to the question of the extent of offshore claims? Does the foregoing mean that the Crown itself can decide through the exercise of the prerogative those bodies of water beyond the coast that are part of the territorial domain of the state? In the event of litigation involving the status of the arctic waters of Canada, or any of the special bodies of water, is Lord Diplock saying that the federal executive in Canada can advise the courts as to its view of the matter and that on being so informed the courts will automatically accept the view of the executive? Can this view be reconciled with the accepted principle enunciated in R. v. Keyn that it is the sole province of Parliament to extend the realm?

45. Id., at 753. Diplock, L.J. also stated at 754:

"The area to which an Act of Parliament or the United Kingdom applies, may vary too as the Crown, in the exercise of its prerogative, extends its claim to areas adjacent to the coast of the United Kingdom in which it did not previously assert its sovereignty.

What is meant by this? Does Diplock, L.J. purport to hold that the territorial extent to which an Act of Parliament applies can be determined by exercise of Crown prerogative? Equally puzzling is the reference by Lord Diplock to the effect of the U.K. becoming party to the 1958 Convention on the Territorial Sea, at 756, thus:

"...the convention, of which the Court must take judicial notice, thus constituted a declaration by the Crown of an extension to the area over which it would claim to exercise territorial sovereignty as internal waters of the United Kingdom when the Convention came into force, as it did, on September 10, 1964 — a matter which lies within the sole prerogative power of the Crown without any constitutional need for the consent of Parliament. (emphasis added)."

46. Supra, note 26.
V. Extension of the Realm and the Power of Parliament

Several important legal issues are raised but are not satisfactorily answered by the judgement of Diplock, L. J. in Estuary Radio. The first series of issues that bears careful examination is the matter of the exclusive sovereign power of Parliament to extend the realm, a proposition supported by the majority in R. v. Keyn, and the relationship of this proposition to the proof of offshore territorial claims in domestic courts. The second series of issues, directly related to the first, involves the whole area of Crown prerogative in relation to cession and acquisition of territory. Let us examine the first series of issues before turning to the second, beginning with a consideration of the relevance of R. v. Keyn to offshore territorial claims.

The issue in R. v. Keyn was whether a German national — the captain of the German flag vessel Franconia — could be tried by the English criminal courts as a result of a collision with an English vessel, the Strathclyde, that resulted in loss of life of a passenger aboard the Strathclyde. The collision occurred 2 1/2 miles from the English coast. The German captain of the Franconia was indicted and convicted of manslaughter under English law by the Central Criminal Court. The issue was referred to the Court of Crown Cases Reserved to determine whether the Central Criminal Court had jurisdiction to try the Franconia's master. That court, consisting of thirteen judges, held by a majority of seven to six that the Central Criminal Court, to which had been transferred the jurisdiction of the Lord High Admiral, lacked the jurisdiction to try the offence. The majority held that the Court lacked jurisdiction because the offence had not occurred within the body of a county of England, which, in the absence of any statute specifically extending the realm, ended at the low-water mark. Moreover, the offence did not lie within the jurisdiction of the Admiral, the Admiral having no jurisdiction to try offences committed by foreigners on the high seas. Even though the territorial sea of Great Britain might be part of the territory of Great Britain as far as international law is concerned, under the common law the realm ended at the low-water mark. In the absence of an act of Parliament specifically extending the realm or conferring criminal jurisdiction on the courts, there was no jurisdiction to try offences committed on the territorial waters of Great Britain.

The judgements of Cockburn, C.J. and Lush, J. are most often referred to support the proposition that, in the absence of legislation to the contrary, the realm of England or of any British dominion
ends at the low-water mark. Cockburn, C.J. reasoned that since the Admiral had no jurisdiction over foreigners, whether on the territorial seas or on the high seas, the Crown would be required to show that the territorial sea had somehow become incorporated into British territory in order to provide the basis for criminal jurisdiction over foreigners. Since the Admiral had no jurisdiction over foreigners on the territorial sea, and since nothing in the precedents revealed that English criminal jurisdiction extended beyond the limits of the realm, was there any basis in law to show that the realm extended beyond the low-water mark? Answering this question, Cockburn, C.J. said:

For centuries our judicial system in the administration of the criminal law has been divided into two distinct and independent branches, the one having jurisdiction over the land and any sea considered to be within the land; the other over the sea external to the land. No concurrent assent of nations, that a portion of what before was treated as the high sea, and as such common to all the world, shall now be treated as the territory of the local state, can, of itself, without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law, or give to the Courts of the country, independently of legislation, a jurisdiction over the foreigner where they had it not before.47

This point was specifically supported by Lush, J., in a succinct statement as follows:

. . . 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

47. Id., at 197.
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 judgement be authorised by an Act of Parliament. 48

The above reasons of Lush, J. were quoted in full by the Supreme Court of Canada in the *Offshore Mineral Rights Reference* 49 in support of the view that in the absence of legislation the territory of the realm — and hence the boundaries of the colony of British Columbia — terminated at the low-water mark. The same view of *R. v. Keyn* was supported by the majority of the High Court of Australia in *New South Wales v. Commonwealth.* 50

There has been some criticism of the reading which both the Supreme Court of Canada and the majority of the High Court of Australia have accorded to *R. v. Keyn.* 51 It is contended that, first, *Keyn* was decided by a majority of only one judge out of thirteen and on this basis can hardly be said to be a definitive case for the proposition referred to; second, that even the several judgements of the majority judges are far from clear on whether under the common law the territory of Britain ended at the low-water mark, and, third, that the central issue in the case was really the question of the jurisdiction of the Admiral and that the decision of the case could have been reached without deciding that the realm ended at the low-water mark. 52

48. Id., at 238.
52. Harrison, *id.* Of significance, for purposes of this article, is Harrison’s analysis of Jacobs, J.’s view, one of the majority, in *New South Wales.* In the opinion of Jacobs, J., *R. v. Keyn* did *not* decide that the Crown through the exercise of the prerogative could *not* claim dominion and proprietorship over the territorial sea. In this opinion the prerogative right over adjacent coastal areas exists independently of the common law and Parliament. In Harrison’s view, Jacobs, J.’s analysis may be the key to reconciling the acceptance by the Supreme Court of
In spite of the criticism levelled at the Supreme Court of Canada for its approval of the majority judgement in *R. v. Keyn* and in spite of arguments that the exact ratio in *R. v. Keyn* is far from certain, it seems beyond doubt to this writer that the ratio of the case, accepted by the Supreme Court of Canada in the *Offshore Mineral Rights Reference* and by the High Court of Australia in *New South Wales*, would be followed in Canada today. Nor, in spite of the view of those who declaim the endorsement given to *R. v. Keyn* by the Supreme Court of Canada, does the latter's view of *R. v. Keyn* seem to be patently incorrect. While it *may* be possible to view *Keyn* purely as a matter of admiralty jurisdiction without reference to whether Parliamentary action is required to extend the realm, there are good reasons on grounds of policy for requiring extensions to the sovereign limits of the state to flow from legislative, rather than executive, action.

From the foregoing it is clear that the realm of Great Britain can only be extended by an Act of Parliament. This proposition, made certain by *Reference Re Ownership of Offshore Mineral Rights*, applies equally in Canada. While, admittedly, *R. v. Keyn* concerned the issue of the territorial limits to the jurisdiction of English criminal courts, the doctrine established in that case, supported by the Supreme Court of Canada, clearly limits the scope of Diplock, L.J.'s proposition in *Estuary Radio*. While the two cases are not entirely inconsistent, they must be reconciled. Since only Parliament can extend the realm, it cannot be an acceptable proposition to simply state, as did Diplock, L.J., that "it still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction" and that "for such extension the authority of Parliament is not required." Clearly, Parliamentary authority is required, at the very least to make certain the jurisdiction of the domestic courts over acts occurring beyond the low-water mark. And, depending upon the force of *Keyn*, Parliamentary authority is required in any instance where the realm is extended beyond the low-water mark,

Canada of *R. v. Keyn* with the problematical fact that the Supreme Court of Canada pointed to no legislative provision actually bringing the territorial sea off British Columbia into the realm of Canada which, of course, was what the majority in *R. v. Keyn* said was necessary.

53. *Id.*, note 45.
subject only to the exception for waters *inter fauces terrae*. 54

The key to reconciling Diplock, L.J.'s broad statement with *R. v. Keyn* may lie in the immediately subsequent part of the *Estuary Radio* judgement where he says:

> When *any Act of Parliament* refers to the United Kingdom or the territorial waters of the United Kingdom and not as confined to the precise geographical area of the United Kingdom or the territorial waters of the United Kingdom and not as confined to the precise moment at which the Act received the Royal Assent... the area to which an Act of Parliament... applies may vary too as the Crown, in the exercise of its prerogative, extends its claim to areas adjacent to the coast of the United Kingdom in which it did not previously assert its sovereignty. 55 (emphasis added)

What Diplock, L.J. seems to be saying is that, consistent with *R. v. Keyn*, it is for Parliament to extend the realm but that, where Parliament has done so — for example, by providing that the territorial sea shall be part of the territorial domain of the state — the executive may, by Crown prerogative, determine whether certain areas such as bays, estuaries, etc., are or are not to be included within that extension as a result of the application of technical legal rules. Put another way, it appears that *Post Office v. Estuary Radio* may be applied so as to allow the executive in Canada to inform the Courts as to the limits of Canadian internal waters or territorial waters, to the extent that this matter is not made precise by the appropriate legislation. Because the *Territorial Sea and Fishing Zones Act* provides that "internal waters of Canada" include areas of the sea landward of the baselines of the territorial sea, it is for the executive to inform the courts, in respect of those areas where baselines have not been drawn, as to those maritime areas which by Crown prerogative have been claimed to be within Canadian territorial domain as part of internal waters of Canada.

54. The history of the common law concept of waters *inter fauces terrae* — between the arms of the land — was looked at by the Privy Council in *Direct United States Cable Co. Ltd. v. Anglo-American Telegraph Co. Ltd., et. al.* (1872), 2 App. Cas. 394, although the decision in the case was, in the final analysis, based on exclusive dominion of Great Britain over the Bay rather than on the common law rule. According to Lord Hale, referred to by Lord Blackburn (at 417), in *De Jure Maris*: "That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner."

55. *Id.*, note 45.
Thus, for example, in the case of Hudson Bay, where baselines under the *Territorial Sea and Fishing Zones Act* have not been drawn, it is open to the Crown to advise the Courts as to the status of the Bay insofar as the executive is concerned under both domestic and international law. Upon being so informed, the Courts will accept as conclusive as to the facts and law the statement made by the appropriate Minister of the Crown. But the condition *sine qua non* of the acceptance of a statement on behalf of the Crown is the act of Parliament extending the realm, for only Parliament can legally extend the areas of the realm, as was decided by *R. v. Keyn*.

VI. *Sovereign Claims and the Crown Prerogative*

The second set of legal problems raised by the judgement of the English Court of Appeal in *Estuary Radio* concerns the Crown prerogative and its application to offshore territorial claims. Together with upholding the conclusive value of the Crown certificate, Diplock, L.J. based his judgement on a view of the prerogative that would sustain the power of the Crown to claim new areas of territory without Parliamentary assent. The question is whether this view is supportable as a matter of law.

The royal prerogative is a complex subject, deeply rooted in the common law history of England. It stems from the pre-eminence of the sovereign, but is limited both by common law and statute. With respect to offshore territorial claims, it has been pointed out that while the Crown has, or once had, a prerogative to erect beacons, lighthouses and seamarks, to declare ports and havens, to protect land from inundation by sea water, and by virtue of the prerogative, has ownership of lands *inter fauces terrae*, none of these points convincingly to a prerogative of delimitation. The same author points out that the possibility of the existence of a prerogative of delimitation was not even considered in *Cunningham's case*, in *Keyn's case* or in the *Conception Bay case* and concludes that it is surprising therefore that the courts in *The Fagernes* and *Estuary Radio* were so ready to accept the view that

56. Thus, the learned judge states: "It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction." *Id.*, note 45.
57. See: Vol. 8 Hals. (4th) at 583 *et seq*.
such a prerogative exists. The broad characterization of the prerogative power asserted by Diplock, L.J. on the basis of *The Fagernes* is therefore in some doubt. If it is more correct in legal terms to view the Crown prerogative as confined to its precise historical limits respecting ports, harbours and the like, or to sea areas *inter fauces terrae*, it may be difficult to convince a Canadian court to recognize the power of the executive, in the absence of Parliamentary sanction, to claim expansive offshore areas that are not—geographically speaking—within the arms of the land.

Related to the matter of the existence or non-existence of a prerogative of delimitation is the prerogative of the Crown in respect of foreign affairs, including treaties. In Canada, only the Crown—the executive branch—can conclude treaties. The question, however, is whether this part of the prerogative can extend so far as to permit the Crown to acquire or cede territory without express Parliamentary sanction. It appears that, in respect of cession of territory, Parliamentary authority is required. Whether the same is true in respect of acquisition of new territory is not clear, but there would seem to be little ground on the basis of public policy for distinguishing between territorial cession and acquisition. Thus, if it is maintained that treaties of cession require Parliamentary sanction because they affect the rights of the subject resident in such territory, the same argument would seem to apply with equal cogency to acquired territory, whether by conquest or otherwise.

VII. *Effect of The Fagernes doctorine on Canadian Claims*

In light of the limitations on the Crown prerogative, what then is the relevance of *The Fagernes* doctrine to present day Canadian offshore claims?

The English Court of Appeal in *The Fagernes* accepted the view that it is for the Crown to advise the courts as to the extent to which certain bodies of water are claimed to be within the realm and under the sovereignty of the Crown. Upon hearing the views of the executive, the court will give heed to them. In *R. v. Keyn*, as noted above, the Court of Crown Cases Reserved held that only

59. *Id.*, at 370-371.
62. *Id.*, at 141.
Parliament could extend the realm and that, whereas by the law of nations, areas adjacent to the coast may be claimed as part of the territory of England, the courts could only exercise jurisdiction if Parliament had adopted the international law rule as part of municipal law. It was for Parliament and Parliament only to extend the realm. *R. v. Keyn* was not referred to by any of the judges in *The Fagernes*, although it was cited by counsel for the respondents in argument. Nor was *R. v. Keyn* referred to by Diplock, L.J. in *Estuary Radio*, although it is hard to believe that the court was not fully aware of the importance of the decision — however varied the interpretation of its precise ratio may be — on the law of maritime space.

One is led to conclude that the holding of *R. v. Keyn* was considered not to be relevant to either of the problems which the court dealt with in *The Fagernes* or *Estuary Radio*. Perhaps this is because in neither case can it truly be said that the court was recognizing any power of the Crown to usurp Parliamentary authority and to extend the realm by an act of the royal prerogative alone. In *The Fagernes* the central issue was whether the location of the collision between the two vessels was at a point that was *inter fauces terrae* as being within the adjacent county — i.e., within the realm and subject to the jurisdiction of the courts. In *Estuary Radio*, on the other hand, the issue was whether the point at which Red Sands Tower stood in the Thames Estuary was within the term “bay” as defined by the Territorial Waters Order in Council, 1964. In deciding this question, the Court relied on the evidence of expert Crown witnesses as to what constituted the natural entrance points to the bay — the Thames estuary — across which baselines could be drawn under the Order in Council enclosing the waters as internal waters. There was no question of accepting the views of a Minister of the Crown as to whether the area in question constituted part of an area claimed to be within the realm of the United Kingdom. The case is thus quite distinguishable from *The Fagernes*. It is unfortunate that the broad doctrine of *The Fagernes* was cited by Diplock, L.J. without analysis as to its precise ratio and without narrowing the case to its proper limits — that is, whether the area in question was considered by the Crown to be *inter fauces terrae* and part of the adjacent county. It is hard to imagine that *The Fagernes* stands for more than this.

As far as Canada’s offshore claims are concerned, *The Fagernes* can really only stand for the proposition that the courts will
recognize on the part of the Crown the right to claim — in the absence of legislation by Parliament — certain limited offshore waters as being inter fauces terrae under the common law and hence within the territorial sovereignty of the realm. The Bristol Channel is an example of such an area. For any area beyond waters inter fauces terrae, and act of Parliament is required, consistent with R. v. Keyn.

Would a Canadian court give effect to the views of Ministers of the Crown regarding Canada’s claim to the Bay of Fundy, Gulf of St. Lawrence, Hecate Strait, Queen Charlotte Sound and Dixon Entrance and the waters of the Arctic archipelago? The answer depends largely on the extent to which the courts in Canada would follow The Fagernes doctrine in a restricted or broad application. And this in turn will depend upon the degree to which Canadian courts will also follow the rule in R. v. Keyn regarding the requirement for Parliament to act to extend the realm. Even accepting the argument that Parliament has extended the realm by enacting the Territorial Sea and Fishing Zones Act, it is far from certain that the views of the executive are binding in respect of any areas that are greater in extent than waters inter fauces terrae.

Where, then, do matters stand insofar as proof of offshore territorial claims before Canadian Courts are concerned? In the event that the issue arises during the course of litigation, Canadian statutes leave open for determination by the courts the outer limits to Canadian internal waters and the corresponding inner limits of the territorial sea in those maritime areas adjacent to the east, west and arctic coasts of Canada where territorial sea baselines have not been drawn. In the absence of such baselines, the courts will seek to obtain the best evidence available regarding the status of the waters in these maritime areas. As has been demonstrated, there is considerable risk in leaving everything to the authority of a Crown certificate, particularly where the body of water of concern is greater than those waters which the common law regards as inter fauces terrae.

One obvious and simple solution to this problem would appear to lie in the drawing of baselines under the Territorial Sea and Fishing Zones Act to enclose all those bodies of water which are at present claimed by the Crown as internal waters of Canada. This would clearly and definitively remove all lingering doubts as to the status of these waters under Canadian law. There are, it is recognized, major international relations issues posed by this kind of approach,
particularly where foreign maritime interests are involved. Other states — the same that opposed the assertion of jurisdiction at the time of adoption by Parliament of the *Arctic Waters Pollution Prevention Act*\(^6\) — may have an interest in challenging such an outright assertion of territorial sovereignty over large coastal areas by Canada.\(^6\)

In light of these political realities, an alternative solution to the problem might be to amend the *Territorial Sea and Fishing Zones Act* to provide that the presentation of a certificate by the executive in respect of any issue concerning the status or limits of Canadian internal waters is conclusive proof of the facts as stated therein. This approach, following a similar approach used in other statutes, would accomplish the overall objective of ensuring against a diversion of views between the executive and the judiciary over the status of the east, west and arctic waters of Canada. It would fill an important gap in Canadian statute that, if left open, could well result in a judicial determination at variance with the position which the federal executive in Canada has taken regarding the status of these special bodies of water over the course of many years.


64. See for example the position of the U.S.A. contained in a statement released by the State Department on April 15, 1970, following the introduction in the House of Commons of the Arctic Waters Pollution Prevention Bill and the amendments to the *Territorial Sea and Fishing Zones Act*, reprinted in part in (1971), 9 C.Y.I.L. 287.
Figure 1
GULF OF ST. LAWRENCE
PROPOSED BASELINES

Figure 2
NEW BRUNSWICK

BAY OF FUNDY

NOVA SCOTIA

BAY OF FUNDY
PROPOSED BASELINES

Figure 3
WEST COAST
PROPOSED BASELINES

Figure 4
Proof of Offshore Territorial Claims in Canada

EAST COAST
BASELINES IN PLACE

Figure 5
Figure 6

WEST COAST
BASELINES IN PLACE

BRITISH COLUMBIA

DIXON ENTRANCE
QUEEN CHARLOTTE STRAIT
QUEEN CHARLOTTE SOUND
VANCOUVER ISLAND
CANADA
USA

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Figure 7