PROCEDURES FOR TRANSFERRING TO BRITISH COLUMBIA
THE FEDERAL GOVERNMENT'S INTEREST IN
OFFSHORE OIL AND GAS

by

JANICE ZAHARKO
LL.B, The University of Alberta, 1971

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTERS OF LAW

in
THE FACULTY OF GRADUATE STUDIES
(Faculty of Law)

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

© OCTOBER, 1980
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the Head of my Department or by his representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
2075 Wesbrook Place
Vancouver, Canada
V6T 1W5

Date September 30, 1980
The Provinces of British Columbia, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland are all seeking control over offshore resources, that is the natural resources within the waters beyond their coastlines. Provincial demands have ranged from challenges of the federal government's claim to ownership of these resources to discussions of schemes whereby management of the offshore resources would be shared by the provincial and federal governments. There has not been any conclusive judicial determination of the ownership of offshore natural resources, though the federal government relies on the decision by the Supreme Court of Canada in the Offshore Minerals Reference, that the resources beyond the ordinary low water mark off British Columbia come within the exclusive legislative jurisdiction of the federal government.

The applicability of the decision in this Reference, to Newfoundland is being challenged by that Province. The remaining Maritime provinces of Nova Scotia, Prince Edward Island and New Brunswick, had reached a memorandum of understanding with the federal government on a shared management scheme but a subsequent federal proposal to seek constitutional amendment to transfer ownership of offshore natural resources to the Maritime provinces and
British Columbia made the management scheme obsolete since the scheme would have transferred a substantially lesser degree of control. The present federal position is to deal with control over offshore resources through constitutional amendment; as part of a proposed wholesale amendment to the British North America Act, 1867.

This paper examines the necessity for constitutional amendment to deal with the transfer of offshore oil and gas, under federal control, to the coastal provinces and in particular to British Columbia. As an alternative to constitutional amendment, this paper examines three procedures, for transferring offshore oil and gas to British Columbia which do not require constitutional amendment. The first procedure examines the possibility of extending the boundaries of the Province of British Columbia, for the limited purpose of including offshore oil and gas within the boundaries of British Columbia thus bringing offshore oil and gas within the legislative jurisdiction of the province. The second procedure examines the possibility of transferring ownership to either the Province of British Columbia or to a petroleum corporation controlled by the Province. The assumption in this second procedure is that a transfer of ownership could give a substantial degree of control to the Province
over offshore oil and gas. The final procedure is to adapt the proposed Maritime shared management scheme to enable British Columbia to share with the federal government management of oil and gas development off British Columbia's west coast. It is necessary in assessing the most viable alternative, to examine a shared management scheme even though a discussion of shared management would at first appear to be reverting to an alternative which has been superseded by offers by the federal government to transfer more substantial control.

Supervisor
## TABLE OF CONTENTS

### INTRODUCTION

<table>
<thead>
<tr>
<th>Section 1:</th>
<th>Natural Resources and the Constitution</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 2:</td>
<td>Procedures for Transferring Offshore Oil and Gas to British Columbia</td>
<td>13</td>
</tr>
<tr>
<td>Section 2.1:</td>
<td>Procedure I - transfer of legislative authority over offshore oil and gas to the Province of British Columbia</td>
<td>14</td>
</tr>
<tr>
<td>Section 2.2:</td>
<td>Procedures which do not transfer legislative control over offshore oil and gas to British Columbia</td>
<td>20</td>
</tr>
<tr>
<td>Section 2.3:</td>
<td>Procedure II - transfer of ownership over offshore oil and gas to the province of British Columbia or a legal entity under the control of the province of British Columbia</td>
<td>21</td>
</tr>
<tr>
<td>Section 2.4:</td>
<td>Procedure III - transfer of administration of offshore oil and gas to the province of British Columbia with legislative authority retained by the federal government</td>
<td>22</td>
</tr>
</tbody>
</table>

### CHAPTER I - PROCEDURE I - THE TRANSFER OF LEGISLATIVE JURISDICTION OVER OFFSHORE OIL AND GAS TO BRITISH COLUMBIA

<table>
<thead>
<tr>
<th>Introduction - Natural Resources and Provincial Boundaries</th>
<th>27</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1:</td>
<td>Historical Review of the British North America Act, 1871</td>
</tr>
<tr>
<td>Section 1.1:</td>
<td>the ability of the federal parliament to create provinces and enact provincial constitutions is questioned</td>
</tr>
<tr>
<td>Section 1.2:</td>
<td>provision for the federal and provincial governments to agree to variation of provincial constitutions</td>
</tr>
<tr>
<td>Section 2:</td>
<td>The Extent of Variation of Provincial Constitutions Permitted under The British North America Act, 1871</td>
</tr>
</tbody>
</table>
Section 2.1: variations in the terms of admission of a province

Section 2.2: variations relating to a provincial constitutions applicable to territory added to an established province

Section 2.3: summary of variations to constitutions

CHAPTER II - ASSESSMENT OF THE ABILITY OF THE FIRST PROCEDURE TO ACCOMMODATE FEDERAL/PROVINCIAL CONTENTIONS RELATING TO CONTROL OVER OFFSHORE OIL AND GAS

INTRODUCTION

Section 1: Description of the Federal Government's Jurisdiction in the Territorial Sea and Continental Shelf - the Offshore Areas

Section 1.1: interest of the coastal state recognized under international law

Section 1.1(a): the territorial sea - relating federal jurisdiction to international convention

Section 1.1(b): the continental shelf - federal jurisdiction over the continental shelf and its reliance on international convention

Section 2: Determination of Federal - Provincial Boundaries Under a Boundary Extension Pursuant to Section 3 of the B.N.A. Act, 1871

Section 2.1: domestic boundaries

Section 2.2: international boundaries

Section 3: Determination of Federal Jurisdiction in the Territory and Waters of the Territorial Sea and Beyond

Section 3.1: federal jurisdiction which enables the unilateral setting of territorial limits of the exercise of jurisdiction
Section 3.2: federal jurisdiction which will enable it to exercise jurisdiction beyond declared territorial jurisdiction

Section 3.3: federal jurisdiction within a province

Section 3.3(a): treaty implementation

Section 3.3(b): federal jurisdiction over lands reserved for Indians and Indian claims to offshore resources

Section 4: Provincial Jurisdiction Within the Extended Provincial Boundaries that Include Offshore Oil and Gas

Section 4.1: provincial legislative requirements over offshore oil and gas development

Section 4.2: the control of coastal states over offshore resources

Section 4.3: provincial jurisdiction - terms and conditions

Section 5: Transfer of Legislative Jurisdiction Over Offshore Resources from a Central to a Local Government - Recognition of International Convention: the American Proposal

CHAPTER III - PROCEDURE II - THE TRANSFER OF OWNERSHIP OVER OFFSHORE OIL AND GAS TO BRITISH COLUMBIA

Section 1: Transfer of Ownership of Land Between the Federal and Provincial Governments

Section 1.1: statutory provisions for transferring land from the federal government to British Columbia

Section 1.2: the capacity of the Province of British Columbia to deal with public lands, the administration and control of which have been transferred to it when the public lands are beyond provincial territory

Section 1.3: the source and nature of executive authority
CHAPTER IV - PROCEDURE III - THE TRANSFER OF ADMINISTRATIVE CONTROL OVER OFFSHORE OIL AND GAS TO BRITISH COLUMBIA

INTRODUCTION

Section 1.1: transferring legislative authority to a legal entity of the province

Section 1.2: introduction - delegation of federal legislative powers to a designated entity of the province - to a provincial officer

Section 1.2(a): method of delegation of power to dispose of offshore oil and gas to a provincial officer

Section 1.2(b): delegation of legislative authority to a provincial officer

Section 2: Assignment of Federal Government's Interest as Lessor, In Dispositions of Offshore Oil and Gas to the Province or a Legal Entity Created by the Province

Section 3: Conclusions

CHAPTER V - CONCLUSION
INTRODUCTION

Section 1: Natural Resources and the Constitution

The Supreme Court of Canada decided in the Offshore Minerals Reference\(^1\) that, as between the federal government and the Province of British Columbia, the federal government had exclusive property in, and exclusive right to exploit and legislate with respect to minerals and other natural resources in the territorial sea and the continental shelf, both areas being seaward of the ordinary low water mark on the coast of the mainland and several islands, which the Court decided, was the Province's western boundary. The Province of British Columbia has not accepted this position,\(^2\) and the federal government has been unsuccessful in its attempts to reach a compromise, by transferring some degree of control over offshore minerals to British Columbia,\(^3\) (hereafter referred to in this paper as the "province" or "British Columbia").

Discussions between the two governments, however, have not progressed beyond the political forum. No attempt has been made to identify the legal procedures available to pass varying degrees of control over the offshore minerals to the Province.
The provincial and federal policy-makers have not therefore had the opportunity to focus on such procedures in developing their positions on the control of offshore resources. This situation, in part, may be responsible for the impasse that has developed between the two levels of government. Faced with viable procedures for transferring control over offshore mineral resources, the policy implications would be clarified and negotiations hopefully facilitated. It has been said that:

"...All policy makers must sooner or later try to select a successful course of action from among alternatives. This involves a prediction of consequences based on assessed probabilities." 4

This paper, then, will examine three alternative procedures for transferring a portion of the offshore natural resources, offshore oil and gas, to the Province, since these two minerals are considered to be of primary interest to British Columbia. Limiting discussion to these minerals will not affect the application of these procedures to other minerals.

Before giving a detailed explanation of the procedures which will be examined, it is necessary to place British Columbia's request, to control resources in physical proximity to its borders, within the constitutional and
historical perspective of provincial demands for control over resources within their borders.

The Canadian constitution envisioned provinces exercising control over natural resources within their borders, subject only to specified federal powers. The distribution of property and more particularly land, under the 1867 constitution provided the mechanism for carrying out this distribution. Under section 109 of the British North America Act, 1867 (B.N.A. Act 1867), the four original provinces of Quebec, Ontario, Nova Scotia and New Brunswick were given ownership of lands, minerals and royalties, commonly referred to as a province's natural resources, within the defined boundaries of each of those provinces. The control of the federal government over property and more specifically land can be viewed as a specific reservation from this general distribution of property to the provinces, since under the B.N.A. Act, 1867, the federal government was given ownership, only of the property set out in s.117 i.e., defense and fortifications, and pursuant to s.108 of the property described in the third Schedule of the 1867 Act. The property defined in this Schedule consists primarily of certain defined lands i.e., Public Harbours, Canals with Lands and Water Power connected therewith; though some moveable property
is also referred to, i.e. Steamboats, Dredges and Public Vessels, Railway and Railway Stacks. Any other federal property rights flowed from the exercise of the federal Parliament's exclusive legislative powers under section 91 of the B.N.A. Act, 1867.

The original four provinces were afforded two types of control over the natural resources within their boundaries. The first type was control over the natural resources held by the Crown. After confederation these holdings were commonly described as property of Her Majesty in right of Canada, or a province. In this paper these holdings of the federal or provincial government are referred to as the ownership by the federal or provincial government, or property or land. The second type of control is the legislative control given the four original provinces over property in the province pursuant to sections 92 (5) and (13) of the B.N.A. Act 1867. This control was not limited to land "owned" by the province. The corresponding federal legislative power is the federal government's right to legislate over property in exercising powers within its exclusive legislative jurisdiction.

Each province established by the Imperial Parliament, after the 1867 Union of the four original provinces,
obtained ownership of the natural resources within their provincial boundaries under the scheme established by the B.N.A. Act, 1867. Thus, when the provinces of British Columbia (with the exception of lands reserved for the Railway Belt and the Peace River Block), Prince Edward Island and Newfoundland were created, they had complete control over natural resources within their borders. These provinces which entered Confederation with control over their natural resources have one common denominator: they were all autonomous colonies under the British Empire. In each Colony the Crown, "Her Majesty", exercised her capacity as a person under the common law. The property distribution under the 1867 constitution merely confirmed the existing state of affairs within these former colonies.

The omission in section 146 of the B.N.A. Act, 1867 of a clear procedure for creating provinces out of the remaining British territory that was eventually to be transferred to the Dominion of Canada, emphasized the distinction between the provinces created by Britain and those created by the federal Parliament. The ability of the federal government, to create provinces out of the territory transferred to it from Britain and to provide for the constitution of such newly established provinces, will be discussed in Chapter I, in connection with the events leading up to the passing of the British North America
Act, 1871. When the federal government created the provinces of Manitoba, Saskatchewan and Alberta, these new provinces were not transferred the natural resources held by the Crown in right of Canada within their borders. Since these provinces were carved out of what was essentially unoccupied frontier lands, it may have been felt that a transfer of the natural resources within Provincial boundaries would be premature considering their state of development. These provinces were satisfied, at least initially, with the subsidies they received to compensate for the withheld resources. Today a similar situation is developing in the remaining federal territories of Canada - the Yukon Territory and Northwest Territories. In their struggle to attain provincial status, the control over resources within their boundaries will be a major issue in settling the terms of admission.

By 1930 the prairie provinces of Manitoba, Saskatchewan and Alberta had successfully negotiated the transfer to them of complete control over natural resources within their boundaries. The agreements which effected this transfer of control are commonly referred to as the 1930 Resource Transfer Agreements. While the Province of British Columbia when created, generally had control over natural resources within its borders, the 1930 Resource
Agreements transferred to British Columbia unalienated lands within the area referred to as the Railway Belt and Peace River Block. These lands had been reserved to Canada, under Article 11 of the Terms of Union of British Columbia, for the construction of the railway to the Province. However, while the natural resources within the prairie provinces had been reserved to the federal government under the federal Acts of Parliament establishing the provinces, the passing of the control over these resources to the prairies provinces was authorized by constitutional amendment requiring the legislative sanction of the British Parliament. The process that culminated in this amendment to the constitution took twenty-six years. As early as 1912 the prairie provinces had requested control over natural resources, but agreement on the terms of transfer was not reached until 1929.

Today, the position of both major federal political parties in Canada, is that constitutional amendment is necessary, to pass control to the coastal provinces over offshore mineral resources located beyond provincial boundaries. The former Conservative government under Prime Minister Joseph Clark, in September of 1979, expressed the federal government's willingness to seek
constitutional amendment to transfer federal ownership of offshore minerals to the provinces of Newfoundland, Nova Scotia and British Columbia, and indicated a readiness on the part of the federal government to enter into similar discussions with other concerned provinces. The present Liberal government under Prime Minister Trudeau, has included the question of ownership over offshore mineral resources among twelve issues it proposed be considered for constitutional amendment. The attempts by the Liberal government in 1977 to set up a scheme to share management of offshore resources with the Maritime provinces of Nova Scotia, New Brunswick and Prince Edward Island, never progressed beyond an expression of an "agreement to agree". The failure was due partly to the Province of Newfoundland taking a maverick position in the discussions, by declaring that it intended to challenge federal ownership of resources off its coast in the courts. It eventually withdrew from discussions of a management scheme for offshore resources of the Maritime provinces and took the position that it would challenge the applicability of the Offshore Minerals Reference to mineral resources off its coast. The proposal by the subsequent Conservative government described above, to transfer ownership of offshore minerals to the
Maritime provinces, finally closed discussions on a shared management scheme which would have passed relatively less control to the provinces. The details of this scheme will be described in Chapter III.

The premise underlying this paper is that constitutional amendment to effect a transfer of control to the coastal provinces and, specifically, to pass control over offshore oil and gas to British Columbia, is an unnecessary and ineffective procedure. First, historically, constitutional amendments such as the 1930 Resource Transfer Agreements which passed natural resources to the prairie provinces, have entailed protracted negotiations and reflect an attitude that provincial control over natural resources must be uniform throughout the country. No account is taken of regional, economic or social differences between the provinces. The development of offshore oil and gas in Newfoundland certainly cannot in any way be compared to the development of British Columbia's offshore oil and gas potential. In the case of Newfoundland, there are known potentials and social benefits, while the offshore potential of British Columbia has not been explored, nor have the social and economic consequences of exploration been weighed. The second, and perhaps most unsatisfactory aspect of constitutional amendment, is its
tendency to be all encompassing. Since constitutional amendment must be debated in the Canadian Parliament, there is a tendency to deal with all current constitutional concerns rather than adopting an ad hoc process of dealing with the objectives of individual provinces. This is the present situation where the question of passing control over offshore resources to the coastal provinces is just one issue in a package of constitutional matters upon which the federal government is demanding provincial agreement. Failure to agree on other matters totally unrelated to control over offshore natural resources could frustrate any consensus that may be reached over offshore development; a good tactic of negotiation, but not one which is conducive to co-operative constitutional development. Finally, both levels of government have not demonstrated any innovativeness in seeking a real solution to the impasse. Constitutional amendment sanctioning provincial control over offshore development has been regarded talismanically by both levels of government. Anything short of constitutional amendment, it is feared, would leave some cloud over the exercise of provincial authority. The purpose of this paper is to demonstrate that there are other procedures available to pass control over offshore oil and gas to the coastal provinces, that would not leave the provinces'
jurisdiction vulnerable to a legal challenge.

The alternatives which will be examined have not been implemented by any other political jurisdiction facing a similar division of control over offshore mineral development between a central and regional government. The solutions adopted by Australia and the United States are particularly relevant to a discussion of alternatives that could be implemented in Canada. When the coastal states in Australia demanded control over offshore development, the solution was found in the Commonwealth and states of Australia each passing identical legislation. The result, of course, is that the same legislation, state and Commonwealth, was in force in all the offshore areas assuring that, if challenged, one or the other legislation could be judicially upheld. Through this exercise in constitutional cooperation, the states obtained some input into the terms of control through their participation in the preparation of the legislation, but the necessity of all parties having to agree to every part of the common legislation makes the scheme excessively rigid and does not account for the particular ambitions of individual states. This scheme will be discussed in greater detail in Chapter III.
In the United States the courts consistently denied claims by various coastal states to ownership of offshore mineral resources. After the Supreme Court had established the exclusive ownership of the federal government in offshore resources, the United States Congress passed control to the coastal states over a portion of these resources. Considering the geographic and even geological similarity between some of the coastal states of the United States and the costal provinces of Canada, it is necessary to understand the scheme used in the United States, and to examine its strengths and weaknesses when considering alternative schemes in Canada. An understanding of the American scheme is particularly timely in that the scheme may be modified for Puerto Rico, presently a possession of the United States to entice it to apply for statehood. A very good case can be made for transferring to Puerto Rico rights, more extensive than those enjoyed presently by the coastal states. The Puerto Rican case will be examined in this paper to demonstrate that exclusive control over offshore development by the coastal provinces need not be tantamount to stripping the federal Parliament of other constitutional powers it currently exercises over the offshore area and also to emphasize that not all coastal regions need be dealt with on equal terms.
Finally, an examination of alternative procedures must identify areas which will require compromise between the federal government and the Province of British Columbia before any procedure can be implemented. Each procedure will, of course, raise different areas of contention, and these will be reviewed in the context of each procedure.

Section 2: Procedures for Transferring Offshore Oil and Gas to British Columbia

The following three procedures for transferring varying degrees of control over offshore oil and gas to British Columbia will be examined:

(a) a procedure which transfers complete legislative authority over offshore oil and gas to the Province, leaving only the general residual power (with certain exceptions) over these resources to the federal government;

(b) a procedure which transfers ownership of offshore oil and gas to the Province, but which reserves legislative authority to the federal government; and
a procedure which transfers administration of offshore oil and gas to the Province, reserving both legislative authority and ownership of the resources to the federal government.

There are two aspects to each procedure: first, consideration of the legal format necessary to effect the transfer, referred to below as the instrument of transfer, and second, identification of the change in provincial-federal jurisdiction that will occur after the transfer is complete. Each procedure contemplates the relinquishment of varying degrees of federal control over offshore oil and gas to British Columbia, which will be determined by the instrument of transfer. This paper will examine the change of control or jurisdiction that could be accomplished by each procedure with a view to exposing the alternative that would best accommodate federal and provincial objectives over offshore oil and gas development.

Section 2.1: Procedure I - transfer of legislative authority over offshore oil and gas to the Province of British Columbia

The extension of the boundaries of the Province of British Columbia to include offshore oil and gas is the
maximum control which the Province could obtain over these offshore resources. An amendment to the B.N.A. Act, 1867,\textsuperscript{15} entitled The British North America Act, 1871,\textsuperscript{16} (B.N.A. Act, 1871), provides a procedure whereby the federal government can increase the territory of a province, with the province's consent from territory not included in any other province. The placing of the new territory within provincial boundaries, if not subject to any reservations, could pass to the province, ownership over undisposed federal interests in the territory and legislative authority over the new territory. When territory is added to a province it becomes "Property ... in the Province" within section 92(13) of the B.N.A. Act, 1867. This section gives the provincial legislature exclusive authority to make laws in relation to property and more specifically land within its boundaries. By the transfer of exclusive legislative authority to a province, the federal government, in effect, relinquishes its ownership of the territory. Undisposed federal territory added to a province always remains vested in the Crown since the Crown is indivisible,\textsuperscript{17} meaning that the Crown or Her Majesty in Right of the Province or Her Majesty in Right of Canada is the same "legal person at the head of all her governments".\textsuperscript{18} Ownership of the territory is not therefore determined by a transfer of title
between the federal and provincial governments since the lands remain vested in the Crown, but rather the "conveyance" is effected by "the transfer of authority and duty to administer the lands on behalf of Her Majesty". When unalienated federal land is included within the boundaries of a province without reservation, it becomes subject to the exclusive jurisdiction of a province. The province, in effect, becomes the owner of the land. Where the federal government intends to include within a province, territory which it has disposed of in whole or in part, the province assumes the territory subject to these rights, but still has legislative authority over the encumbered property within its boundaries. In this case though it would not have "ownership" it would have legislative authority over the land. The provincial ownership or legislative authority over land are, of course, always subject to specific powers given the federal government under the B.N.A. Act, 1867.

However, as stated earlier, the procedures which will be examined in this paper seeks both a practical and legal solution to passing control over offshore oil and gas to British Columbia. However, it is not practical to consider that the federal government would unconditionally
extend the boundaries of British Columbia in order to incidentally include offshore oil and gas within the Province. If the boundaries were so extended they would include the waters and all other natural resources within the limits of the extended provincial boundaries. The result would be that the federal government may be relinquishing more territory and legislative ability, than is necessary for the effective exploitation by British Columbia of offshore oil and gas. This is the precise impasse that has developed in the discussions over constitutional amendments that would pass control over offshore minerals to the coastal provinces. The impasse relates to the extent of powers that the federal government is willing to have the province exercise over offshore resources. The federal position is quite clear: it will not pass exclusive rights over offshore resources to the coastal provinces. The description of the limited rights which the coastal provinces would exercise over offshore areas has therefore been thought to require the sanction of an amendment to the constitution. One reason that the B.N.A. Act, 1871 has been overlooked is that this Act appears only to authorize a procedure by which provincial boundaries can be extended, thereby entitling a province to exercise all legislative powers over the added territory given to it under its constitution.
The first Chapter then will examine the possibility of using the B.N.A. Act, 1871 to extend the boundaries of the Province of British Columbia only for the purpose of permitting the Province to obtain legislative control over offshore oil and gas. All other legislative power over the extended boundaries and ownership in resources other than oil and gas would be retained by the federal government. To the writer's knowledge, using the B.N.A. Act 1871 to pass limited legislative jurisdiction over territory comprising exploitable Canadian offshore resources has not yet been formally considered by the federal government. The Act was considered in the Maritime Memorandum of Understanding only as a means of defining interprovincial boundaries in the offshore areas. The Australian constitution, in section 123, incorporates the substantive provisions of the B.N.A. Act, 1871. The first procedure proposes that the 1871 Act could be used to define any powers which the federal government wants to retain over offshore resources that would come within territory added to the Province. However, the Australian government does not appear to have contemplated that section 123 of the Australian constitution could have been used to define the control which the Commonwealth or states would exercise over offshore areas. If this first proce-
dure is sustainable, constitutional amendment would not be necessary. The knowledge that the control over offshore minerals could be settled domestically without recourse to the British Parliament may place negotiations at a more satisfactory level, encouraging cooperation and compromise.

As stated above it is necessary to ensure that this procedure, as well as the other procedures, provide not only a legal method for transferring offshore oil and gas to the Province, but that these procedures provide a practical method of accommodating federal and provincial positions concerning control over offshore areas. It is not enough to conclude that under this first procedure the legislative power which the province now has over territory within its present boundary, could be limited as regards any territory added to the Province. It is also necessary to attempt to define the limitations which would be imposed over the added territory to permit the practical viability of this procedure to be assessed. The first chapter will examine the legislative and justicial history of the 1871 Act to ensure that there is no legal impediment to the general use of this Act to redefine the Province's constitution as it would relate to the added territory. The second chapter will then examine whether certain
limitations that the federal government would probably insist on, could be accommodated by the 1871 Act, without affecting the ability of the Province to effectively exploit offshore oil and gas.

Section 2.2: Procedures which do not transfer legislative control over offshore oil and gas to British Columbia

The third and fourth chapter of this paper examine procedures which transfer to the Province of British Columbia respectively; ownership and administration of offshore oil and gas without transferring to the Province legislative authority over these resources. The legislative authority over offshore oil and gas would in both these cases remain with the federal government. There are a number of reasons for considering these alternatives. First, they are alternatives to constitutional amendment and could be enacted almost immediately, and second, they could pass substantial control to the Province without irrevocably changing the federal government's ultimate control over offshore resources. Finally, a comparison of the advantages and disadvantages of all alternatives will assist the policy-makers in their ultimate choice.
Section 2.3: Procedure II - transfer of ownership of offshore oil and gas to the Province of British Columbia or a legal entity under the control of the Province of British Columbia

It is proposed in the second procedure that the federal government pass ownership to the Province of British Columbia or to a legal entity, preferably a petroleum corporation under the control of the Province, but that federal legislative power over offshore oil and gas would continue. While offshore oil and gas would remain outside of the Province's boundaries and therefore beyond the Province's legislative jurisdiction, it is assumed that the ownership rights which the Province obtains over offshore oil and gas, would give it sufficient control to determine the development of these resources. Also considered in this Procedure is a transfer of ownership to a provincially controlled petroleum corporation, though not necessarily as an alternative. It is necessary to consider, under this first Procedure, whether the Province could, under the Canadian constitution, control land beyond its boundaries. If the Province cannot own land beyond its boundaries, other devices such as transferring ownership to a corporation controlled by the province will be considered. The instruments of transfer necessary to complete a change in ownership will have the
greatest bearing on determining any legal limitations to effecting a transfer of ownership to the Province or to a provincial petroleum corporation.

Section 2.4: Procedure III - transfer of administration of offshore oil and gas to the Province of British Columbia with legislative authority retained by the federal government

An examination of procedures for transferring control to British Columbia over offshore oil and gas would not be complete without attempting to apply the Maritime management scheme to the west coast. The efforts of the provincial governments and the federal government to settle their differences over the control of resources off the east coast cannot be disregarded. The fourth chapter will then examine as the third procedure, a transfer of the management over offshore oil and gas from the federal government to British Columbia. Regardless of how obsolete this third procedure may appear in the context of discussions on constitutional amendment proposing the transfer of exclusive legislative jurisdiction over natural resources to the provinces, there is merit in applying the Maritime management scheme or variations of it to the west coast. One variable in the Maritime agreement does not exist in the case of British Columbia. In the case of the east
coast, the control of offshore resources has not been referred to the courts for a ruling, while the Supreme Court of Canada has expressed the opinion that the resources off the west coast are within the exclusive control of the federal government. This fact will have a bearing on how the Maritime scheme can be adapted to British Columbia.
INTRODUCTION

FOOTNOTES


3. Statement of Prime Minister Trudeau concerning offshore minerals made on December 2, 1968, reproduced in Lewis and Thompson on Oil and Gas, Volume I, s.29B.


5. The terms of union of Prince Edward Island, set out in Imperial Order in Council dated June 26, 1873, reproduced in R.S.C. 1970, Appendix No. 12, provided the Province with a subsidy since the government of Prince Edward Island held no lands from the Crown.


7. R.S.C. 1970, Appendix No. 11, hereafter referred to as the "B.N.A. Act, 1871".


10. Manitoba Act, 1870, s.30, Alberta Act, 1905, s.21, Saskatchewan Act, 1905, s.21, op.cit., supra, n.8.
11. The federal Minister of the Interior during debate in the House of Commons on the 1930 Natural Resource Agreements, said that in 1912 he had been a member of the Alberta government: "...and at that time the premiers of the three prairie provinces decided they should make a request of the federal government for the return of the natural resources". Canadian House of Commons Debates, February 18, 1929, p.192.


18. op. cit. supra, n.6 at 57.

19. Id., at 71.

20. After writing this paper the writer had the opportunity to discuss it with Norman Tarnow, lawyer with the Attorney General's Office in British Columbia. He advised me that he made a submission in November, 1979, to the Continuing Committee of Officials on Constitutional Amendment recommending that the B.N.A. 1871 be considered as a method of transferring offshore resources of British Columbia.
21. R.J. Harrison, The Offshore Mineral Resources Agreement in the Maritime Provinces (1978), 4 Dalhousie Law Journal 245, 258. Professor Harrison, who participated in the preparation of the Memorandum of Understanding, suggested that the B.N.A. Act, 1871 could be used to settle interprovincial boundaries. The author is indebted to Professor Harrison for encouraging her to examine other applications of this Act, which examination is reflected in this first procedure.

22. Commonwealth of Australia Constitution, 1900 (Imp.), 63 & 64, Victoria c.12, s.123: "The Parliament of the Commonwealth may, with the consent of a State, and with the approval of the majority of electors of the State voting on the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected." (emphasis added)

CHAPTER I

PROCEDURE I - THE TRANSFER
OF LEGISLATIVE JURISDICTION
OVER OFFSHORE OIL AND GAS TO
BRITISH COLUMBIA

INTRODUCTION - Natural Resources and Provincial Boundaries

This chapter will assess whether the British North America Act, 1871\(^1\) could be used to pass the exclusive legislative authority of the federal government over west coast offshore oil and gas to the Province of British Columbia. While constitutional amendment seems the route favoured by the federal government to resolve demands by the various provinces for more control over natural resources, this may not be the appropriate procedure in the case of offshore resource.

The provincial appeals for more control over natural resources fall into two categories. The first category are appeals which would require a reconsideration of the legislative distribution over natural resources under The British North America Act, 1867. These claims concern federal legislative control over natural resources within
provincial boundaries. While the provinces have the exclusive legislative control over these natural resources pursuant to section 92(13) of the British North America Act, 1867, i.e. "Property and Civil Rights in the Province", the federal government has an incidental or residual legislative power over these resources if it can either bring its legislation within the categories specifically assigned to it under section 91 of the British North America Act, 1867 or justify the legislation under its residual power, as a law for the "peace, Order and Good Government of Canada", pursuant to the preamble to section 91. The provinces contend that the exercise of either the federal incidental or residuary power over provincial resources, frustrates their ability to control the development of resources under their jurisdiction. This ability has been described by Professor LaForest as giving to the provinces "A most effective weapon for controlling their economic destiny".  

The current impasse between the Province of Alberta and the federal government over the setting of domestic oil prices is the most recent example of the extent to which provinces are testing the limits to which they can exercise control over their natural resources. The position
of the Province of Alberta is that if a satisfactory price is not set, the province will refuse to sell oil to the rest of Canada. This position threatens to neutralize the federal government’s ultimatum to unilaterally force a settlement of an oil price by using federal powers to control the export of the Alberta oil. The control which the provinces are seeking in this first category is control over their local economies, through guarantees that the provincial legislative powers under the constitution to control property within their borders will not be curtailed by federal legislation. To achieve this end it may be necessary to obtain a precise commitment from the federal government of the powers it will exercise over provincial resources, a commitment which could only be implemented and policed by constitutional revision.

The second category of provincial appeal for control over natural resources concerns natural resources beyond provincial boundaries. This category relates to demands by the coastal provinces for control over east and west coast offshore gas. The only difference between the position of these two regions (at least as concerns the type of control they are demanding over offshore oil and gas) as stated earlier is that the provincial claims to
control over the offshore resources has been adjudicated by the court in the west coast, while the east coast provinces are still in a jurisdictional dispute with the federal government over control. The basis of both claims, while perhaps historically dissimilar, can easily be described as a boundary dispute. The Supreme Court of Canada alluded to this in the Offshore Minerals Reference. After completing a historical survey of the events which led the Colony of British Columbia into Confederation, the Court summed up the issue before it as follows:

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

The Court went on to hold that the boundary of the Province was the low water mark on the coast of the mainland and islands of British Columbia placing offshore resources beyond provincial territory. Unlike the first category, this second category does not involve a dispute over natural resources within existing provincial boundaries, at least off the west coast. Though some would argue that the opinion expressed by the Supreme Court of Canada in the Offshore Minerals Reference was not a binding decision, since it was merely a reference submitted to the Court by
the federal government, it is highly unlikely that the Supreme Court would decide differently if the matter was brought before it again by a third party. The Supreme Court of Canada in the past has expressed its intention to be bound by opinions of the Court resulting from matters brought before it by way of reference. In the Attorney-General of Canada v. Higbie, Chief Justice Rinfret, in following a previous reference decision of the Supreme Court stated:

It is needless to mention here that although this was not a judgment in the true sense of the word, but merely what is sometimes referred to as an opinion made in a Reference to this Court by the Governor General in Council as provided for by section 55 of the Supreme Court Act and the special jurisdiction therein given to this Court, we should regard an opinion of that kind as binding upon this Court.

The second category therefore would involve a request by the Province of British Columbia to extend provincial boundaries so as to bring offshore oil and gas within the legislative influence of the Province. The ability of the Province to legislate over offshore oil and gas is the most extensive power which the Province could obtain. Constitutional amendment is not needed to extend provincial boundaries, and this fact
distinguishes the two categories of natural resource control described above. The British North America Act, 1871 which is a constitutional act in itself, provides a mechanism for the federal government and provinces to mutually agree to boundary extensions. But once extended, the province's control over natural resources comes within the first category, for the resources within the extended boundary would then come within the exclusive legislative jurisdiction of a province.

The purpose of examining this first procedure is to determine whether the British North America Act, 1871 provides authority for the federal government and the Province of British Columbia to define the limits to which each government will exercise legislative jurisdiction over offshore oil and gas. The issue to be considered is whether, in extending the boundaries of the Province to include offshore oil and gas, the governments could agree on a variation of the legislative power that each would otherwise exercise under the British North America Act, 1867. If such authority exists, it becomes superfluous to require further constitutional sanction to pass legislative control over offshore oil and gas to the Province.

A short historical reference to the B.N.A. Act, 1871
demonstrates that this legislation was to be used to avoid further amendments to the B.N.A. Act, 1867. On January 3, 1871 Canada's first Prime Minister and then Minister of Justice for Canada, Sir John A. Macdonald sent a memorandum to the British Government which substantiated his government's request for an amendment to the B.N.A. Act, 1867 (later to be passed as the B.N.A. Act, 1871). The Minister stated in this Memorandum that one of the reasons for the amendment was to prevent:

...the necessity of repeated application to the Imperial Parliament for legislation respecting the Dominion.  

If the British North America Act, 1871 can legally accommodate a satisfactory resolution of provincial demands for control over west coast offshore resources, the British Parliament should not be asked once again to confirm the authority of the Canadian government.

Section 1: Historical Review of the British North America Act, 1871

Consideration of this legislation in the context of the present federal/provincial discussions of control over natural resources and constitutional amendment is slightly anachronistic. The federal government has taken the position that failure to reach agreement on outstanding
federal/provincial constitutional differences, which includes control over natural resources, may force the federal government to unilaterally request that the British Parliament amend the Constitution. Curiously enough, the amendment to the British North America Act, 1871 was very nearly passed solely at the request of the Canadian Cabinet without reference to Parliament. As Gerin-LaJoie points out:

Had the Imperial Government followed to the letter the course suggested [a request by the Privy Council in Canada to the Imperial Parliament to pass the constitutional amendment] a dangerous precedent would have been set since an amendment to the Constitution would have been secured without any intervention of Parliament in Canada. 10

This situation was unintentionally averted by the combination of two events. Firstly, the British Colonial Secretary sent the draft Bill to the Governor General prior to introducing it to the British Parliament, thus delaying the first reading. During this delay the second event, was a request by the opposition party in the Canadian Parliament for details on a possible constitutional amendment which had been suggested as necessary during the previous Parliamentary session. The Macdonald government was forced into disclosing not only their action at unilaterally requesting the amendment (which may have been
a legitimate oversight) but the draft Bill as well. Needless to say both the procedure used by the government to secure the amendment and the amendment, were fully debated by the Canadian Parliament. The Bill was eventually referred to Britain by a unanimous resolution of the Canadian Parliament which also unanimously adopted a motion to the effect that no changes in the British North America Act, 1867 would be sought by the Executive government without the previous assent of the Canadian Parliament. 11 However, it is more than a historical peculiarity that provides similarities between the political and constitutional situation which existed in Canada when the B.N.A. Act, 1871 was being proposed, a situation which was resolved through constitutional amendment, and the present circumstances where British Columbia is seeking control over offshore resources. As the following discussion will indicate the B.N.A. Act, 1871 was proposed to permit the federal government a certain degree of flexibility in passing jurisdiction to new provinces over territory to be set aside as a new province or added to existing provinces. This is the exact situation which federal government finds itself in today with respect to British Columbia.
The British North America Act, 1871 contains only six sections. Each of these sections, however, were meant to correct, as one member of the House of Commons described it in 1871, "the defective framing of 'The British North America Act of 1867'".\textsuperscript{12} The relevance of the provisions of this Act to the flexibility afforded to the federal government in determining provincial jurisdiction will be discussed in the following sections.

Section 1.1: the ability of the federal parliament to create provinces and enact provincial constitutions is questioned

Section 5 of the British North America Act, 1871 confirmed The Temporary Government of Rupert's Land Act, 1869,\textsuperscript{13} and The Manitoba Act, 1870.\textsuperscript{14} As all lawyers know, a confirming statute always signals the prior passage of doubtful legislation, and the B.N.A. Act of 1871 is no exception.

At Confederation, a vast territory of land then known as Rupert's Land and the North-Western Territory, remained a British possession. This territory today comprises the three prairie provinces: Alberta, Saskatchewan and Manitoba, the Northwest Territories and the Yukon Territory. While the provinces, as they are known today,
of British Columbia, Prince Edward Island and Newfoundland, did not enter the Canadian Confederation in 1867, their admission was specifically contemplated under section 146 of the British North America Act, 1867. The federal government, however, found itself in the unfortunate position in 1870 of having to negotiate a constitution and provincial status for a portion of the territory comprising Rupert's Land and the North-Western Territory. The inhabitants of this territory were not concerned that the territory had not passed to the control of the federal government or of the fact that the B.N.A. Act, 1867 had not anticipated a procedure for setting up a government for this area. The federal government was forced to take action under threat of insurrection within this territory. The government had already assented, on June 22, 1869, to The Temporary Government of Rupert's Land Act, 1869, to prepare for the transfer of Rupert's Land and the North-Western Territory to the federal government from Britain, and to temporarily provide a civil government within these territories. The government then introduced the Manitoba Act, 1870, a Bill prepared as a result of negotiations with delegates from that part of the still British territory which was demanding local autonomy. The Manitoba Act, 1870 would give provincial status and a
provincial constitution to a part of the territory that Britain was to transfer to the control of the federal government. While the first Act, The Temporary Government of Rupert's Land Act, 1869 came into force immediately, The Manitoba Act, 1870 was to come into force on the day upon which Rupert's Land and the North-Western Territories were admitted by the British Privy Council into Confederation. While the law officers of the Crown did not question the validity of the legislation, sufficient doubts were raised by the Opposition during the debate of the proposed Manitoba Act that the government was compelled to request Imperial confirmation of the legislation. It is fortuitous that the Opposition members relentlessly pushed for Imperial confirmation, since the 1871 Act provided clear procedures for creating new provinces or adding territory to existing provinces. To appreciate the gap which had been left in the British North America Act, 1867 and the impact of the amendment, the complete history of the doubts surrounding The Manitoba Act, 1870 must be understood.

On December 16 and 17, 1867, the House of Commons and Senate respectively had petitioned the Queen pursuant to section 146 of the British North America Act, 1867, to unite Rupert's Land and the North-Western Territory with Canada, and to grant to the Parliament of Canada
authority to legislate for the future welfare and good government of these two territories. The law officers of the Crown in England advised that the address could not be implemented unless the Hudson's Bay Company first surrendered its rights over Rupert's Land. The Rupert's Land Act, 1868, assented to on July 31, 1868, was enacted by the British government to permit Britain to accept the Company's surrender of its charter. The Act affected only the British Crown's position with respect to Rupert's Land and was of no immediate concern to Canada and had no immediate bearing on the Constitution of Canada.

Section 5 of the Rupert's Land Act, 1868 (Imp.) provided that it should be competent for "Her Majesty in Council on address from the Houses of the Canadian Parliament" to declare Rupert's Land part of the Dominion of Canada. To this extent the Act was merely a repetition of section 146 of the British North America Act, 1867. However, section 5 also gave the Parliament of Canada the authority to make "Laws ... for the Peace, Order, and Good Government..." of Rupert's Land, a proviso requested in the December, 1867 addresses. This provision vested in the Canadian Parliament complete jurisdiction to pass laws for the governing of Rupert's Land, though the exercise of this jurisdiction was dependent on the British
Order in Council\textsuperscript{22} which would unite Rupert's Land and
the North-Western Territory to Canada. This Order in
Council was not passed until June 23, 1870, to take effect
on July 15, 1870—more than a year after the Canadian
Parliament enacted The Temporary Government of Rupert's
Land Act, 1869, and more than a month after The Manitoba
Act, 1870 was passed.

The action of the federal government in passing The
Manitoba Act, 1870 prior to the Imperial Order in Council
was justified to the Canadian Parliament by Sir Georges-
Etienne Cartier as follows:

\ldots We stated that though not actually in
possession of the North West territory, we
thought we should legislate in a manner to
be able to annex or deal with it the moment
the Imperial Sanction was given. The advisers
of Her Majesty made no objection. On the con­
trary, the action of Canada was endorsed by the
British Legislature. The transfer did not take
place when we expected owing to the Manitoba
trouble. \textsuperscript{23}

The basic issue concerning the validity of The
Temporary Government of Rupert's Land Act, 1869 and The
Manitoba Act, 1870 was the right of the federal government
to enact laws for the governing of the former British
territory, or to create provinces from this territory and
enact constitutions for those provinces\textsuperscript{24} The constitutions,
of course, for the four original provinces at Confederation - Nova Scotia, New Brunswick, Ontario, Quebec were all specifically dealt with under the B.N.A. Act, 1867, while the constitutions of British Columbia, Prince Edward Island and Newfoundland were incorporated as part of their terms of admission to Confederation pursuant to the specific direction concerning the admission of these colonies contained in section 146 of the B.N.A. Act, 1867.

The Manitoba Act, 1870, besides creating a provincial legislative structure similar to that of existing provinces with similar legislative authority, provided for representation of the Province in the House of Commons and Senate. The Act gave Manitoba a constitution. The federal government was therefore assuming it had the same ability to negotiate the terms of entry into the Union of territory under its jurisdiction as the British Parliament had when it negotiated the terms of entry of the original colonies into Confederation.

The Memorandum referred to above, prepared by the Minister of Justice, Sir John A. Macdonald for transmittal to the British Secretary of State for the Colonies, in support of his government's request for a constitutional amendment to remove doubts raised by the two Acts, best
sums up the constitutional issues raised by the passage of these pieces of legislation. In the Memorandum, the Minister of Justice pointed out, that the terms of the December, 1867 Senate and House of Commons Address requesting the admission of Rupert's Land and the North-Western Territory into the Union did not include a new constitution for the North West. If it had, he went on to state, it would have been subject to the B.N.A. Act, 1867. The Rupert's Land Act, 1868, (Imp.) which provided for the admission into the Dominion of Canada of Rupert's Land, but not of the North-Western Territory by the Imperial Parliament, he noted, provided in section 5, that the Parliament of Canada could make such "Laws, Institutions and Ordinances ... as may be necessary for the peace, order and good government of Her Majesty's subjects".

Sir John A. Macdonald went on to say that:

This provision of the Act may fairly be held to have authorized the Canadian Parliament to pass the Act, giving a Constitution to a portion of Rupert's Land; but still the question remains whether under the two Imperial Acts referred to [B.N.A. Act 1867 and the Rupert's Land Act, 1869] it had the power to give the people of the new Province representation in the Senate and House of Commons.

The general purview of "the British North America Act, 1867", seems to be confined to the three Provinces of Canada, Nova Scotia and New Brunswick, originally forming the Dominion. 28
He demonstrated this situation by referring to the provisions in the Manitoba constitution regarding representation of the provinces in the Senate and House of Commons. The Manitoba Act, provided for increased representation in each House which would have changed the numerical representation set out in the B.N.A. Act, 1867. The B.N.A. Act, 1867, of course, made no references to the increase of numbers in either House in the event of any addition to the "Territory of the Dominion". Under these circumstances, he recommended constitutional amendment to confirm the legislation.

The British North America Act, 1871 was therefore passed primarily to confirm The Manitoba Act, 1870. Incidental doubts which had arisen regarding the ability of Parliament to pass The Temporary Government of Rupert's Land Act, 1869, before the territory was formally transferred to the Dominion were also laid to rest by similar confirmation of this Act in this constitutional amendment. But while the primary purpose of this Act was to confirm doubtful legislation as stated earlier, it was intended that the Act should also avoid repeated applications to the Imperial Parliament for legislation respecting federal power to deal with the establishment of or changes to provincial territory. As is so often the case with
constitutional amendments the legislation requested by Canada from the Imperial Parliament, went beyond the immediate issue of confirming the doubtful legislation. In addition to confirming the doubtful legislation, the federal Cabinet requested that the Imperial Parliament introduce legislation that would empower the federal government:

(1) to establish other Provinces in the North-West Territory with suitable Constitutions and Governments possessing powers not greater than those conferred on the Local Governments by the British North America Act, 1867 [B.N.A. Act, 1871, s.2]

(2) to admit Representatives from such Provinces into the Parliament of the Dominion [B.N.A. Act, 1871, s.2]

(3) to increase or diminish the limits of the Province of Manitoba, or any of the Provinces, with the consent of the Local Government of such Province. [B.N.A. Act, 1871, s.3; which also provides for the imposition of terms and conditions.]

While, as mentioned earlier, the draft British Bill was eventually debated in the Canadian Parliament, the measure was introduced by the Colonial Secretary, the Earl of Kimberley, and passed in both Houses of the British Parliament without debate. The Act as passed substantially incorporated the request of the federal Cabinet and also empowered the federal Parliament to make provision for any territory not for the time being included
in any province (section 4). The Act can therefore be regarded as having passed to the federal government the powers to create "local governments" within federal territory. Curiously enough, while the request of the federal Cabinet specifically stated that provinces subsequently established in the North-West Territory should not have powers or constitutions greater than those conferred on the local governments by the B.N.A. Act, 1867, this limitation appears nowhere in the B.N.A. Act, 1871. This omission will be discussed further below.

A limitation, however, was placed on the federal powers. The Act provides, in section 6, that after the federal Parliament establishes a province, it cannot alter the federal legislation establishing a province or its constitution. This provision appears to have been added to the initial draft since the draft Bill prepared in London and sent to Canada contained no such provision. Sir Georges-Etienne Cartier, acting for the Minister of Justice, seems to have been responsible for this addition. In a memorandum to the Colonial Secretary he wrote:

> The Undersigned has to observe that it is absolutely necessary that the Province of Manitoba, as well as any which may hereafter be erected, should hold the same status as the four Provinces now comprising the Dominion - and British Columbia, when it comes in - and like them, should hold its Constitution subject only to alteration by the Imperial Legislature. 33

(emphasis added)
The introduction of this limitation on federal power in the Act appears in the opening words to section 6 which state: "(e)xcept as provided by the third section of this Act..." It is this section and these words which make this Act relevant to a transfer of offshore oil and gas to the Province of British Columbia.

Section 1.2: provision for the federal and provincial governments to agree to variations in provincial constitutions

The B.N.A. Act, 1871 is, in this writer's opinion, the most important constitutional amendment existing. It gave the federal government the power to determine whether a territory under its jurisdiction should be given legislative autonomy, and to adapt the legislative distribution of powers under sections 91 and 92 of the B.N.A. Act, 1867 to reflect the stage of development of a particular territory. This power did not only relate to establishing an administration within territories not included in provinces (section 4) and establishing new provinces (section 2), but extended to alterations of the territory of established provinces (section 3). The extent of this last power has never been fully examined. Section 3 of the B.N.A. Act, 1871 states:
3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby. (emphasis added)

Since boundaries were originally determined by the Confederation Act, this section has primarily been regarded as providing the necessary constitutional sanction to variations in provincial boundaries, and has frequently been used to alter the provincial boundaries. However, there are two provisions in the B.N.A. Act, 1871 to suggest that this section carries more authority than merely the establishment of boundary lines.

As stated above, the sacrosanct provisions of section 6 of the B.N.A. Act, 1871 do not apply to alterations of provincial boundaries. There is a suggestion therefore in this section that an alteration of provincial boundaries could somehow be used to affect the province's constitution. If it did not, the words in section 6: "(e)xcept as provided by the third section of this Act,..." are superfluous. The phrase in section 3" ...upon the terms and conditions as may be agreed by the said
Legislature" hints at the dormant powers of this section. A boundary extension, can, therefore, be conditional, and the suggestion is that the conditions can relate to the constitution of the province which embodies the province's legislative powers. The reference to "terms and conditions" in this section brings the entire preceding historical review of the B.N.A. Act, 1871 full circle since these are the words used in section 146 of the B.N.A. Act, 1867, which determined the terms of entry of new provinces.

Britain was able to determine the terms of entry of certain colonies upon "Addresses of the Houses of Parliament and Legislatures", under this section, which also provided:

> It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, ... to admit [those colonies or provinces... Rupert's Land and the North-Western Territory]... into the Union, on such Terms and Conditions in each case as are in the Addresses expressed... subject to the Provisions of this Act [B.N.A. Act, 1867]...

(emphasis added)

The B.N.A. Act, 1871 is not specifically subject to the B.N.A. Act, 1867 due to obvious problems in the lack of latitude this would have given the federal government in the establishment of new provinces. However, regardless of how broad a latitude the federal government has, it must be remembered that it could not negotiate entry on terms which exceed the amalgam of powers under the B.N.A.
Act, 1867. The powers which are valid topics for negotiation are those powers the federal government can exercise over territory not included within a province. These powers are extensive and negotiations on terms and conditions under section 3 are concerned with the extent to which the federal government is willing to relinquish or subordinate its powers to a province.

While section 6 of the B.N.A. Act, 1871 assured the province of Manitoba and any province (territory administered by the federal government was not covered by the section) subsequently established by the federal Parliament, that the federal legislation which established the province and provided for its constitution and administration could not be altered by the federal government, this did not necessarily mean that the province could not amend its constitution. For example, certain provisions of the B.N.A. Act, 1867 are, except where varied by, incorporated into, The Manitoba Act, 1870. Notably among these provisions is the ability of the province under section 92 of the B.N.A. Act, 1867 to amend its constitution. This point is important in assessing the risks involved in using the B.N.A. Act, 1871, based on the assumption that the Supreme Court's decision in the Offshore Minerals Reference conclusively determined the boundaries of the Province of
British Columbia. It is arguable that any doubt over the ownership of offshore resources could be resolved under section 3 as an "alteration" of provincial territory if any doubts exist over provincial boundaries making it unclear whether the offshore areas are an "increase or diminution" of provincial territory. Certainly a defined legislative and property scheme, imposed as terms and conditions over offshore resources could be considered an alteration of provincial territory. Since the provinces can alter their constitutions, the combined force of the B.N.A. Act, 1871 and this provincial ability would provide sufficient legal sanction to a transfer of control over offshore resources to the Province. This is one more reason for the assumption in this paper of the conclusiveness of the Supreme Court's decision. The risks involved in assuming that the boundaries have been conclusively determined by the Court thus permitting the federal and provincial government to use section 3 to authorize a simple boundary extension, are minimal when one considers the safety "catch" of other provisions of this section. This paper therefore examines the substantive issues arising from this first Procedure by assuming that the Province's boundaries are those determined by the Supreme Court in the Offshore Minerals Reference.
While the federal government could not alter the terms of admission of territory into the Union once admitted, there was no restriction on the terms of entry which the federal government could negotiate. As mentioned earlier, nowhere in the B.N.A. Act, 1871 is there a requirement that a new province be given the same legislative powers as the four original provinces. The statement by Georges-Etienne Cartier that new provinces should hold the "same status" as the four original provinces refers only to assuring the newly established provinces that the federal government could not, unilaterally, alter their terms of entry. The constitution of Manitoba provides an example of a variation from the jurisdiction afforded the original four provinces. When the terms of entry for Manitoba were negotiated, the federal government withheld certain legislative power from the province over land within the new province by reserving to itself ungranted crown lands. Section 30 of The Manitoba Act, 1870 provided:

30. All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion...

This reservation was a substantial variation of the terms of entry into the Union of the four original provinces which retained the ability to legislate over lands within their provincial boundaries when ownership of Crown lands
was passed to them. The legislative distribution of property under the constitution was fundamental to the powers a province could exercise, not only as regards the pure economics of revenue generation for a province, but also its ability to control land would determine its direction of development. The fact that the local administration within Manitoba prior to its becoming a province never had the ability to legislate over property, does not reflect on the ability of the federal government to reserve substantial powers.

The next two provinces that the federal government established in the territories, pursuant to the B.N.A. Act, 1871 - Alberta and Saskatchewan - likewise had Crown lands reserved to the federal government as a term of entry. Section 21 of both The Alberta Act, and the Saskatchewan Act, provided:

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the Northwest Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada...

As discussed earlier, these provinces eventually were able to renegotiate their terms of entry and obtain control over lands within their borders, although this procedure required
further constitutional amendment. It is not entirely clear that constitutional amendment was required, but there are three possible explanations: first, a unilateral transfer by the federal government may have been construed as being contrary to the restrictions contained in section 6 of the B.N.A. Act, 1871; secondly, the renegotiated terms provided for the provinces and the federal government to agree on subsequent amendments, a procedure which may have exceeded the ability of federal and provincial governments to renegotiate the terms of provincial entry contained in section 3 of the B.N.A. Act, 1871; or thirdly, a constitutional amendment would remove any doubt that the province had obtained jurisdiction over the land, an attitude which appears to be influencing present federal/provincial constitutional negotiations.

The federal government has varied the constitutions of provinces through the terms of entry into the Union. In the case of the prairie provinces, the federal government did not relinquish powers it held over territory which was subsequently included within a province. It would appear that a similar power exists when there is an agreement to alter provincial territory under section 3 of the B.N.A. Act, 1871. Writing of this section, Gerin-LaJoie has said:
...section 3 provided that Parliament might, with the consent of the legislature of any province, modify the boundaries of such province. This section offers a special interest since it introduced in the Constitution the principle of federal-provincial co-operation for the purpose of constitutional amendment, although it was restricted to a particular topic. 36

As stated at the beginning of this chapter, the federal/provincial dilemma over offshore minerals is a problem of determining federal/provincial boundaries. Section 3 may provide the solution. The next section will examine the interpretation which the courts have placed on the extent of the terms and conditions which the federal government could impose on a province over territory it is seeking to be included within its borders.

Section 2: The Extent of Variation of Provincial Constitutions Permitted under the British North America Act, 1871.

Generally, the constitutional variation necessary to sustain an agreeable federal/provincial regime over offshore oil and gas development would primarily require the ability of the federal government to secure to itself the categories of exclusive jurisdiction. The first category is an ownership jurisdiction over all property other than oil and gas, in the waters and the resources in those waters,
and the second category is the legislative jurisdiction which would enable it to continue to negotiate and enforce through federal legislation international agreements in offshore areas. These variations will be examined in greater detail in the next chapter, but it is essential at this point to conceptualize the variations contemplated by some of the conditions necessary to reach an amicable solution to the offshore resource controversy. The condition precedent, in the first Procedure to using section 3 is the necessity for them to be an extension of provincial boundaries. However, it is intended that only the oil and gas within these boundaries would pass to the Province. Can the procedure therefore be attacked since, the added territory would differ from the original provincial territory where the Province has complete legislative jurisdiction over and subject to the 1867 Act ownership of former federal Crown property within its borders. The reservation of waters and resources within the waters overlying the oil and gas would continue the federal government's exclusive jurisdiction over sea coast fisheries and activities within the waters even including possibly those related to the provincial oil and gas activities. Federal jurisdiction and the resources of those waters within existing provincial boundaries, of course, must under British Columbia's constitution be a valid exercise of a specific or residual federal power.
The federal government's retention as is proposed in this Procedure of the overlying waters in the offshore area would however be paramount to any provincial jurisdiction. Confirmation of the status that the federal government now holds in the international community is perhaps the most difficult variation. Through this variation the federal government is seeking assurance that it could exercise a jurisdiction within the added territory which it could not otherwise exercise in a province. Though the variations are intended to apply only to the added territory, the first two categories, i.e. reservations of residual land and water jurisdictions, would vary the Province's entitlement under its constitution to all property within its boundaries (subject to the federal-provincial property distribution under the B.N.A. Act, 1867) and the second category would vary the exclusive legislative jurisdiction of the Province by making it subject to federal legislative powers beyond those set out in the Province's Constitution. The second category is a direct variation of legislative jurisdiction, as opposed to an indirect variation as is the case when land is not transferred to the province. It is therefore important to determine how the courts have dealt with challenges to the conditions set by the federal government pursuant to section 3, that have varied provincial constitutions.
The cases on the B.N.A. Act, 1871 break into two groups: first, cases which arose out of a variation on legislative jurisdiction on admission of a territory as a province (sections 2 and 4); and, secondly, variations of provincial legislative jurisdiction imposed on territory added to a province (section 3). It is important to examine both lines of judicial decisions, since any restriction on the ability of the federal government to vary the constitutions of new provinces pursuant to sections 2 or 4 of the Act, would probably apply to terms and conditions imposed in relation to territory added to existing provinces. The decision can also be broken into types of legislative jurisdiction. Firstly, what may be referred to as pure legislative ability which stems from the distribution of legislative ability under sections 91 and 92 of the B.N.A. Act, 1867, and secondly, incidental legislative ability, that stems from a transfer of property and in particular land under the legislative division of this section and other provisions of the B.N.A. Act, 1867. Both types of legislative jurisdiction, provincial and federal, will be considered in the terms of transfer under this Procedure. It will therefore be important that the cases on the B.N.A. Act, 1871, support terms and conditions that affect both types of jurisdiction.
Variations on admission of a territory were first considered by the Privy Council in *Brophy and Others v. The Attorney General of Manitoba*.\(^{39}\) The variation concerned differences between the education provisions of the B.N.A. Act, 1867 and the provisions of The Manitoba Act, 1870 respecting the same subject - a variation which can best be described as a variation of a "pure" legislative jurisdiction. The B.N.A. Act, 1867 provided, in section 93(3), for appeals to the Governor General in Council from the decisions of "Provincial Authorities" in cases where the decisions of the Provincial Authorities were considered to be contrary to the rights or privileges given the Protestant and Catholic minorities under this same section. However, The Manitoba Act, 1870, in section 22(2), in addition to permitting appeals from decisions of "Provincial Authorities", provided for appeals from decisions"... of the Legislature of the Province". The Brophy case concerned an appeal to the Governor General in Council from two statutes passed by the Legislature of Manitoba. The Province maintained that the federal government could not vary section 22 of the Manitoba Act, 1870, to provide for appeals from decisions of the province's legislature reflected in the passage of two provincial statutes which were the basis of the appeal.
Counsel for the Attorney-General of Manitoba argued that laws in relation to education were within the exclusive powers of the provincial Legislature and that if an appeal were allowed, it would be tantamount to denying the right inherent in all legislatures of repealing or altering its own legislation. In comparing section 22(2) of The Manitoba Act, 1870, with section 93(3) of the B.N.A. Act, 1867, the Court held:

...In view of this comparison, it appears to their Lordships impossible to come to any other conclusion than the 22nd section of the Manitoba Act was intended to be a substitution for the 93rd section of the British North America Act... It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void... It must be remembered that the Provincial Legislative power is strictly limited. It can only deal with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. (emphasis added)

The Court therefore had no problem in destroying the myth that provincial legislative authority emanates solely from the B.N.A. Act, 1867. The Court implied that this is only the case, where the province's constitution has not varied the powers given provinces generally under the 1867 Constitutional Act. The B.N.A. Act, 1867 then determines provincial jurisdiction only to the extent that it is adopted by the provincial constitution.
Not specifically argued before the Court in Brophy was whether the Parliament of Canada, in exercising its authority to establish new provinces given it by the B.N.A. Act, 1871, could modify, as it did, section 93 of the fundamental Act of 1867. This precise question was referred to the Court of Appeal of Alberta, in Rex v. Ulmer.

This case challenged once again the federal government's ability to modify section 93 of the B.N.A. Act, 1867, as it did by section 17 of The Alberta Act, 1905; the constitutional act of the Province of Alberta, passed under the authority of section 2 of the B.N.A. Act, 1871. It was apparently believed that if section 93 stood unaltered and applicable to Alberta in its original form the class of persons to whom the defendant in this case belonged would have enjoyed more extensive rights or immunities as against the legislative power of the state than those given them under section 17.

The Alberta Act, 1905, generally followed The Manitoba Act, 1870. Section 17 of the Alberta Act is similar to section 22 of The Manitoba Act, and provides that section 93 of the B.N.A. Act, 1867 should apply with certain exceptions. The result, described by the court:
was to give the whole field of legislation upon the subject of education to the provincial Legislature because no general power with respect to any part of that field was given to or retained by the federal Parliament. 44 (emphasis added)

In dealing with the authority of the federal Parliament to pass section 17, the Court concentrated on the meaning of "constitution" as used in section 2 of the B.N.A. Act, 1871. Mr. Justice Stuart of the Supreme Court of Alberta held:

But one principle seems clear: An amendment which fixes or alters the line of demarcation between the field of provincial and that of federal legislative jurisdiction cannot possibly be created as part merely of the "constitution" of a province. Obviously sec. 92, subsec. 1, was never intended to give provincial Legislatures power to alter the line of demarcation as laid down in sec. 91, and 93. The fixing of that line was undoubtedly part of the constitution of Canada as a whole, not part of the constitution of a province by itself.

Adopting this interpretation of the word "constitution" as applied to a province and applying it to sec. 2 of The B.N.A. Act, 1871, it would follow, and I am of the opinion that it must follow, that although the federal Parliament may provide for the "constitution" of a new province which it erects it cannot under that authority alter the line of demarcation between the federal and provincial legislative powers. For that is not fixing the "constitution" of the province merely. It is fixing the constitution of Canada. 45 (emphasis added)
Did this mean that after a territory becomes a province or part of a province the federal government can only restrict powers given to the province but not reserve to itself the exclusive exercise of powers it held prior to the territory becoming a province? Or that the federal government can modify the B.N.A. Act, 1867 only to the extent necessary to adapt it to local circumstances? With regard to offshore oil and gas, would this mean that Canada could not reserve to itself, for example, the right to implement treaties concerning the territorial seas and continental shelf that relate to oil and gas development? However, in reaching this decision in this case, Justice Stuart held that:

...by sec. 2 of the Act of 1871 it did not intend that, under the power to provide a provincial constitution, the federal Parliament might decide upon such slightly different restrictive limitations in protection of the rights of minorities with respect to legislation as might be deemed just in the circumstances of the particular time and territory. 46

and it was for these narrow reasons that the variations outlined in section 17 of the Alberta Act were upheld.

This case would cause problems in interpreting the extent to which section 3 could be used to impose terms and conditions on provincial legislative jurisdiction, if
the court's discussion in this case of the extent of variations permitted in the constitutions of new provinces, had not been implicitly overruled by subsequent decisions of higher courts. This case did not refer to the Brophy decision though reference was made to Clement's Canadian Constitution and Lefroy's Canada's Federal System. In both these texts the authors discuss the Brophy case. Curiously enough higher courts which subsequently considered the B.N.A. Act, 1871 do not make reference to the Ulmer case, which perhaps reflects this author's view that the case was correctly decided but for the wrong reasons. Furthermore, though this case questioned federal authority there is no indication of the Attorney General being notified of the action. The report of the case indicates that only counsel for the defendant and provincial Crown presented arguments to the court. For these reasons this decision should be regarded more for its conclusion rather than for its reasons.

The question of whether section 17 of the Alberta Act was in whole or in part ultra vires the Parliament of Canada was again raised in conjunction with the proposed transfer of natural resources to Alberta, Saskatchewan and Manitoba. In a reference to the Supreme Court of Canada by the Attorney-General of Canada, the reasons for reference (hereafter referred to as the 1927 Reference) were stated in the order as follows:
...as a result of certain negotiations looking to the transfer to the province of Alberta of the public lands within the province, now vested in the Crown and administered by the Government of Canada for the purposes of Canada, an agreement was entered into on the 9th January, 1926, between the governments of the Dominion of Canada and of the Province of Alberta, respectively, whereby it was agreed that certain provisions of the Alberta Act should be modified to the intent that all Crown lands...within the province... after coming into force of the said agreement, belong to the province... Notice was given by resolution that a bill would be introduced into Parliament, at its present session, to approve and give effect to the said agreement as so modified, but a question having been raised as to the constitutional validity of section 17 of the Alberta Act, relative to the subject of education and schools within the said province, it was decided not to proceed with the proposed legislation as drafted until this question of doubt could be authoritatively settled. 49

This case is important from two perspectives: firstly historically, as to why the 1930 National Resource Agreements could not have been passed under section 3 of the B.N.A. Act 1871 as terms and conditions on an "alteration of territory" within the province, and secondly, as to definitively stating that there are no limitations on the terms and conditions upon which a province and the federal government may agree in distributing legislative power under the B.N.A. Act, 1871.

As to the first point, members of the House of Commons were not clear as to the rationale underlying the 1927
Reference. The member of Parliament for Toronto-Northwest commented:

...It has been admitted here, as well as by the Department of Justice, that the validity of clause 17 of the Alberta Act is not in dispute. The Minister of the Interior also informed the House that neither the federal nor the provincial authorities were contesting its validity ... clause 17 which was made applicable to them (provinces) was taken from the old Northwest Territories Act. The act has been on the statute books for over twenty years and the validity until recently was never disputed until some implied doubts were expressed by some unknown persons to the Minister of Justice. 50

The connection between this reference and the necessity for ratification by the Imperial Parliament of the 1930 Resource Agreements is alluded to by Mr. Bennett (leader of the Opposition and member - Calgary West) during the debate on the natural resources transfer. He stated at that time:

...As has been suggested to me, there is a clause in the agreement that was submitted to this house in 1926 with respect to the ratification of the legislation by the Imperial Parliament. This was inserted because it is necessary from the constitutional standpoint. 52

Earlier in the same debate Mr. Bennett queried actions by the government to have the Privy Council review the Supreme Court's decision on the Reference, which had been
decided in favour of the federal government, thus confirming the validity of section 17 of the Alberta Act. Mr. Bennett's question to the government was as follows:

...Why is your government now so anxious to go to the Privy Council on appeal from a judgment in its own favour - a judgment in its own favour mark you? ...The judgment of the Supreme Court of Canada was a unanimous judgment in support of the federal government's contention as to the proper interpretation of section 17 of the Act of 1905... The position is that the Dominion government made an application for leave to appeal to the Privy Council. It has not yet received that leave, and when the application for leave was made to the Privy Council, the presiding Lord asked who was the appellant, and as they did not have any appellant except the Dominion government, which could not appeal from a judgment in its own favour, they have apparently been looking ever since for an appellant. 53

There is no satisfactory answer as to why the federal government was so anxious to have this case brought before the Privy Council. Was it seeking support from the Court that constitutional amendment, as was being proposed by the 1930 Resource Agreements, was not necessary; was it seeking confirmation that the authority to pass the reserved natural resources to the provinces was within federal competence if the provinces concurred in the alteration. Unfortunately this issue will have to remain in the realm of speculation.

The second aspect of the 1927 Reference has already been alluded to: that is, what interpretation should be
placed on the terms which Canada could impose on the constitution of a new province? Mr. Justice Newcombe, who delivered the unanimous judgment of the Supreme Court in this reference, did not refer to either Brophy or Ulmer. Curiously enough, though the Attorney-General of Saskatchewan and the Attorney-General of Alberta were given notice of the hearing, neither filed a factum, though each of them announced their intention to appear but not to take part in the argument. The only factum filed was by the Attorney-General of Canada. The Court, therefore, exercised its discretion pursuant to section 60 of the Supreme Court Act, and appointed legal counsel to argue the case in opposition.

The question before the Court, as mentioned above, was whether section 17 of the Alberta Act, 1905 was in whole or in part ultra vires of the Parliament of Canada. In support of this contention, counsel argued that the Territories became constitutionally incapable, because of the provisions of section 146 of the B.N.A. Act, 1867, of incorporation into the Union as provinces upon terms or conditions different from those which applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. The Court held on this issue that the powers conferred by section 146 of the B.N.A. Act, 1867 were exhausted or spent so far as
the Territories were concerned, by their admission under the Imperial Order-in-Council of July 23, 1870.

The Court\textsuperscript{56} indicated that section 17 of the Alberta Act, 1905 was necessary to carry forward the rights and privileges with respect to separate schools, or religious instruction in public or separate schools that had existed in the territory pursuant to the North-West Territories Acts and Territorial Ordinances of 1901, prior to the Union. However, any doubts that these limitations were restricted to situations of transitional powers respecting acquired rights are removed by Mr. Justice Newcombe, who stated:

...at the time of the establishment of the province of Alberta, the Parliament of Canada had the power to define and to regulate the legislative powers which were to be possessed by the new province. It is, I think, as impossible as it is expedient to cast any doubt upon the generality and comprehensive nature of constitutional powers conferred for peace, order and good government, and I do not find either in the British North America Act of 1867 or of 1871, anything expressed or implied which limited the power of the Parliament of Canada in 1905 to define the constitution and powers of the provinces which were at that time established and constituted within the Territories. \textsuperscript{57}

The final two cases deal with terms and conditions which relate to the second category of legislative jurisdiction-incidental legislative ability, stemming from the
distribution of property under the 1867 Constitution, to either the provinces or the federal government.

In Attorney-General for Alberta v. Attorney-General for Canada \(^58\), (the 1928 Escheats Case) the Privy Council on appeal from the Supreme Court of Canada, was asked to determine the rights of the Dominion and the Province of Alberta in escheats and bona vacantia in the Province. The Privy Council had held in Attorney-General of Ontario v. Mercer \(^59\) that escheats were royalties from the land and thus reverted to the Province of Ontario pursuant to section 109 of the B.N.A. Act, 1867 which provided that "All Lands, Mines, Minerals, and Royalties... shall belong to the several Provinces..." As was indicated earlier in this paper section 21 of the Alberta Act, 1905, did not pass Crown lands to the province when it was created. This case confirmed the ability of the federal government to alter the legislative distribution by retaining Crown lands and therefore incidentally retaining the right to legislate with respect to such property pursuant to Section 91(1) (renumbered 1A by the B.N.A. Act (No. 2) 1949) \(^60\) of the 1867 Constitution i.e., the Public Debt and Property. In interpreting section 21 of The Alberta Act, 1905, the Privy Council held that Alberta was placed in the same position as other provinces in regard to property.
... except as varied by the statute, either by express terms or reasonable implication. Sect. 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta.

The next case set aside all doubts on the extent of the federal powers to limit provincial jurisdiction by altering as a term of entry into the Union the property distribution under the 1867 constitution. In Reference on Saskatchewan Natural Resources (the 1930 Saskatchewan Natural Resources case) the Supreme Court of Canada was asked to decide whether the federal government has to account for the use of the land it reserved "for the purpose of Canada" pursuant to section 21 of The Saskatchewan Act, 1905, after the transfer of the natural resources to the Province under the 1930 Resource Transfer Agreements. The Province of Saskatchewan contended that the authority of the federal government to constitute the Province of Saskatchewan depended upon the B.N.A. Act, 1871, and they submitted "(t)here is nothing in the Act authorizing the Dominion to hold the public domain for the purpose of Canada". The provincial argument referred to the distinction between legislative jurisdiction and proprietary rights, a position quite clearly recognized under the Canadian constitution.
The province contended that the conferring of one affords no presumption of the transfer of the other. It was then suggested that the federal government had no capacity to enjoy the beneficial interest in any of the reserved lands and was limited to the benefit from the property distributed to the federal Crown under the 1867 Constitution. Mr. Justice Newcombe, who had sat on the Supreme Court's hearings of the 1927 Reference and the 1928 Escheats Case, applied the Privy Council decision in the Escheats Case and went on to hold:

...And it follows also that the legislation of the Dominion was paramount and unaffected by any powers granted to the legislature or the local government of the Territories, or any territorial exercise of those powers which might prove to be repugnant. 65 (emphasis added)

The implications of this statement to a legislative division over offshore resources is obvious. The federal power to reserve property in constituting new provincial territory and to simultaneously preserve federal jurisdiction over such property was upheld in this case. However, this case dealt with a variation of the original constitution of a Province. What must now be examined is whether there is any reason to believe that federal powers are any less as regards the imposition of terms on the extension of provincial territory under section 3 of the B.N.A. Act, 1871. The next
section deals with cases concerning this issue.

Section 2.2 - variations relating to the constitution applicable to territory added to an established province

The key factor in appreciating the distinction between these variations and those discussed in the previous section is that once a province is created it is governed not solely by the B.N.A. Act, 1867 but also by its own terms of entry, that is the province's particular constitution. The first section has shown that a province's legislative ability is not necessarily determined by the provisions of the B.N.A. Act, 1867, since the province's constitution may have varied by its terms of admission.

The second group of cases which consider variations relating to the constitution applicable to territory added to an established province must therefore examine the constitutional powers afforded to provinces under the 1867 Constitutional Act as such powers are varied by the provincial constitution, declared pursuant to the B.N.A. Act, 1871. The B.N.A. Act, 1871 deals both with the authority of the federal government to declare provincial constitutions and to add territory to provinces on terms and conditions. While the declared provincial constitution cannot thereafter be altered except by the Imperial Parliament, (s.6 B.N.A. Act, 1871) this does not apply when territory is added to a province.
The province in this latter case can agree to a variation of its constitution through the terms and conditions imposed on the added territory pursuant to section 3, of the B.N.A. Act, 1871. The variations considered in this section are variations of provincial legislative powers under the B.N.A. Act, 1867, as may be varied by the province's terms of entry, the sum total of which is the province's constitution.

Since all cases in this section concerning variations of provincial constitutions on additions to provincial territory arise out of a common act situation, the issues arising out of these cases have received a thorough consideration by the courts.

The cases arose out of a provision in The Manitoba Act, 1870 which restricted provincial taxing power over the lands of the Canadian Pacific Railway (C.P.R.). This restriction did not appear in the Manitoba Act, 1870, and did not apply to other than the added territory. The Parliament of Canada in 1881 following a petition of the Legislature of Manitoba, enlarged the Province of Manitoba by the addition of a large territory which, until then, had been part of the North-Western Territories. The addition to the Province of Manitoba was made by concurrent legislation of Canada and the Province, enacted pursuant to section 3 of the B.N.A. Act 1871 (hereinafter referred to
as the "Manitoba Boundaries Act 1881"). The terms and conditions agreed to and incorporated in the legislation of the Dominion and the Province extended to the new territory added to Manitoba, all Dominion legislation which had been since the creation of Manitoba applicable to it, and provided in section 2:

The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

A month earlier Canada had ratified by statute a contract between the Dominion government and the Canadian Pacific Railway. Clause 16 of the contract read:

...the company shall be forever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein, and the lands of the company in the North-Western Territories until they are either sold or occupied shall also be free from such taxation for twenty years after the grant thereof from the Crown.

The issue in all the following cases: Canadian Pacific Railways Company v. Burnett, The Rural Municipality of Cornwallis v. Canadian Pacific Railway Company, North Cypress v. C.P.R. and the Manitoba Reference 1958, was whether the Province of Manitoba,
through its municipalities could tax the interest of the
Canadian Pacific Railway, in the lands the federal govern-
ment intended to grant them for the construction of a
railway. All the cases in one form or another challenged
the federal government's authority to exempt from provincial
taxation lands that if they had been within the original
boundaries of the province would have been subject to
taxation. Plainly stated: could the federal government
limit the legislative authority of the Manitoba
Legislature in this manner. The particular prohibition
on the taxation by Manitoba of C.P.R. lands, dealt
with by these cases, touches both types of legislative
jurisdiction mentioned earlier, but really amount to a
direct restraint on the province's legislative jurisdiction.
The province could certainly have taxed interests in lands
within its boundaries. Under section 92(2) of the B.N.A.
Act, 1867, provinces have the power of "Direct Taxation
within the Province..." The original constitution of the
province, the Manitoba Act, 1870, did not vary this power
and incorporated it as a term of entry placing it within
the exclusive legislative jurisdiction of Manitoba. In
all these cases there was no question that the C.P.R. lands
were within the Province of Manitoba. Since they were not
"ungranted lands" reserved under s. 21 of the Manitoba Act,
1870. Therefore the federal government, in asking Manitoba
to consent to having its taxing power restrained over the C.P.R. lands, was asking the Province to consent to a limitation of its legislative jurisdiction as a condition to the federal government transferring additional lands to the Province.

In *Canadian Pacific Railway Company v. Burnett*, an agreement for sale by the C.P.R., on default, preserved the exemption afforded C.P.R. lands under section 16. Mr. Justice Killam, referring to clause 16 and the statutes extending the limits of the province, (approved by the Supreme Court of Canada) said:

> The provisions making the added territory subject to the enactments of Parliament respecting the Canadian Pacific Railway, and the lands to be granted in aid thereof, appear to me to be clear limitations upon the legislative authority of the Legislature of Manitoba and not merely stipulations in a contract or treaty which might be broken by that Legislature. 76 (emphasis added)

Mr. Justice Bain, in this same case, held, after referring to the *B.N.A. Act, 1871*:

> The Legislature having agreed upon the terms and conditions, and the Parliament of Canada having increased the limits subject to these terms and conditions, it seems to follow at once, that the terms and conditions specified become, as it were, part of the constitution of the added territory, subject to which the Provincial Legislature alone can exercise jurisdiction, and which it cannot alter or vary without the consent of the Imperial
or Dominion Parliaments, any more than it could any of the provisions of the Manitoba Act...

The next case, The Rural Municipality of Cornwallis v. The Canadian Pacific Railway Company, was not a direct attack on the federal government to restrict the province's taxing powers, but rather questioned the manner by which the restriction was implemented. The Province argued that the exemption was not effective since the guarantees given the C.P.R. were contained in a contract between the Company and the federal government and were not part of a legislative enactment, contemplated by section 2 of the Manitoba Act, 1881. While the court rejected Manitoba's position a very important point was raised in the course of counsel's argument though not commented upon by the court. The report of the case indicates that The Honourable Joseph Martin, Attorney-General of the Province of Manitoba, in the course of his arguments in support of the ability of the municipality to tax, stated:

The powers of Manitoba were derived from the Manitoba Act. Imperial Act of 1871, c.28. No power was given to the Province of Manitoba to agree to the exemptions. When the territory was added, it became fully subject to the authority.
It was now inevitable, that the issue of the federal government's authority to impose the conditions on territory added to a province which derogated from the province's original constitution, would be squarely raised before the courts. In *The Rural Municipality of North Cypress et al.* v. Canadian Pacific Railway Company, the plaintiff municipal taxing authority argued:

By the Manitoba Act, 33 Vic., c.3 (D.1870), s.2 it is provided that the provisions of the B.N.A. Act shall be applicable to Manitoba, except where varied by the former. By B.N.A. Act, s.92, s-ss. 2 and 8, Provincial Legislatures are given power to make laws on direct taxation within the Province in order to the raising of a revenue for Provincial purposes; and Municipal institutions in the Province. These are unchangeable. By 34 and 35 Vict., C.28, s.3, (Imp.) the Parliament of Canada may, with the consent of the Legislature of any Province, alter the limits of a Province upon such terms and conditions as may be agreed to by the Legislature. The words "terms and conditions" must mean subject to the B.N.A. Act and the Manitoba Act. Section 6 limits the powers of the Dominion Parliament. The condition limiting the power of legislation as the C.P.R. lands was beyond the power of the Dominion Parliament, and of course beyond the power of the Local Legislature.

Mr. Justice Killam, now Chief Justice, held in the Court of King's Bench for Manitoba that the decision of the Supreme Court of Canada in *Cornwallis* settled any question on the effect of the Manitoba Boundaries Act, 1881, in limiting the powers of the province. The Chief Justice stated:

...The terms and conditions upon which the extension of the boundaries of Manitoba was made by the Dominion and accepted by the Province imposed constitutional limitations
upon the authority of the Provincial Legislature with respect to the added territory, different from those existing with respect to the original Province.

...The restriction in the 6th section of the British North America Act, 1871 upon the power of the Parliament of Canada to alter the Act establishing the Province of Manitoba, was subject to an exception of the provisions in the 3rd section relating to the alteration of Provincial boundaries. The expression "terms and conditions" in the latter section was apt to include limitations of Provincial powers, and was accepted by both the Dominion Parliament and the Provincial Legislatures as appropriate for the purpose. 81 (emphasis added)

The Supreme Court of Canada on appeal of the decision in North Cypress, upheld the contention that the terms and conditions were constitutional limitations of the powers of the Legislature of Manitoba in respect of the added territory. In his judgment in the Supreme Court, Mr. Justice Davies stated:

As regards the limitations placed upon the legislative powers of Manitoba with respect to the territory added to that province by the legislation of 1881, I have no doubt that the terms and conditions on which it was provided in the 3rd section of the B.N.A. Act of 1871, that the Parliament of Canada might with the consent of the legislature of any province agree for the increase or alteration of the limits of such province were not to be confined to small matters financial or otherwise as between the province and the Dominion but were broad enough to cover any existing legislation already applicable to the territory to be added to the province and were, as used in the legislation adding that territory to Manitoba, intended to embrace and did embrace the Dominion legislation relating
to the Canadian Pacific Railway and the lands granted in and of its construction. I fully agree with the Chief Justice of the court below that it was a constitutional limitation upon the powers of the provincial legislature quoad this added territory. The extent of such limitation is of course to be determined by its language. \(^82\) (emphasis added)

The decisions very clearly indicate that a province can agree to a restriction on the legislative powers it will exercise over territory added to the original provincial boundaries. The references by the courts to section 6 of the B.N.A. Act, 1871, clearly regard the conditions as determining the constitution for the added territory. The courts have therefore accorded to the federal parliament in setting the conditions on which a province will administer territory added to its boundaries the same powers the federal Parliament can exercise in determining the original constitution of a province. This power was described by Mr. Justice Newcombe in the 1927 Reference as follows:

...the Parliament of Canada had plenary powers of legislation as large and of the same nature as those of the Parliament of the United Kingdom itself; and, thus construed, so long as there was no repugnancy to an Imperial Statute, there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new provinces therein, for the constitution and administration of any
such province, and for the passing of laws for the peace, order and good government thereof, and for its representation in the Parliament of Canada. 83
(emphasis added)

This statement was specifically approved by the Supreme Court of Canada in the 1958 Manitoba Reference84, which also confirmed Burnett, Cornwallis and North Cypress. Mr. Justice Rand held in the 1958 Manitoba Reference, (Cartwright, J. concurring):

It has already been held by the Judicial Committee in Attorney-General of Saskatchewan v. Can. Pacif. Rlwy, Co. (1953) A.C. 594, approving Reference re Constitutional Validity of section 17 of the Alberta Act (1927) S.C.R. 364 that in the constitution of Saskatchewan, which in this respect is identical with that of Alberta, a reservation to that effect was valid; both are provinces set up under the powers conferred upon Parliament by s. 2 of the British North America Act, 1871. That section provides for vesting in new provinces power to pass laws for their "peace, order and good government:,, s. 3 enables the alteration of provincial limits on "such terms and conditions as may be agreed to". That these conditions embrace the preservation of one of the terms of fulfilling such a vital constitutional obligation as that being carried out in 1881 seems to me to be too clear for a debate. The reservation in the case of the new provinces was a direct limitation of taxing power; and I am unable to distinguish that effect when confined to a portion of a province from its applicability to the whole. 85 (emphasis added)

This statement clearly extends the ability to affect the provincial constitution to territories added to the
Province pursuant to section 3 of the B.N.A. Act, 1871.

Mr. Justice Locke, held in this same case:

...Sections 2 and 3 of the British North America Act of 1871, in my opinion, empower Parliament to impose the restriction on the powers of taxation of the province of Manitoba as its limits were defined by the legislation of 1881 and the latter section empowered the legislature to agree to this as one of the terms upon which the addition to its boundaries were made and to pass the provincial legislation that year. 86

Mr. Justice Locke could not have better described the situation existing today regarding a possible boundary extension to add offshore territory to British Columbia. The next section will attempt to summarize the conclusions that the various courts made in the preceding cases.

Section 2.3 - summary of legislative variations

The courts have clearly decided that the B.N.A. Act, 1871 should be afforded as liberal an interpretation as possible. The fact that many of the terms, either in the original constitution as imposed on a transfer of territory may have reflected the circumstances of the day should not be taken as a limiting factor. While education or the building of a railway may have motivated the conditions in earlier times, the situation today over offshore resources
justifies comparable conditions when considering the terms on which territory should be added to a province. The Supreme Court described this situation in the Offshore Minerals Reference as follows:

...The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests. 87

The same was said about the special tax status afforded the C.P.R. when viewed in the context of the government's undertaking to build a railroad across Canada.

One final case, the decision of the Privy Council in the Saskatchewan C.P.R. Reference (1953) should be referred to before attempting a summary of the extent of variations permitted under section 3. While the case falls into the first group of cases mentioned on variations, since it concerns a variation of the terms of entry, it arises out of the same fact situation of the second group of cases, the restriction on provincial taxing powers over C.P.R. lands within the province of Saskatchewan. In 1881, when the restriction was imposed on the territory added to Manitoba, the future Province of Saskatchewan was still part of the North-western Territory. When Saskatchewan sought admission in 1905 as a Province a term of entry was a restriction on the taxing power of the new province on C.P.R. lands. This
restriction is substantially the same as section 2 of the Manitoba Boundaries Act, 1881, and appears as section 24 of the Saskatchewan Act, 1905. Since the courts in the various cases discussed in the previous section clearly do not distinguish between conditions imposed on entry and conditions imposed on additions, this case offers clear judicial summary of the powers inherent in both sections 3 and 6 of the B.N.A. Act, 1871.

The scope of powers residing in the federal government under the 1871 Act were described in this case by Viscount Haldane, in the Privy council decision as follows:

...The words "peace, order and good government" (s.2 of 1871 B.N.A. Act) are words of very wide impact, and a legislature empowered to pass laws for such purposes has a very wide discretion. But Mr. Leslie (for Attorney-General for Saskatchewan) and Lord Hailsham (for Attorney-General for Manitoba) emphasized the distinction between section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order and good government in territories not included in a province, and section 2, which only enabled them to provide for the passing of laws for the peace, order and good government of a province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed to the province. The prescription, they contended, had been done for good and all by section 92 of the Act of 1867.
But their Lordships would observe that if this argument was well founded the words in section 2 of the Act of 1871 "for the passing of laws for the peace, order and good government" would be superfluous. The power to make provision for the "constitution" of the new province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general impact, their Lordships do not feel justified in placing on them the narrow meaning for which the appellant and Lord Hailsham contend.

If the words "for the passing of laws for the peace, order and good government" were held not to be superfluous then the introduction to section 6 which confirms the inviolability of a provincial constitution declared under section 2, are also not superfluous. These introductory words of course are: "Except as provided by the third section of this Act (B.N.A. Act, 1871) ...". Section 3 of the B.N.A. Act, 1871, then re-opens the federal powers to define a province's constitution in cases where territory is added to a province, a power which in the words of Viscount Simon would include the power to prescribe what laws might be passed to the province.
In summary therefore the federal government can impose terms and conditions on provincial legislative jurisdiction when adding territory to a province that:

(1) limit the legislative jurisdiction to the particular land transferred to the province within the extended boundaries:

The 1930 Saskatchewan Natural Resources case confirmed the ability of the federal government to transfer less territory to a new province than was transferred to the original four provinces. This case also confirmed that the federal government retained the powers it had prior to the transfer over land it reserves to itself in the transfer. The federal government could then extend the boundaries of the Province of British Columbia under section 3 (B.N.A. Act, 1871) to include all of the federal government's territory over offshore resources. As a term of the transfer it could reserve to itself all property other than oil and gas, within this territory as well as the exclusive right to legislate with respect to the reserved property.
(2) under the ability of the federal government to prescribe what laws are to be passed to the province (Saskatchewan C.P.R. Reference 1953), the federal government could restrict the laws which the Provincial legislature may pass;

The imposition of this term is essential to the ability of the federal government to reserve to itself the right to pass laws respecting off shore resources in furtherance of international agreements. The federal ability to impose conditions expressed as prescribing what laws the province and not the federal government can pass. However, since property other than oil and gas, would remain under federal jurisdiction, legislation implementing international agreements concerning offshore areas would be in furtherance of the federal territory specifically reserved. Under the power described in this part the federal government could restrain the Province from legislating contrary to international agreements.

(3) set a new constitution for the added territory (1927 Reference)
A confirmation of the federal government's ability to enact federal legislation implementing international agreements which could affect the offshore oil and gas transferred to the Province could be justified as an exercise of the federal power to redefine the constitution of the Province as regards the added territory. Though the background and necessity of this term will be discussed in the next chapter, for now it is sufficient to accept that the federal government cannot implement international agreements concerning property within the Province, unless it could be justified under a specific federal power. The 1927 Reference held that so long as not repugnant to the 1867 constitution, there is no limit to the plenary powers of the federal parliament with respect to the establishment for the constitution of a Province. There exists no repugnant Imperial statute rather as will be explained later s.132 of the B.N.A. Act, 1867 leaves a void in the area of treaty implementation. Furthermore the term would only continue present federal powers
over offshore oil and gas since there is no attempt to augment federal authority in this field. Furthermore continuation of the federal ability to exercise treaty implementation powers generally over offshore areas is no more a change than was made to the education provisions of the B.N.A. Act, 1867, in certain of the provincial constitutions.

A discussion of the terms and conditions of transfer presupposes some background knowledge on the necessity of the terms and conditions to a transfer of offshore oil and gas to British Columbia. It is intended that any questions concerning the nature of the variation and the type of condition necessary to implement it, will be clarified in the next chapter.
CHAPTER I

FOOTNOTES


2. LaForest, Natural Resources and Public Property, (1969) 168.


6. Id., at 800.


8. Id., at 403.

9. Canada Parliament, Sessional Papers (House of Commons) 1871, No.20, 2nd. return, p.1, "Correspondence between the Imperial and Canadian Governments relative to the Manitoba Act".


15. Canadian House of Commons Debates, 1871, p.603, see Gerin-LaJoie, op.cit., supra, n.10 at 50, footnote 2.


19. Rupert's Land Act, 1868 (Imp.) 31 & 32 Victoria, c.105, the author has relied extensively on the historical account of Gerin-Lajoie op.cit., supra, n.8, pp.50-58, and on the original material referred to in his work.

20. The preamble to the Rupert's Land Act, 1868 reads as follows: "And whereas for the Purposes of carrying into effect the Provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid upon such Terms as Her Majesty thinks fit to approve, it is expedient that the said Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities so far as the same have been lawfully granted to the said Company, should be surrendered to Her Majesty, Her Heirs and Successors, upon such Terms and Conditions as may be agreed upon by and between Her Majesty and the said Governor and Company as hereinafter mentioned..."


28. Ibid.


30. Canadian Sessional Papers, No.20, 1871, 2nd Return "Correspondence from the Governor General of Canada to the Secretary of State for the Colonies".


32. Op.cit., supra, n.10 at 57, also see Great Britain, Parliament, Parliamentary Debates (Commons), 3rd série, Vol.206, p.1171: "The Act of Confederation of the North American Provinces gave power to the Parliament of Canada to establish Provinces in the territories admitted into the Dominion of Canada, and to provide for the representation of such Provinces in Parliament; but an Order in Council was necessary, and prior to the issue of such an Order in July last the Canadian Parliament passed two Acts... The Law Officers of the Crown were of opinion that these were valid, as not being beyond the powers of the Canadian Parliament; but doubts having been expressed the Canadian Parliament had addressed the Crown for an Act in the Imperial Parliament confirming their validity. The Bill would give the Canadian Parliament power to establish new Provinces and provide for the constitution, thereof much in the same way as the United States Government dealt with territories; it gave power to alter the limits of constituted Provinces and enabled the Canadian Parliament to legislate for any territory not for the time being included in any Province." (emphasis added)


34. The legislation establishing Alberta and Saskatchewan has been referred to as the "Autonomy Acts".


38. Variation refers to a variation from the full exercise of powers given the original provinces under section 92 of the B.N.A. Act, 1867.


40. Id., at 209.

41. Id., at 213, 216, 222. The court discussed the reasons behind the variation as being the absences in Manitoba, at the time of union, of any public system of education, and therefore the wording of section 93(3) would not have been appropriate. It is unlikely that this comment restricts the court's decision in view of the broad reasons for judgment.


43. (1923), 1 W.W.R. 1.

44. Id., at 11.

45. Id., at 13.

46. Id., at 9.

47. Ibid.


50. Canadian House of Commons Debates, 1927, p. 371, also see p. 360 statement of the Minister of Justice.


52. Canadian House of Commons Debates, 1929, p. 25.

53. Canadian House of Commons Debates, 1929, p. 25.


56. Id., 373.
57. Ibid.
60. Id., at 486.
61. Id., at 487.
63. Id., 269.
67. S.M. 1881-1883, c.1, c.6 (3rd).
68. S.C. 1881, c.14 s.2(b)
69. S.C. 1881, c.1, assented to February 13, 1881.
70. Id., Schedule.
71. (1889), 5 Man R. 395.
72. (1890-91), 7 M.L.R. (Man.Q.B.) affirmed by the Supreme Court of Canada (1892), 19 S.C.R. 702.
73. (1905), 4 M.L.R. 382, affirmed by the Supreme Court of Canada (1905), S.C.R. 500.
77. Id., at 430.
78. (1890-91), 7 M.L.R. 1,5.
79. (1905), 14 M.L.R. 382, 385.
81. (1905), 14 M.L.R. 382, 402.
82. (1905), S.C.R. 550, 565.
85. Id., 748.
86. Id., 771.
CHAPTER II

ASSESSMENT OF THE ABILITY OF THE FIRST PROCEDURE
TO ACCOMMODATE FEDERAL/PROVINCIAL CONTENTIONS
RELATING TO CONTROL OVER OFFSHORE OIL AND GAS

INTRODUCTION

Each procedure for transferring offshore oil and gas to British Columbia consists of two parts; the instrument of transfer, and the change of jurisdictional status. The first chapter examined an issue relating to the former, that is whether section 3 of the B.N.A. Act, 1871 could be used to effect a transfer of limited legislative jurisdiction over offshore oil and gas to the Province. The mere fact that this first procedure could authorize a transfer of limited, as opposed to complete legislative jurisdiction to the Province does not mean that the procedure could be used to successfully negotiate a division of federal and provincial jurisdiction over offshore resource development. To date there has been no public statement by either the Province or the federal government as to either's position on the specific terms of a transfer of offshore oil and gas, but there is evidence from the discussions to date that a complete transfer of legislative control to the Province would not be considered by the federal government.¹
This chapter examines the second part of the first procedure — the change of the jurisdictional status of the area involved as a result of a transfer of limited legislative jurisdiction from the federal government to the Province of British Columbia. The area is difficult to discuss since the limitations on the legislative jurisdiction will determine the jurisdictional divisions between the Province and the federal government, and one cannot discuss the change of jurisdiction status without referring to the terms and conditions which delimit federal and provincial jurisdiction. The following discussion then assumes certain terms and conditions which would accommodate federal and provincial positions on offshore resource development, in an attempt to facilitate an agreeable federal–provincial split of jurisdiction over offshore oil and gas. The situations which will require the formulation of terms and conditions can be categorized as follows:

1. boundary delimitation problems;
2. preservation of the federal presence in offshore areas in international relations;
3. affirmation of exclusive federal powers;
4. establishment of Provincial civil jurisdiction generally and specifically over oil and gas development.
It is intended that an examination of the foregoing will produce terms and conditions that will set the groundwork in reaching a compromise between federal and provincial positions concerning the jurisdiction each would have respecting offshore oil and gas development. Unlike the other procedures to be examined in the following chapters, this first procedure provides a method for passing control and a method for determining the jurisdictional relationship between the federal government and a province. In the other two procedures, the method also determines the jurisdictional relationship. For example, the delegation of legislative authority is a means of passing a degree of control, but the method determines the relationship between the giving and receiving parties, i.e. that of delegator and delegatee, with all the incidents that follow from this relationship.

It will be necessary, however, before proceeding to a discussion of the four categories and related terms and conditions, to put aside certain nagging doubts that still have not been broached. These relate to the present jurisdictional status of the areas offshore of British Columbia. This issue will be examined in the next section.

The concluding section in this chapter will compare
the jurisdiction that British Columbia would obtain on a transfer of offshore oil and gas under the first procedure to the jurisdiction over offshore oil and gas transferred coastal states in the United States by their federal government.

Section 1: Description of the Federal Government's Jurisdiction in the Territorial Sea and Continental Shelf - the Offshore Areas

There is no suggestion from either the historical material on the B.N.A. Act, 1871, nor from the various judicial opinions on this Act, that the federal government could transfer an exclusively federal power to a province.

The general constitutional prohibition against transfers from the provinces or the federal government of the exclusive jurisdiction of the other would no doubt apply.

This prohibition will be discussed in greater detail in Chapter III in the context of the third procedure. A transfer of the federal government's jurisdiction over offshore minerals would not be possible under the first procedure if it came within a category of exclusive federal legislative jurisdiction. The federal jurisdiction over property though is a bit of an anomaly when considered
in the context of the general prohibition against the transfer of legislative jurisdiction between the federal government and provincial legislatures. The federal government, of course, has exclusive jurisdiction over "The Public Debt and Property", pursuant to section 1A of the B.N.A. Act, 1867. But while there is no impediment to the federal government transferring its property to a province (if the property is within the province's legislative jurisdiction), the federal government could not transfer the federal government's legislative authority, as opposed to property, to a province. That is, it could not transfer to a province the right to legislate over federal property. The first procedure would transfer legislative jurisdiction over offshore oil and gas to the Province by first extending the boundaries of the Province to include these resources and then, secondly through the terms of transfer, the federal government would pass its interest in the offshore oil and gas to the Province, subject to such other conditions as the federal and provincial governments negotiate. This procedure, it is argued, involves a transfer of property, not of legislative jurisdiction. However, the Supreme Court of Canada in the Offshore Minerals Reference, cast some doubt as to the roots of the federal jurisdiction over its property in offshore minerals. The Court stated as regards the
federal government's jurisdiction over offshore resources in (1) the territorial sea:

Legislative jurisdiction with respect to such land 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... the mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concerns or interests... Moreover the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. 4 (emphasis added)

and (2), the continental shelf:

Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, [Geneva Convention on the Continental Shelf] and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention. 5

The Supreme Court here is suggesting that the federal government's right to the offshore minerals comes within exclusively federal powers since the powers over offshore resources were not specifically distributed to either the provinces nor federal government under the original constitution, the B.N.A. Act, 1867. Furthermore, they suggest that these rights could not accrue to the nation - that is, Canada - unless they were held by the federal
government. If these statements reflect Canada's interest in offshore oil and gas, the B.N.A. Act, 1871 may not be able to be used to pass legislative authority to British Columbia, since the transfer would purport to transfer exclusively federal powers to the Province. Though subsequent discussion of the federal government's interest in offshore resources in the Reference dilutes the effect of the statement quoted above, it is important to examine the reasons why the Court may have considered it necessary for it to take this position - a position they no doubt felt necessary to ensure that Canada as a nation could retain an interest in offshore resources.

The examination of the federal government's jurisdiction has two components: first, the interest recognized by international law, and second, the interest recognized by the domestic jurisdiction - that is, the interest which the federal government perceives it has in offshore resources. While the Supreme Court of Canada, in the Offshore Minerals Reference, had the opportunity to examine the first component, the second component was not really raised before the Court. These two components will now be examined.
Section 1.1: interest of the coastal state recognized under international law.

The Supreme Court of Canada was asked to decide in the Offshore Minerals Reference whether the federal government or the Province of British Columbia had the right to explore and legislative jurisdiction over the lands, including the mineral and other natural resources of the seabed and subsoil within the following two areas:

1. seaward from the ordinary low watermark on the coast of the mainland and islands of British Columbia, to the outer limits of that territorial sea of Canada, hereafter referred to as the "territorial sea"; and

2. beyond that part of the territorial sea of Canada to a depth of 200 meters or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources, hereafter referred to as the "continental shelf".

The Supreme Court was asked to determine whether the federal government had property in the lands, including mineral resources, of the seabed and subsoil within the territorial sea. It was not asked to determine whether the federal government had property in the minerals within
the continental shelf. This writer maintains that the failure to request the Court to determine this question tended to mislead the Court on the issues to be determined. The Court was forced into circular reasoning, for if it determined that the resources of the continental shelf were beyond the boundaries of the Province of British Columbia, it was asked not to declare that the federal government had property in the resources of the seabed, but that it had legislative jurisdiction over the resources in the seabed. Since the Court was asked to declare the federal government's interest in the continental shelf as a legislative, rather than a property interest, the Court may have felt that this was an expression of the federal government's position on the extent of its interest. Furthermore, if the federal government's interest was a mere legislative right, this right would appear to have its basis on international convention rather than constitutional law, since the federal/provincial legislative distributions of power have their roots in property delineation. As will be demonstrated below, had the question of property rights in the continental shelf been argued before the Court, there may not have been the need for the Court to rely on the "international recognition" of rights in the continental shelf while coming to the same conclusion.
The Supreme Court of Canada referred to two Conventions in the Reference:

1. the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; and

These two Conventions recognized a coastal nation's right to the resources respectively in the territorial sea and continental shelf. The effect of these Conventions in determining federal jurisdiction over each of the two areas described will now be examined.

Section 1.1(a): the territorial sea - relating federal jurisdiction to international convention.

The rights of a nation over its territorial sea are not dependent on international law. For example, Article 12 of the Convention on the Territorial Sea and Contiguous Zone states that:

...the territorial sea is not to extend beyond the median line, every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial sea off each of the two states is measured...

It is arguable that the territorial sea is not to extend beyond twelve miles. However, a number of nations have declared a territorial sea beyond twelve miles. Though Canada has not ratified the Convention, this would not affect the exercise of rights sanctioned by the Convention
within the twelve-mile territorial sea declared by Canada.¹²

This premise has been confirmed by the Supreme Court of Canada in S.S. May v. The King.¹³ In this case, a fishing vessel registered in the United States was condemned as forfeited to His Majesty on the ground that it was a foreign fishing vessel within the meaning of the Customs and Fisheries Protection Act, R.S.C. 1952, c.43, and that at the time of its seizure it was within three marine miles of the coast of Canada off British Columbia, having entered British waters¹⁴ for a purpose not permitted by treaty or convention or by any law of Great Britain or Canada, in violation of the Act. Though the case is mainly concerned with the defences raised by the shipowners to justify being in "British waters", Mr. Justice Lamont very clearly stated the extent of Canadian jurisdiction over the territorial sea when he said:

...It is a well recognized principle, both in this country and in the United States, that the jurisdiction of a nation is exclusive and absolute within its own territory, of which its territorial waters within three marine miles from shore are as clearly a part as the land. ¹⁵ (emphasis added)

By equating federal jurisdiction over the territorial sea with federal jurisdiction over land, it is clear that
the federal government's interest in the seabed resources of the territorial sea is an interest in property. The Supreme Court of Canada in the Reference did, in fact, reach this conclusion, but for some reason felt compelled to attribute this interest to international convention.

The Supreme Court of Canada, in the Offshore Minerals Reference, did not refer to this case, but rather, relied on a later decision of the Privy Council, Croft v. Dunphy, concerning federal jurisdiction over the territorial sea and beyond. This case did not discuss S.S. May v. The King, but this is not surprising since the main issue in Croft v. Dunphy was whether the federal government had the right to legislate beyond its declared territorial sea. At the time Croft v. Dunphy was before the Privy Council, the territorial sea of Canada was three miles. The issue before the Court was whether a Canadian registered vessel could be bound by federal legislation purporting to apply to Canadian vessels to a distance of twelve miles beyond the three mile territorial sea. The Privy Council held that the federal government had the right to legislate beyond the three mile limit pursuant to the powers it obtained under the B.N.A. Act, 1867. The Privy Council specifically held that no question of international law was involved, mainly because the legislation was
recognized as legitimate by international law. In this author's opinion, the Court also laid to rest any argument that the Court would enforce international law over domestic law, when it stated:

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires: ...It may be that legislation of the Dominion Parliament may be challenged as ultra vires on the ground that it is contrary to the principles of international law, but that must be because it is assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. 17

The Privy Council had said earlier in this case that the powers conferred on the federal Parliament under the B.N.A. Act, 1867 were as plenary as those passed by the Imperial Parliament,18 and since there was no reference in the Offshore Minerals Reference to a lack of power to legislate contrary to international law, it must be assumed that federal legislation in the territorial sea would be upheld by Canadian courts, regardless of international law.

The reasons given by the Supreme Court in the Reference are therefore confusing. The Court's reference to Croft v. Dunphy somehow suggests that legislation respecting the territorial sea is extra-territorial and
it connects this federal ability, to Canada's sovereign ability, for as the Court stated:

There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931, 22 Geo. V. C.4. Section 3 of the Statute of Westminster provides in an absolutely clear manner and without any restrictions that the Parliament of a Dominion has full power to make laws having extra-territorial operation. 19

If the Court was suggesting that the ability of the federal government to declare its territorial sea was in effect an exercise of extra-territorial jurisdiction, the effect is a contradiction in terms, since the declaration of a territorial sea brings the area within territorial jurisdiction. In effect, such declaration is an assertion of territorial jurisdiction. One matter which has as yet not been referred to is the effect of section 3 of the Statute of Westminster, 20 which provides:

S.3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

This legislation of the Imperial Parliament confirmed the federal Parliament's authority to pass laws that would apply beyond declared Canadian territory - to, in effect, legislate extra-territorially. This power had to a certain extent already been upheld by the Privy
Council in *Croft v. Dunphy*. However more important than confirming this right was clarification in the Statute that the ability to pass laws having extra-territorial application was an exclusively federal ability. The provinces were not given the right to pass laws applying beyond their territorial jurisdiction.\(^2\) Therefore, if the Supreme Court in the Reference felt that the federal government's interest in the territorial sea was as a result of the exercise of its extra-territorial jurisdiction, in no way could the Province of British Columbia obtain an interest in this area.

Relating this to the proposed first procedure, the fact that the federal government has the right to acquire new territory does not mean that once acquired, it legislates as if the acquired territory was not federal territory. The Supreme Court did, in fact, acknowledge that the territorial sea was a part of the territory of Canada.\(^2\) As regards the first procedure, a distinction can then be drawn as to the federal government's ability to acquire territory, an ability not unilaterally afforded to the provinces, and the federal government's ability to deal with the property once acquired. The acquisition is an exercise of the federal government's exclusive power to extend its boundaries, a power which will be
discussed in greater detail in the next section. However, once acquired, there is no convention of international law or constitutional restriction that would impede the federal government from including its property interest in the mineral resources of the territorial sea in a grant to the province. International law recognizes the exclusive interest of the nation in its territorial sea, and constitutional law recognizes the ability of the federal government under section 3 of the B.N.A. Act, 1871, to legislate over its territory and, if it desires, to extend provincial boundaries to include federal territory.

The Supreme Court of Canada described the federal government's ability to conclude international agreements respecting offshore minerals, but did not deal with the issue of implementing as opposed to entering into international agreements. When the federal government obtained the ability to negotiate international agreements in its own right, it lost the ability to implement these agreements except by federal legislation within the jurisdiction of section 91 of the B.N.A. Act, 1867. As will be discussed in later sections, the inability of the federal government to enforce international treaties which relate to exclusively provincial matters is not an international law problem, but a constitutional law
problem. While the Supreme Court recognized that if the province had the property in the mineral resources of the territorial sea, the federal government could not implement international agreements concerning this property without provincial concurrence, it cannot have held this as an impediment to the province obtaining the property if sanctioned by the Constitution.

Therefore, the jurisdiction which the federal government exercises over the mineral resources of the seabed within the territorial sea, are not dependent on its ability to legislate extra-territorially, or upon recognition by the international community. Rather, its jurisdiction is an exercise of its powers over land within its territorial jurisdiction. An examination of the federal legislation over mineral resources of the territorial sea and continental shelf will confirm that this is the situation. The next section will examine the nature of the federal government's jurisdiction over the continental shelf.

Section 1.1(b): the continental shelf - federal jurisdiction over the continental shelf and its reliance on international convention

The claims by coastal states to jurisdiction over the continental shelf beyond their territorial sea is historically a relatively recent occurrence. The issue was, in
fact, forced by the unilateral declaration by the United States of sovereignty over the continental shelf. In 1945, President Truman issued the following proclamation:

...the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States [and] subject to its jurisdiction and control. 24 (emphasis added)

This proclamation forced the international community to reach some consensus on the continental shelf. The current consensus is reflected in the 1958 Geneva Convention on the Continental Shelf.

Article 2 of the 1958 Convention on the Continental Shelf states (paragraphs 1 to 3):

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

The Supreme Court held that British Columbia lacked jurisdiction over offshore minerals because it is the federal
government that would be recognized by the international community as having the rights stated in the 1958 Convention on the Continental Shelf. The Court also suggested that its reasons for holding that the territorial sea was within federal jurisdiction applied equally to the continental shelf. Therefore, the Court was suggesting that the rights were somehow dependent on recognition by the international community. However, Article 12 in no way suggests this interpretation. The jurisdiction of a province or the federal government over offshore minerals is to be determined by the domestic jurisdiction, by reference to its constitution. The interpretation to be placed on the exercise by a state of rights recognized under international law has been described by one writer as follows:

If the function of international law is to secure general recognition of the exercise of authority by sovereign States, one must look to constitutional law and not to international law to determine the extent and degree of that authority.

The Supreme Court certainly could not have meant that the coastal state acquires rights in the continental shelf by international recognition, for the Convention itself confirms that the rights arise without proclamation. However, as mentioned earlier, the one question which the Court was not asked to answer provides a complete description of its jurisdiction over the mineral resources of the continental
shelf. The question is, of course, does the federal government have property in the mineral resources of the continental shelf. In order for the federal government to be able to transfer jurisdiction over offshore oil and gas to the Province, its interest must be in the nature of a property interest, not a mere legislative jurisdiction. If the federal jurisdiction is merely legislative, it would not be susceptible to a boundary extension, as is contemplated by section 3 of the B.N.A. Act, 1871. When the Court was not asked to decide the question, a void was created. If the question was put to court today, however, there is every reason to believe that it would hold that the federal government's interest in the continental shelf is its property, for it would now have the benefit of judicial interpretation of Article 2. In interpreting this Article, the International Court of Justice has said:

...the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring and exploiting its natural resources. 28 (emphasis added)

Therefore, as the federal government's jurisdiction over land is a jurisdiction over property, its rights in
the continental shelf are a property interest. This interpretation is further confirmed by reference to Article 2, paragraph 2, which provides that no one may explore or exploit the natural resources of the continental shelf without the consent of the coastal state. The implication, of course, is that the coastal state's rights are assignable. If the rights were merely legislative this could not be the case, since international law would be presupposing that the domestic law permitted assignment of legislative power. This particular paragraph is permissive, not prohibitive, and is not susceptible to such a rigid interpretation.

There is one final issue that must be discussed relating to the nature of the federal government's jurisdiction over the continental shelf. At the time that the Reference was heard, the federal government had not ratified the 1958 Convention on the Continental Shelf. The Court was left with no indication as to how the federal government perceived its jurisdiction, notwithstanding the provisions of the Convention. The Court referred in its judgment to the legislation of various coastal states which ratified the Convention. In particular, it mentioned the Outer Continental Shelf Lands Act\textsuperscript{29} of the United States, and the Continental Shelf Act, 1964\textsuperscript{30} of the United Kingdom.
The Outer Continental Shelf Lands Act follows the Truman Proclamation, which principles are embodied in the Convention on the Continental Shelf, and legislates over the continental shelf as territory of the United States. One author has, in fact, described this statute as asserting "...American territorial ownership". On the other hand, the Continental Shelf Act, 1964, of the United Kingdom provides that Her Majesty is vested with "...any rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and natural resources, except insofar as they are exercisable in relation to coal...". The British legislation does not assert territorial jurisdiction in the constitutional law sense, over the continental shelf.

While the United States has extended its territorial jurisdiction in order to exercise its sovereign rights, the United Kingdom has chosen to exercise its rights by legislating extraterritorially. The issues this latter method raise are described by Johnathan Kitchen in his study of labour law and offshore oil activities, as follows:

The problem of the application of laws to the Continental Shelf is that the British sector is clearly extraterritorial insofar as it is, by definition, beyond the limits of territorial waters. Nevertheless, the U.K. continental shelf is an area in which the jurisdiction of the United Kingdom over offshore installations has been acknowledged by international
convention. It might therefore be aptly described as a sort of legal "no man's land" for which the Coastal State has been given authority to make certain limited legal provisions. 33

The issues raised by the Court in the Offshore Minerals Reference concerning the ability of the federal government and inability of the provinces to legislate extra-territorially, is more relevant to establishing the nature of the federal jurisdiction in the continental shelf than it is to the territorial sea. As mentioned above, when the Reference was heard, the federal government had not specifically legislated over the continental shelf. The Court could not be sure how the federal government would choose to exercise its jurisdiction. If the federal government exercised its jurisdiction over the continental shelf through legislation that was extra-territorial, the Court quite rightly would perceive this as an impediment to any provincial control.

This doubt is today academic, for the federal Parliament's exercise over the mineral resources has been an assertion of a territorial jurisdiction. The federal government obliquely implemented the 1958 Convention on the Continental Shelf through an amendment to the Oil and Gas Production Conservation Act. 34 Originally this
Act only applied to federal lands in the Yukon and North-west Territories. However, on February 6, 1970 Canada ratified the 1958 Convention on the Continental Shelf. An amendment to the Oil and Gas Production Conservation Act had been introduced prior to this date, to extend the application of this Act to cover:

...those submarine areas adjacent to the coast of Canada to a water depth of 200 meters or beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil thereof. 36

On second reading of the Amendment Bill on February 13, 1970, the House of Commons was advised that the wording was derived from the Geneva Convention:

...which instrument of international law confirms Canada's sovereign rights to explore and exploit the resources of our submerged continental margin. 37

The Amendment also extended the Act to cover:

any lands that belong to Her Majesty in right of Canada or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the minerals therein 38

The purpose of this section was to tie the Act into the acts which provide for "land disposition matters in the territories and the offshore" respectively being the Territorial Lands Act and the Public Lands Grants Act, so that there "could be no doubt on the part of the
international community as to the extent of Canada's claims to mineral resources in these regions.\textsuperscript{42}

The Oil and Gas Production Conservation Act is clearly an assertion of Canadian territorial rights, even though it itself does not control disposition of the resources. The definition used in section 3 of the Act, combined with the provisions of the Public Lands Grants Act, places the areas defined within Canadian territory. Conservation legislation usually follows the disposition of the resource and is a control on the development of the resource. What is unusual about this Act is that the disposition of the resource is made by subordinate legislation, that is, by regulations made pursuant to the Public Lands Grants Act (offshore public lands) and under the Territorial Lands Act (for northern on and offshore public lands); while the conservation legislation is enabling, that is, by statute. One purpose of the Oil and Gas Act (Bill C-20)\textsuperscript{43} is to correct this situation. The proposed Oil and Gas Act would consolidate the disposition and conservation regimes. The legislation in the proposed Bill is an assertion of Canadian territory, territory which is susceptible of being included within provincial boundaries.
Section 2: Determination of Federal/Provincial Boundaries under a Boundary Extension Pursuant to Section 3 of the B.N.A. Act, 1871

This section will examine issues that must be considered when determining the extension of the boundary of the Province of British Columbia pursuant to section 3 of the B.N.A. Act, 1871. The determination of British Columbia's new boundary - extended to include the oil and gas resources within the territorial sea and continental shelf - require the setting of a new domestic boundary and a new international boundary. The new domestic boundary will be the western limit of new provincial jurisdiction, while the new international boundary will be the northern and southern limit of provincial jurisdiction, which will coincide with the outer limits of the boundaries of the State of Alaska to the north (and west) and the State of Washington to the south. To accommodate problems associated with both the domestic and international boundary delineation, the federal and provincial governments will have to reach an understanding on how the boundary is to be determined. This understanding will have to be reflected in the terms and conditions of transfer. Both aspects of boundary determination are discussed below, together with suggested terms and conditions.

Section 2.1: Domestic Boundaries

The determination of domestic boundaries is an issue,
since it will be necessary to determine conclusively the division between exclusively provincial jurisdiction and provincial jurisdiction over the added territory. The Supreme Court of Canada, in the Offshore Minerals Reference, held that the territory of British Columbia stops at the low water mark. This description of boundary created certain problems since it is difficult to ascertain what is a harbour or bay for the purposes of international or domestic law at the time most of the provinces entered Confederation, and the lines of low tide are shifting and uncertain and sea coasts are characterized by deep indentations, straits, innumerable islands and inlets of various configurations. A definitive description of federal/provincial boundaries is only important when the province is not transferred complete legislative control over offshore mineral resources. However, any limitations on legislative control or reservation of property to the federal government must distinguish between the Province's existing exclusive jurisdiction over onshore and offshore minerals and its jurisdiction over offshore mineral resources. Some procedure must be used to distinguish between the two types of property. Since under the Constitution the federal and provincial governments cannot delegate to each other legislative powers, the exclusive jurisdiction to be exercised by the Province within its boundaries must be certain.
The B.N.A. Act, 1871 could be used\textsuperscript{49} not only to declare the jurisdictional limits of each level of government for the purposes of offshore oil and gas development, but also to clarify the existing provincial boundary of British Columbia. A solution proposed by the federal government in 1963\textsuperscript{50} was to draw arbitrary boundaries, called "mineral resources administration lines" based on the geodetic grid system. The lines would be within known federal jurisdiction in the territorial sea beyond the inland waters of the provinces. These lines were suggested as a basis of revenue-sharing and administration of federal offshore mineral resources, though the legal basis for effecting the delineation and subsequent administration of lands and revenues were not dealt with. The B.N.A. Act, 1871 could be used to define the boundaries and jurisdictions for such domestic purposes.

The problem of defining borders by using the "mineral resources line" in this case, however, is that they were intended to pass exclusive rights to all resources and waters on the provincial side, enabling the province to pass legislation respecting them under its constitution. The question is then raised as to whether this division would interfere with exclusively federal fields such as navigation, shipping, settlement of Indian claims,\textsuperscript{51} sea coast and inland fisheries and public harbours. There
is no authority to suggest that the B.N.A. Act, 1871 could pass specific federal powers to a province. The problem arises in a theoretical sense. For the first time in Canada's constitutional history a Province's boundaries will include areas of the territorial sea and waters beyond that overlying the oil and gas resources of the continental shelf. This is a different situation than navigable waters within a province which are under federal jurisdiction. The federal government's interest in the territorial sea and, to a certain extent, beyond, is not merely legislative jurisdiction, but is a sovereign interest. The rights in this area have been described as follows:

Full sovereignty of both water and seabed extends from the shoreline (or baseline) to the outer limit of the territorial sea. Seaward from this limit the water falls into the region of the high seas, of free access to all states. But with respect to the seabed and its resources certain sovereign rights exclusive to the coastal state exist, thus bringing the third dimension into play. In short, beyond the outer limit of the territorial sea any distant state may navigate freely on the surface of the water, may engage in fishing (assuming there are no other restrictions by definition or agreement), but may not exploit minerals and certain other natural resources from the seabed of the continental shelf. 52

Sovereignty carries with it the following incidents:

1. authority to rule over the territory and the persons and objects within it;
2. exercise of legislative power;
3. dispensation of justice;
4. administration of activities of state within the territory;
5. control access to the territory;
6. oppose the exercise of the authority of foreign states subject to international law;
7. protection of the territory of states and the interests of its citizens.\(^5^3\)

Though the provincial property rights are always subject to valid federal jurisdiction, will the mere fact of including these particular Canadian waters within provincial territory alter the constitutional relationship previously enjoyed by the federal government? In a sense, will adding these waters to a province produce a provincial mutant hitherto unknown? It is nearly impossible to predict the extent to which the Province could assert jurisdiction over these particular waters once within its borders. Could it, for example, maintain that portions of the waters were not navigable? Since the primary test for navigability is commerciality, this claim is possible. If it could, would this then curtail further federal jurisdiction over these waters? What of the federal government's ability to exercise Customs legislation in these waters? The question could arise as to where the Canadian border begins. These waters, it must be remembered, function as both a national and a provincial
boundary. Those problems only reflect the need to clearly define federal and provincial jurisdictions over these waters. In any case, the condition of transfer could reinforce the applicability of federal legislation. This is the case of the coastal states in the United States under the Submerged Lands Act, which will be discussed below. However, since it is intended to transfer to the Province jurisdiction beyond the territorial sea, it may be advisable to have all offshore oil and gas development regulated under a common regime, and set the provincial boundaries on land, though the Province could lose its claim to other offshore minerals which may be within provincial boundaries. The following Condition could be considered:

**Condition 1:**

1. The boundaries of the Province of British Columbia are as described in the attached schedule and beyond those boundaries, the Province shall have the exclusive right to exploit oil and gas in the territorial sea and continental shelf to the extent recognized from time to time by international law, provided that such area not included within the boundaries described in the attached schedule are added to the Province pursuant to (4).

2. Canada and British Columbia agree that the description of boundaries contained in the schedule are conclusive for all purposes, the territory added to the Province herein referred to as the "added territory".

3. The term "recognized by international law" means the latest International Convention respecting the exploitability of oil and gas in the continental shelf or in waters beyond the territorial sea, ratified by Canada.
(4) Canada agrees that legislation implementing any international treaty or convention which it has ratified that would increase the limits of exploitable oil and gas as defined in this transfer, shall be laid before Parliament at the next session following ratification, and subject to the consent of the Province the limits of exploitable oil and gas shall be transferred to the Province under the conditions of this transfer, and shall also be referred to as added territory.

Section 2.2: **international boundaries**

The determination of Canada's international boundaries with foreign states is an issue, since their determination could affect the extent of the rights transferred to the Province.\(^{58}\)

On the west coast, certain international boundaries between Canada and the United States are still in dispute. The Province of British Columbia has found position taken by the federal government in respect of some of the maritime boundaries off the coast of British Columbia unacceptable, and has submitted counter-proposals.\(^{59}\)

The Province's submission with regard to mineral and petroleum resource boundaries would have to be settled before a transfer of offshore oil and gas, since in some cases, the Province would claim more extensive rights than Canada. For example, Canada has proposed an equidistance line in the Juan de Fuca area which the
Province maintains would ignore the Juan de Fuca Canyon as a boundary area. The federal government argues that the Canyon is the submarine extension of the Straits of Juan de Fuca, and is the geomorphic and physiographic boundary between that shelf and the shelf extending from the coast of the United States on the Olympic Peninsula, south of Cape Flattery. The geological structure of the shelf and slope, British Columbia maintains, show potential for substantial oil and gas reserves. Prior to the Offshore Minerals Reference, the Province granted permits for petroleum exploration out to the edge of the Juan de Fuca Canyon (which were made subject to settlement of the boundary).

As regards the boundary on the continental shelf off Dixon Entrance, the Province maintains that it should be drawn in a manner that recognizes that the Alaska Panhandle is a "special circumstance". It maintains that the effect of the Panhandle is to deprive Canada of a substantial area of continental shelf that would otherwise be regarded as the "natural prolongation" of Canada.

The Province also has problems with the establishment of fisheries boundaries. It maintains that there is no applicable convention relating to the drawing of lateral boundaries in fishing zones, and refers by analogy to the determination of boundaries of a nation's territorial sea under the Convention on the Territorial Sea and
Contiguous Zone (1958)\textsuperscript{62}, which was not ratified by Canada.\textsuperscript{63} Under Article 12 of this Convention, the equidistance line may be displaced as a boundary in case of historic title or other special circumstances. In the case of Juan de Fuca and Dixon Entrance, the Province wants the fisheries and mineral resource boundaries to coincide.

The conditions of transfer must therefore account for settlement of international boundaries acceptable to the Province as regards the Canadian claim to offshore mineral resources. Though it is not intended that jurisdiction over fisheries would pass to the Province, the non-resolution of the issue could result in a stalemate in the negotiations on the conditions of transfer of offshore oil and gas.

**Condition 2:** The Province of British Columbia, in consultation with Canada, shall be represented and entitled to make submissions, in negotiations with the United States concerning the settlement of international boundaries between Canada and the United States, in the Straits of Juan de Fuca and Dixon Entrance.

This condition would at least ensure British Columbia that a boundary decision would not be made without accounting for the Province's views. It would be unrealistic to assume that the federal government would agree to be bound to British Columbia's submission, since it is particularly sensitive to any precedent that could be established regarding boundary disputes on the east coast.
This condition would at least force a compromise, for if the Province is ensured participation during the negotiations, the federal government will want internal differences settled before formal negotiations with the United States commence.

Section 3: Determination of Federal Jurisdiction in the Territory and Waters of the Territorial Sea and Beyond

This section will review the two types of jurisdiction which the federal government exercises over the territorial sea and over the waters and territory beyond the territorial sea. The first type of jurisdiction relates to powers reserved exclusively to the federal government. An example of the exercise of this jurisdiction is the ability of the federal government to declare unilaterally its territorial jurisdiction (assuming that the jurisdiction does not infringe on provincial boundaries).

The second type of jurisdiction is the jurisdiction the federal government exercises, by default of the offshore territory not being within a province. For example, the federal government can now enact legislation implementing international obligations it has undertaken. If the territory was within a province, the federal government would have to justify such legislation as being pursuant to an exclusively federal power. It would not be realistic to assume that the federal government would relinquish more of this second category of jurisdiction than is necessary to permit the Province to develop
effectively offshore oil and gas. Both types of jurisdiction however, become intermeshed when implemented in the offshore areas, since federal legislation in the offshore areas need not be categorized under specific exclusive federal powers. The best way to demonstrate the federal exercise of jurisdiction is by describing firstly, its ability to determine territorial jurisdiction - that is, determine the area within which it claims to exercise its exclusive jurisdiction vis-a-vis other nations and, secondly, its ability to determine the jurisdiction it will exercise beyond its territorial jurisdiction.

Section 3.1: federal jurisdiction which enables the unilateral setting of the territorial limits of the exercise of jurisdiction

The federal government enacted amendments in 1970 to the Territorial Sea and Fishing Zones Act, which unilaterally increased its territorial sea from three miles to twelve miles and extended jurisdiction over fisheries beyond this area through declaring fishing closing lines. This action enabled the federal government to establish functional control over fisheries management beyond its territorial sea as part of the management of the marine environment as a whole.

This unilateral measure taken by the federal government has been described as reflecting:

...a heightened concern with the territorial integrity and, even more significantly, a new willingness to take measures to protect that integrity, even at the risk of appearing to disregard international legal precedents and procedures.
The federal government's ability to respond to threats to its territory by extending "functional" control beyond the sovereign limits recognized by international law, must be preserved in the conditions of transfer.\textsuperscript{68} The federal government must continue to have the ability to enact legislation which consolidates its control over the resources of Canadian waters - waters to which it claims exclusive sovereignty.

A transfer to the Province under the first procedure extends provincial boundaries so that Canadian waters are included within provincial boundaries and as well, those waters beyond Canadian territory, i.e. beyond the territorial sea, would come within provincial boundaries. Since the provinces cannot unilaterally extend their territorial jurisdiction, the right of the federal government to extend its territorial jurisdiction must be preserved. In a sense there are two boundaries after the transfer - a domestic and an international boundary. The domestic boundary will be the federal/provincial boundary which will extend beyond the territorial sea to the resources of the continental shelf to the extent recognized by international law. The international boundary will be the limits established by the federal government as its territorial sea. By establishing this limit, it claims certain exclusive rights accorded to nations by international convention. While there was no constitutional impediment to the federal government
unilaterally declaring its boundary extension, the situation may be different if the extended territorial sea was within established provincial boundaries. While the federal government could never give the Province more jurisdiction than it has once it obtains the jurisdiction, the Province may be able to be transferred any extension of jurisdiction recognized under international law. If the federal government extended its territorial jurisdiction and the extended territory came within provincial boundaries, the provinces could argue that a merger takes place and that the new federal territory comes within the provinces. This writer assumes that the federal government will want to preserve its right to extend its territorial boundaries for purposes not associated with offshore oil and gas development, such as it did for fisheries. The problem is one of policy and not law, though the legal implications may affect the policy position. Assuming that both parties are agreeable that the boundary extension is to transfer only offshore oil and gas, the following condition would probably assure that present federal jurisdiction would continue within the extended provincial boundary.

Condition 3: For greater certainty, except as regards the oil and gas transferred to the Province under Condition 1, all Crown lands, mines and minerals and royalties incident thereto, and the waters, and all resources, plant and animal within such waters, superjacent to such lands,
mines and minerals or under or over the added territory, shall continue to be vested in the Crown and administered by the Government of Canada, for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada.

Section 3.2: federal jurisdiction which will enable it to exercise jurisdiction beyond territorial jurisdiction

The ability of Canada to unilaterally declare its territorial jurisdiction for domestic purposes, has enabled it to pass legislation to control activities beyond its territory which may affect its territory, that is, to extend its domestic control over resources traditionally beyond its territory. This ability is essential to enable it to control the development of offshore oil and gas. A province under section 92 of the B.N.A. Act, 1867, is limited to the exercise of powers given to it under the Constitution within its borders. Constitutional amendment would be necessary to change this situation.

On October 27, 1969 the government of Canada introduced the Arctic Waters Pollution Prevention Act, which extended Canadian jurisdiction outside the territorial sea by providing preventative measures against oil spills in an area up to 100 miles from Canada's Arctic coast. Though justified as not being an assertion of sovereignty by Canada over Arctic waters, but merely an exercise of Canadian desire to keep the Arctic free of pollution,
the legislation gave Canada effective functional control over passage through Arctic waters. The legislation had the incidental effect of emphasizing Canada's jurisdicational interests in terms of environmental security. Since the provinces do not have the ability to pass laws which have effect beyond the territorial limits of a province, or to pass laws extending functional control over activities outside its territory, it is essential that the power of the federal government to make and enforce laws relating to specific maritime functions and activities off Canada's coasts be preserved in any transfer to the Province.

Since the Province does not have the constitutional ability to exercise the jurisdictions referred to in this section, it may seem irrelevant to the Province's offshore activities. However, the Province's offshore activities can take place beyond territorial jurisdiction, and the federal government's ability to control these activities must be recognized. Domestically this becomes an implementation problem. The following condition would clarify continuation of the federal government's jurisdiction in offshore waters.

**Condition 4:** For greater certainty, nothing in this transfer restricts the rights of the Parliament of Canada to legislate beyond Canadian waters.
Section 3.3: federal jurisdiction within a province

The previous two sections demonstrated that the federal government's jurisdiction in the offshore is unique. It can determine boundaries and thus territorial and international relations. The provinces are obviously hamstrung in these areas. However, there are two particular types of federal jurisdiction that they could frustrate if the boundaries are extended without specific reservations to preserve the federal power. The first is the treaty implementation power of the federal government, and the second is the jurisdiction of the federal government over lands reserved for Indians.

Section 3.3(a): treaty implementation

The Supreme Court of Canada in the Offshore Minerals Reference, reiterated that the federal government was the sovereign state which would be recognized by international law. It expressed the concern that if the territory was provincial, the federal government could not honour its international obligations. Certainly if a treaty related to a matter within the exclusive provincial jurisdiction, the federal government could not legislate to implement the terms of the treaty. The following condition would preserve federal treaty implementation powers.

Condition 5: Notwithstanding anything in this transfer, the added territory shall be subject to all provisions as may have been or shall hereafter be enacted by the
Parliament of Canada, in order to implement any international treaty and convention. 78

Since federal legislation implementing treaties could affect either the Province's rights in offshore oil and gas or those of holders of an interest from the Crown, the following condition is necessary.

**Condition 6:** In the event that any rights of the Province hereby granted become the subject of an enactment by the Parliament of Canada, the Province or holders of an interest from the Province shall be compensated for such interference as follows: (compensation scheme).

Section 3.3(b): federal jurisdiction over lands reserved for Indians and Indian claims to offshore resources

At the time that Prime Minister Joseph Clark was proposing that the offshore mineral resources be transferred to British Columbia, the Union of British Columbia Indian Chiefs (UBCIC), in evidence before a National Energy Board Inquiry, submitted their position that the Indian people are owners of offshore mineral resources, based on unextinguished aboriginal rights. A resolution filed before the Inquiry, referred to an undertaking between the Prime Minister and the Premier of British Columbia, not to settle a transfer of offshore resources to the Province until the Indian interest had been settled. Any interest of the native people in the offshore must be accounted for in a transfer to the Province. Either the claims will have to be settled by the courts or through mutual agreement.
or the transfer will have to be made subject to any claims. If the transfer does go ahead reserving the right to future claims, the industry may be leary of entering into any development that could be defeated in the future, and the Indians may feel that any resources which they may be entitled to would be dissipated before settlement is reached, or worse, that irreparable damage to other resources may occur as a result of development. The author strongly suggests that no transfer be proposed until the affected Bands approve the terms under the referendum procedures set out in the Indian Act. 82 This situation is not unique to Canada. The Submerged Lands Act (U.S.A.) provides in section 1311(b):

There is excepted from the operation of section 3 of this Act [transfer to coastal state], ...such lands beneath navigable waters, held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians...

There are examples of federal legislation in Canada reserving future claims by Indian bands as a condition of disposition or a power of disposition. The Northern Pipeline Act, 83 authorizing construction of a pipeline through the Yukon and Northwest Territories, an area over which the resident Indians have laid claim, provides:

23.1 Notwithstanding this Act, any native claim, right, title or interest that the native people of Canada may have had prior to the coming into force of this Act in and to the land on which the pipeline will be
situated, continues to exist until a settlement in respect of any such claim, right, title or interest is effected.

The Indian Oil and Gas Act\textsuperscript{84} contains a similar provision introduced at the committee stage of the Bill. Its inclusion is unusual since the Indian Oil and Gas Act deals only with settled lands and is subject to the surrender provisions of the Indian Act. Section 7(2) of this Act reads:

\begin{quote}
Notwithstanding anything herein contained, nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.
\end{quote}

The following condition is suggested for inclusion as a condition of transfer.

\textbf{Condition 7:} The Province and Canada have consulted with the following Indian bands of the Province in the preparation of this transfer: (list bands), but notwithstanding anything herein contained, any native claim, right, title or interest that the native people of Canada may have had prior to the coming into force of this transfer and in and to the territory transferred to the Province, continues to exist until a settlement in respect of any such claim, right, title or interest is effected, and any disposition of oil and gas shall be made subject to such claim.

Section 4: Provincial Jurisdiction Within the Extended Provincial Boundaries that Include Offshore Oil and Gas

The first procedure suggests a method by which limited jurisdiction over offshore oil and gas could be
passed to the Province. The limitations reflect the federal position, which basically is that it would retain the power it presently exercises over the waters and natural resources other than oil and gas, in the offshore areas. The procedure of extending the boundaries is meaningless without an expression of the powers which the Province would exercise within the extended territory. The primary reason why the first procedure is so suited to a transfer of legislative jurisdiction to British Columbia is that the offshore territory is brought within the distribution of powers under the B.N.A. Act, 1867. This procedure can assure each level of government the exclusive jurisdiction they agree is necessary to the realization of their respective objectives in the development of offshore resources. The most difficult task in this procedure will be reaching a compromise on these objectives. Any compromise on the extent of provincial jurisdiction will be the primary negotiation concern. This section will review the legislative authority that the Province would probably require over offshore oil and gas. In assessing whether the requirements are realistic, a review will be made of the degree of control held by the coastal states in the United States over natural resources transferred to them by the central government of that country.
Section 4.1: provincial legislative requirements over offshore oil and gas development

The Province at minimum would require the same legislative authority over offshore oil and gas as it has regarding onshore development of similar resources. For example, as regards the exploitation of oil and gas within the existing boundaries of British Columbia, provincial legislation covers the following areas:

1. terms respecting exploration and disposition and development, including conservation of petroleum and natural gas (86) "surface" entry would be federal since the federal government would continue to exercise control over the waters above the transferred resources;

2. transportation of petroleum and natural gas products; (87) the federal government would have to continue to exercise some control over the laying of pipelines under navigable waters or waters beyond the territorial sea; pursuant to the federal undertaking of navigation, shipping and fisheries, and implementation of international conventions;

3. taxation of mineral interest and transportation facilities; (88) the province should have the ability to tax the resource and operators, since a transfer pursuant to section 3, B.N.A. Act, 1871, extends provincial boundaries over the transferred resources;

4. storage of production naturally occurring underground cavities (89) - sufficient interest in these underground formations should pass to the province to enable it to allow such storage, since this right is directly related to conservation of the resource;

5. labour relations and civil law within the province; (90) the courts have held that offshore exploration within a province can be subject to provincial labour legislation (91) - as in the case of taxation of the
resource, the resources after a transfer are within the provincial boundaries and should be accorded the same status as other resources within the province;

6. management and generation of energy from offshore oil and gas; (92) subject to the federal government's exercise of its residual power and implementation of international convention, these powers should be exercised by the province;

7. pollution in waters resulting from offshore oil and gas operations; (93) as discussed above, the province should have the ability to control pollution through resource specific legislation - however, the federal government should have the right to implement international conventions (94) on pollution, as well as enforcing general pollution legislation pursuant to the federal undertaking of navigation, shipping and fisheries.

This list appears very extensive and perhaps too cumbersome in its breadth to accommodate the limitations which will be proposed by the federal government. However, the legislative regime being proposed off Canada's west coast by the first procedure is already operative in the territorial sea of the United States. The major difference is that the coastal states are given exclusive jurisdiction over all resources within the territorial sea. Though this difference may create an administrative problem in the Canadian scheme where only oil and gas come within provincial jurisdiction, there is no reason to suggest that the scheme in the United States depends on exclusive jurisdiction over all resources being transferred.
An examination of present and possible future developments in the United States in the field of offshore management of resources will be helpful in considering conditions to be attached to a transfer of offshore oil and gas to British Columbia. The Submerged Lands Act, and Outer Continental Shelf Lands Act of the United States will be examined in this section.

The coastal state has near exclusive jurisdiction over natural resources in the territorial sea (secured from their coasts to a distance of three geographic miles and up to three marine leagues in the Gulf of Mexico). Within this zone, the states are free to lease or sell tracts, but the federal government retains jurisdiction and ownership of the water column and air space over the seabeds. Under the Submerged Lands Act, the United States retains control of the land and water of this belt for purposes of commerce, navigation, national defence and international affairs. Under the Act the rights of the federal government under the Constitution are paramount to the state's proprietary rights, but the Act does not preclude the ability of the state to exercise those rights. Therefore, the Act acknowledges paramountcy without declaring exclusive jurisdiction in the federal government. This type of jurisdiction is recognized in Canada in regard to fisheries
within a province, or exploitation in navigable waters of provincial minerals, and could be applied to the development of Canadian offshore oil and gas. Certain reservations of rights to the federal government were justified on the basis that the territorial sea is a major channel of interstate commerce, with defence implications. However it was pointed out that the federal powers would not reduce the state's title beyond that "inherent in the supremacy clause of the Constitution". This Act has been described as:

...a congressional expression of a desire to allow coastal states control over the submerged lands off their coast within the territorial sea. Such control is subject to the overriding federal concerns of commerce and defence.

The Submerged Lands Act allows the coastal states to control resources within this zone. As one writer noted:

Ownership of a particular coastal region confers the power to determine whether or not to develop resources located in the area. As owners of the sea bottom of the territorial sea, for instance, the states are responsible for deciding whether to begin offshore mineral explorations in that area or to leave the sea bottom undeveloped.

The situation in the state's zone of control over the territorial sea must be contrasted to the federal government's control over the outer continental shelf, pursuant to the Outer Continental Shelf Lands Act. Where the territorial sea zone is an example of federal/state cooperation, the jurisdiction regime in the outer
continental shelf exposes the problems of limitations on federal development of offshore resources, even where the federal proprietary rights are exclusive. While the state does not have a proprietary interest in the outer continental shelf, it can exercise limited control over outer continental shelf development by the fact that development in this area will frequently require extensive use of state lands for transportation or processing facilities. 102 As noted above, two areas where the Province would seek jurisdiction over offshore oil and gas would be the law of general application in the Province and pollution control. Both these areas have been recognized in the outer continental shelf as requiring state participation.

The civil and criminal law applicable 103 to the outer continental shelf is state law, though mineral leases are specifically governed under the Outer Continental Shelf Lands Act. The transfer should declare the civil and criminal law of the Province applicable to offshore oil and gas exploitation, though a very clear definition of what is included in oil and gas operations must be developed.

In Canada, the offshore area is a legal no-man's land. The Federal Court of Canada, in Dome Petroleum Limited v. N. Bunker Hunt et al, 104 held that in the absence of a breach of federal law, the Court had no jurisdiction
notwithstanding that the activities of the company were within the territorial limits of Canada. The case was an action for debt between an American and a Canadian, the plaintiff requesting an injunction to protect that debt. The property was situate outside the territorial limits of the Northwest Territories, but within Canadian territory. After the Federal Court declined jurisdiction, the plaintiff was left with no recourse, since the Territorial Court could certainly not issue an injunction to be enforced beyond its territorial limits.

Pollution control of offshore mineral development is a two-edged problem. There is the problem of the environmental effects on onshore development to support offshore mineral recovery, and the potential for pollution of the coastal areas from offshore activities. These two occurrences can be summed up as follows:

Ecologically fragile and abound with inhabitants, the nation's coastlines are a scarce and highly useful source of recreation and esthetic enjoyment. Refineries and their adjoining tank farms require considerable amounts of land that would otherwise be used for diving or open space. They also cause serious air, water and visual pollution problems. Finally, offshore development suffers the unhappy prospects of massive oil pollution of the nation's beaches and coastal waters. Even the Federal Government [U.S.] admits that sooner or later a major spill will occur. 105
In the United States two federal statutes have had a significant impact on outer continental shelf activities: the National Environmental Policy Act (NEPA,\textsuperscript{106}) and the Coastal Zone Management Act.\textsuperscript{107} At present there are no comparable federal laws in Canada to control environmental effects of offshore mineral development. The federal Cabinet has created a process for reviewing environmental effects of projects under federal jurisdiction, the Environmental Assessment Review Process (EARP), but to date the process has no legislative sanction. Without legislative sanction the process will only succeed to the extent that all parties compromise their positions, a situation not conducive to effective environmental management and control. The main criticism of NEPA is that though the delays which legislation can cause under the Act is a strong weapon of the opponents of oil drilling, "...NEPA in general is concerned with procedures that are necessary prerequisites to action and is not a substantive impediment to drilling".\textsuperscript{108}

The Coastal Zone Management Act was passed when Congress identified "a national interest in the effective management, beneficial use, protection and development of the coastal zone".\textsuperscript{109} The Act encourages the creation of statewide programs of coastal management by providing grants to any coastal state for the development\textsuperscript{110} and administration\textsuperscript{111} of a management program for the land and water resources
of the coastal zones. Once a coastal plan has been approved, the statute requires the federal government to conform its activities and those of its lessees or permittees to the state's coastal plan. Likewise, section 307(d) provides that no federal agency may grant assistance under other federal programs to proposed state or local government activities that "affect" the state coastal zone and are not consistent with a state plan. Though it does not require certification, but rather only conformity with a state plan to the maximum extent practicable, section 307(c)(1) applies to activities conducted or supported by federal agencies which "affect" the state coastal zone. Interpretation of the geographic scope of these provisions, particularly the cooperation requirements for lessees under section 307(c)(3), will be crucial to the effect of the Act on outer continental shelf policymaking.

The shortcomings of this Act are that it does not provide a balance between environmental protection and energy development. As well, there is a lack of prior consultation with coastal states before leasing is initiated by the federal government. The necessity of the coastal state having total control over the environmental effects of offshore mineral development is evident from a review of the inadequacies of the Coastal Zone Management Act in the United States. There is a movement to encourage the states
to directly participate in outer continental shelf development - an area where they have no proprietary interest. A stronger case can be made to give a province control over environmental legislation related to the development of offshore oil and gas under its legislative jurisdiction.

Section 4.3: provincial jurisdiction - the terms and conditions

The following condition is a suggested format for expressing the jurisdiction which the Province would be able to exercise over offshore oil and gas.

Condition 8: For greater certainty, the civil and criminal laws heretofore or hereafter in force in the Province, to the extent they are not inconsistent with the terms of this transfer and the exercise of any power reserved to the Parliament of Canada, are declared to be the law applicable to the exploitation, development, and, transportation by underwater pipeline, of oil and gas herein transferred to the Province, and for greater certainty, but not to restrict the generality of the foregoing, the Province, subject to the foregoing limitations, may pass legislation with respect to:

(a) taxation of the oil and gas resource and its transportation by underwater pipeline;

(b) the terms and conditions of exploitation, development, transportation by underwater pipeline of oil and gas, conservation, pollution prevention, including any compensation scheme related to oil and gas;

(c) labour relations and conditions of work related to the exploitation, development and transportation by underwater pipeline of oil and gas;
(d) storage of oil and gas in any naturally occurring underground cavity: within the transferred area.

Condition 9: The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province.

This condition would extend the civil law of the Province to the offshore oil and gas development so as not to leave the enforcement of contracts beyond the reach of the provincial courts. This condition also extends the federal criminal law activities associated with oil and gas development, though it would probably be more appropriate for the federal government to legislate so as to include the geographic area as opposed to incorporating provincial oil and gas activities within federal criminal jurisdiction. The reference to criminal law is included mainly to indicate that federal criminal legislation such as the Narcotics Control Act, may not apply to certain offshore areas.

Section 5: Transfer of Legislative Jurisdiction Over Offshore Resources From a Central to a Local Government - Recognition of International Convention: the American Proposal

The proposition of extending the jurisdiction to exploit offshore natural resources to the extent recognized by international law is currently being considered in the negotiations for the admission of Puerto Rico as a state.
Studies of the mineral potential underlying the territorial sea and continental shelf off Puerto Rico, it has been said "will create political pressures for Puerto Rico to demand exclusive rights to exploit its surrounding seabed in an area from 9 to 200 miles into the sea". The inclusion of such a provision in Puerto Rico's compact of admission could be politically necessary and practically essential. The "compact of admission" refers to the terms upon which new states are admitted into the union under the American Constitution. In *Brophy v. The Attorney-General of Manitoba*, the Privy Council used similar terminology in describing The Manitoba Act, 1870 confirmed by the B.N.A. Act, 1871, when it stated:

...the Manitoba Act of 1870, which was in truth a Parliamentary compact..."

(emphasis added)

In the United States, it is necessary to consider whether the equal footing doctrine would prohibit Congress from granting rights to an incoming state that exceed those granted to any existing state at its admission. This doctrine that new states must be admitted on an equal footing with the old ones has made it unclear as to whether there is a congressional bar to a grant of disproportionate seabed rights to an incoming state, i.e. rights beyond the territorial sea. The Supreme Court of the United States held in *United States v. Texas*, that seabed rights were vested in the federal government under the equal footing doctrine.
The "equal footing" phrase has been included in each state's act of admission since 1796,¹²³ though it "...does not rest on any express provision of the constitution... but on what is considered... to be the general character and purpose of the union of the states... - a union of political equals".¹²⁴

In an historical analysis of this doctrine, Bartley explains that the:

..."equal footing" phrase antedates the constitution and had its origins in the quarrels which arose over the various states' claims to western lands... in 1780, Congress passed a resolution asking the various states to cede their western lands to the Congress, on condition that other states would be created from them with the "same rights of sovereignty, freedom, and independence as the other states". ¹²⁵

It is clear from the previous examination of the B.N.A. Act, 1871, that there is no constitutional impediment in Canada to admitting new provinces on conditions which varied their constitutions from that of the four original provinces (under the B.N.A. Act, 1867), and similarly on conditions that varied provincial constitutions as regards territory added to existing provinces.¹²⁶

A very convincing case¹²⁷ is made, notwithstanding the equal footing doctrine, for the inclusion in the compact for the admission of Puerto Rico; the grant of the right to explore and exploit the natural resources of the seabed
to the extent recognized by the international community.

The following considerations (which are relevant to a transfer to the Province) would flow from such a grant:\textsuperscript{128}

1. the grants of seabed rights will have to be sufficiently specific to avoid problems related to establishment of baselines from which to measure state control, shifting coastlines, and pollution and environmental controls; \textsuperscript{129}

2. the grant would have to account for the implementation of international obligations which may change the rights granted from time to time;

3. the grant would affirm the "imperium rights" of the United States;

4. confirmation of the federal government's right to exercise control over national defence, foreign affairs, world commerce and navigation in offshore waters; and in order for the federal government to carry out the constitutional power by the enactment of laws regulating the seabed and submerged lands the inclusion of a provision for a compensation scheme in the event of and "taking" (i.e. expropriation) of the state's interest.

Based on the foregoing discussion of the capacity of the federal government to legislate in the offshore, a review of specific federal legislation and comparable provincial legislation respecting the control of oil and gas development and finally, the situation which is developing in the United States regarding offshore mineral resource development, the preceding conditions should be considered in a transfer of legislative jurisdiction over offshore oil and gas to British Columbia.
CHAPTER II

FOOTNOTES

1. Letter to Premier Brian Peckford of Newfoundland from former Conservative Prime Minister Joseph Clark dated September 14, 1979, where the Prime Minister stated, at pages 3-4: "As I am sure you and your officials readily appreciate, the protection of the environment and governmental supervision and regulation of offshore mineral resource activities are inextricably related. Before the commencement of actual field operations, proposed offshore programs must be carefully studied, with their authorization being dependent upon a number of factors, not the least of which are those relating to pollution prevention and safety. Once such activities are underway, inadequate action with respect to direct supervision and regulation can have the most serious consequences, as has been demonstrated in the case of each of the major offshore oilwell blowouts in the world to date. Moreover, the information derived from offshore activities is not only essential to ensure safe operations but is also essential to the national hydrocarbon inventory program, given the continuing federal need-to-know requirement for the formulation and implementation of national energy strategy. Obviously these considerations will find their place within the framework of the arrangements for implementation that result from our continuing discussions on offshore mineral resources.

Another concern of fundamental significance will be to ensure the full maintenance of and respect for Canada's international responsibilities and obligations with regard to the offshore, as well as the constitutional rights and responsibilities of the Federal Government in this context."

Annexed to the letter and described as "Basic Principles Concerning Offshore Mineral Resources" contained the following descriptions of limitations on a transfer of offshore mineral resources: "The Province of Newfoundland should own the mineral resources of the continental margin off its coast insofar as Canada is entitled to exercise sovereign rights over these resources in accordance with international law. Such ownership should be, to the extent possible, of the same nature as if these resources were located within the boundaries of the Province. The legislative jurisdiction of the Province should, to the extent possible, be the same as for those resources within the boundaries of the Province.

Such ownership of and legislative jurisdiction over offshore resources by Newfoundland will be consistent with and subject to the division of legislative
competence as between Parliament and provincial legislatures under the Constitution of Canada."

Copies of this correspondence were sent to the Premier of British Columbia as reflecting the federal government's general position on offshore minerals transfer to other provinces.

2. This issue will be examined in Procedure II.

3. See C.P.R. v. Notre Dame de Bonsecours [1899] A.C. 367, where Lord Watson stated: "The Dominion cannot give jurisdiction, or leave jurisdiction, with the province... If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction."

This statement does not appear in the reported case, but in the verbatim report as cited by Lefroy, Canada's Federal System (1913) 70, footnote 10a.


5. Id., at 822. The continental shelf has been described by Zacher and Johnson, International Law (1977) 1, as follows: "The seabed itself can be divided into two distinct geological regions: the continental margin and deep ocean floor. The margin is that area of submerged land geologically associated with the continental mass, and it consists of three regions: the shelf, which averages forty miles in width and which is marked by a shallow inclination towards greater depths; the slope, which plunges at much steeper inclinations to great depth; and the rise, an accumulation of sediment at the base of the slope which tapers off at a shallow inclination until it merges with the deep ocean floor (see Fig. 1)."

6. The Court in the following excerpt referred to section 3 of the B.N.A. Act, 1871 as a means available to the federal government to extend the boundaries of British Columbia which had not been used: "There has never been any alteration of the limits of the Province of British Columbia pursuant to this section [s.3, B.N.A. Act, 1871] and there is no provision for extending the limits in any other way."

7. Id., at 798.


11. Id., at p. 432 footnote 10, also see Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf (1971), 10 International Legal Materials 1225, 1258-1270.

12. Territorial Sea and Fishing Zones Act Amendment, R.S.C. 1970, c.45, s.1. (1st Sup.)


   "The rights in the territorial sea
   formerly asserted by the British
   Crown in respect of the Colony of
   British Columbia were after 1871
   asserted by the British Crown in
   respect of the Dominion of Canada..."


17. Id., at 164.

18. Ibid.


21. Section 7(2) of the Statute of Westminster extended section 2 of the Act to the provinces but nothing was said of section 3, which by its explicit language only referred to the Dominion Parliament, also see D.P. O'Connell, International Law (1965) 538.


26. Ibid.


28. North Sea Continental Shelf Cases, I.C.J., February 20, 1969, reproduced in (1969) 8 International Legal Materials 340, 363 para 39. The latest informal composite negotiating text supported by Canada regarding the continental shelf would not change the status of the continental shelf being ab initio territory of the littoral state. Article 76, paragraph 1 of this text defines the continental shelf as follows:

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine area that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The continental shelf, therefore, is measured horizontally instead of vertically as under Article 12 of the 1958 Convention, that is, to a depth of 200m. Article 27 of the negotiating text is otherwise identical to Article 2 of the Geneva Convention on the Continental Shelf (1958). It is this latter Article which the court ruled on in the North Sea Cases.


30. 13 Eliz., c. 29.


37. Ibid.

38. Ibid, also see R.S.C. 1970, (1st Supp) c. 55 s. 3(c).

39. Ibid.

40. See Canada Oil and Gas Land Regulations C.R.C. 1978 c. 1518 - the Regulations are passed simultaneously under both statutes.

41. Ibid.


43. Bill c-20 (1977) First reading December 20, 1977, not passed before parliament prorogued. This legislation would also provide a pollution control regime for offshore development which is presently lacking in both the east and west coast.


47. Statement of Prime Minister Trudeau on Offshore Mineral Rights in the House of Commons Monday, December 2, 1968, reproduced in Lewis and Thompson on Oil and Gas, Volume I, s. 29B.
48. Re: Strait of Georgia (1976), 1 B.C.L.R. 98, (B.C.C.A.) the court held that the lands including the mineral and other natural resources of the seabed and subsoil, covered by the waters of the Strait of Juan de Fuca, the Strait of Georgia (Gulf of Georgia) and the Queen Charlotte Strait (bounded on the south by the international boundary between Canada and the United States) are the property of the Province of British Columbia; the case has been appealed but not as yet argued before the Supreme Court of Canada. Also see Regulations of the Province of British Columbia purporting to regulate offshore mineral resources B.C.O.C. 3570 - B.C. Regulation 105, 106 - Constituting a Crown Reserve on lands forming part of the continental shelf.

49. The settlement of the 1891 Manitoba Ontario boundary dispute by constitutional amendment raises the question whether the B.N.A. Act can be used where boundaries are not settled. The argument is that section 3 only applies to the alteration of established boundaries. It is doubtful whether there is a problem, because every province has a limit to their jurisdiction though subject to determination by the courts. Since s.3 allows both for increases and diminution of boundaries, it should not be necessary for the federal government or the Province to know the exact boundaries as long as both parties consent to the change, acknowledging that it will either increase or diminish their territory.


51. Section 3 of this Chapter will discuss Indian claims.


53. I. Head, Canadian Claims to Territorial Sovereignty in the Arctic Regions (1963), McGill L.J. 200, 224.

54. The fact that Lake Erie is within the province of Ontario does not preclude the exercise of federal jurisdiction respecting provincial offshore mineral development. See Underwater Gas Developers Ltd. v. Ontario Labour Relations Board (1960), 21 DLR (rd) 345, 240 L.R. (rd)63


57. The B.N.A. Act, 1871 requires a Province to consent to an alteration of its territory. If the implementation of an international treaty or convention would reduce or increase the Province's interest in oil and gas they would have to consent to such an alteration. The risk in this situation is whether the Province can agree in advance to a future change in its territory. Therefore additions will be dealt with on an ad hoc basis. If international convention extends the limits the choice is left to the Province to consent. Unfortunately since no term could bind a future Parliament the best undertaking that the federal government can make is to introduce the necessary legislation. No special provision has to be made to decrease the territory since the only situation where this would arise would be in the implementation of treaties—a power which will be reserved to the federal government.


60. See Bourne, McRae, loc. cit. supra, n. 58.

61. Provincial submission op. cit. supra, n. 45, item 4.


64. Jacomy-Millette, Treaty Law in Canada (1975) 211 para. 64 footnote 155.


67. Id., at 245.

68. Op. cit. supra, n. 64 at 93.

69. See s. 21 of the 1905 Alberta and Saskatchewan Acts - this section was used in drafting this condition since it has been judicially upheld as reserving property and legislative power to the federal government in the fields specified.

70. See s. 92(13) B.N.A. Act, 1867, "Property and Civil Rights in the Province" (emphasis added) and s. 92(16), "Generally all Matters of a merely local or private Nature in the Province" (emphasis added); also see The Statute of Westminster 1931, (Imp) 22 Geo. c.5 s.3.

71. Canadian House of Commons Debates, October 24, 1969, p. 3a, on Arctic Waters Pollution Prevention Act, R.S.C. 1920, c. 21 (1st Supp.).

72. Johnson and Zacher, op. cit. supra, n.23 at 121 footnote 46.

73. Id., 170.


77. Hogg, op. cit. supra, n. 74 at 192. Jocomy-Millette, op. cit. supra, n. 64 at 245, para 112 describes the problem of federal treaty implementation as follows:

"The treaty question thus essentially has two aspects, creation of the international instrument, which is exclusively a matter for the executive, and its implementation at the domestic level, which depends on the respective powers of the federal parliament and the provincial legislatures, in accordance with the constitutional rules on distribution of legislative power. This second stage is therefore concerned with a fragmented power. According to the decisions of the courts, section 132 of the B.N.A. Act, which applied in the case of imperial treaties, can no
longer be of assistance. It should be recalled however, that subsequent decisions have held that the power of the federal Parliament to amend legislation implementing imperial treaties made under section 132 continues, provided of course that such treaties have not been denounced."


78. See paragraph II(b) of 1881 Manitoba Boundary extension which refers to C.P.R. lands discussed in section 3 this section is used as a precedent since it has been held to reserve specified federal legislative power - this condition does not conflict with s. 132 of the B.N.A. Act as being tantamount to an amendment to that section permitting the federal government to implement international treaties and conventions within provinces, since the federal government is reserving a power in the case of the offshore areas not extending a prohibited power - the implementation refers specifically to oil and gas since other "property" remains vested in Canada.


80. Id., 11th General Assembly, October 1979, attached as Appendix "A".

81. Ibid.

82. Indian Act R.S.C. 1970, c.I-6, s.37 s.40.


84. S.C. 1974-75-76, c.15.

65. If the Indian people agree by the referendum procedure to the transfer reserving their claim they may require a continuous registration clause - under this clause the companies who obtain a disposition bear the
burden, to make the oil and gas marketable it may be necessary for Canada and the Province to agree on a compensation scheme in the event that the native claim is sustained.

86. See Petroleum and Natural Gas Act, R.S.B.C. 1979, c. 323 and Regulations made pursuant thereto.

87. The Pipelines Act, R.S.B.C. 1979, c. 328 and Regulations made pursuant thereto - see the control exercised by the federal government over pipelines in navigable waters within a province: Imperial Oils Ltd. v. The Queen (1973), 4 L.C.R. 66; also see provisions of Oil and Gas Production Conservation Act.


89. Petroleum Underground Storage Act, R.S.B.C., 1979, c. 325.


91. Under Water Developers Ltd. v. Ontario Labour Relations Board (1960), 21 D.L.R. (2d) 345 affirmed 24 DLR (2d) 673, also see Title 43 U.S.C.S. s.133(2).


93. Pollution Control Act, R.S.B.C. 1979, c. 332, and Petroleum and Natural Gas Act, s. 123, 124; see R.S.B.C. 1960, c. 33 as consolidated by R.S.B.C. 1979, c. 323.


95. The Submerged Lands Act is not restricted to mineral development. The coastal state is declared to have ownership in the lands and nature of resources within its boundaries (Title 43 U.S.C.S. s. 1311) and the seaward boundaries extend to three (3) geographic miles.
from its coast (43 USCS s. 1312). Natural resources are defined (Title 43 U.S.C.S. s. 1301(c) as including oil, gas, and all minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power. The United States (federal government) retains control over navigation, national defence and national affairs within the transferred territory (Title 43 U.S.C.S. s. 1314).


96. R. Breeden, Federalism and the Development of Outer Continental Shelf Mineral Resources (1977), 14 Public Land and Resource Law Digest 33, 38, the writer has relied extensively on Dr. Breeden's excellent article in the development of this section.


98. Submerged Lands Act, 1953 held constitutional in Alabama v. Texas 347 U.S. 272 (1954) - control beyond the marginal shelf is retained by the federal government; The Outer Continental Shelf Lands Act 1953, declared that the subsoil and seabed of the Outer Continental Shelf are subject to federal jurisdiction, control and administration - this declaration was affirmed in U.S. v. Maine 420 U.S. 515 (1975).

99. Mill and Woodson, op. cit. supra, n. 97 at 418.

100. Mill and Woodson, op. cit. supra, n. 97 at 418 footnote 80.

101. Breeden, op. cit. supra, n. 96 at 41.

102. Ibid.


104. [1978] 1 F.C.R. 11, in the United States, see Guess v. Read 290 F. (2d) 622 (U.S.). It is only for that portion of the subsoil and seabed of the outer continental shelf, and artificial islands and fixed structures erected thereon that state law applies. This does not include the sea above the subsoil and seabed does not include the air above the sea. Also see Regina v. Tootalik E4-321 (1969), 71 W.W.R. 435 (Territorial Court) affirmed (1970), 74 W.W.R. 740.
105. Breeden, op. cit. supra, n. 96 at 34.


108. Breeden, op. cit. supra, n. 96 at 56.

109. **Coastal Zone Management Act**, Title 16 U.S.C.S. 31451(a) of Public Law 92-583, s. 302(a).

110. Id., s. 305.

111. Id., s. 306.

112. The federal outer continental shelf is covered by the Coastal Zone Management Act, see op. cit. supra n. 96 at 60. Breeden states: section 307(c) (3) of the Act the section most relevant to offshore drilling requires state certification before a federal agency may issue any licence or permit to conduct an activity affecting land or water uses in the coastal zone of a state. Likewise, section 307(d) provides that no federal agency may grant assistance under other federal programs to proposed state or local government activities that affect the state coastal zone and are not consistent with a state plan. Though it does not require certification, but rather only conformity with a state plan to the maximum extent practicable, section 307(c) (1) applies to activities conducted or supported by federal agencies which affect the state coastal zone. Interpretation of the geographic scope of these provisions particularly the certification requirements, for lessees under s. 307 (c) (3), will be crucial to the effect of the Act on Outer Continental Shelf policymaking.

113. Breeden, op. cit. supra, n. 96 at 78, 81.

114. Id., at 63-64, see amendments to **Outer Continental Shelf Act** discussed at p. 82.

115. See s. 1333 Outer Continental Shelf Lands Act, Title 43 U.S.C.S. 1331. Note that the following list is only an example of the powers which may be included in a list of provincial authority; transportation of oil or gas by ship would come within federal jurisdiction - federal jurisdiction would still apply to pipelines underlying navigable waters.
116. See Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights - Notes - (1979), 88 Yale Law Journal 825, footnote 3 - the author has relied exclusively on this article in describing the Puerto Rican proposal.

117. Id., 826.


119. [1895] A.C. 203, 228.

120. Notes: op. cit. supra, n. 253 at 829, 835.


123. Notes: op. cit. supra, n. 116.


125. Bartley, op. cit. supra, n. 122 at 43.

126. See Chapter II section 3.1 infra.

127. Notes: op. cit. supra, n. 116 at 844-849.

128. Id., also see footnote 123 p. 845, excluded from discussion since the transfer to British Columbia would not include minerals other than oil and gas.

129. See Suggested Condition 1 - section 3.1.
CHAPTER III

PROCEDURE II - THE TRANSFER
OF OWNERSHIP OVER OFFSHORE
OIL AND GAS TO BRITISH COLUMBIA

Section 1: Transfer of Ownership of Land Between the Federal and Provincial Government

The issues raised by a transfer of ownership of offshore oil and gas, which for all purposes is land, without a transfer of legislative jurisdiction must be examined in order to fully appreciate the importance of the first Procedure.

The Procedure for transferring control over offshore oil and gas to British Columbia which will be examined in this chapter, is the possibility of transferring the ownership of the offshore oil and gas from the federal government to British Columbia. There are two mechanisms by which the federal government can dispose of federal property. Firstly, in the absence of specific statutory direction or authority the federal government may dispose of its property by executive order, that is by order in council pursuant to the prerogative of the Crown at common law. However, where specific statutory direction or authority exists the implication is that the federal government must follow the procedure set out in the statute. Both of the foregoing mechanisms will be examined in detail below in examining
the issues that arise where, as is proposed in this second Procedure, the federal government desires to transfer ownership of offshore oil and gas to British Columbia. This second procedure is restricted to a transfer of ownership, without a transfer of legislative authority, which would remain in the federal government control. It is assumed that the Province as owner, could effectively control the development of offshore resources through the exercise of the usual rights associated with ownership, in the same manner as a private owner controls his land, that is, through the terms of disposition.\(^3\)

It is necessary that this Procedure restrict the transfer to a transfer of ownership, since the transfer of federal legislative jurisdiction over offshore oil and gas to the Province would be unconstitutional. The transfer examined in this Chapter is only possible if the Province can assume the same position as an individual who would be transferred a fee simple interest in the offshore oil and gas. The federal government in transferring control over offshore oil and gas to the Province, under this second Procedure must ensure that the transfer is not tantamount to a transfer of legislative jurisdiction. As was pointed out in the first Chapter the federal Parliament cannot transfer federal legislative power to a Provincial Legislature.
Once again, any scheme for sharing control of the exclusively federal field of offshore oil and gas must follow the admonition of Lord Watson in *C.P.R. v. Notre Dame de Bon Secours*:

The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.

As will become evident below the apparent statutory authority for transferring offshore oil and gas to the Province raises doubts as to the ability of the federal government to transfer, and the provincial government to exercise the rights of ownership over these resources, since the resources are beyond the geographic boundaries of the Province of British Columbia. Two mechanisms for transferring the federal government's ownership of land have been identified above. Since these two mechanisms are equally applicable to the Province they must be available to it in order for the Province to effectively deal with the resources proposed to be transferred. The order for discussion of the issues raised by the Procedure being discussed in this Chapter, will consider; firstly, the statutory authority of the federal government to transfer offshore oil and gas to the Province and secondly,
the ability of the Province to deal with these resources following a transfer.

The last section in this Chapter will examine an alternative method of transferring offshore oil and gas to British Columbia, which proposes that the federal government transfer ownership over offshore oil and gas to a corporation controlled by the Province.

Section 1.1: statutory provisions for transferring land from the federal government to British Columbia

There is no apparent necessity to consider using the prerogatives of the federal government as a mechanism for transferring offshore oil and gas to the British Columbia, since this procedure available to the Crown at common law has been codified. The Public Lands Grants Act\(^6\) which is the present authority for disposing of federal offshore oil and gas\(^7\), provides in subsection 4(2):

The Governor in Council may by order transfer to Her Majesty in any right other than Canada the administration and control of the entire or any lesser interest of Her Majesty in right of Canada in public lands not required for public purposes, either forever or for any lesser term, and subject to any conditions, restrictions or limitations that the Governor in Council considers advisable. (emphasis added)

It is pursuant to this statutory authority that the federal government is directed to transfer its ownership over public lands to provinces. To this point in the discussion the term "ownership" has been used very loosely.
In his excellent article on the legal nature of executive governments, Professor Mundell, in describing the unique constitutional division of federal and provincial powers over public lands, in fact provides a good definition of the incidents of ownership by federal and provincial governments. He states:

...lands held by the federal and provincial governments are both vested in Her Majesty but...the administration of the lands is carried out on her behalf through different representatives. ...title remains throughout in Her Majesty. All that need be transferred is the authority and duty to administer the lands on behalf of Her Majesty. (9) (emphasis added)

The Province of British Columbia, it would appear, could obtain administration and control of offshore oil and gas following a transfer under subsection 4(2) of the Public Lands Grants Act. There is no requirement in this Act for the Province to accept or acknowledge the transfer by some act, legislative or otherwise, in order to complete the transfer of administration and control. However, reference in another federal statute to a province being transferred less than "administration and control" over offshore oil and gas, raises some doubts as to whether a transfer under the Public Lands Grants Act, can be used outside of provincial territory. Earlier in this paper reference was made to the Oil and Gas Production and Conservation Act. 10 Section 3, of this Act excepts from
the application of the Act any area:

...within the geographical limits of, or if the administration of the oil and gas resources in the area has been transferred by law to, any of the ten provinces of Canada. (11) (emphasis added)

The reference in this Act to the transfer of administration of oil and gas to any of the ten provinces applies only to east and west coast offshore oil and gas. As was pointed out in the second Chapter this section was added to the Oil and Gas Production and Conservation Act in 1970 in order to facilitate the possible transfer of management of offshore resources to British Columbia and the Maritime Provinces. However the term used in this Act is "administration" not "management". It is possible that provision was being made for a transfer of greater than management responsibility but less than legislative jurisdiction. Is it possible then that doubt was cast, at the time this Act was amended, on the ability of the federal government to transfer administration and control under the Public Lands Grants Act to provinces over offshore areas?

The only other instance, of which the writer is familiar, where federal statute law limits the transfer of federal public property to a transfer of "administration" appears in identical sections of the Yukon Act and Northwest Territories Act, which read:
The following properties, namely,

(b) public lands, the administration of which has before, on or after the 1st day of April, 1955 been transferred by the Governor in Council to the Commissioner,

are and remain vested in Her Majesty in right of Canada, but the right to the beneficial use or to the proceeds thereof is hereby appropriated to the Commissioner and is subject to the control of the Commissioner in Council; and any such lands, ...may be held by and in the name of the Commissioner for the beneficial use of the Territory [Territories]

It is clear that both the Yukon Territory and Northwest Territories have legislative control through the Commissioner in Council over the land, the administration of which has been transferred to them. If the term "control" is omitted from section 3 of the Oil and Gas Production and Conservation Act does this mean that it is the transfer of "administration" not "administration and control" that is necessary to transfer less than a legislative jurisdiction over offshore oil and gas to the Province? If so, then is a transfer pursuant to subsection 4(2) of the Public Lands Grants Act restricted to transfers of public lands to provinces where the lands are susceptible of being made subject to the legislative control of the province, i.e. is the Public Lands Grants Act limited to transfers of federal public lands within provincial territory by authorizing transfers of administration and control of public lands?

It should be noted that section 3 of the Oil and Gas Production
and Conservation Act is not authority in itself for the transfer of "administration" to the province of offshore resources but rather the section anticipates a transfer of administration authorized by law. The reference could not be to subsection 4(2) of the Public Lands Grants Act since this subsection authorizes a transfer of both administration and control. However, the reference in the Oil and Gas Production and Conservation Act\(^\text{15}\) is not necessarily conclusive that the Public Lands Grants Act cannot be used to authorize the transfer of federal public lands beyond provincial territory to a province. Section 3, may have been purposely drafted broadly to cover future arrangements on shared federal and provincial responsibility over offshore oil and gas resources, and perhaps should not then be considered as a comment on the authority of section 4(2) of the Public Lands Grants Act to transfer federal public property, wherever situate, to a province. The next section will consider the ability or capacity of the Province of British Columbia to deal with the oil and gas transferred to it under subsection 4(2) of the Public Lands Grants Act.\(^\text{16}\)

Section 1.2: capacity of the Province of British Columbia to deal with public lands, the administration and control of which have been transferred to it when the public lands are beyond provincial territory

Assuming that the federal government has the authority to transfer the administration and control of offshore oil and gas to British Columbia, so that the Province essentially
becomes the "owner" of these resources, it now becomes necessary to determine how the Province could deal with these lands. Certainly the Province could not pass legislation to control the development of these resources for such legislation would be extra-territorial, and as was discussed in Chapter II, the Province lacks the ability to pass extra-territorial legislation. The writer is not aware of any court decision which considers the capacity of a provincial government to administer and control public lands outside of provincial territory.

The problem of the capacity of the Province to deal with offshore oil and gas under its administration and control is not a problem vis à vis the federal government. If only the federal and provincial governments were involved in a co-operative scheme to transfer effective management to the Province by a transfer of administration and control, the legality or capacity of either government to enter into such a transaction is not a practical problem. The only parties who may complain would be the taxpayers who would see potential federal monies diverted into the provincial coffers. But, as will be discussed in Section 2 below, there are few restraints on the federal spending power. The main problem necessitating an examination of the authority or capacity of the Province to deal with the transferred resources is the fact that the transfer could be challenged
by a third party. The federal government could not force its prior grantees of interests in offshore oil and gas to surrender their interests to the Province, and it would be difficult to justify expropriation of any interests which require a public purpose to be identified, when under the Public Lands Grants Act public lands can only be transferred when not required for public purposes. Furthermore, the Province would have no right of expropriation, since it cannot legislate beyond provincial territory. Any existing dispositions which the Province may have made in the context of contesting federal ownership of offshore resources could not be surrendered by provincial interest holders with any certainty of obtaining a better interest; but the Province could not continue to challenge federal legislative jurisdiction over offshore oil and gas and, at the same time, accept administration and control of offshore oil and gas. It is therefore very important for the Province to identify its capacity or authority to deal with the offshore resources, since its ability to demonstrate its authority will be necessary in order for it to win the confidence of future interests, and to effect binding compromises in the case of existing interests.

Of the three functions of the provincial government: legislative, judicial and executive, only the provincial executive has any possibility of functioning to the extent
necessary to accept and hold as owner, offshore oil and gas. The discussion of the issues involved in assessing the capacity or authority of the Province to deal with the transferred offshore oil and gas then involves a review of what can be described as the most wicked provision of the Canadian constitution – the provisions relating to executive authority. The introduction to this chapter discussed two mechanisms whereby the Crown, provincial or federal, can deal with land, being either pursuant to the authority of a statute or, in the absence of statutory authority, pursuant to the Crown's prerogative. The following section will now consider this second mechanism.

It is extremely difficult to present a chronological and historical discussion of "Executive Authority",19 a fact pointed out by Professor Mundell in his article, referred to earlier in this Chapter. In an attempt to place the discussion in a logical sequence the order of consideration of the issues will be as follows: (1) the source and nature of executive authority, and (2) the relationship of the executive authority to the federal-provincial distribution of property under the constitution; and an examination of whether this relationship affects the capacity of the Province to deal with offshore oil and gas following a transfer of administration and control.
Section 1.3: the source and nature of executive authority

Executive authority is part of the Canadian constitution. Section 9, of the B.N.A. Act, 1867 provides:

The Executive Government and Authority of and Over Canada is hereby declared to continue and be vested in the Queen.

Professor Mundell after a thorough examination of all the authorities which have considered the nature of "Executive Authority", concludes that:

...The expression "Executive Government and Authority" in this section [Section 9] covers the whole range of Her Majesty's legal activities at common law...

Earlier Professor Mundell said,

Unless Section 9 is treated as disposing of all Her Majesty's capacities and special attributes not expressly dealt with elsewhere the provisions of the Act are not exhaustive. (20) (emphasis added)

While these statements do not describe executive authority they conclude that executive authority exhausts the range of possible governmental authority. Therefore once it has been determined that the Province does not have legislative authority over offshore oil and gas, the Province must be able to establish that it can deal with the offshore resources under its executive capacity.

While section 9 of the B.N.A. Act, 1867 refers to Canada, there is no doubt that the Province has executive authority. In Bonanza Creek Gold Mining Company, Limited v. The King, the question before the Board was whether
the provincial executive i.e. the Lieutenant-Governor of Ontario, could incorporate a company with capacity to exercise rights outside the province. Viscount Haldane held that executive authority did reside in the provinces and has as its source the constitution. He stated:

...It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. 22 (emphasis added)

In particular, the Constitution of British Columbia provides, in section 8:

S.8 Executive power continues, so far as it is unaltered by this Act [Constitution Act for British Columbia], as it existed on February 14, 1871, subject to sections 58, 59, 60, 61, 62, 66 and 67 of the British North America Act, 1867, and to any other part of that Act affecting it and to the order of Her late Majesty in Council. 23

The foregoing has identified the source of executive authority. The following discussion will now consider the nature of executive authority, and in particular identify what powers the Crown has over land that have as their source executive authority. In the case of Attorney-General for Canada v. Higbie 24, which will be discussed in greater detail below, Mr. Justice Sloan, in the B.C. Court of Appeal, pointed out in his dissenting judgment (the case being reversed by the Supreme Court of Canada) 25 that:

Land vested in the Crown, that is to say, in the King in his politic capacity, may, in the absence of restrictive statutory provisions binding the Crown, be alienated by the King by virtue of the Royal prerogative and, according to conventional constitutional custom, through his delegate,
and upon the advice of his Ministers. (emphasis added)

The executive therefore has the right in the absence of statute to alienate land by virtue of its executive powers which is merely the modern expression for prerogative. The above was a statement of the law prior to the admission of British Columbia as a province, but the courts have held that the prerogative rights of the Crown in right of the provinces, and in particular British Columbia, have not been curtailed by the B.N.A. Act of 1867. Therefore in the absence of statutory authority, the prerogative exists to permit the Province to alienate land. The exercise of this prerogative resides in the Lieutenant Governor who is the representative of Her Majesty. However, in practice, the exercise of the prerogative respecting the alienation of land is carried out, by the Lieutenant Governor in Council, as Mr. Justice Sloan indicated in the above passage, "according to conventional constitutional custom". The next section will consider the relationship of the executive authority to the federal and provincial distribution of property under the constitution.

Section 1.4: executive authority and the distribution of property under the constitution

This section examines whether the exercise of executive authority with respect to land is restricted to land within the Province i.e. within provincial boundaries. If the
exercise of the alienation is so restricted then the Province
would not have the capacity$^{31}$ to alienate offshore oil and
gas, the administration and control of which is intended to
be transferred to it by the federal government. While the
courts have acknowledged that executive authority resides
in the province as well as federal government, doubt exists
as to whether the executive has powers of alienation beyond
the territorial limits of a province.

As Professor Mundell points out in this article,
"executive authorities of Her Majesty follow legislative
authority".$^{32}$ This does not necessarily mean that the
executive authority would be restricted to the extent of
the legislative authority, such that if the province is
restricted to legislating with respect to lands within the
province it is also restricted in its executive capacity
to alienating lands within the province. In his article,
Professor Mundell refers to the following passage from
Bonanza Creek in support of this proposition. Lord Haldane
in this case states:

It is to be observed that the British North America
Act has made a distribution between the Dominion
and the provinces which extends not only to legis­
lative but to executive authority. The executive
government and authority over Canada are primarily
vested in the Sovereign...Section 65 [sic, of the
B.N.A. Act, 1867] on the other hand, provides that
all such powers, authorities, and functions shall,
as far as the same are capable of being exercised
after the Union in relation to the government of
Ontario and Quebec respectively, be vested in and
exercisable by the Lieutenant-Governors of Ontario
and Quebec respectively. [sic. the same applies
to British Columbia - see section 8 of the Constitution Act quoted above]

The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. (33) (emphasis added)

An argument could be made therefore that any restraints on the legislative authority of the province under the constitution apply equally to the exercise by the province of its executive authority. The Supreme Court of Canada has also suggested that the prerogative rights, or as expressed in modern terms, "executive power" of the Crown under the Canadian federal structure may be local in nature. Mr. Justice Strong said in Reg. v. Bank of N.S. (S.C.C.),

...the prerogative rights of the Crown were by the statute apportioned between the provinces and the dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefor continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law. (36) (emphasis added)

This statement could mean that the prerogative rights are restricted to provincial territory as determined by the constitution; that is territory within provincial boundaries.
The Higbie case, referred to briefly above provides further comment on the territorial application of the provincial prerogative.

This case involved an action by the Attorney General of Canada against the defendants, Western Higbie and Albion Investments Ltd., for possession of certain of the foreshore of Vancouver Harbour. The adjoining upland was originally granted in 1858 by the Provincial Crown as part of a lot of an official survey. In subsequent conveyances to predecessors of Western Higbie and Albion Investments Ltd. the boundary was specifically described as the high water mark. The grant as well as the later instruments carried all appurtenances. In 1924 by mutual federal and provincial orders in council made in the absence of either federal or provincial statutory authority, the Province of British Columbia acknowledged that the foreshore of certain harbours, were public harbours within the meaning of Schedule III of the B.N.A. Act, 1867, thus becoming the property of the federal government. The foreshore to the property claimed by the defendants was included in this order in council. As a defence to the action by the federal government for possession of the foreshore, the defendants denied the title of the federal government, on the basis that the provincial government could not in the absence of statutory authority pass the foreshore to the federal government. The Court of Appeal of British Columbia
reversing the trial judge, held that the Provincial order in council was of no effect and that the lands in question could only be disposed of by the legislature of British Columbia. While this case concerns a transfer between the federal and provincial governments of administration and control, the comments which the courts made concerning the exercise of the executive authority or prerogative by the province to transfer land in the absence of statutory authority is relevant to a discussion of the Province's ability to exercise its executive authority. The court had to hold that the Provincial executive had the capacity to "transfer" administration and control to the Dominion for the federal government to maintain its action for possession. The Supreme Court of Canada, affirming the decision of the trial judge and reversing the decision of the Court of Appeal of British Columbia, held that the Province had the authority to pass the order in council. In upholding the authority of the order in council the Court placed emphasis on the fact that the land which was subject to the transfer was within provincial territory. Chief Justice Rinfret, in the Supreme Court decision held that the orders in council:

...were effective to transfer both the property and the jurisdiction to the Dominion of Canada. (40)

Is there an implication here that a transfer of administration and control purports a transfer of both property and jurisdiction, or that a transfer must be susceptible to transferring
both property and jurisdiction? However, the question being considered now is does the Province have the capacity to alienate public lands under its executive authority. In deciding that the Province had such capacity in the Higbie case, Chief Justice Rinfret went on to state:

...It was stated in the judgment of the majority of the Court of Appeal that under the British North America Act, 34 Victoria, cap. 28, s. 3, the Parliament of Canada could 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; and it was deduced from that, that the legislature alone could transfer the lands covered by water, now in question. But, of course, we do not agree that the orders in council constituted a transfer. In our view, they constituted only a change of administrative control. Besides that, they contained admissions that the transfer had really been made automatically by force of the British North American Act of 1871, as forming part of a public harbour at the time when British Columbia came into the Confederation. Moreover, a transfer such as this does not affect provincial limits; and it is sufficient to think of a case where certain land is used by the Dominion Government to build a courthouse, or a post office, or such other things, to indicate that the transfer in question does not alter the limits of the province within the meaning of section 3 of chap. 28 of the statute 34-35 Victoria, being the British North America Act of 1871. The lands remained with the provincial territorial limits. (41) (emphasis added)

There is a strong implication in this statement that the order in council was valid since it did not purport to alter the limits of the Province and purported only to deal with provincial territory, i.e. territory within the geographic boundaries of the Province. The analogies to a transfer to the federal government for the purposes of constructing federal buildings such as courthouses and
post offices emphasizes this interpretation, since the works to be constructed on public lands would clearly be within the geographic boundaries of the Province. By referring to the limits "within the meaning of section 3, of the B.N.A. Act of 1871" the court is suggesting that the provincial order in council in this case was valid since the lands in question remained within provincial territory. If the Province then purported to alienate offshore oil and gas solely under its executive authority is it indirectly extending provincial territory contrary to section 3 of the B.N.A. Act, 1871, since the limits of provincial territory can only be extended under the 1871 Act through mutual statutory authority.

It is important to note that in reaching his decision the Chief Justice referred to the Province having the power to deal with its property as it is described in section 109 of the B.N.A. Act, 1867, without legislative enactment since the words "subject to the control of its legislature" do not appear in section 109, and as used by the courts when referring to the disposition of public lands, these words are,

...simply a statement of the law that the provincial legislature may legislate with respect to such lands. (42)

There is an assumption therefore that the Court had no problem with the alienation by the Province since there was no restriction on alienation by the prerogative, in the absence of a specific statute controlling a disposition of lands described in section 109 of the B.N.A. Act, 1867.
This section reads:

109. All lands,...belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union [sic. British Columbia was placed in the same position as the original provinces by its terms of admission and the B.N.A. Act, 1930], shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise... (emphasis added)

The Court must then have been taken to have placed weight on the fact that the lands which the Province transferred to the federal government in this case were situate in the Province of British Columbia. The question then has been left open as to whether the executive of British Columbia has the capacity to alienate lands not situate in the Province. It must also be pointed out that Chief Justice Rinfret referred to the statement referred to above of Mr. Justice Strong in The Queen v. The Bank of Nova Scotia\textsuperscript{43} in determining the nature of the Province's executive authority. Some doubt therefore is cast on the ability of the Province to alienate lands by virtue of its executive power beyond its provincial territory, that is, beyond its boundaries as determined by the 1867 Constitution.\textsuperscript{44} The next section will examine another method by which the Province could obtain the "ownership" of federal offshore oil and gas.

Section 2: Transfer to a Provincial Corporation

Generally if a province holds property and more specifically land outside of its provincial boundaries, it holds its interest through a provincially controlled
corporate entity. For example the Ontario Energy Corporation holds a 5% equity interest in the Alberta Syncrude project for the Government of Ontario, or SOQUIP, a statutory state petroleum corporation which is wholly owned by Quebec holds extensive land holdings outside Quebec. Another example is Alberta Gas Trunk Line Co. Ltd. a statutory corporation created by the Alberta legislature which carries on extensive activities, and is particularly authorized so to do, outside of the Province of Alberta. Usually the activities which these corporations carry out are commercial in nature and are an exercise of the Province's spending authority. As Professor Hogg, points out in his book on the Canadian constitution:

There is no compelling reason to confine spending or lending power (of a province) because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subject...46

Intergovernmental dealings in land in these cases are insulated by the corporate status and unrestricted revenue spending ability. This brings us to consideration of the second part of this Procedure being the transfer of ownership in offshore oil and gas to a legal entity created by the Province. The first two questions which must be answered are: can the Province create a legal entity, i.e. a corporation, to carry on business outside the Province; and secondly, could the Province appropriate funds for the operation of such a corporation?
Section 2.1: ability to create a corporation to carry on business outside the Province

Under section 92(1) of the B.N.A. Act, the Province can only incorporate companies with provincial objects. However, the Privy Council held, in the Bonanza Creek case, that:

...The limitations of the legislative powers of a province expressed in s. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights...

...It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authority (47)

(emphasis added)

The court had earlier stated that rights outside the province would have to be derived from authorities outside the province.
The Supreme Court of Canada subsequently held in *Honsberger v. The Weyburn Townsite Company*, that:

...The words "with provincial objects" are merely declaratory of the necessary limits upon the operation of provincial legislation on the subject mentioned which in the absence of them (provincial objects) would have been the consequence of the legal principle that corporate status and capacity, in like manner as rights, cannot, in jurisdictions beyond the boundaries of the province be legally operative ex proprio vigore but only by virtue of recognition, express or implied, accorded by some other political authority or system of law. (49)

Owing to the doctrine of parliamentary sovereignty, a legislative body may give a corporation as many powers and privileges, and submit it to as many special rules as the Legislature sees fit. Through the corporate entity, a legislative body is able to operate as a natural person. In the case of the offshore oil and gas, a statutory corporate body could assume ownership of these resources without attracting the problems associated with transfers of administration and control between federal and provincial governments or requirements that the provincial government have executive authority to dispose of offshore oil and gas. The Governor in Council (the federal cabinet) has the authority pursuant to section 4(1)(a) of the Public Lands Grants Act to authorize the sale, lease or other disposition of public lands not required for public purposes and for which there is no other provision in law. The Governor in Council under
this same section likewise can, and has made, regulations authorizing the Minister of Energy, Mines and Natural Resources to sell, lease or otherwise dispose of offshore oil and gas subject to the conditions prescribed in the Canada Oil and Gas Land Regulations. Since a provincially controlled corporation can carry on activities outside the province, there is no jurisdictional impediment to the Minister disposing of oil and gas to this corporation under the Regulations in the same way as dispositions are made to any other company. Furthermore there is no impediment to the Governor in Council revoking the Minister's authority under the Regulations and authorizing a disposition to a provincial corporation under paragraph 4(1)(a). The provincial corporation then obtains the offshore oil and gas on whatever conditions may be agreed to, subject to federal law. The applicable law however can likewise be the subject of negotiations. As LaForest indicates:

The activities of a provincial Crown corporation are not limited to the confines of the provinces, and it may even enter fields normally within federal jurisdiction (for example, airways), though in such fields its operations would be subject to federal regulatory control.

Section 2.2: obtaining appropriation for the corporation

Having decided that British Columbia could, by statute, create a corporation to develop offshore oil and
gas, the following questions must be considered:

1. Could British Columbia spend public funds on the activities of a company whose activities are to take place outside the territorial limits of the Province?
2. Can the federal government transfer ownership to a provincially incorporated company, and how would the transfer be effected?
3. What laws would apply to the provincial corporation?

The spending power of a province is directly related to its taxing power. A province under section 92(2) of the B.N.A. Act, 1867, is limited to direct taxation within the province for the raising of revenue for provincial purposes, but, as Chief Justice Duff pointed out in Reference re Employment and Social Insurance Act:

...The words "for provincial purposes" mean neither more nor less than this: the taxing power of the legislature is given to them for raising money for the exclusive disposition of the legislature.

The Province could, therefore, appropriate funds for the corporation.

Is there an impediment to the federal government transferring its property in offshore oil and gas to a provincial corporation? As discussed above, the federal
government has the same rights respecting its property as any other owner.\textsuperscript{54} It could, therefore, transfer offshore oil and gas to a provincial corporation and provide funds for it to carry out a mandate of developing offshore resources.

Section 2.3: methods of transferring ownership

There are two ways in which the federal government could transfer its property:

1. Disposition by the federal government of offshore oil and gas is presently subject to the \textit{Canada Oil and Gas Land Regulations} made pursuant to the \textit{Public Lands Grants Act}. The provincial corporation could obtain the offshore oil and gas:
   a. by a grant pursuant to the \textit{Canada Oil and Gas Land Regulations};
   b. through an amendment to these Regulations, on other terms and conditions prescribed by the Governor in Council;

   - The amendment could provide for a new regime for offshore oil and gas transferred to the corporation - Documentation of the grant, satisfactory to British Columbia, could establish the terms of exploitation, royalties, rent, etc.; or
c. through a sale of the offshore oil and gas to the corporation and a new legislative regime, acceptable to the Province, to control the development (accounting for conservation and environmental matters) could be put into place by the federal government.

2. The Oil and Gas Act (Bill C-20) could be amended to provide for:
   a. preference disposition of offshore oil and gas to the provincial corporation in substitution of Petro-Canada's preferential rights; or
   b. an entirely new regime regarding the disposition, matters of conservation and environmental concerns could be established under the proposed Bill, which would also pass property in offshore oil and gas to the provincial corporation.

Under the latter procedure (section 2.2(b) - item 2b above), the provincial corporation would have the widest flexibility. It would own the offshore oil and gas to the limits recognized from time to time under international law, and dispose of the resource as owner, subject to federal conservation and environmental legislation. The territory remains federal and general federal legislation, i.e. to implement international treaties, would apply. It
is obvious that the interest held by the corporation and legislation applicable to it must be satisfactory to the Province.

The provincial corporation would control the development of the resources by contracts, further assigning its interest, and the provincial government could in this regard control the corporation through the incorporating statute. A rather unique situation develops regarding the extra-territorial licencing of the provincial corporation, in that there is no legislative regime respecting extra-provincial licencing of "foreign" companies in the offshore areas. But this has not impeded other provincial petroleum corporations.

The type of legislation which could be considered for the provincial corporation is a provincial act similar to SOQUIP, the Quebec state-owned petroleum corporation. According to its 1977-78 annual report, this company has holdings outside Quebec in the Maritimes, Alberta, the Yukon, Northwest Territories and Labrador Sea. The 1977-78 annual report disclosed that SOQUIP held 1,398,543 hectares under federal permits off the east coast.
Section 3: Conclusions on Transfer of the Ownership of British Columbia

Considering the lack of clear authority for the Province to dispose of lands beyond its borders it may be advisable to use the alternate method suggested in section 2; that is to transfer ownership of the offshore oil and gas to a corporation controlled by the Province. Though using a corporate entity to achieve what may be impossible to achieve by a direct transfer of administration and control to the Province, would probably be more cumbersome administratively, it can accomplish the same ends. Use of the corporate guise may be challenged by some as doing indirectly what can be done directly, but as Professor Elmer Driedger, perhaps the most knowledgeable writer on federal-provincial co-operative devices, has said:

The application of the maxim "you cannot do that indirectly which you are prohibited from doing directly" ...is not law. It is only a statement in summary form of a result arrived at by the application of principles other than the maxim. (56)

But as in the case where the courts have held that the federal and provincial governments cannot delegate legislative authority, one to the other, they did not hold as objectionable, what could be regarded as accomplishing the same ends indirectly, the delegation by Parliament or the legislature of legislative authority to a non-legislative entity of the Province or federal government, as the case may be. 57
There being no substantive legal impediment to the province exercising control over offshore oil and gas through a provincial petroleum corporation, all that is left is to obtain agreement on the terms of co-operation.
1. A.G. Can. v. Higbie, [1945] S.C.R. 385, 402, 403, 407, 427, the process of inter-governmental transfers described in this case is equally applicable to the federal government, see LaForest, Natural Resources and Public Property under the Canadian Constitution (1969), 143.

2. Ibid.


7. Canada Oil and Gas Land Regulations, C.R.C. 1978 c. 1518

8. See infra. Introduction to this Paper at page 15.


10. R.S.C. 1970, c. 0-4, as amended


12. The Yukon Territory and Northwest Territories are excluded by the specific reference in the section to ten provinces and since the word "or" is used the two exceptions must be taken to be mutually exclusive.

13. Yukon Act, S.C. 1974, c. 5 s.7
14. Northwest Territories Act, S.C. 1974, c.5 s.16 (clerical error in Act, reference in s.16 should read s.45). For a description of the total control of the territories see reference to reversing of a transfer, contained in subsection 37(1) of the Northern Pipeline Act, S.C. 1977-78, c.20.

15. Federal Bill C-20, 3rd session, 30th Parliament 25 Eliz. II, 1977, the proposed Oil and Gas Act, referred to in Chapter II of this paper adopts the portions of section 3 of the Oil and Gas Production and Conservation Act quoted in the preceding text in its definition of "Canada lands", i.e. Canada lands would not include lands the administration of which has been transferred to the provinces. As may be recalled this Bill was proposed as the new authority for disposing of offshore oil and gas.

16. The Supreme Court of Canada in the Reference re: Offshore Mineral Resources [1967] S.C.R. 792, was not asked to declare that the federal government had property in the oil and gas beyond the territorial sea. Since the Public Lands Grants Act only applies to a transfer of public lands and not legislative jurisdiction over public lands an argument could be made that the federal interest is purely legislative and could not be transferred to the provinces. However, as was pointed out in Chapter II, the North Sea cases decided by the International Court of Justice subsequent to the Offshore Minerals Reference described the natural resources of the continental shelf as the property of the coastal state.

17. op. cit. supra, n.1 at 436, Mr. Justice Rand expressed these concerns in connection with a transfer of administration and control between the Province of British Columbia and the federal government intended to settle "ownership" of the foreshore of certain public harbours.


19. op. cit. supra, n.1 at 410

20. op. cit. supra, n.9 at 68-70, see p.69 for statement that executive authority follows legislative authority based on Bonanza Creek.

22. Id., at 579, also see section 14, Order of Her Majesty in Council Admitting British Columbia into the Union dated May 16, 1871 and section 8 of the Constitution Act, R.S.B.C. 1979, c.62.

23. Constitution Act, R.S.B.C. 1979, c.62 s.8, latter reference to order in council is no doubt a reference to the Imperial Order in Council admitting British Columbia as a province; see op. cit. supra, n.22 [1945] S.C.R. 385.


25. Ibid.


Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.

29. op. cit. supra, n.21 at 443, Liquidators of the Maritime Bank of Canada; also see Higbie, [1945] S.C.R. 385 at page 410, where Chief Justice Rinfret stated:

We do not agree...that the Royal prerogative is vested in the legislature and we think it vested in the Executive. Crown lands are vested in His Majesty the King; and there is no difference in quality between the Crown acting under its prerogative, or under a modern statute.
In further support of this contention I refer to the judgment of Mr. Justice Kerwin in the Supreme Court decision in the Higbie case where he interprets the intent of the following statement of Lord Watson in St. Catherine's Milling and Lumber Company v. The Queen (1899), 14A.C. 46, 56; these expressions ["belonging to" or "the property of", a province] merely impart that the right to its (public lands) beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Mr. Justice Kerwin makes the following comment on this passage which at first reading would appear to require that provincial alienation of lands be authorized by statute.

If the words "and is subject to the control of the legislature" are more than obiter dicta they might be taken as referring merely to that control which a provincial legislature may undoubtedly exercise and not that it is the sole branch of a Provincial Government to act under all circumstances. Indeed in Ontario Mining Co. v. Seybold, [1903] A.C. 73, Lord Davey, after setting out, at page 79, an extract from Lord Watson's judgement including that copied above, continues: -

Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.
These words in themselves might be taken as expressing the opposite view but Lord Davey may have intended only to emphasize that the Sovereign's representative could not act except upon the advice of his constitutional advisers. [1945] S.C.R. 385, 425.

31. In the Higbie case, [1945] S.C.R. 385, 423, Mr. Justice Kerwin identified the capacity of the province to pass an order in council transferring administration and control to the federal government as a fundamental issue, as follows:

The question immediately arises as to the power of the executive authority of British Columbia to pass the Provincial order in council.

32. op. cit. supra, n. 9 at 69.


36. Id., at 18-19.


39. [1945] S.C.R. 385 per Chief Justice Rinfret, per Mr. Justice Tashereau concurring at p. 410 (S.C.C.), per Mr. Justice Kerwin, Mr. Justice Hudson concurring, p. 423 and p. 426 (S.C.C.), and per Mr. Justice Rand p. 436 (S.C.C.) - the decision of the Supreme Court of Canada in the Offshore Minerals Reference which held that the boundaries of the Province of British Columbia were the ordinarily low water mark, would conflict with the reasoning of Mr. Justice Rand. Furthermore "public harbours" under the B.N.A. Act must be considered to come within provincial territory or else there would not have been the necessity to deal with them under section 108 of the B.N.A. Act, 1867.
It is the writer's opinion that the decision of Mr. Justice Rand that the orders in council were, "an agreement or acknowledgement of boundary at high water mark arising from the fact of actual user of foreshore within the legal requirements for public harbours under schedule 3", [1945] S.C.R. 385, 436 (emphasis added) is of doubtful authority.

As was also pointed out in Chapter II that the determination of boundaries is subject to the constitution and in particular the B.N.A. Act, 1871. The writer is of the opinion that Mr. Justice Rand was concerned with the jurisdiction changes that occur after a transfer between the province and the federal government. He states, at page 434 (S.C.C.),

But it is clear that Lord Davey was there dealing only with the question of the particular executive by whose action an alienation to a subject could be made; [sic. the reference here is to decision of Lord Davey in Seybold quoted in the text above] there is no reference, nor in that case could occasion for it have arisen, to the actual authority of the executive in any case to make a grant and much less the question of authority of the executive to make a jurisdictional transfer.

In the Higbie case all the members of the Court except Justice Rand assumed no change in provincial territory. For the reasons indicated above concerning the establishment of provincial boundaries Mr. Justice Rand's reasons are not clear. In this regard see LaForest, Natural Resources and Public Property under the Canadian Constitution (1969)22. The reasons of the other members of the Court seem more reliable.

40. [1945] S.C.R. 385, 404
41. Id., at 410-411.
42. Id., at 405
43. Id., at 407
In Re: Anti-Inflation Act, [1976] 2 S.C.R. 373, the issue before the Supreme Court of Canada was whether the Lieutenant-Governor in Council in the absence of provincial legislation could enter, as was being questioned by the Court, into an agreement with the federal government by which the federal Anti-Inflation Act and guidelines would be applicable in the province. The Anti-Inflation Act provided that the federal Minister may with the approval of the Governor in Council enter into such an agreement with the government of a province. The Court held that there was no question as to the propriety of the execution and of the binding effect of the agreement so far as the Government of Canada was concerned. However, as the Court pointed out while the Executive or a Minister authorized by it may be the proper signatory to an agreement to which the Government of Ontario is a party, this is merely a formality of execution; and even if the agreement is binding upon the Government of Ontario it may be without domestic force. The Court pointed out that while the Lieutenant-Governor in Council may have a common law power and capacity to enter into agreements in the absence of statutory restrictions this fact does not answer the question of authority to effect changes in Ontario law through such agreements. It is submitted that the same could be said of doubts cast on the ability of the Province of British Columbia to alienate lands under the Crown prerogative if such alienation in substance effects a change in the distribution of executive powers under the Constitution. The Supreme Court held in this Reference, at p. 433 [S.C.R.], that there is no principle [sic. of law] in Canada whereby the Crown may legislate by proclamation or order in council to bind citizens without the support of a statute of the Legislature. This case, of course, does not specifically support or deny any ability of the Province of British Columbia to alienate lands beyond its territorial borders, for use of the prerogative to alienate lands in no way purports to use the prerogative to legislate outside of the territorial boundaries of the Province.

In support of the proposition that the Province can hold and deal with lands beyond its territorial boundaries, the writer was referred to
the interest held by the Province of British Columbia in property commonly known as B.C. House, located in London, England. This property can best be described as a building from which the Province provides tourist information for B.C. visitors. The Provinces of Ontario, Quebec, Alberta, Saskatchewan and Nova Scotia all have similar offices in London. B.C. House is run by an agent-general appointed and funded by the province. Though B.C. House has been described as "the property of the Province" [see Province, p.5, March 26, 1955, "B.C.'s Outpost in London's Heart"] the property in fact was "acquired" from the British Crown on a 99 year lease running from July 5, 1913 (confirmed in a telex from W. R. Smart, Acting Agent General, B.C. House, October 17, 1980; also see B.C.O.C. 289, April 5, 1946, B.C.O.C. 1351, September 24, 1943). As was mentioned in this chapter inter-governmental transfers, as in the case here between the British Crown and Her Majesty in right of a Province pose no practical problems. The arrangement could in effect be classified as an exercise of the Province's spending powers. The Province's holding in B.C. House does not involve a consideration of the Province's ability to alienate lands by virtue of its prerogative outside of provincial territory.

45. For example Alberta Gas Trunk Line Ltd., holds a 50% interest in Foothills Pipeline (South Yukon) Ltd., the company which has received approval to construct the Alaska Highway pipeline which will extend from Alaska, through the Yukon and on through British Columbia and Alberta; through A.G.T.L.'s take-over of Husky Oil it acquired extensive heavy oil rights in Alberta and Saskatchewan - its original legislative mandate which restricted its activities to be carried out within the Province of Alberta has been extended by statutory amendment to permit the company to carry out activities outside provincial boundaries; see Alberta Gas Trunk Line Act, S.A. 1954, c.37 s.14 (as amended by S.A. 1974, c.7 s.11); also see 1978 and 1979 Annual Reports of A.G.T.L., now known as NOVA, AN ALBERTA CORPORATION; change of name made by Alberta Order in Council 749/80 of August 6, 1980.

46. P.W. Hogg, op cit. supra., n. 3 at 71.

47. [1916] 1 A.C. 566, 583, 584-85.

48. Id. at 528.
(1919) 59 S.C.R. 281, 295 Mr. Justice Duff; also see Ashbury Co. v. Riche L.R. 7 H.L. 653 - statutory corporations would not have the powers and capacity of a natural person conferred upon it by the statute.


See Canada Oil and Gas Land Regulations 1978 C.R.C., c. 1518.

op. cit. supra., n. 3 at 169.


op. cit. supra., n. 3 at 143, though subject to statutory restrictions - also see Procedure I and NOTE - Puerto Rican Seabed Rights (1979), 83 Yale L.J. 825 at 841 - "the right to exploit the seabed, under both American and International law, is alienable".

Statutes of Quebec, 1971 c. 36. Any federal legislation would probably have to state that it binds the Province to account for the possibility that the corporation in this case is a Crown agent - in any case this is the case in the Oil and Gas Act, Bill C-20.


CHAPTER IV
PROCEDURE III - THE TRANSFER
OF ADMINISTRATIVE CONTROL
OVER OFFSHORE OIL AND GAS
TO BRITISH COLUMBIA

INTRODUCTION

The final procedure to be examined is the possibility of delegating administration of offshore oil and gas to the Province or to a legal entity of the Province. There are two possible ways which may be considered in transferring administrative responsibility to the Province: first, by delegating legislative authority to a legal entity created or designated by the Province, and second, by assigning the federal interest as lessor to the Province or to a legal entity created or designated by the Province.

The strength of this Procedure is that since there is no change of legislative jurisdiction, the federal government may be more receptive to negotiating a transfer of administrative control to the Province. The weakness, is that the Provincial control can always be revoked at the option of the federal government - possibly an untenable situation for the realization of Provincial objectives over offshore oil and gas development. In fact referring to
this Procedure as a "transfer" is to a certain extent, a
misnomer, since a transfer without qualification implies
an absolute relinquishment of an interest. In this pro-
cedure the federal government does not relinquish its
interest, it merely passes the administration of offshore
oil and gas to the Province. The degree of administrative
control that can be transferred to the Province is entirely
left to the discretion of the federal government. As will
be discussed below, the Province can be transferred anything
from the right to merely carry out the terms of federal
legislation to the ability to pass legislation, which could
be delegated to a legal entity controlled by the Province.
The following sections will deal with the options available
to the federal government.

Section 1.1: transferring legislative authority to a
legal entity of the Province

An attempt was made to transfer the management of
offshore minerals to the Maritime provinces (except New-
foundland). The mechanism proposed to carry out the
transfer of east coast offshore resources from the federal
government is outlined in a document dated February, 1977,
entitled a "Memorandum of Understanding in Respect of the
Administration and Management of Mineral Resources Offshore
of the Maritime Provinces", between the federal government
and the provinces of Nova Scotia, New Brunswick and Prince
Edward Island. The technique used in the Maritime Agreement is the establishment of a Maritime Offshore Resources Board that:

...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. 2

The technique used in the Maritime Agreement and also in agreements between the Commonwealth of Australia and state governments,3 involve, respectively, the adoption or passing by one level of government of exactly the same legislation relating to the exploitation off offshore oil and gas to ensure that if the law of one level of government was challenged, the law of the other level of government would be upheld.

Under the Canadian scheme set out in the Maritime Agreement, offshore mineral resources would be managed by the Maritime Offshore Resources Board. The Board itself,4 however, would not be a law-making body. The Board would be established by identical federal-provincial legislation, each of which would empower the Board to carry out its responsibilities. The legislation applicable to the exploitation of the offshore mineral resources would be passed by the federal government. The provincial legislation implementing the Maritime 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. 5

The Australian scheme differs from the above in that the Commonwealth of Australia and each of the seven coastal states pass legislation identical in every detail; a much more cumbersome scheme. 6

The scheme envisaged by the Maritime Agreement would not in its entirety be applicable to west coast offshore oil and gas, since one of the underlying features of the scheme is the settlement of jurisdictional disputes. As Professor Harrison explains: 7

...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.

Since the federal government of Canada has exclusive jurisdiction over west coast offshore oil and gas, that part of the Maritime Agreement directed toward a settlement of jurisdiction between the federal and provincial
governments need not be incorporated in a similar scheme concerning west coast resources. For the purposes of discussing the transfer of administrative jurisdiction to the Province of British Columbia under this Procedure, it must be assumed that the decision of the Supreme Court of Canada in the Offshore Minerals Reference has conclusively determined provincial and federal jurisdictions over the offshore oil and gas, otherwise the scheme of the Maritime Agreement would have to be totally adopted. The risk involved in applying this assumption can be assessed by examining whether a third party would be hesitant to develop offshore oil and gas under a scheme that acknowledges exclusive federal jurisdiction or on the other hand to assess whether there is any reason for the Supreme Court of Canada to reverse its position. While a great deal of effort was spent in the argument before the Supreme Court in ascertaining what rights British Columbia exercised over territorial waters these considerations become irrelevant in view of the Courts finding that "the territorial sea lay outside the limits of the Colony of British Columbia". The Court made a finding
of fact that the territorial sea was outside the boundary of British Columbia. There is no suggestion in the argument in this case that if Britain exercised jurisdiction over the territorial sea this necessarily had to pass to British Columbia when it was a colony, though the actions of the parties may have affected the Court's determination of fact. The determination of boundaries on water have different indicia than those on land, but once the facts have been settled the boundary is usually determined. Certainly if Britain exercised jurisdiction over the territorial sea it could have reserved this jurisdiction to itself by excluding the territorial sea from the territory of the Colony when it was established.

In the case of British Columbia the Privy Council had confirmed the common law ownership of the Province of the foreshore i.e. to the ordinary low water mark.\(^9\) The Court could have dealt with the case just as easily by holding that the legal description of the territory of the original Colony, indicating that it was "bounded... to the West by the Pacific Ocean"\(^{10}\) meant that the boundary stopped at the low water mark, merely by
interpreting the words "bounded by". The purpose of this discussion is not to rework the Offshore Minerals Reference but rather to indicate that while the reasons of the decision may be questioned the decision could still be well founded.\textsuperscript{11} The Offshore Minerals Reference has been approached as the exercise of the rights determining the boundary, rather than the boundary determining the rights. In any case this Procedure assumes that the Supreme Court has conclusively determined federal-provincial jurisdiction over offshore oil and gas.

In order to ascertain whether a delegation of responsibility for the management of offshore oil and gas to an entity created by British Columbia is possible, close examination of the concepts underlying such a delegation is necessary. The scheme would require federal legislation delegating administration of federal oil and gas legislation to a legal entity created by provincial legislation. Since it is clear that the Province does not have the jurisdiction to legislate respecting offshore mineral resources, there is no necessity (or authority) for the Province to pass legislation\textsuperscript{12} for the exploitation of offshore resources or to incorporate by reference\textsuperscript{13} federal oil and gas.
legislation. The question in respect to offshore minerals is: can British Columbia pass provincial legislation creating a Board that would be delegated the management of federal legislation that applies outside of the territorial limits of the Province? The power of inter-governmental delegation has been described by Professor Driedger as follows:  

...Parliament can choose any person or bodies it wishes to carry out its laws and confer on them capacity and power to do so...

This description certainly does not admit of any territorial limitation.

Delegation has been defined and described as follows:

Delegation may be defined as the entrusting by a person or body of persons, of the exercise of a power residing in that person or body of persons, with complete power of revocation or amendment remaining in the grantor (or delegator)... Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative the ultimate power always remains in the delegator, and has therefore not been renounced.  

The only limitation which the courts have placed on delegation is that the recipient cannot be the provincial or federal legislature.

The issue of whether a board established by British Columbia would lack capacity since the legislation they would administer would be outside the territorial jurisdiction of the Province, is dealt with in the P.E.I. Marketing
Board Case where Mr. Justice Rinfret stated that:

"... (t)he ingenious argument... that the provincial Board had no capacity to receive the delegation of powers from the Federal Government has failed to convince me. As stated above, Parliament could choose its own executive officers for the carrying out of this legislation, and when so chosen the Provincial Board became the agent authorized by the Governor in Council with all or any powers like the powers exercisable by such Board or agent in relation to the marketing of such agricultural product locally within the province. That, of course, must be understood mutatis mutandis. The Board did not need the enabling capacity provided for in s.7 of the Prince Edward Island Act. It became a body, or an entity, and it was not necessary for the Province to give it the power to "perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product"; or, in the words of the enactment of 1950, to "accept and exercise all and any powers or authority granted by the Governor-in-Council pursuant to the Dominion Act"... In the present case, the provincial Board received its powers directly from the Federal Government. 17

The argument before the court was that since the P.E.I. Marketing Board was not, under its enabling legislation, a corporation, the Board would only have capacity in relation to local law, and that the grant of authority from the Dominion was inoperative. Mr. Justice Estey commented on this argument as follows:

It is conceded that the Governor-General in Council might appoint the five individual members of the Potato Board and vest them with the same powers set out in P.C. 5159 (Provincial O.C.). When, however, it is appreciated that this Potato Board is an unincorporated legal entity with the capacity of a natural person, there appears to be nothing in principle or authority to prevent
the Governor-General in Council designating and authorizing it to discharge such duties and responsibilities as may be deemed desirable within the legislative competency of the Parliament of Canada. 18
(emphasis added)

The question of capacity is irrelevant since when the federal government delegated its powers, the entity became the delegatee of the federal government as if constituted by the federal government.19 Furthermore, the federal government may confer upon a provincially constituted board power to regulate a matter "within the exclusive jurisdiction of Parliament".20

The Province could then create a board ostensibly to be available to exercise management of provincial oil and gas. Clearly, the provincial legislation could not give the board powers over offshore oil and gas. The legislation could be permissive, that is, it would not be necessary that the board actually be given the management of provincial oil and gas. In a sense, the board would be analogous to a "holding company". The federal government then would amend its existing legislation, i.e. the \textit{Public Lands Grants Act}, section 4(1), and the \textit{Canada Oil and Gas Land Regulations}, so as to delegate the present powers exercised by the Minister of Energy, Mines and Resources over offshore oil and gas to the Board. But practically, why should the Province go through the trouble of creating a board whose sole purpose for existence would be to receive powers from the federal government? In the case of the
Maritime Agreements, the technique was in reality provincial incorporation by reference of federal laws, and delegation of the administration of provincial laws to the Maritime Offshore Resources Board and federal delegation of the administration of federal laws to the Maritime Offshore Resources Board. The procedure was suggested to ensure that both the provincial or federal law could withstand a jurisdictional challenge. The net result, however, is a delegation of management by whichever government in fact has legislative authority to the Maritime Offshore Resources Board. If, for example, a court held that the Maritimes had exclusive legislative jurisdiction over the offshore resources, the net result would be that the provinces had delegated their legislative authority to the provincial Board, though this legislation would be the same as the federal legislation.

If it was judicially determined that the exclusive jurisdiction over offshore mineral resources was within any of the Maritime provinces, it is highly unlikely that the signatories of the Maritime Agreement would choose to incorporate federal legislation to control the development of offshore minerals. Why, then, should this scheme be imposed on British Columbia? While the Maritime Agreement could be adapted to the west coast, other forms of delegation which would give the Province more control over offshore development should be explored.
The Maritime Agreement and the Australian Common Code reflect two situations: First, the scheme is used where there is a need for federal-provincial cooperation in a field of shared jurisdiction under the 1867 B.N.A. Act, such as in agriculture marketing; Delegation of authority allows one body (and level of government) to effectively administer and completely occupy the field; and secondly, where jurisdictional doubts exist, delegation can be used to overcome the risk of legislation being challenged as unconstitutional, by using the delegation technique as a coordinating mechanism. Neither of these situations exist on the west coast at least as far as the Supreme Court is concerned, and alternative methods of delegation should be examined.

1.2 Introduction - delegation of federal legislative powers to a designated entity of the province - to a provincial officer

Instead of requiring the Province to create a legal entity, why not have the federal government delegate the powers its executive officers have to control the development and dispensation of offshore oil and gas, to executive officers of the provincial government? A further consideration would be for the federal government to create a new legislative regime for offshore oil and gas and delegate to a provincial minister the power to make regulations respecting the exploitation, development and conservation of offshore oil and gas. These regulations, of course
would in fact be federal regulations and subject to compliance with the provisions of the Statutory Instruments Act. 21

While the latter proposition appears startling in its consequences, and there has not been any decisive determination on the extent to which regulatory authority may be delegated, it is well within the realm of possibility.

The case of Hodge v. The Queen 22 affirms the proposition that legislatures are in no sense delegators of or acting under any mandate from the Imperial Parliament. The authority conferred on a province or the federal Parliament is plenary, and they may confide to a body of their creation "the authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect". 23 The legislative body delegating legislative power to a subordinate body never really loses control, for it can always "destroy the agency it has created and set up another, or take the matter directly into its own hands". 24 As to the extent of the power that can be delegated, the court in Hodge said:

...How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the courts of law, to decide. 25

The Supreme Court of Canada has approved the following
description of a delegation of powers: 26

It is improper for an authority with discretionary powers to delegate to another authority over which it is incapable of exercising direct control, unless it is expressly empowered so to delegate...

(emphasis added)

Two questions remain: Who could be delegated the power to dispose of federal interests? And, could the federal government delegate its right to legislate in the area?

1.2(a): method of delegation of power to dispose of offshore oil and gas to a provincial officer

The federal interest in offshore oil and gas are presently disposed of under the Canada Oil and Gas Land Regulations, 27 passed pursuant to the Public Lands Grants Act. 28 The administration of these Regulations has been transferred to the Minister of Energy, Mines and Resources. 29 There is no constitutional requirement that federal property can only be disposed of by a Minister of the Crown. For example, the Indian Oil and Gas Regulations, 30 give the Manager of Indian Minerals the power to issue leases. However, section 4(l)(b) of the Public Lands Grants Act states:

4. (l) The Governor-in-Council may

(b) make regulations authorizing the Minister having the control, management and administration of any public lands to sell, lease or otherwise dispose of them, subject to such limitations and conditions as the Governor-in-Council may prescribe...

(emphasis added)

The Regulations authorizing the disposal of offshore minerals cannot, therefore, permit anyone other than the
Minister to dispose of the property. Unlike the Public Lands Grants Act, the Indian Oil and Gas Act which enables the Indian Oil and Gas Regulations states, in section 4:

s.4 The Governor-in-Council may make Regulations, (a) respecting the granting of leases, permits and licences for the exploitation of oil and gas in Indian lands and the terms and conditions thereof.

An amendment to the Public Lands Grants Act would be necessary to authorize Regulations giving a provincial officer the right to dispose of offshore oil and gas.

The Oil and Gas Act (Bill C-20) would create a new legislative regime for offshore oil and gas development in substitution of the authority exercised over offshore oil and gas under the Public Lands Grants Act. Unlike the regime under the Public Lands Grants Act, the disposition and management of oil and gas resources is contained in the body of the proposed Act and is not carried out through Regulations. However, the proposed Oil and Gas Act does not limit administration in all cases to the Minister. The Bill often refers to the "Minister or a person designated by the Minister". Where this phrase is used, there would be no problem in the Minister designating a provincial officer to carry out the Minister's responsibilities as his designee. However, specific legislative authority would be necessary to delegate other functions to a provincial official. The position that the duties imposed on a Minister or powers
given to a Minister can be exercised under the authority of
the Minister by responsible officials of the department
would not permit the responsibilities of the Minister under
the proposed Oil and Gas Act to be carried out by a
provincial official. S.A. de Smith describes this relation­
ship between Ministers and department officials as follows:

...The official is the alter ego of the
Minister of the department, and since he
is subject to the fullest control by his
superior, he is not usually spoken of as
a delegate. 33

The difference between departmental officers exercising
powers of Ministers and persons acting under delegated
power, lies in the distinction between agency and
delegation. While there are similarities, the main dis­
tinction lies in the delegation of legislative powers.
Where an agent acts on behalf of his principal and in the
principal's name, the acts done by the agent within the
scope of his authority are attributable to the principal.
However, "where legislative powers are delegated by
Parliament or validly subdelegated by Parliament's delegate,
the delegate or sub-delegate exercises his powers in his
own name".34 The powers which are proposed to be transferred
to the Province would be of a legislative character, for
example, the exercise of discretion on disposition of oil
and gas.
Another alternative method of transferring administration of offshore oil and gas to the Province is through delegation of legislative authority over offshore oil and gas to a provincial official. Two steps would be necessary: first, revocation of the existing federal legislation over offshore oil and gas, and secondly, delegation to the provincial official by federal legislation of broad regulation making powers, similar to those contained in Section 4 of the Indian Oil and Gas Act. The ability to pass regulations respecting pollution and conservation should also be dealt with in the legislation authorizing the delegation. These steps would ensure that the disposition of offshore oil and gas could be controlled by the Province.

The Hodge case is authority for the proposition that legislative authority may be delegated. The case of Re Clark et al and the Attorney-General of Canada\(^35\) has acknowledged that a federal board can be empowered to make regulations. What, however, is the limit to the legislative authority which can be transferred?
In the Attorney-General of Nova Scotia v. The Attorney-General of Canada\textsuperscript{36}, the Supreme Court was asked to decide the constitutionality of an Act of the Nova Scotia legislature entitled, "An Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa". The Act provided for the delegation to the Parliament of Canada and the Province of Nova Scotia the authority to make certain laws within the exclusive jurisdiction of the other under sections 91 or 92 of the B.N.A. Act, 1867. The Supreme Court held the legislation constitutionally invalid.

Professor Lederman, commenting on this case, stated that in his view the decision is correct:

\ldots and that direct legislative trading or transfer of primary legislative powers between the federal Parliament and a provincial legislature should not be permitted. \textsuperscript{37}

The Fulton-Faureau Bill proposed in 1965 provided, in Part II, procedures for direct inter-governmental delegation. The objection Professor Lederman had to such
a proposal was that:

...It would be all too easy to engage frequently in such delegation under strong but temporary political pressure of the moment, thus creating a patchwork pattern of variations, Province by Province in the relative powers and responsibilities of the federal Parliament and the provincial legislatures. This would seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions. 38

Professor Lederman no doubt bases his concern on the judgement of the court in the Nova Scotia case, where Mr. Justice Rand pointed out that the possibilities of revocation by the "delegating" body are severely limited as follows:

The practical consequences of the proposed measure, a matter which the Courts may take into account, entail the danger, through continued exercise of delegated power, of prescriptive claims based on conditions and relations established in reliance on the delegation. Possession here as elsewhere would be nine points law and disruptive controversy might easily result. The power of revocation might in fact become no more feasible, practically, than amendment of the Act of 1867 of its own volition by the British Parliament. 39

While the foregoing concerns may influence the policy decision on the extent of legislative power passed to the Province, the courts have not, as yet, limited the extent of legislative power that can be passed to its delegate.
Furthermore, the dubious maxim that one cannot do indirectly what cannot be done directly has no judicial support. The cases of Coughlin v. Ontario Highway Transport Board, and R. v. Smith, decided that the federal Parliament need not enact even the skeleton of a regulatory scheme, but can remit the entire matter to the discretion of the provincial legislature.

There would be no impediment to legislation authorizing the federal Minister of Energy, Mines and Resources to enact Regulations respecting the disposition, exploitation and conservation of offshore oil and gas. Acknowledging that the Minister could undertake this task, so also could a delegate of the federal Crown, i.e. a provincial Minister. It must be remembered however that a provincial officer who would be delegated legislative authority would exercise this power subject to federal legislation, and in particular as mentioned above, the Regulations would be subject to the Statutory Instruments Act.

Section 2: Assignment of Federal Government's Interest as Lessor, in Dispositions of Offshore Oil and Gas to the Province or a Legal Entity Created by the Province

The last part of this third procedure is an examination of the possibilities of assigning Canada's interest as lessor to the Province or to a legal entity created by the Province.
Since this procedure would take effect after disposition, only limited control would be given to the Province—that of a "landlord". The Province's control could be augmented if it was involved in the initial negotiation of the contract prior to disposition, and if it had input into the terms of disposal. One restraint though on the Province's control is that the disposition and possibly even the terms of disposal are subject to federal legislation which could limit flexibility in the terms of disposal and subsequent control over the management of the resources.

However, since legislative jurisdiction remains in Canada, under this alternative the federal Crown's interest could not be transferred to the Province for the same reason that ownership could not be transferred to a Province in the second procedure. But the federal government, can by its prerogative or, if specifically authorized, by legislation, dispose of its entire interest in offshore oil and gas to a corporation and therefore it certainly would seem possible for the federal government to dispose of its residual interest to such an entity. The first question is why would it want to use this procedure, and secondly, how could it effect a transfer?
If the federal government disposes only of its interest as lessor in offshore oil and gas, it has retained control not only of the terms of disposition, but also of its ability to legislate (and expropriate) with regard to offshore oil and gas. A provincial entity would be entitled to collect revenues from the disposition and would have the management of any contract.

The main problem in this procedure is effecting the transfer. Furthermore, public money must, under the Financial Administration Act, be paid into the Consolidated Revenue Fund and statutory authority would be required to forego this revenue owing to the federal Crown. The Financial Administration Act provides as follows:

s.2 "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money...

s.11(1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General...

s.36 No money shall be borrowed or security issued by or on behalf of Her Majesty without the authority of Parliament.
The need for statutory authority to forego revenue from offshore oil and gas is a minor problem compared to the impossible task of separating the legislative and purely contractual aspects of the dispositions of offshore oil and gas. Under the present legislative regime for offshore oil and gas, not only is there no provision for the federal Crown to assign its interest as lessor, but it would be impossible for it to effect such a transfer without transferring legislative responsibility. The federal interest, in disposed lands is not held by a simple contractual arrangement between the lessor and lessee. The contract relating to the disposition can best be described as a "statutory contract". The rights of the Crown are contained, not only in the lease document, but in the Regulations which can be amended so as to affect the contractual arrangement. This alternative is therefore not practicably feasible.

Section 3 - Conclusions

The alternative methods for transferring administrative control to the Province or to a body it controls demonstrates the wide range of possible co-operative schemes available to achieve a shared responsibility over offshore resource development. The major drawback is the
administrative machinery necessary before such schemes can be put in place. The instruments of transfer fall into all categories of legislation requiring a specialized bureaucracy to administer. The strongest disadvantage of any method suggested in this procedure is that there is no change of jurisdictional status. The federal government retains its exclusive jurisdiction only sharing its responsibility with an option to terminate without notice. It would be difficult to envisage the Province being satisfied with any scheme proposed in this Procedure. The examination of this alternative is perhaps most important for assessing the advantages of the other two Procedures proposed in this paper.
CHAPTER IV

FOOTNOTES


3. Id. at 260-261.


5. op. cit. supra, n.2.

6. op. cit. supra, n. 2 also see A. Thompson, Australia's Off-Shore Petroleum Common Code (1968) 3 U.B.C.L.R. 1.

7. op. cit. supra, n. 2 at 259.

8. See discussion in introduction to this paper on binding effect of declaratory judgements; (1967)) S.C.R. 795, 817. Also see p. 801.


10. R.S.B.C. 1911 c. 83; p. 266 s. 3; c. 67, p. 266 s. 4.


12. as in the case of Australia.

13. as in the case of the Maritime Agreement.

"...the legislature should be unlimited in its choice of persons or bodies to whom it wishes to entrust such authority"

Tuck at 92

"if, therefore, the Provincial legislation or the Dominion Parliament has "the same authority as the Imperial Parliament" [see Hodge v.R. (1883), 9 AC 117.] within its sphere of operation set by the British North America Act, it follows that a Provincial legislature should be able by delegation, to entrust to the Dominion or any other agent of its choosing, the exercise of a power in the Province by the British North America Act, and vice versa."

15. Id. Tuck at 86.


obiter of hand Haldane: Re: the Initiatives Referendum Act, (1919) A.C. 935 @ 945, also see Re: Clark et al and Attorney General of Canada (1978), 81 D.L.R. (3rd) 33.

17. (1952) 4 D.L.R. 146 @ 154, also see judgement of Mr. Justice Rand at p. 166.

18. Id. p. 178-179; also see Hogg Constitutional Law of Canada (1977) 121-123, 127.


22. (1883) A.C. 117, 132.

23. Id.

24. Id.

25. Id.

27. See Procedure I for a full description of legislative authority, C.R.C. 1978 c. 1518.


29. SOR/66-9 pursuant to Public Service Rearrangement and Transfer of Duties Act 1966.

30. C.R.C. 1978 c. 963, s. 7.

31. S.C. 1974-75-76 c. 15.

32. See Bill 20 infra s. 11(1) – production licences – also transitional provisions refer to designee.

33. de Smith, Judicial Review of Administrative Action (1973) 271, as to the delegation of legislative power de Smith writes at 265.

"it is doubtful whether implied authority to sub-delegate legislative powers would ever be conceded by the English courts save in time of grave emergency. For when Parliament has specifically appointed an authority to discharge a legislative function, a function normally exercised by Parliament itself, it cannot readily be presumed to have intended its delegate should be free to empower another person or body to act in its place."

also see (1957), 1 Melbourne U.L. Rev. 105.

34. Id. at 266.


36. op. cit. supra, n. 16.

37. op. cit. supra, n. 19 at 426.

38. Id.

40. Driedger, op. cit. supra, n. 14 at 695.


43. S.C. 1970-71-72 c. 38 (as amended) s. 2(1) (b) (c) and (d).

44. RSC 1970, c. F-10, s. 60.
CHAPTER V

CONCLUSION

Disputes between the federal and provincial governments over the control of resources, within or beyond provincial borders, should not be resolved by constitutional amendment, until all other legal alternatives to resolving the disputes within the existing constitutional structure have been surveyed. Everytime that the constitution is amended, the society which is governed by it will be directly affected. A constitutional amendment is not a restatement of the objectives contemplated by the original constitution, but rather is a redefinition of those objectives. The seriousness of this step must be weighted against the ability of the present constitution which the citizens of this country have adopted as their system of government. It is therefore important to thoroughly understand the spirit of all constitutional acts before deciding that they be changed.

Efforts should first be directed at resolving problems within the constitutional framework, rather than defining new relationships through constitutional amendment, even though it is often easier to resolve current problems by looking ahead instead of back. As the distinguished American writer, Robert Penn Warren points out:
There's an appalling ignorance and contempt for history. It is considered a dead subject. People are not interested in the past;...today people are interested only in now and tomorrow. 1

Provincial claims to participation in natural resources beyond their borders is not a new problem. At about the time that the prairie provinces began to demand control over their natural resources the Maritime provinces saw how vulnerable their economy was if it could not be sustained by a solid resource base.

In 1912, Sir Robert Borden made the following comments on the anticipated transfer of natural resources to the prairie provinces:

"...when this question does come to be considered (transfer of natural resources to the provinces) some regard will have to be given to the claims of some other provinces of Canada, and especially the three Maritime provinces, whose boundaries have not been increased, whose boundaries cannot very well be increased on account of their natural situation. 2

Prior to the transfer of natural resources to the prairie provinces, the federal government had convened the Royal Commission on Maritime Claims - The Duncan Commission, as a result of representations, by the Maritime provinces; complaining that their interests had suffered under the economic policies adopted by successive federal governments.
The position of the Maritime provinces was best described in Nova Scotia's brief to the Commission requesting compensation when the control of natural resources was settled on the prairie provinces. Paragraph 2 of this brief read:

2. A credit against the Dominion government of such an amount as will fairly represent, on a per capita basis of calculation, Nova Scotia's proprietary interest in the public lands of Manitoba, Saskatchewan and Alberta, if and when the said lands are transferred to the government of these provinces. 4 (emphasis added)

Control over natural resources and the revenues they attract, has always been considered vital to the development of provinces within the Canadian constitutional system. What must be examined is the role of the federal government over these resources. Mr. Cabot Martin captures the provincial dilemma over offshore resources in the following excerpt from his article supporting Newfoundland's claim to offshore resources:

...a new "federal" interest has been created - that of guaranteeing raw materials at "reasonable prices" to feed the industrial juggernauts of central Canada. This interest, paradoxically runs diametrically opposite to another professed federal interest - that of eradicating regional disparity. 5

What must be evaluated is the extent to which the spirit
of the Canadian constitution encouraged and recognized the need for economic self-sufficiency by the province. If it does, then the answer to achieving this balance must be found in the constitution. This paper has demonstrated three alternatives for achieving the goals of economic balance. Perhaps it will be hardest for the federal government to see the resolution of resource management within the context of the existing constitution. In his article which examines the concept of federalism and the outer continental shelf in the United States, Dr. Breeden points out:

It is often said that the national government represents the whole people, acts as an arbitrator among the States, and promotes national development by checking the parochial behaviour of state governments. This view fails to take account of the federal government as land manager with parochial interests of its own. 6

There will be no satisfactory resolution to federal and provincial resource distribution until both governments openly admit to their "territorial" objectives and from there work at compromising their positions to the benefit of society and Canada as a whole. It is about time that we recognize that the constitution reflects a statement of co-operation to which all levels of government and people must be committed. When working within the constitution does not seem to be the easiest solution perhaps the
solution in itself is inappropriate. The following statement by the Tremblay Royal Commission of Inquiry into constitutional problems should be borne in mind by those who would propose to alter the constitutional structure of this country:

What then, after all, is federalism? We have said it is the system of association as opposed to the system of singleness; it obstrudes itself each time we desire neither unity, destructive of individualites, nor independence, destructive of unity. It is thus a general formula, effective not only between states but in all fields of social life? Thus considered, it appears as a system which, in simultaneous reaction against unitarianism and individualism, proclaims association between individuals and social groups as a central organizing principle of society. 7

Federal and provincial goals in the development of offshore oil and gas can be resolved within the existing constitutional framework. It is not the lack of alternatives within the constitution that has hampered the resolution of jurisdictional disputes over offshore oil and gas development but rather it is the lack of a commitment by the federal and provincial governments to co-operate, and compromise their positions. The final statement to this paper then is that co-operation and compromise should be carried out within the existing present constitutional structure.
CHAPTER V

FOOTNOTES


BIBLIOGRAPHY

BOOKS


Bartley, The Tidallands Oil Controversy - A Legal and Historical Analysis (1953).


Gerin-Lajoie, Constitutional Amendment in Canada (1950).


Sovereignty of the Sea - Geographic Bulletin No. 3 April 1965 U.S. Department of State.

Yates and Young, Limits to National Jurisdiction over the Sea (1974).
JOURNALS


Bourne and McRae, Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined (1976), The Canadian Yearbook of International Law 75.


Head, Canadian Claims to Territorial Sovereignty in the Arctic Regions (1963), 9 McGill L.J. 200.


Martin, *Newfoundland's case on offshore minerals; a brief* (1975), 7 Ottawa L.R. 34.


Rubin, *The Role of the Coastal Zone Management Act of 1972 in the Development of Oil and Gas from the Outer Continental Shelf* (1975), Natural Resource Lawyer 399.


Tuck, Delegation a Wrung Over the Constitutional Hurdle (1945), 23 Canadian Bar Review 92.
CASES


Ashbury Co. v. Riche (1875), L.R. 7 H.L. 653.


Bonanza Creek Gold Mining Co. Ltd. v. The King, [1916] 1 A.C. 566.


Guess v. Read 290 F. (2d) 622.

Hodge v. The Queen (1833), 9 A.C. 117.


Reference re Strait of Georgia (1967), 1 B.C.L.R. 98 (B.C.C.A.).


Rex v. Ulmer (1923), 1 W.W.R.


United States v. Louisiana, 339 U.S. 699

An Act to provide for the boundaries of the Province of Manitoba, S.C. 1881 c. 14, S.M. 1881, c.1 - 2nd sess. (not assented to), c. 1 - third sess. assented to March 4, 1881.

Arctic Waters Pollution Prevention Act, R.C.S. 1970, c. 1st Supp.), c. 21


Charter of the Quebec Petroleum Operations Company, Statutes of Quebec, 1969, c. 36.

Coastal Zone Management Act.Title, 16 U.S.C.S. 1451-S.1451-6, supp. 1944, or Public Law 92-583.

Commonwealth of Australia Constitution, 1900 (Imp.), 63 & 64, Victoria c. 12, s. 123.

Continental Shelf Act, 1964, 13 Eliz. 2, c. 29.


Energy Act, R.S.B.C. 1979, c. 108.

Factor Act, R.S.B.C. 1979, c. 118.


Gasoline Tax Act, R.S.B.C. 1979, c. 152.


Indian Oil and Gas Act, S.C. 1974-75-76, c. 15.


Industrial Operation Compensation Act, R.S.B.C. 1979, c. 195.


Labour Regulation Act, 1979, R.S.B.C., c. 213.


Petroleum and Natural Gas Act, R.S.B.C. 1979, c. 323.


Pipeline Act, R.S.B.C. 1979, c. 328.

Pollution Control Act, R.S.B.C. 1979, c. 332.


Rupert's Land Act, 1868 (Imp.) 31 & 32 Victoria, c. 105.

Statutory Instruments Act, S.C. 1970-71-72, c. 38, as am. s. 2(1)(b)(e) and (d).

Submerged Lands Act Title, 43 U.S.C.S., s. 1301,


Worker's Compensation Act, R.S.B.C. 1979, c. 431.

REGULATIONS

Canada Oil and Gas Drilling and Production Regulations, C.R.C. 1979.

Canada Oil and Gas Land Regulations, C.R.C. 1978, c. 1518.

Indian Oil and Gas Regulations, C.R.C. 1978, c. 963.

Oil and Gas Drilling Regulations, SOR/79-82.


Minimum Wage Order 10 (1972), Geophysical Exploration and Oil Well Drilling and Service Industry, B.C. Regulation 275/72.

**Canadian House of Commons Debates**, 1871, p.148; 604.

**Canadian House of Commons Debates**, 1927, p. 360-371.

**Canadian House of Commons Debates**, 1929, p. 25.

**Canadian House of Commons Debates**, February 18, 1929, p. 192.

**Canadian Sessional Papers**, 1871, No. 20, 2nd. Return, p. 4.

Canada Parliament, Sessional Papers (House of Commons) 1871, No. 20, 2nd. return, p. 1. Correspondence between the Imperial and Canadian Governments relative to the Manitoba Act.

**Canadian Sessional Papers**, No. 20, 1871, 2nd Return "Correspondence from the Governor General of Canada to the Secretary of State for the Colonies".

**Canadian House of Commons Debates**, October 24, 1969.

**Canadian House of Commons Debates**, February 13, 1970, p. 3577


Duncan Commission, Royal Commission on Maritime Claims, Ottawa (1926).

Federal-Provincial Memorandum of Understanding in


Statement of Prime Minister Trudeau concerning offshore minerals made on December 2, 1968, reproduced in Lewis and Thompson on Oil and Gas, Volume I, s. 29B.

Submission of the Province of British Columbia on West Coast Maritime Boundaries between Canada and the United States (1977).

Vancouver Sun, June 17, 1980, p. 1.