

**Legal Argument  
in  
Restoring the Grand Banks**

**John L. Joy, Q.C.**

**Introduction**

Most lawyers are familiar with the saying, "Take care of the facts and the law will take care of itself".

My comments tonight will be in two parts. The first is a national commentary I prepared with the assistance of Maureen Anonsen at CBC on The Northern Cod Fishery and concerns both facts and policy. CBC did not broadcast it because of the strike, and then they cancelled the commentary series altogether. We all recognize, of course, that restoration of the Grand Banks and the fishery involves more than cod. Many other species have a vital role.

The second part focuses more directly on the role of legal argument in restoring the Grand Banks.

**CBC National Commentary on The Northern Cod Fishery**

We are continually losing sight of the history of the destruction of the northern cod fishery off Newfoundland and Labrador.

No matter what issue is front and centre in the media – a food fishery protest, the Fishery Products International withdrawal from rural Newfoundland, or the impending failure of the crab fishery – we are constantly losing sight of how the destruction of the northern cod stock occurred, and what broad policy steps we must take to get the cod and other ground fisheries back on track.

Here's what happened.

Newfoundland fishermen have traditionally from 1800 to 1945 caught most of the incredibly abundant northern cod in any year. The foreign fleets took only a small portion of the total. This practice worked well. It was indeed a sustainable fishery.

Our catch, however, began a steady and deepening decline after World War II, but in the 1960s the foreign fishery exploded. By 1968 the actual total domestic and foreign catch tripled to more than one million metric tonnes. The foreign share was as much as 90% of the total.

The Grand Banks effectively died as one of the most productive fishing grounds in the world.

The Canadian government's response to this crisis was to declare a 200-mile exclusive fishing zone in 1977, and we tried to regain our share of this fishery, but it was too late. Commercially, the fish were gone. Since that time fish stocks have been in steady decline, and by 1992 Canada imposed on the Canadian industry a moratorium on fishing the northern cod stock.

Canadian fishing boats have stopped fishing northern cod except as by-catch in other fisheries, but the foreign fleets have continued their relentless and unregulated fishing effort to the present.

Why do they continue fishing even when there is a moratorium?

They are fishing just outside Canada's 200-mile exclusive fishing zone in the area known as the Nose and Tail of the Grand Banks and on the Flemish Cap where these highly migratory stocks assemble during certain times of the year.

Is it possible to turn things around?

Will the cod come back?

With the right policies I know the cod and other ground fish stock will recover, and we can have a healthy and sustainable fishery.

What do we have to do?

We must completely ban domestic and foreign fishing effort for cod and other ground fish stocks except for scientific survey purposes.

We must create an independent, properly-funded fisheries science institute similar to the National Research Council.

We must declare Canadian custodial management on the Nose and Tail of the Grand Banks and the Flemish Cap off Newfoundland and Labrador.

The Government of Newfoundland and Labrador must take a greater leadership role in fisheries and marine conservation.

We must have a major overhaul of the federal Department of Fisheries and Oceans following a royal commission investigation into the administration of the department.

We must leave to future generations a healthy fishery as close to the way we found it as possible.

For Commentary this is John Joy in St. John's.

You are among the crowd that might have listened to this intended national commentary.

I am delighted to provide it to you this evening.

### **The Role of Legal Argument in Restoring the Grand Banks**

One of the principal roles of legal argument in any public issue of this magnitude is to add legal reasoning to the public debate in a meaningful way.

A perfect example of the proper use of legal argument was the manner in which the Newfoundland and Labrador government appointed legal advisers, commissioned legal research, oversaw the publication of the research and popularized the results concerning jurisdiction over offshore oil and gas.

The legal argument was a novel one in the context of both international law and Canadian constitutional law. As I saw it, the provincial government developed its best legal arguments and did an excellent job publicizing them. The argument appeared in the famous Cabot Martin article in a learned legal journal. If you did not see it in the journal form, then you will all recall receiving a very fancy full-colour booklet providing a summary of the legal argument. This government used these and other methods to get the message out.

The legal argument became an icon in the debate for Newfoundland and Labrador jurisdiction over the continental shelf. It was an essential touchstone.

When I contrast that approach with the present level of public debate on custodial management, I am immediately struck by the lack of any presence of the legal argument at any level, federal or provincial. All we have is political rhetoric on one side or the other.

Neither the federal nor the provincial government has developed the legal argument. No one, for example, is known as the director of the legal research in the same way that everyone knew that Cabot Martin and, in the early stages at least, Leo Barry, had the direction of this matter.

The legal background paper for the May, Russell and Rowe study, *Strategic Brief*, is essentially still a secret document. It is also a bloodless one. It does not present the best argument for custodial management or any other form of coastal state jurisdiction. It hypes and hawes about this and that. You cannot say much more about it than that. I am sure you realize I am being diplomatic here, hopefully saying just enough to make my point.

The custodial management legal argument is not a two or three month project. It requires an energetic and long-term commitment of many years. We should have started this legal strategy ten years ago. We must start it now.

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The immediate question is: where is the leadership in developing the best possible legal argument?

The political strategy directing the issue of the legal argument for custodial management is weak, without direction, and lacking passion and commitment.

Where is the budget for this legal work, where are the Newfoundland and Labrador lawyers and our legal scholars knowledgeable in the issue, where are our political and legal directors of this work, where is the publicity strategy to make it a part of the public psyche and public debate?

The legal argument for custodial management or some other form of coastal state jurisdiction is a strong and reasonable argument.

Even if we brought the argument to a national or international court and lost, that would not be the end of the world.

Remember Iceland did not win one case at the International Court of Justice concerning its fisheries jurisdiction. Iceland initially claimed that the court had no jurisdiction when the United Kingdom filed its complaint. Iceland lost. Iceland, then, lost the case on its merits. Iceland, actually, refused to appear to argue the case! The court, on its own initiative, made some important comments on the rights of coastal states.

The Icelandic legal argument, however, played a valuable role in the whole process that eventually resulted in a favourable international political solution for Iceland with the development of the exclusive economic zone.

Similarly, the legal argument played a valuable role in the eventual political solution to our offshore oil and gas issue.

Why the federal government and the provincial government have tied their legal arms behind their backs, I will never know.

We all know the federal government has no interest in developing the legal argument.

The provincial government, in my view, must provide the leadership on the development of the best possible legal argument for custodial management, and make it a part of the public debate. Hire Cabot Martin, second Leo Barry from the Supreme Court, engage Jack Harris, seek the advice of the Fisheries Institute for North Atlantic Islands, but get on the job and do the work.

We have nothing to lose and everything to gain.