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ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 12th day of March, A.D., 2001, at the Wu Conference Centre, Fredericton, New Brunswick, commencing at 9:30 a.m.

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

Mtre L. Yves Fortier, C.C., Q.C.,

Mtre Stephen L. Drymer, Esq.

Mtre Jean G. Bertrand, Esq.

. . . . . .

MR. FORTIER: Good morning, Mr. Chairman, distinguished members of the Tribunal. I'm Yves Fortier and I'm the agent for the Province of Nova Scotia. The names of all the members of the legal team representatives of Nova Scotia in the room this morning, as well as the Province's

advisors, appear on a list which we have filed with the Registrar earlier today.

Mr. Chairman, distinguished members of the Tribunal, it is a distinct honour for me and my colleagues to represent the Province of Nova Scotia in this important arbitration. It is also a singular honour for me and my colleagues to appear before an international tribunal composed of such distinguished jurists.

To demonstrate the vital importance to the Province of Nova Scotia of this arbitration, the Premier himself, the Honourable John Hamm has decided that he would attend before the Tribunal today. The Premier will make the initial submission to the Tribunal on behalf of the Province. And Mr. Chairman, I would be grateful if you could invite Premier Hamm to address the Tribunal at this point.

CHAIRMAN: Mr. Hamm.

HONOURABLE JOHN HAMM: Good morning, Mr. Chairman and distinguished members of our Tribunal. As Premier of Nova Scotia I am here today to explain the Province's position regarding the issue before this Tribunal.

For Nova Scotians this proceeding is not about where boundary lines should be or about who should draw them. We believe these questions were resolved to the satisfaction of all paries almost 40 years ago. For Nova

Scotians the issue may be stated very simply, a deal is a deal.

In the late 1950's and the early 1960's the offshore potential of Canada's East Coast began to be recognized. At that point all five eastern provinces decided upon the need to do two critically important things.

The first step was to agree amongst themselves where boundary lines would be drawn for the purpose of offshore development. The second crucial step was to work with the federal government to determine the questions of ownership and jurisdiction over resources that might be discovered offshore.

Clearly, the issue of interprovincial boundaries was regarded as one which had to be addressed and conclusively resolved to the satisfaction of all provinces before the parties could begin negotiations with Ottawa on the issues of jurisdiction and ownership.

Perhaps more important, offshore boundaries had to be put in place before the provinces could credibly hope to attract any interest from industry. All five east coast provinces, including Newfoundland and Labrador, participated in that decision making process.

Nova Scotia was represented by its Premier of the day, the Honourable Robert Stanfield. Newfoundland was represented by its Premier of the day, the Honourable

Joseph Smallwood.

With their encouragement and active participation and after many years of discussions, the Premiers of the four Atlantic Provinces agreed September the 30th 1964 on mutual boundaries for the purposes of delimiting their respective rights to offshore resources. Quebec joined the agreement shortly thereafter. This was the 1964 Agreement which established the interprovincial lines that we all still use today.

The 1964 Agreement developed cooperatively, concluded and implemented in good faith by all, has served as the basis for the development of offshore activity throughout Eastern Canada.

In the years since the provinces agreed on their boundaries, Nova Scotia and Newfoundland and Labrador concluded jurisdictional and revenue sharing arrangements with the federal government relating to offshore resources.

Other provinces have yet to do so, but all have relied on the lines established in the 1964 Agreement.

I want to stress for the members of this Tribunal that the activities of the various provinces with respect to the offshore, whether under arrangements with the federal government or not, could not and would not have been possible without a pre-existing agreement among those very

provinces. Without that deal and without the interprovincial lines that it established, development of the offshore would not have taken place as rapidly.

Today Atlantic Canada stands on the cusp of major economic and social change which will help all four of our provinces reposition our economies, economies which have suffered from over a century of decline.

The potential of the offshore and the steps taken to develop its vast resources have been and will continue to be catalysts riding this strategic opportunity. To upset the basis on which this economic growth has taken place is to risk continued development.

I do wish to stress that Newfoundland and Labrador and Nova Scotia have worked together cooperatively on many other issues of importance to our region, and we will continue to do so. However, in late 1997 or early 1998, Newfoundland and Labrador made known its intention to dispute the existing boundary lines. At no time from 1964 to 1997 did Newfoundland and Labrador ever notify Nova Scotia that it considered the existence of their mutual boundary to be in dispute.

At no time during that period did Newfoundland and Labrador notify its provincial neighbors and co-contracting parties that it considered the 1964 Agreement to be dead.

Challenging the 1964 Agreement affects not only the Nova Scotia, Newfoundland and Labrador boundary, but all of the agreed boundaries of the East Coast Provinces. Atlantic Canada has depended on the stability of the boundaries established in the 1964 Agreement.

Nova Scotia is not here to seek a better deal, instead Nova Scotia is asking that the Tribunal confirm the agreement that has served our region so well over the past decades and that Newfoundland and Labrador respect and honour the commitments that have governed all decisions regarding expiration and development of the offshore.

The dispute is not about some technical lines drawn on a chart. This dispute is about whether an agreement stands. We expect that this Tribunal will recognize the merits of the arguments and the force of the evidence to be presented by Mr. Fortier and his team. We trust that 36 years of stability will not be upset. We expect that the Tribunal will determine that the line dividing the offshore areas of Nova Scotia and Newfoundland and Labrador has been determined by Agreement.

We trust that finding in favor of these facts will enable Nova Scotia and Newfoundland and Labrador to prosper for decades to come. This will give Atlantic Canada's Provinces an opportunity to work together in building a brighter future for ourselves and for our

country.

Thank you, Mr. Chairman.

CHAIRMAN: Thank you very much, Premier Hamm, for your very clear exposition of your position.

MR. FORTIER: Mr. Chairman, distinguished members of the Tribunal, three or four preliminary comments before I begin my oral presentation.

With your forbearance, Premier Hamm, Minister Balser and their colleagues will stay with the Tribunal until the morning break. They will then return to Halifax to attend to matters of State.

You have before you on your table three different binders. No, two different binders. One, the large one consists of all figures which were filed be Nova Scotia with its memorial and counter memorial. They are in chronological order and we trust that they will be helpful to members of the Tribunal during the hearing and during their deliberation.

You also have, that is a smaller binder, a number of slides. They are the slides to which I initially will be referring to in the course of my presentation and they will be added to during the next two days when I'm followed at the bar by my colleagues.

And finally, some of us appearing on behalf of Nova Scotia have statements which we are using in order to

facilitate our respective oral presentation. Those statements will be delivered to the Registrar of your Tribunal at the conclusion of each individual presentation.

Mr. Chairman, members of the Tribunal, today and tomorrow my colleagues and I will present Nova Scotia's first round of oral submissions. In order that you can follow, and indeed anticipate Nova Scotia's oral argument, I will outline very briefly the division of labour between members of the Nova Scotia legal team.

Initially it will be my responsibility to provide the Tribunal with an overview of Nova Scotia's case. I will then review the precise mandate of your Tribunal as well as the law applicable to this phase of the present arbitration.

I will be followed at the bar by the Deputy Agent of Nova Scotia, Mr. Stephen Drymer, who will address the relevant events leading to and surrounding the conclusion in 1964 of the Agreement between the East Coast Provinces, including the parties to the present arbitration, Nova Scotia and Newfoundland and Labrador.

Mr. Drymer will be followed by Mr. Jean Betrand, who will review the various aspects of the parties' conduct, including the many pertinent meetings held, documents executed, provincial and federal legislation passed during

the period after the conclusion of the 1964 Agreement to the present.

Mr. Phillip Saunders will then refer the Tribunal to the conduct of the parties to the 1964 Agreement, including Nova Scotia and Newfoundland, as manifested specifically by the issuance of oil and gas permits in their respective offshore areas, demonstrating their respect and application of the agreed line.

Ms. Valerie Hughes will then review the law and its applications to the facts put in evidence by the parties.

And finally, my colleague, Jean Bertrand, in my absence on Tuesday afternoon will conclude Nova Scotia's first round submission with a summary of the oral presentations.

I have referred to by absence on Tuesday afternoon -- on Tuesday. As members of the Tribunal and my friends representing Newfoundland are aware, unfortunately in my capacity as an ad hoc judge on the International Court of Justice, I have been convened unexpectedly to The Hague for a meeting of the court on Wednesday morning. Regrettably, and I certainly mean no disrespect to the Tribunal, I must leave Fredericton at the conclusion of the hearing today and fly to The Hague overnight. Now there are no direct flight connections between Fredericton and The Hague, unfortunately. So it will be a longer

journey than what I -- in an ideal world I would have hoped for. But I plan to return to Canada on Wednesday evening, and in the event that the International Court of Justice and Air Canada cooperate with me, I will be present before the Tribunal at the opening of its session on Thursday morning. Maybe a little tired, but I will be here.

Mr. Chairman, Members of the Tribunal, in this the first, and Nova Scotia is confident, the only phase of this arbitration, this Tribunal must determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.

Thus the present case is not, in essence, about a boundary. It is about an agreement. An agreement concluded nearly 40 years ago amongst the Government of Canada's five East Coast Provinces, in good faith. An agreement that has stood unchallenged and on which the five governments have relied since that time, to their benefit. An agreement to which today one of the five governments, Newfoundland and Labrador, claims it never agreed.

As Nova Scotia demonstrated in its Memorial and Counter Memorial, the agreement was concluded in 1964 and provided for the delimitation of the offshore areas of the

five provinces, including the line dividing the offshore areas of the parties to the present arbitration, all in respect of the provinces rights to mineral resources. The Government of Newfoundland and Labrador now says that it never agreed to the line. The evidence we submit, including the evidence of Newfoundland's conduct over the years, says otherwise.

The line in question, Mr. Chairman, is not a Stanfield line. It is not a proposed line. It is not a purported line. It is not a Nova Scotia line. It is the line agreed to by the governments of five provinces in the context of a binding agreement amongst themselves. It is the existing line applied in practice by Nova Scotia and Newfoundland and incorporated into federal and provincial law. It is the line that the parties to this arbitration have resolved by agreement.

Now the Terms of Reference establishing the Tribunal provide that the dispute in this case concerns portions of the line dividing the respective offshore areas of Nova Scotia and Newfoundland and Labrador.

The dispute arises in relation to the description of the term "offshore area" as set out in legislation enacted by the Parliament of Canada and the legislatures of the two provinces. This legislation applies only to the petroleum and natural gas resources of the seabed and

subsoil of the offshore area defined for each province. It has no application to fisheries or to any other matters related to the water column. It applies only to the petroleum and natural gas resources of the seabed and subsoil of the offshore area.

At the outset, Mr. Chairman, Members of the Tribunal, I will examine briefly the key provisions of certain instruments as they apply to the dispute that the Tribunal has been mandated to resolve, and I will describe the fundamental nature of the dispute itself.

In 1985 and 1986, respectively, the Government of the Province of Newfoundland and Labrador and the Government of Nova Scotia, each concluded a bilateral Accord with the Government of Canada establishing an administrative regime to govern the management of oil and gas exploration and development of its offshore area.

As you know, Mr. Chairman, Members of the Tribunal, each of these accords was subsequently implemented by means of mirror federal and provincial legislation.

The essential purpose of the two Accords, and their implementating legislation, was to set aside longstanding constitutional differences between the provinces and the Government of Canada regarding jurisdiction over the mineral and other resources of the seabed and subsoil of the waters offshore of each province. To that end, each

Accord and its corresponding legislation established a management and revenue sharing regime administered by a joint federal-provincial Offshore Petroleum Board. The Boards enjoy specified authority over exploration and development in each of the Nova Scotia and Newfoundland offshore areas, including the authority to issue permits for exploration and exploitation purposes. The scope of the legislation, and thus the operations of the Boards that they establish, is limited to the offshore area as defined in each Act.

Now Section 2 of the Canada-Nova Scotia Accord Act defines Nova Scotia's offshore area as follows: "Offshore area means the lands and submarine areas within the limits described in Schedule 1." Schedule 1 to the Act provides a detailed description of the limits of the offshore area. And the offshore boundary between Nova Scotia and Newfoundland is defined in Schedule 1, as you can see on the screen in the following terms, which bear reading.

Thence northeasterly in a straight line to a point at latitude, et cetera, being approximately the mid-point between Cape Anguille and Point de l'Est. Thence southeasterly in a straight line to a point at latitude, et cetera, being approximately the mid-point between St. Paul Island, Nova Scotia and Cape Ray, Newfoundland. Thence southeasterly in a straight line to a point at

latitude, et cetera, being approximately the mid-point between Flint Island, Nova Scotia and Grand Bruit, Newfoundland. Thence southeasterly in a straight line and on an azimuth of 135 degrees to the outer edge of the continental margin.

This is the description of the offshore boundary between Nova Scotia and Newfoundland, which is defined in Schedule 1 of the 1986 legislation.

This, Mr. Chairman, Members of the Tribunal, this definition in Schedule 1 is the very boundary between the respective offshore areas of Nova Scotia and Newfoundland that have been established 24 years earlier in the agreement concluded by the five provinces on September 30, 1964.

Now the Canada-Newfoundland Accord Act, in contrast to the Canada-Nova Scotia legislation, does not specify the limits of Newfoundland's offshore area. It provides instead a generic definition of offshore area, leaving the precise definition to be prescribed. And you have on the screen the definition of the offshore area found in the Canada-Newfoundland Accord Act.

Now to date no line has been prescribed pursuant to that provision.

The dispute in the present case, Mr. Chairman, Members of the Tribunal, was initiated by the Province of

Newfoundland and Labrador in an effort to evade the obligations it willingly assumed in 1964 and to claim for itself a greater offshore area than that established in the 1964 Agreement.

As Premier Hamm stated earlier, the implications of this claim by Newfoundland and Labrador, the implications are very, very profound.

Newfoundland would ask your Tribunal effectively to undo the 1964 Agreement. To erase its agreed boundary with Nova Scotia. Indeed to erase all of the interprovincial boundaries agreed to by the five East Coast Provinces in 1964, and thereby throw into disarray over 37 years of regional stability.

In late 1997, early 1998, further to communications between the Governments of Newfoundland and Canada, the Federal Minister of Natural Resources determined that a dispute had arisen and he put in place a process of consultations between the parties to establish the Terms of Reference.

You now have on the screen Section 48 of the Canada-Nova Scotia Accord Act, which confers authority on the Minister to proceed as he did. Where a dispute between the province and any other province that is a party to an agreement, words which are not devoid of meaning, that is a party to an agreement arises in relation to the

description of any portion of the limits, et cetera, the dispute shall at such times as the Federal Minister deems it appropriate be referred to an impartial person, tribunal, et cetera.

And finally, subparagraph 4, where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing Maritime boundary delimitations with such modifications as circumstances require. I will be returning to this provision shortly.

Now it is important, Mr. Chairman, Members of the Tribunal to keep in mind that the Terms of Reference did not -- which guide this arbitration did not simply appear out of nowhere at a point in time. They followed this very, very lengthy process of consultation to which both provinces participated. It participated actively. It lasted for over a year. It was akin to a mediation, although not referred to as such. And at the conclusion of the mediation, the mediator submitted his report and recommendations to the Minister. This was a the end of 1999.

In the fullness of time, on May 31, 2000, after the lengthy consultations, the Federal Minister of Natural Resources wrote to the parties advising them of his

decision to establish an arbitration process with two distinct phases. And attached to the Minister's letter were the Terms of Reference governing the arbitration.

Both the Minister's letter and the Terms of Reference, as you well know, Mr. Chairman, Members of the Tribunal, both the Minister's letter and the Terms of Reference provide that in this phase the Tribunal's sole mandate is to determine whether a boundary has been resolved by agreement.

Now, the Nova Scotia argument can be stated very simply. In the Autumn of 1964, Nova Scotia and Newfoundland, together with New Brunswick, Prince Edward Island and Quebec, concluded a binding agreement, of immediate effect, providing for the division of those areas of the seabed adjacent to the five provinces for the purpose of delimiting their respective rights to the mineral resources of those areas.

The terms of the 1964 Agreement are clear from the plain words of the contemporaneous documents evidencing the Agreement, and as interpreted with reference to their object and purpose. Those terms are also confirmed by the subsequent conduct of the parties.

First, the Agreement delimited the entire area of the seabed adjacent to the East Coast Provinces that might be claimed by Canada under international law.

Second, the Agreement established accurately and completely the boundary line as between the five East Coast provinces for all purposes relating to the exploration and development of offshore minerals, including arrangements with the federal government for the sharing of jurisdiction and benefits, such as the Accord Acts of 1985 and 1986.

As demonstrated in our written pleadings, the 1964 Agreement is evidenced by an extensive and authoritative documentary record that should leave no doubt that an Agreement was concluded, and that all parties intended that Agreement to be binding.

Further, the conduct of the parties subsequent to the conclusion of the '64 Agreement, over a period of nearly 40 years, Mr. Chairman, evidences their consistent adherence to and reliance upon the boundaries established in the Agreement, in many varied and numerous contexts.

The 1964 Agreement has been applied by all of Canada's East Coast Provinces, including Newfoundland and Labrador, in both joint and unilateral assertions of jurisdictions, in legislation defining provincial offshore areas, in jurisdictional agreements with the Government of Canada, and in the issuance of permits for private exploration rights. It is abundantly clear that the provinces understood that in concluding the 1964 Agreement they

undertook to be bound by its terms.

Now, Nova Scotia's conduct has been clear, it has been consistent, and it has been unequivocal. From the conclusion of the 1964 Agreement to the present day, Nova Scotia has, in good faith, openly and with precision applied its boundaries as established in the 1964 Agreement, for all purposes relating to offshore mineral rights.

New Brunswick, Prince Edward Island and Quebec all continue to respect, apply and rely upon the boundaries established in 1964.

Of the five parties to the 1964 Agreement, only Newfoundland, and only relatively recently, has ever indicated that it does not consider itself bound by the 1964 Agreement, or suggested that the boundaries of its offshore area could be other than those established in the 1964 Agreement.

Nonetheless, the facts set out and reviewed in our written briefs clearly show that Newfoundland considered the 1964 Agreement to be binding when it entered into it, and applied the agreed boundaries in its own practice after the 1964 Agreement was concluded.

Indeed, Mr. Chairman, members of the Tribunal, Newfoundland still relies on the boundary when it is advantageous for it to do so, and has to Nova Scotia's

knowledge, never protested the consistent and public application by the other East Coast Provinces of the boundaries established in the 1964 Agreement.

The facts demonstrate that the Government of Newfoundland agreed to the boundary as defined in the 1964 Agreement, and as legislated in the 1988 Canada-Nova Scotia Accord Act, that it benefited from it over the years, both through the stability it provided in the development of the offshore oil and gas industry, and because defined boundaries were considered to be the sine qua non of the Provinces' claim as against the Government of Canada to jurisdiction over the offshore.

Now, however, Newfoundland and Labrador has decided that it would prefer a line other than the one it agreed to in 1964.

Mr. Chairman, members of the Tribunal, this case is only about delimiting Nova Scotia's and Newfoundland's respective rights under the existing valid regime of joint federal-provincial administration and revenue sharing to which I referred earlier.

It is not, it is not, as Newfoundland argues, about the Canadian Constitution. It is not, as Newfoundland menacingly submits, about Parliamentary supremacy.

In its very selective account of the history of the development of interprovincial offshore boundary,

nonetheless wished to conclude an agreement on boundaries.

Among other reasons, because they recognized that the jurisdictional battle with the federal government, as all constitutional battles, as we Canadians know so well, would be long term. I remind you that in this case it took 20 years for Nova Scotia and Newfoundland and Labrador to conclude even their offshore accords with Canada. And the provinces also wished to get on with managing the growing interest from industry to explore the offshore areas that they claimed for themselves.

Federal approval, as manifested by legislation under the BNA Act, 1871, was regarded as a useful means of sealing the deal between the provinces and Canada, not the Agreement between the provinces themselves.

By altering the provinces' boundaries so as to encompass the offshore, such legislation would presumably have enshrined their ownership rights to the offshore. That's what they were about.

In some, the communique discloses that the provinces regarded their offshore boundaries as a matter that could be agreed among themselves, and that was in fact agreed among themselves at the conference for a variety of purposes, one of which was so as to be able to support their claims to ownership, vis-a-vis the Government of Canada.

Two days later, on October 2, 1964, Premier Stanfield of Nova Scotia wrote to the Atlantic Premiers, enclosing quote "a summary of matters discussed at the Atlantic Premiers Conference." That is our Annex 26, and Newfoundland's document 13. And I believe that's apparent -- yes, our Annex number is mentioned on the slide, the hard copy of which you should have. Source Annex 26.

Now, the document enclosed with that letter, which is also found under Annex 26, is entitled "Matters Discussed at the Atlantic Premiers Conference in Halifax, et cetera, Requiring Further Action." That document records under the heading "Submarine Mineral Rights and Provincial Boundaries" the following: I do not think it could have been stated more clearly. The conference agreed on the marine boundary lines between each of the provinces.

Again, at page 2, paragraph 3 of our Annex 26, the conference agreed on the marine boundary lines between each of the provinces.

Further on in the document, under the heading "Action", the document states, yes, Premier Stanfield of Nova Scotia will prepare a presentation to the pending Federal-Provincial Conference, setting out the position of the four provinces with respect to mineral rights, and again, the agreed marine boundaries.

I think it bears reiterating, what were those

boundaries? The boundaries that are stated at the outset, the conference agreed on the marine boundary lines between each of the provinces.

In this document one has an explicit statement of the agreement on boundaries concluded by the premiers at their conference of September 30th, not as a subsidiary component, or a -- of a broader proposal as alleged by Newfoundland, but as a discreet agreement that stands alone, separate from the provinces' position with respect to submarine mineral rights. And separate as well from the action item, which they -- which is called "A Presentation to be Prepared".

Now, the presentation setting out the parties' position on jurisdiction to the offshore is, as the document makes clear, a matter quote "requiring further action". It is something to be done. I think here we -- we need not parch the meaning of "be" and "are" and "is" and "it". It's much more clear in this document. All right.

Action, prepare a presentation that requires further action. On the other hand, the boundaries are declared, as we have seen, to be agreed. They are a fait accompli. I trust the court reporter won't have trouble with my French.

Even the envisaged presentation to the federal

government was to distinguish between setting out quote "the position of the four provinces with respect to submarine mineral rights", on the one hand. And on the other hand, quote "the agreed boundaries."

I apologize if this is repetitive, but I think it bears repeating, given the nature of the dispute. I think the document is clear, and I think it speaks eloquently to the fact that these boundaries were agreed, the premiers considered them agreed, and that Agreement they considered to be separate from any question of jurisdiction, and from any presentation to be prepared for the federal government.

PROFESSOR CRAWFORD: Mr. Drymer?

MR. DRYMER: Yes, Sir.

PROFESSOR CRAWFORD: I'm a little interested in the way the presentation to the Quebec government --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- in the letter of 2 October 1964, which was signed by Mr. Stanfield.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: And to which I infer he attached the agenda.

MR. DRYMER: What was attached to -- now I was just speaking of the letter of October 2, '64.

PROFESSOR CRAWFORD: That's right.

MR. DRYMER: It is our Annex 27.

PROFESSOR CRAWFORD: Yes.

MR. DRYMER: It's Newfoundland's document 12.

PROFESSOR CRAWFORD: Yes.

MR. DRYMER: What was attached to that letter, three items; (a), the statement setting out the position of the four Atlantic Provinces, that was the communique.

PROFESSOR CRAWFORD: That was the communique?

MR. DRYMER: Yes, sir. (b), the description was the notes re boundaries; (c), a map showing the proposed boundaries, that was the 1961 map that we saw earlier.

PROFESSOR CRAWFORD: So they were the three documents attached?

MR. DRYMER: Yes, sir. And I can tell you that in our filing, you will find attached exactly as it was found in our files, the communique. Now that's all you will find -- excuse me. That's not all you will find attached. You do not find the notes re boundaries, those seem to have been misplaced. But you do find a reference to the attached map, and it's a page that says simply "This map is in your conference files." So attached to this letter was the communique.

PROFESSOR CRAWFORD: The letter of 2 October 1964 refers to proposed marine boundaries.

MR. DRYMER: Yes, sir.

PROFESSOR CRAWFORD: How do we explain that?

MR. DRYMER: Simply by virtue of the fact that as of that date, the boundaries had yet to be approved by Quebec. Before they could be approved they had to be proposed.

I remind you that the conference two days earlier had been attended only by the four provinces, not Quebec.

PROFESSOR CRAWFORD: So he was being polite?

MR. DRYMER: Yes, sir. He was proposing that Quebec agree to these boundaries.

PROFESSOR CRAWFORD: He -- he could have said, well we've agreed upon them, and we -- we invite you to sign up?

MR. DRYMER: Well that's not our way in Canada.

PROFESSOR CRAWFORD: No, I understand that.

MR. DRYMER: Certainly not vis-a-vis Quebec.

PROFESSOR CRAWFORD: And certainly not in 1964.

MR. DRYMER: No. Maybe later. Yes, sir.

MR. LEGAULT: I don't have the document before me at the moment, but according to a note I have here, the letter of October 2 from Premier Stanfield to Premier Lesage --

MR. DRYMER: Yes, sir.

MR. LEGAULT: -- has a bullet (a)?

MR. DRYMER: Yes.

MR. LEGAULT: Where there is a reference to proposed boundaries that does not refer to Quebec in any way, but refers rather to proposed boundaries of Nova Scotia, New

Brunswick, Prince Edward Island and Newfoundland. So that without regard to Quebec's accession to any agreement, the inference here appears -- I ask you if this is the case, appears to refer to the boundaries of the four provinces who purportedly agreed to these boundaries as proposed boundaries? Is that correct? And if so, would you have any explanation for that?

MR. DRYMER: With respect, Mr. Legault, would it assist you to have a look at the document? I give you not my copy, but from the Newfoundland Memorial? It's clean. I don't see the reference that you are referring to in the document, to tell you the truth. The bullet items (a) --

MR. LEGAULT: Yes.

MR. DRYMER: Oh yes, excuse me. Item (b), pardon me. Description by metes and bounds of proposed marine boundaries of the Provinces of Nova Scotia, yes, and a map showing the proposed boundaries. Yes. Excuse me.

MR. LEGAULT: Yes.

MR. DRYMER: Yes. Well my answer to that is, as I mentioned a few moments ago to Professor Crawford, vis-a-vis Quebec these were proposed.

MR. LEGAULT: No. No. I'm sorry, Mr. Drymer. At least, if I'm understanding this correctly, and please feel free to correct me if I'm not. The --

MR. DRYMER: Easier said than done.

MR. LEGAULT: -- reference is to proposed boundaries without regard to Quebec. Proposed boundaries of Nova Scotia, I'm sorry, where is this? Proposed boundaries of Nova Scotia, New Brunswick --

MR. DRYMER: Yes.

MR. LEGAULT: -- Prince Edward Island and Newfoundland. So I understood you a few moments ago to say that vis-a-vis Quebec, the boundaries could only be proposed --

MR. DRYMER: Yes.

MR. LEGAULT: Quebec -- because Quebec hadn't signed on.

MR. DRYMER: Yes.

MR. LEGAULT: But these four provinces are the provinces who, I understand it, are supposed to have signed on to agreed boundaries --

MR. DRYMER: Yes.

MR. LEGAULT: -- and not proposed boundaries.

MR. DRYMER: All right. Let me -- I think I can explain that. And I think it is exactly as -- perhaps I wasn't clear enough earlier on.

As the letter to Premier Lesage makes clear, the provinces had agreed their boundaries, and then they proposed them to Quebec. If you continue in this document, if I may, Mr. Legault?

MR. LEGAULT: Yes.

MR. DRYMER: Two paragraphs further on, I will read this to

you, and if you like I will -- I could provide you with a clean copy. "The conference agreed that I should advise the Government of Quebec..." -- let me back up. In the earlier sections of this document, Premier Stanfield is addressing himself to the Premier of Quebec to say, here are the boundaries. Now, he wouldn't be proposing his boundary with Newfoundland to Quebec. That would make no sense. What he is proposing is that Quebec sign on to this overall Agreement, number one.

Number two, later on in the document, he says, as we have seen a few moments ago, this is the second to last paragraph on page 1 of this document gentlemen, "The conference agreed that I should advise the Government of the Province of Quebec of our stand on the matter of mineral rights, and of..." this is important, "...the marine boundaries agreed upon by the Atlantic Provinces."

This document states clearly the Atlantic Provinces have agreed on their marine boundaries. Now they are being proposed to Quebec. And I would submit that Premier Lesage's response is telling in this regard as well. I quote from our Annex 28, I'm not sure if we are in sync with my slides, but I don't think it matters at this point. Our Annex 28 is Premier Lesage's telegram.

In response to Mr. Stanfield, "I'm happy to let you know that the Province of Quebec is in agreement with the

Atlantic Provinces on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic Provinces." I think it can't be more clear.

PROFESSOR CRAWFORD: Thank you very much, Mr. Drymer.

MR. DRYMER: You're welcome.

PROFESSOR CRAWFORD: Why was Quebec not asked to the Atlantic Premiers Conference?

MR. DRYMER: I think they simply had no place. This was an annual conference, a regular event attended by the premiers of these four provinces. I think you would have seen a -- well, it's not an Atlantic Province -- the point is that you would have seen a footnote in our -- well, here is another distinct feature of Canadiana. You would have seen a footnote, I think, in our Memorial telling you that the Maritime Provinces are New Brunswick, Prince Edward Island and Nova Scotia. The Atlantic Provinces are those three plus Newfoundland. I only learned that myself a couple of years ago, I admit. And the East Coast Provinces was a different forum -- less formal.

I don't think there are annual meetings of the East Coast provinces, but the reference to the Atlantic region includes those four provinces and those four provinces alone, presumably, because other than the fact that Quebec and Newfoundland dispute the border of Labrador, Quebec does not have an Atlantic coast.

PROFESSOR CRAWFORD: If I wanted to reach a formal agreement in international law on the boundaries of a group of States, I would invite all the States. I mean, I wouldn't reach an agreement without one of them, even if I subsequently wanted to write to them and say, oh, I understand that this is going to be okay with you from other sources. Is it? I mean that would -- in international law, that would be a good recipe for being slapped in the face because you hadn't invited the State concerned.

MR. DRYMER: Well --

PROFESSOR CRAWFORD: And we are supposed to be applying international law. I see that there was a structure of --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- Atlantic Premiers' meetings --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- and in the nature of things, they understood that Quebec would go along with it.

MR. DRYMER: Well, excuse me. Yes. Yes, they had hoped that Quebec would go along, but as we have seen, the forum in which the agreements were shaped, as among the Atlantic provinces, was this Annual Conference of Premiers. But throughout the period, that conference was in communication with Quebec.

I cannot tell you why they chose to do it this way

rather than convene an extraordinary session of the East Coast provinces. You say under international law, this would be a recipe for disaster. I'm not sure whether inviting Quebec to a meeting of the Atlantic provinces wouldn't also have been a recipe for disaster.

In any event, this is the way they did it. They agreed amongst themselves; they proposed the boundaries to Quebec and Quebec's response, I think, could not have been less unequivocal -- less unequivocal. Excuse me. What does "not" mean?

The Province of Quebec acceded to the agreement by means of this telegram in which Premier Lesage, the head of government, states that "I am happy to let you know that my province is in agreement with the Atlantic provinces' stand on submarine mineral rights and also on the marine boundaries agreed upon by the provinces."

And, as you will see over the course of the next day and a half or so and as you have seen in our written materials, Quebec itself defines its boundaries according to these agreements on maps relating to oil and gas, on maps that emanate from their Ministry of the Environment. This is what Quebec uses to this day.

PROFESSOR CRAWFORD: I understand that there is reference in the papers to a map produced by Quebec within their Minerals Department or whatever --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- around 1960 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- which was, to all intents and purposes, the --

MR. DRYMER: The same.

PROFESSOR CRAWFORD: -- the same as on the 1961 map.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: Have we found that map?

MR. DRYMER: No, sir. I can find you the reference if you want.

PROFESSOR CRAWFORD: No, no, I'm familiar with the reference.

MR. DRYMER: Okay.

PROFESSOR CRAWFORD: I just noted that the map itself hadn't been --

MR. DRYMER: Yes. There's a reference that Quebec had prepared its own version and that it happened to concord -- to accord with what the Atlantic provinces were working on during this negotiation phase, but Nova Scotia has not found a copy of that map, and I presume the same could be said for Newfoundland and Labrador.

Now I will have to have Jean tell me what slide we're meant to be at, but I don't think that matters. We're referring to the Matters Discussed Memorandum, and if

you'll permit me to take you back there, gentlemen, there's one final point I would like to make.

I hade been distinguishing, as the Premiers themselves did, between the question of their position on submarine mineral rights and their agreed boundaries. Newfoundland, as you know, has disputed the meaning of the term "agreed". We haven't gone beyond that, but we'll bring our dictionary tomorrow.

Now lest there be any doubt that the Premiers themselves understood what they meant when they referred to "agreed boundaries" as opposed to a simple political understanding or a negotiating proposal or a quote "common position" unquote to be presented to the federal government, as Newfoundland would have it and as they claim at paragraph 33 of their Memorial, you will see that the very next item in the Matters Discussed Memorandum, which has nothing to do with the issue we're talking about, states -- item 4: "The conferences discussed a common approach to economic development in the Atlantic region."

Now I submit to you that the Premiers themselves understood the distinction between an agreement and between a common position, and they understood then, as we understand today, that an agreement means an agreement.

Finally, I was going to address, gentlemen, the issue

of the word "proposed" in this document, but I believe that we have covered that, unless you have further questions on the subject.

PROFESSOR CRAWFORD: Sorry. The word "proposed" in the --

MR. DRYMER: Yes, in the Matters Discussed --

PROFESSOR CRAWFORD: In the Matters Discussed --

MR. DRYMER: -- document, sir. That's 26, I believe, of our Annexes, and 12 of Newfoundland's documents.

PROFESSOR CRAWFORD: Presumably, you would say the same thing about this in the context of the approach to Quebec? This was a proposal for their agreement?

MR. DRYMER: Absolutely. And I think it's absolutely clear in this agreement, as well, the distinction between -- yes, excuse me, at page 2 under "Action" again, it's to be done. All right. "We'll ask the Province of Quebec to support the stand of the four Atlantic provinces", et cetera, the point being that it remained for Quebec to approve these boundaries, and before they could be approved by Quebec, before the agreement could be acceded to by Quebec, it had to be proposed to Quebec, and that's what happened.

PROFESSOR CRAWFORD: So the agreement, and also the communique, distinguished between certain areas which are to be inland or territorial waters and certain areas further out. I suppose the distinction is slightly

clearer in the communique, though it's also in paragraph 3 of the Matters Discussed document.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: And the proposal is that Canada should assert internationally --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- the Gulf of St. Lawrence to be what international lawyers call internal waters. That is, they would be part of Canada properly, so called, and not offshore areas, not even territorial waters. I mean the territorial sea is drawn from the line which encloses internal waters.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: Was any -- is there any evidence that any thought was given as to where the closing line would be for internal waters if the Gulf of St. Lawrence -- and it refers to the Gulf of St. Lawrence including --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- Cabot Strait. So where was the line to be? I mean, it's relevant to the question why the line stops on the map where it does.

MR. DRYMER: Yes. The best evidence we have and the only evidence that I think anybody in Canada could uncover regarding the extent of our country's claim at that time is in Annex 144 of our materials that was filed with our

Counter Memorial.

PROFESSOR CRAWFORD: Annex?

MR. DRYMER: 144. All right. And in the documents which I believe were sent to the Tribunal, as well, yesterday, omitted from our Annex 144 is a map that shows the area of the Gulf and the Cabot Strait and the Laurentian Channel out to the Atlantic Ocean showing the fisheries closing lines at the mouth of the Gulf. Now there are only fisheries closing lines, but the implication is that the Gulf was inside that line, although the claim has never been defined as such. Cabot Strait itself, however, is clearly outside that line. Is that of assistance to you?

PROFESSOR CRAWFORD: We have firsthand evidence on the Tribunal of --

MR. DRYMER: That's why I stopped when I did.

PROFESSOR CRAWFORD: But it sounds like for the purposes of this agreement --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- if that's what it was, that the internal waters to be proclaimed would include Cabot Strait as part of the Gulf of St. Lawrence.

MR. DRYMER: Oh, I think not.

PROFESSOR CRAWFORD: Sorry.

MR. DRYMER: Actually, because if I may point out, I can walk with this microphone, if I may -- the fisheries

closing line was approximately here. Cabot Strait extends out here, all right, both inside and outside the closing line. I don't think that -- we have found no definition of the term "Cabot Strait", but I do not think, on the other hand, that there's any evidence that Canada's claim ever extended to Cabot Strait as it appears on certain of the maps. That is well outside the closing lines.

PROFESSOR CRAWFORD: I have no -- yes, I mean that may well be right about the Annex 144 that you referred us to.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: The point I'm making is that the Atlantic provinces were saying that Canada should declare as internal waters the Gulf of St. Lawrence including inter alia Cabot Strait --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- and therefore, they must have had, even if only embryonically in mind, the idea of a closing line somewhere which would incorporate Cabot Strait within the Gulf of St. Lawrence's internal waters, and --

MR. DRYMER: They may have had such in mind, Professor Crawford, but I am unaware, Nova Scotia is unaware of any such claim ever being made by Canada.

PROFESSOR CRAWFORD: No. Sure.

MR. DRYMER: And, moreover, the last turning point on the line, which even Newfoundland does not dispute, is well

outside the closing line and there is no dispute, either, that from that point the line runs somewhere. I think we're well outside, far outside any potential claim, but as I've said, no claim was ever made out there.

PROFESSOR CRAWFORD: The final defined turning point is in Cabot Strait, is it not?

MR. DRYMER: As I said, it is unclear. Cabot Strait appears on certain of the maps further in, on certain of the maps further out. Certainly, it straddles the fisheries closing line that you see on the map in 144. Does it extend that far? I haven't found a definition for you.

PROFESSOR CRAWFORD: And you would say that whatever the position was, you couldn't possibly have regarded the end of the line on the 1961 map as --

MR. DRYMER: Territorial. Oh, of course.

PROFESSOR CRAWFORD: -- territorial? It was well beyond anything that could be --

MR. DRYMER: Clearly.

PROFESSOR CRAWFORD: -- even a plausible closing line?

MR. DRYMER: Absolutely.

PROFESSOR CRAWFORD: So on any view, that map went beyond territorial waters as described in the communique?

MR. DRYMER: Sir, that's precisely the point we make in our Counter Memorial. In using those terms, the Premiers did not, as far as we know, intend any technical meaning --

technical, international, juridical meaning to those words. In any event, as you say, the line extended far beyond any plausible claim and certainly, certainly far beyond any claim ever actually made by Canada.

If I may, I would like to consider now the actual boundaries determined by the Premiers in the 1964 Agreement.

I mentioned earlier that the 1961 Notes re Boundaries and Map would be considered further on in my submissions. I have arrived at that point now. Having considered a run-up to the September '64 -- September 30th, 1964 conference, having considered the -- excuse me, the events of that conference, and the Agreement as declared by the Premiers in their communique and matters discussed, I turn now actually to the boundaries.

Now, the first point is obvious by now, that the boundaries that the Premiers unanimously agreed were set out in the Notes re Boundaries, and depicted on the map that originated in 1961.

The first point to note about these boundaries as described in Schedule "A" to the Premiers' communique, is that they explicitly apply only to mineral rights, and to mineral rights as between the Provinces.

Again, I would make the point that we are not talking about altering by agreement of the provinces their

boundaries under the Constitution. The supremacy of parliament is not being challenged. It does not enter into the picture whatsoever. They are delimiting mineral rights as between the provinces.

The Agreement goes on to described each province's boundaries relative to every other province with which it shares a boundary by means of a series of turning points and straight lines joining those points. That is, by metes and bounds, as it is commonly understood.

Section 1, entitled "Boundary of Nova Scotia" which I am sure you are all familiar with, describes the boundary of Nova Scotia with its -- with the neighbouring provinces of New Brunswick, PEI, Quebec and Newfoundland respectively.

The boundary of Nova Scotia -- excuse me. Nova Scotia's boundary with Newfoundland is described as follows: I will not run through the entire description, but focus on the last portion. "Thence southeasterly to international waters."

Section 6 of the agreed boundary description, which is the boundary of Newfoundland, describes that Province's boundary with Nova Scotia even more precisely. From the common -- from the tri-junction point with Nova Scotia and Quebec, southeasterly to mid point between St. Paul Island and Cape Ray, southeasterly to the mid-point between Flint

Island and Grand Bruit, which must have been Grand Bruit at some point. Thence southeast to international waters. From the last turning point, therefore, the agreed Nova Scotia-Newfoundland boundary is stated to run southeasterly southeast. It is stated two ways to international waters.

As discussed in our Memorial and Counter Memorial, this description clearly and accurately describes a line covering the full extent of the continental shelf over which Canada could claim rights at the time. A boundary running southeast, that is along an azimuth of 135 degrees.

I propose now to address the matter of the accession of Quebec to the Agreement, though I question whether there is much more to be said after our discussion earlier on.

PROFESSOR CRAWFORD: Yes, and maybe -- I'm sorry if I took --

MR. DRYMER: No, that's quite all right.

PROFESSOR CRAWFORD: Took that out of order. Is someone going to -- I suppose at a later stage someone will come back to the question of the -- the more precise determination of the turning points and so on?

MR. DRYMER: Yes. That exercise, which as you will recall, took place in the period '68-69, and was formally approved

by the Premiers of the East Coast Provinces in '72, will be addressed by my colleague, Mr. Bertrand.

I don't think that there is much left for me to say about the accession of Quebec that would not be repetitive at this point.

CHAIRMAN: I wonder if this might be a convenient time for a break, or do you have a better --

MR. DRYMER: Absolutely. No, sure. This is very suitable.

CHAIRMAN: The reason I do that is that 4:30 is pretty strict so far as I am concerned.

MR. DRYMER: I understand. This suits me fine. Thank you, sir.

(Brief recess)

CHAIRMAN: Yes, Mr. Drymer.

MR. DRYMER: Thank you, Mr. Chairman. Gentlemen, I will not address the argument that I had intended regarding the accession of Quebec since many of the points have already been covered. I would simply recap by reminding the Tribunal of the terms of Mr. Stanfield's request to the province. The conference agreed that I should advise the Government of Quebec of our stand on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic Provinces.

We proposed those boundaries to Quebec, and Premier Lesage's response several days later was I'm happy to let

you know that the Province of Quebec is in agreement both with the Atlantic Provinces on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic Provinces.

There is one further point that I would like to make regarding this correspondence, something that was not touched on earlier. The letter from Premier Stanfield to Premier Lasage, that is, I remind you again, our Annex 27, Newfoundland's Document 12.

In the first paragraph it states, I introduce -- that is I, Premier Stanfield -- you will recall that at the federal-provincial conference held in the city of Quebec, I introduced the matter of submarine mineral rights and asserted that those rights would be vested in the provinces.

The important line is the next one. This matter, that is the matter of submarine mineral rights and the assertion that those rights would be vested in the provinces, quote "is one of the items on the agenda for the next federal-provincial conference." I submit that that is important to bear in mind as we consider now the issue of the Joint Submission presented by the Atlantic Provinces to the federal-provincial conference of Prime Ministers on October 14 and 15, 1964.

The conference was convened in Ottawa on October 14,

15, 1964. And in attendance were the Prime Ministers or the First Ministers or the Premiers of the provinces and the Prime Minister of Canada.

As mentioned, among the items under discussion was the matter of submarine mineral rights and the provinces' assertion that these rights should be vested in the provinces. As agreed by the Premiers on September 30th, Premier Stanfield -- yes, he made the presentation, but he made the presentation that was explicitly attributed to the Provinces of Nova Scotia, New Brunswick, PEI and Newfoundland. And he explicitly stated that his presentation was made on behalf of the four Atlantic Provinces pursuant to agreements reached at the conference held in Halifax on 30th September of last.

The Joint Submission represents the first practical application by the provinces of the boundaries established in the 1964 Agreement. The Joint Submission distinguished, as had all previous documents and correspondence, the questions with which we are concerned as follows: a) proprietary rights and submarine minerals as between Canada and the provinces, and b) boundary lines between the provinces.

Annexed to the Joint Submission, which is Annex 31 of our documents and it is Newfoundland document 15 -- annexed to the Joint Submission were the notes re

boundaries containing the description of the boundaries established by the Premiers and the accompanying map.

The Joint Submission provides additional evidence regarding the formation, nature and scope of the 1964 Agreement. Here we have in effect the full text of the boundary descriptions agreed by the provinces annexed to a formal submission by the provinces to a conference of Prime Ministers relating to a claim for proprietary rights and submarine minerals, whatever the extent and nature of those rights may be. Yet a reading of the submission reveals that it was concerned principally not with how to determine boundary lines between provinces but as its title, and as the federal-provincial nature of the conference suggest, with the determination of proprietary rights and submarine minerals as between Canada and the provinces.

Again, these two matters, these two processes were distinct although the fact that the provinces had agreed their boundaries -- the fact that they had agreed their boundaries for the purpose of delimiting their respective rights is referred to in the Joint Submission, providing we submit further proof that Newfoundland's theory that the boundaries were merely a proposal is fundamentally incorrect. The focus of the provinces' submission at the Ottawa conference was their jurisdictional claims against

the federal government. This was a matter as between the provinces and the federal government, that is a proper matter for a federal-provincial conference of Prime Ministers.

In this context, that is in the context of a submission concerned with proprietary rights as between Canada and the provinces, interprovincial boundaries were relevant insofar as they could serve as a means of enshrining the provinces' jurisdictional claims.

A reading of the Joint Submission demonstrates that it was not at all concerned with the location of the provinces' offshore boundaries. This had been determined already by the provinces two weeks earlier on September 30th. However, the Joint Submission represents the use of those boundaries in support of the provinces' claims vis-a-vis Canada, as had long been contemplated.

Specifically, the provinces sought the incorporation of their agreed boundaries into legislation, the idea being that by altering the provinces' territories to encompass the offshore, such legislation would formalize the federal government's acceptance, or approval, or recognition or agreement of provincial rights as the agenda says, as between Canada and the provinces.

The Joint Submission is eloquent and telling proof of the principle that delimiting boundaries was, again as

Newfoundland itself recognizes, regarded as necessary inter alia to assist in the provinces' claims to offshore ownership, not the reverse. The Joint Submission, as I mentioned, reflects the practical application of that principle. The provinces agreed their boundaries, then they used them to assist in their claims, vis-a-vis the government of Canada.

At all times, both prior to and after September 1964, an agreement among the provinces and an agreement between the provinces and the Government of Canada, which of course was the objective of the Joint Submission were regarded as distinct, as I have said, both temporally and conceptually.

CHAIRMAN: I wonder if you can't carry that -- or if you are not carrying it a little far.

Obviously, you are in the provinces here, and there are hopefully resources around you. The first thing you have got to have is some title to that.

Obviously, if there are a number of provinces, you have got to have a division. What they wanted was the resources. They wanted, I am sure to push the Feds into these -- into giving them up. And they had to have a division between them in order not to have -- well to permit the oil companies. Isn't it really -- there may be two facets to it, but at the end of the game, isn't that

the reality of it, that they want the resources and they feel that it is convenient to divide them.

MR. DRYMER: I will say yes. But I will also say that there are several facets.

CHAIRMAN: Yes and no.

MR. DRYMER: No, I won't say no. I will say that there are -- I think there are several facets to your question. The answers to which are all I think yes. Yes, they wanted to delimit their boundaries so as to make their claim vis-a-vis the Feds easier to -- more credible, let's say. Certainly more palatable to the federal government than dealing with five provinces individually.

However, yes, they also needed to agree boundaries for various reasons, including the need to deal with interest being expressed already by oil companies. And I think history, yes, again, has proved that even in the absence of title to those resources, the boundaries agreed by the provinces have stood the test of time and have proven that the provinces were right to do things as they did. The provinces do not have title today. They abide by their boundaries. And it's thanks to those boundaries that they are able to exploit and explore as they do.

PROFESSOR CRAWFORD: Just reading the submission, if you haven't looked at the map, you would have thought that the submission related almost exclusively to territorial

waters or at least to waters which were arguably inland.

This continual reference to submarine lands being contiguous to a province, for example, on page 1 of the submission and again on page 3 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- happens twice. And then it says on page 3, towards the bottom of the page, the Atlantic provinces certainly exercise jurisdiction over contiguous marine and submarine areas before they respectively entered into Confederation with the other provinces.

Now that may well have been true about immediate offshore areas in terms of fisheries and even coal mines and so on, but it's most certainly not true about the outer continental shelf in the Atlantic.

Again, do you think that it's not fair to say that the emphasis of the document was on inland and in effect on territorial waters?

MR. DRYMER: You have made it easy for me to answer this question with a yes. Yes, I think it is not fair to say that the focus was on inland waters and territorial waters, the provinces claim to the offshore. But they were proved wrong, of course, by the Supreme Court of Canada, twice, many years later. But the provinces claimed to contiguous resources was, as far as they were concerned, contiguous up to 200 miles offshore.

PROFESSOR CRAWFORD: But where is the evidence of that in this document?

MR. DRYMER: Well in this document --

PROFESSOR CRAWFORD: The evidence is the map, you would say?

MR. DRYMER: Not exclusively, Professor Crawford. I would refer you, as well, to the conclusion.

Now the page numbering in our document and in the document filed by Newfoundland is slightly different.

PROFESSOR CRAWFORD: Right.

MR. DRYMER: But it is the second to last paragraph.

PROFESSOR CRAWFORD: Right.

MR. DRYMER: It begins, in conclusion, the Provinces of Nova Scotia, New Brunswick, PEI, and Newfoundland, assert that the provinces are entitled to ownership and control of submarine minerals underlying territorial waters, including as we have seen language we explored earlier and that dates back many years, including subject to international law areas in the Banks off Newfoundland and Nova Scotia.

PROFESSOR CRAWFORD: There is no mention there to 200 miles or anything like that?

MR. DRYMER: No, sir. No, sir.

PROFESSOR CRAWFORD: That would have been an anachronistic. There was no 200 miles in 1964.

MR. DRYMER: Correct. My point earlier was simply that the

provinces claims to minerals in the shelf contiguous to their area was not restricted to three miles, or 12 miles, or to any particular limit as defined by them.

PROFESSOR CRAWFORD: The second point, which is straightforward I guess, on page 4 where the word, "tentative boundaries", I mean in what sense -- how do you explain the word "tentative" in the light of your argument that these are already agreed?

MR. DRYMER: I think there are two explanations for the word "tentative". Tentative, because again I think history has proved the provinces right, it remained for the precise technical coordinates to be assigned to the turning points.

Tentative, as well, I would remind the Tribunal, in this context of a submission to the -- excuse me, to the federal government. These are the provinces that they are asking the federal government to accept as the basis of delimiting federal versus provincial rights. In that context, as well, they could have been regarded as tentative.

Again, the Joint Submission, Professor Crawford, was an example of precisely one of the uses to which the provinces had long intended to put their agreement on boundaries. It is an example of one of the reasons for their having decided quote "first of all, to agree among

ourselves," which they did on the delimitation of their respective rights. As at all times prior to and after September '64 in this document you will find proof that an Agreement among the provinces and an Agreement between the provinces and Canada were distinct.

Ultimately, the significance of the discussion of boundary lines between provinces in the Joint Submission is the following, it boils down to this. In the provinces' view, they are a matter for agreement between the provinces concerned. They have been agreed among the provinces concerned, and I quote from the document, to assure all of the provinces that their position in respect of ownership of submarine mineral rights will be acknowledged and respected by Canada, they should be legislated under Section 3 of the BNA Act. Again, the boundaries here are simply being put to use in support of their claims to proprietary rights in submarine minerals as between Canada and the provinces.

There is nothing here -- I will say it again, there is nothing in the Joint Submission to suggest that the provinces' boundary agreement was conditional or in any way dependent on federal approval, or recognition, or acceptance, or agreement of the provinces' jurisdictional claims.

Delimiting boundaries was regarded by the provinces as

necessary among other things to assist in their claims to offshore ownership, not the reverse. And the Joint Submission provides compelling evidence of the provinces' views in this regard.

Before concluding my submissions regarding this significant event and this document, many of which have been covered in the questions that have been asked by the Tribunal, I would like to refer quickly and finally to the matter of the geographical scope of the rights asserted by the provinces.

As we have seen, the penultimate paragraph refers to areas in the banks off Newfoundland and Nova Scotia in the context of a claim to jurisdiction vis-a-vis the federal government. As noted, the provinces requested the government, the federal government, to constitutionalize their agreed boundaries so as to encompass the offshore area claimed by them as a means of delimiting federal versus provincial rights. The boundaries agreed by them must have extended as far as the rights that they purported to delimit.

CHAIRMAN: One of the things, and I suppose you can't give me an answer to that, but I wonder why they use terms like "international water", "banks of Nova Scotia". They knew perfectly well what the continental shelf was.

MR. DRYMER: I'm not convinced that at the time the full

extent of the territory of the continental shelf was --

CHAIRMAN: Oh, the full extent, no, but the term was --

MR. DRYMER: Oh, the term.

CHAIRMAN: The term and idea was then known, you know.

MR. DRYMER: Well, sure. They certainly --

CHAIRMAN: I remember those times.

MR. DRYMER: They certainly received excellent legal advice on the matter, but our view -- our view, as stated in our written submissions, is that the term "international waters" was not simply pulled out of a hat. Now it may not have been used in any technical sense, but the purpose of this agreement -- let's consider the context here. The provinces were claiming from the Government of Canada rights to offshore minerals in the continental shelf. They must have intended to claim and to delimit the full extent of that shelf, whatever that extent might be.

In that context, I submit that the term "international waters" must be understood as meaning the continental margin, the limits of Canadian jurisdiction over the continental shelf under international law.

PROFESSOR CRAWFORD: Yes. The oddity is that it never actually said so, they refer to the banks and so on. I mean the word "international waters", the normal contrast would be internal waters, and it's clear that they are intending to refer to internal waters. And yet, as you

say, it's clear that their agreement goes some way beyond internal waters. How far is the question, but it goes some way, whatever their intention must have been.

MR. DRYMER: Well, clearly, their intention was not internal waters. Clearly, their intention was not the last turning point, either, because from there it went to international waters. Now the Tribunal may ultimately disagree with our interpretation of what that means, but I submit that in the context, the only reasonable conclusion is that in the minds of the provinces, international waters meant the continental margin, the limits of Canadian state jurisdiction under international law.

If I may conclude, gentlemen, the contemporaneous written evidence of the 1964 Agreement, and specifically, of the provinces' intent to enter into a binding agreement establishing their boundaries is overwhelming, both in terms of the amount of such evidence and its consistency, as well, of course, as its weight.

The evidence of this intent from the period 1958 to 1964 includes the communique released at the conclusion of the September 30 conference, recording that the Premiers had quote "unanimously agreed the marine boundaries of the provinces". It includes the memorandum entitled "Matters Discussed", which states unequivocally "The conference agreed on the marine boundary lines between each of the

provinces."

It includes Premier Stanfield's October 2 letter to Premier Lesage of Quebec, seeking Quebec's concurrence with the marine boundaries agreed upon by the Atlantic provinces, and Quebec's accession to the 1964 Agreement, evidenced in Premier Lesage's response, in which Quebec notes its agreement with the Atlantic provinces on the matter both of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic provinces. Is this an innovation that you could not get into the Supreme Court, Justice LaForest? Is my time up?

CHAIRMAN: No, you have got another minute or two.

MR. DRYMER: I only have a minute or two. The evidence of events leading up to and surrounding the conclusion of the 1964 Agreement also has much to disclose regarding the nature and scope of the 1964 Agreement boundaries themselves, in particular, the line dividing the respective offshore areas of Newfoundland and Labrador, as well as their applicability to the jurisdictional regime that currently exists in 2001.

Then, as now, the issue revolved around the matter of permits to explore for oil and gas. The boundaries agreed by the provinces in '64 delimited the entirety of the continental shelf, subject, of course, to Canadian jurisdiction at international law.

The Nova Scotia/Newfoundland line delimited the provinces' respective offshore areas accurately and completely to the outer edge of the continental margin along an azimuth in the outer segment running southeast or 135 degrees.

Those boundaries were not dependent on acceptance or approval by the federal government or by any third parties. Delimiting boundaries was regarded as necessary to assist in the provinces' claims to offshore ownership, not the reverse. The boundaries were nowhere stated and never intended to apply only in the context of ownership of offshore mineral rights. They applied as between the provinces to delimit their respective rights to the mineral resources of the continental shelf, no matter the nature or degree of those provincial rights. They apply today in a context where clearly the provinces do not own those mineral rights.

All of this, I submit, gentlemen, will be demonstrated even more clearly by my colleagues this afternoon and tomorrow in the course of Nova Scotia's oral submissions during the hearing, and if the Tribunal has no further questions, that concludes my remarks.

CHAIRMAN: Thank you, Mr. Drymer.

MR. DRYMER: Thank you. If it please the Chairman, I would ask you to call upon my colleague, Mr. Bertrand, to

address you.

CHAIRMAN: Thank you.

MR. BERTRAND: Mr. Chairman, may I have your indulgence for a two-minute pause so that we can set up properly? We'll have to load the presentation and I will have to get wired.

Good afternoon, Mr. Chairman, distinguished panel members. My name is Jean Bertrand, and as already advertised by my colleagues, Messers. Drymer and Fortier, I will be addressing part of the subsequent conduct presentation of Nova Scotia's case.

I unfortunately have a lot ground to cover. We have the equivalent 30 some years to cover from 1964 to the present date. I doubt that we will be able to do that this afternoon. Let me just map out for you topics that I intend to address. And given the pace at which I will be able to go, I will be able to adjust accordingly, so that I still can fit my presentation within the time that I had projected initially.

The first issue that I would like to cover with you is the work of the JMRC, the Joint Mineral Resource Committee, that spanned between 1968 and 1972.

Secondly, I would like to deal more precisely on the Premier's meeting of June 17, 18 of 1972, where they agreed to the delineation of the boundary established in

1964 by approving the turning points that JMRC had prepared for them.

Thirdly, I would like to address the decision of Newfoundland to leave the common front of the eastern provinces and undertake separate negotiations with the federal government.

Fourthly, I would like to review briefly how Newfoundland and Nova Scotia have used the 1964 Agreement in their own legislation through implementation, the adoption of implementation statues with respect to the various agreements that they have concluded with the federal government over time.

Fifthly, I would like to look at the documents that Newfoundland says indicates clearly either an objection by that province to the 1964 Agreement, or an admission by Nova Scotia that Newfoundland did not feel that it applied to it.

Finally, if time permits, I would like to look at what use has been made by the parties of the 1964 Agreement in the context of being an agreement that serves other purposes than simply asserting a claim of full ownership over the offshore mineral resources.

First the work of the JMRC between 1968 and 1972. As was demonstrated by Mr. Drymer, the 1964 Agreement established interprovincial boundaries including the line

dividing the offshore areas between Newfoundland and Nova Scotia, on the basis of a description by metes and bounds represented on an attached map which is found at Annex 32, whether its with or without the "compass rose".

The precise technical coordinates of the boundaries remained affix by plotting the latitude and longitude of the turning points along the agreed boundaries. This technical exercise was necessary obviously inter alia so as to facilitate the granting and precise location of offshore exploration permits. And as Professor Saunders will explain to you tomorrow, soon after that 1964 Agreement was concluded, the provinces were out there issuing permits to allow industry to proceed with exploration of offshore mineral resources.

The JMRC was created as a result of a memorandum of agreement signed in Halifax on July 16, 1968. This is a document you will find under Nova Scotia's Documents, Annex 36. And that memorandum of agreement was signed by the five East Coast Provinces. The mandate of the JMRC is found in an attachment to the memorandum of agreement, which is found under Annex 36.

The purpose of the JMRC we can read in this document of July 16, 1968, is to initiate and foster cooperation among the provinces that are parties to the Agreement and the study of problems concerning the management of mineral

resources and the submarine areas or lands within the provinces and their common terrestrial border zones and to make recommendations to the government. So clearly the mandate of the JMRC went beyond a simple assertion of a claim of ownership over the offshore mineral resources.

Its very first meeting on July 16, 1968, JMRC established a sub-committee and five technical committees, and we find this evidence in the minutes of the JMRC, which are also found under Annex 36 of our documents.

PROFESSOR CRAWFORD: Can I just take you back to paragraph 5. Paragraph 5 refers to submarine areas within the provinces. I mean, I hope it's not reading too much backwards into history but it would have been very difficult to argue at the time when this agreement was concluded that the Continental Shelf as succinct from the territorial sea was within the provinces. The provinces may well have had jurisdiction over it. But I mean, international laws would have said in 1968 that the Continental Shelf was not within Canada, so how could it have been within the provinces?

MR. BERTRAND: Correct. I would refer you to the second section of the sentence. And in their common terrestrial border zones and to make recommendations with respect to these topics, I would think that we would not limit it then --

PROFESSOR CRAWFORD: But the problem with terrestrial is that it -- I'm not sure what common terrestrial border zones means but it's very odd to describe the Continental Shelf as a terrestrial border zone. I mean, it's just oddly drafted. It may just be a peculiarity that -- when they got to formalizing agreements and signing them that they didn't -- they got the language wrong. But it's very odd language for an agreement which is concerned with the exploitation of the Continental Shelf in terms of any understanding of what the Continental Shelf was in 1968.

MR. BERTRAND: I can only note that you are right in the sense that the language is peculiar. At this time I don't think I can offer anything else to help you in this regard. But if I may overnight think about it and maybe I may come back to it tomorrow morning.

CHAIRMAN: Would the Quebec approach to the Gulf of Saint Lawrence as being part of the territory of Quebec in some way shape or form, I thought there was some kind of thing, would that be -- because this emanated, I think, from Quebec, the expression, and that may have colored it, I don't know. I merely throw this out to you.

MR. BERTRAND: It may have had something to do with it certainly.

PROFESSOR CRAWFORD: Because it's clear by this stage that Mr. -- is it Allard, of Quebec, who is playing a very

leading role in the --

MR. BERTRAND: In the work of this committee, certainly.

PROFESSOR CRAWFORD: Was this document ever produced in French?

MR. BERTRAND: I don't believe it was.

PROFESSOR CRAWFORD: No. It would be interesting to see how they translated or how they rendered common terrestrial borders.

CHAIRMAN: I think it was thought in French.

MR. BERTRAND: I'm sorry?

CHAIRMAN: I think it was thought in French.

MR. BERTRAND: So at its first meeting the JMRC did create a sub-committee and a number of technical committees. One of the technical committees, which is now well known was the Boundary Committee and its precise mandate was to fix the precise delineation and description of the boundaries of the participating provinces and a -- in submarine areas. At the same meeting, several appointments were made, including that of the Chairman, Mr. Donald Smith and I mentioned that because you will see documents that refer to also another Chairman by the name of John Smith who was the Chairman of the Technical Committee.

MR. BERTRAND: The Vice-Chairman, as Professor Crawford pointed out, was Mr. Allard, thereby reflecting Québec -- Québec's keen interest in the matter.

Shortly after its creation, the Technical Committee members were informed that New Brunswick's Department of Natural Resources had completed the plotting of the turning points as described in the Agreement reached by the Atlantic Premiers back in July of '68.

It was said that the points had been calculated in latitude and longitude using a computer program, and those coordinates are found under Annex 39 of our documents.

These were initially distributed to the members of the Technical Committee on September 5, 1968, and we see that through Chairman Smith's letter to the various members of the committee, forwarding the list of coordinates.

Newfoundland, like other -- the other four East Coast Provinces, verified and confirmed that the latitude/ longitude coordinates conformed to the verbal description of its boundary in the 1964 Agreement. And we see for example, the letter that Mr. Lukins of the Government of Newfoundland, Mr. Lukins being Chief Engineer of the Minister -- Ministry of Mines, wrote to his Deputy Minister on January 7, 1969. He says I have separated out of the list those -- those points that refer to the boundary of Newfoundland. The points as circled on these plans agrees with the points as referred to in the description of the boundary of Newfoundland.

On January 17, 1969, the JMRC was presented with the

report of the Technical Committee of the Boundary Committee. And we see this in the minutes of the meeting which was held on January 17, 1969. And we can have a close look at it. And it is clear that the mandate of the committee was to precise the delineation of the boundary that had been agreed upon by the provinces back in 1964.

It says, The Committee has determined and agreed upon the location and methodology for the finding -- the turning points as described in notes re boundaries of mineral rights as between maritime-provincial boundaries, as set forth by the Atlantic Provinces' Premiers in 1964.

Now the report of the Technical Committee included first a list of the turning points as described in the 1964 Agreement. Secondly, their latitude/longitude coordinates as plotted by the Technical Committee, and third, a map depicting the result of the exercise.

I think it's worth having a look at the map, the actual map that was produced by the Technical Committee. It is a map which has been reproduced in the Nova Scotia Memorial under Figure 7.

It's a map that sets out all of the turning points described in the 1964 Agreement, and it has also -- it bears also a link between each of these points. And I think it's important to note that the line doesn't go beyond turning point 2017. And I will go back to that in

a minute.

That basic recital of events is not really challenged by Newfoundland. On these facts the parties pretty much see eye to eye. And we refer you to the various paragraphs of the Newfoundland Memorial, and Nova Scotia Memorial, the page numbers in section 2.

However, Newfoundland notes from the same facts, that the list of coordinates showed the most seaward extension of the line between Nova Scotia and Newfoundland as turning point 2017. And that statement is found at paragraph 45 of the Newfoundland Memorial.

Secondly, we can gather from the statements that are made in paragraphs 44 and 47 of the Newfoundland Memorial that it is Newfoundland's position that there was no follow-up to the work of the JMRC.

Our position vis-a-vis that is that Newfoundland's position on this account is baseless.

First, I intend to deal with turning point 2017. And Nova Scotia's position is that it is not the most seaward extension of the line.

First, we submit that we have to recognize that the mandate of the Technical Committee was limited to identifying and describing those turning points. And not actually drawing the full extent of the line agreed upon in 1964 on a map.

Secondly, it is true that turning point 2017 is the last turning point provided by the metes and bounds description of the notes re boundaries, which are found under Annex 18 of that copy, or as an attachment to the Joint Submission eluded to by Mr. Drymer a few minutes ago, which may be found under Annex 31.

But the 1964 Agreement does provide for a line that runs from turning point 2017, SE, which we believe to mean southeast to international waters. Turning point 2017 is in the notes re boundaries, the mid point between Flint Island and Grand Bruit.

And this is why, we submit, Tribunal members, that the depiction of the turning points and the 1964 line, which we have included as figure 8 in our Memorial, is an accurate depiction of the line established by the east coast provinces in 1964.

The line as we can see, does not stop at turning point 2017, because from there it goes southeast to international waters.

The second statement, or allegation of Newfoundland, is that there was no follow-up to the work of the JMRC. It is true that the JMRC had suggested at its meeting of January 17, 1969, that the turning points of the boundaries be approved by written agreement to be executed by all provinces concerned, and that this agreement be

confirmed by legislation. And we find this account of the meeting under Annex 41 at page 2.

It is also true that the Chair of the JMRC, actually the Vice-Chair of the JMRC, wrote to his colleagues on May 12, 1969, to seek among other things, an agreement of the provinces on the boundaries delineated by the turning points, which had just been completed by the Technical Committee, and sought also confirmation by Provincial and Federal Legislation.

And that letter is known as the Allard letter. And we can find it under Annex 43 of the Nova Scotia documents.

But nevertheless, the east coast provinces' Premiers did agree to these boundaries as described by the turning points developed by the JMRC at their June 17 and 18, 1972 meeting. This we submit is the follow-up to the work of the JMRC. Let us see how this came about.

And I now address the second topic that I would like to raise here today. The approval, the formal approval of the turning points by the Premiers of the east coast provinces. The JMRC met again on May 24, 1972. On this occasion, it agreed on eight principles relating to various aspects of their common provincial position on the offshore mineral resources.

After having adopted these principles, the secretary of the JMRC was directed to write to each of the five east

coast Premiers, asking that these principles be considered at their upcoming June 17, 18 meeting. The principles are listed in the minutes of this meeting and also are listed in the letter, which the secretary of the JMRC addressed to each of the east coast provinces' Premiers, including Premier Moores. And these documents you will find under Annex 44 and 46. Annexes 44 and 46.

Among these principles laid out in the letter is the fourth one, which states that the governments of the four Atlantic provinces and the Province of Quebec should confirm the delineation and description of the boundaries of the said five provinces in the submarine areas and the turning points in longitude and latitude relating thereto, as was requested by the Honourable Paul Emil Allard on May 12th 1969, then Vice-Chairman of the Joint Mineral Resources Committee.

A copy of the map, and I stress this part, a copy of the map showing the delineation and description of the said boundaries and the turning points is attached to the minutes. And at the outset of the letter, the secretary of the JMRC was saying that he was attaching a copy of the minutes with the letter.

So at the Premiers' meeting held on June 17th and 18th 1972, the first item on the agenda was the letter to the First Ministers from the Joint Mineral Resources

Committee, and that was the letter we just saw under Annex 46.

The First Ministers agreed then to the delineation and description of the boundaries developed using the turning points by the JMRC. Unfortunately, no minutes appear to have been kept of this meeting. Despite that, the Premiers' agreement with respect to this particular issue was recorded in a communique, which was issued following the meeting.

This two-page communique sets out by saying that it is issued following -- and we can hardly see, you can probably see it better on your monitors. It was issued following the meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Quebec.

It clearly states that the First Ministers agreed that a second item, the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these provinces.

We submit that the Premiers' agreement is also evidenced in the minutes of a subsequent meeting of the Premiers, which was held on August 2nd 1972. And the account of that later meeting is found under Annex 56.

PROFESSOR CRAWFORD: Mr. Bertrand?

MR. BERTRAND: Yes, Professor Crawford.

PROFESSOR CRAWFORD: Earlier on, counsel accepted the proposition or appeared to accept the proposition that your case stands on an agreement made in 1964, not subsequently, although of course, your position is that there is evidence of the existence and content of that agreement is provided by what happened subsequently, nonetheless the agreement dated from 1964.

And let us assume for the sake of argument that under the applicable law, whatever it may be, the Tribunal were to say that the agreement in 1964 was not definitive, because for example it was two imprecise, and that in order to have an agreement either under Canadian law or international law, you have to have a sufficient level of precision.

Clearly a lot of work had been done going into the 1972 meeting. And so any -- certainly as to the Gulf of St. Lawrence area any criticism about imprecision had now disappeared.

Is it your position that even if the Tribunal were to hold hypothetically that the 1964 Agreement was not a binding agreement by reason of lack of precision or for some other reason, nonetheless, this was not a sufficient agreement? I mean, I just wonder why you say so categorically that it was 1964 or nothing?

MR. BERTRAND: Well I'm not sure that we are saying it's 1964 or nothing. What we are saying is that it's 1964. And that in itself what happened in 1964 constitutes a binding agreement using the rules of formation of an agreement under international law.

If you are -- with all due respect, if you are telling me that this is not what the Tribunal is going to find and that you would be prepared to find the existence of that agreement, albeit with a date of execution eight years later, because some essential features were missing for a binding agreement to have occurred, then I will say well fine.

PROFESSOR CRAWFORD: I can assure you I'm not telling you what the Tribunal is going to decide, because there are rules of audi alteram partem in all relevant legal systems.

What I'm saying -- what I'm doing is trying to explore the structure of your argument.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: Because clearly they were -- something happened in 1964, there was some level of agreement in 1964, but they were uncertainties, at least on the face of it, and there were various suggestions that more needed to be done. More was done, precise turning points were agreed and coordinates were determined, and in some

respects vague descriptions of the lines in 1964 were given much higher levels of precision.

So the question is what do you say about 1972 on a mere hypothesis? I'm not -- it doesn't involve, of course, any decision by me or anyone else. What's your position? Do you say that the 1972 document is capable of being an independent agreement? I mean, there is some evidence, isn't there, that it was thought of as an agreement, because if you look at your Annex 56, where it says the delineation and description was agreed by the First Ministers at their meeting of June 17 and 18.

MR. BERTRAND: Right. Correct. Well I think our --

PROFESSOR CRAWFORD: There is no reference to 1964 in that document.

MR. BERTRAND: If I may I would like to supplement my earlier answer. I think there are several elements to such a scenario. But first, with all due respect, I would like to challenge your first assertion, which is that '64 lacked an essential component, which was precision for it to be a binding agreement.

It would be Nova Scotia's position that whatever imprecision resulted from the language or the methodology used in the notes re boundaries to describe the boundary would not be such that you could find that an agreement had not occurred. What I would think that you would have

to do then is do the work yourself. And this is why, for example, I believe Mr. Gray is here. So if 1972 had not occurred, I think I would be standing here arguing that you have to figure it out for yourself where the turning points are. But that doesn't mean that an agreement did not occur back in 1964.

PROFESSOR CRAWFORD: Thank you.

MR. BERTRAND: Secondly, I must point out that even I was somewhat surprised to see that the work that needed to be done to come up with a precise delineation of the boundary through the use of turning points was accomplished fairly rapidly. It's a work which is more technical in nature, hence probably the name of the committee, rather than a work that relates to a meeting of the minds on what the boundary and where the boundary should be. I think it's a question of describing the boundary as opposed to agreeing as to what it should be.

The committee was struck on July 14, I believe, or 17, I don't quite recall. And the members received a letter in late August advising them that the work had been completed.

So if I may go to the -- briefly to the minutes of the August 2nd 1972 meeting of the Premiers. The account there states that in dealing with the agenda item concerning the boundaries between the provinces, it was

suggested that the governments of the five eastern Provinces request the Government of Canada to accept the delineation and description of the offshore boundaries between each of the five eastern provinces, which delineation and description was agreed upon by the first ministers at their meeting on June 17 and 18.

There is a recognition that there had been an Agreement back on June 17, 18, and furthermore, there is a restatement of the support of the Premiers then for the Agreement made back in June. The meeting agreed that the position concerning the boundaries should be taken at the meeting of June 17 and 18.

Now my recollection is that Newfoundland refers to this document in support of its allegation that the Premiers did not agree on the boundaries because they did not act on the suggestion that had been made to require from the federal government that it adopts the turning points that had been delineated by the JMRC. We submit obviously, as Mr. Drymer has explained, that this is beside the point.

The provinces could and did agree as between themselves on the issue of boundaries, and whether or not they then seek or obtain the federal government's approval to the boundaries, the description that they have provided, is irrelevant to the existence of their prior

Agreement.

Would this be a good time -- it would be a good time for me to pause in the argument, and if it's suitable to the panel, we will wish you a good evening.

(Adjourned)

Certified to be a true transcript of the proceedings of this hearing as recorded by me, to the best of my ability.

Pamela Lapres

Newfoundland, in its pleadings, concentrates almost exclusively on the federal-provincial dimension of the issue. By doing so, Newfoundland seeks to divert attention from the interprovincial relationships and agreements, including the relationship and agreement between Nova Scotia and Newfoundland, that must be the true focus of the arbitration. The question the Tribunal has to determine, whether the Nova Scotia/Newfoundland boundary has been resolved by Agreement, obviously refers to an agreement between the parties to the present arbitration, not to an agreement between the provinces and the federal government.

Newfoundland's tunnel vision pervades its Memorial and Counter Memorial. For example, its account of the critical events of 1964 is largely restricted, as you must have noticed, to a discussion of the October 1964 Joint Submission presented by the provinces to the federal government. The actual interprovincial Agreement concluded on September 30, 1964, and on which the joint submission was itself in part based, is in turn misinterpreted or treated to only passing reference. Newfoundland goes to great lengths to confuse the two events, holding out the joint submission as the Agreement by which, it says, Nova Scotia argues that the provinces determined their offshore boundaries. It then purports to

analyze whether the Joint Submission, standing alone, constitutes a binding interprovincial agreement, which of course, it does not. But having asked the wrong question, Newfoundland naturally reaches the wrong conclusion.

Now Newfoundland's blinkered approach is also reflected in the evidence which it proffers regarding the parties' conduct after 1964. And as you will have noticed, the Newfoundland briefs, as particularly its Memorial, reveal an obsessive and unhelpful reliance on the views of federal officials, federal politicians, as to the supposedly non-binding nature of the 1964 Agreement. Yet, Mr. Chairman, members of the Tribunal, these statements are reflective only of the federal view that until the federal government agreed, the provinces' claim to ownership of the offshore and the interprovincial boundaries that they asked the federal government to recognize were not opposable to the federal government. What Newfoundland fails to overcome in its Memorial and Counter Memorial is the overwhelming evidence that the provinces, the parties to the 1964 Agreement, regarded their boundaries as binding between themselves, and that they acted accordingly for more than three decades.

Finally, Mr. Chairman, members of the Tribunal, Newfoundland grossly exaggerates both the nature of the Agreement that is at issue in this case, and the impact of

your Tribunal's decision, suggesting that matters such as legislative supremacy are in question. In fact, and it bears repetition because of the way that it has been dealt with and repeated in the Newfoundland briefs, in fact, the Tribunal has been tasked, your Tribunal has been tasked by the Government of Canada solely to determine whether the boundary between the offshore areas of the Provinces of Nova Scotia and Newfoundland and Labrador has been resolved by agreement for the purposes of the Accord legislation, and for no other purpose. A finding, as requested by Nova Scotia, that the boundary has been resolved by Agreement will not constitute, once the Tribunal's award has been translated into law, an alteration of the provinces' boundaries as set out in Canada's Constitution. It will not constitute an alteration of the provinces' boundaries set out in Canada's Constitution, nor will it encroach in any manner on the principle of the supremacy of Parliament. It will merely determine, as the Tribunal has been asked to do by the Government of Canada, one aspect of the provinces' respective rights and obligations arising under existing, valid administrative arrangements.

Newfoundland, in its pleadings, erects a straw man. It construes the Agreement that it says Nova Scotia must prove exists as an agreement between the provinces and

Canada, binding under Canadian -- under domestic -- Canadian domestic law. And then it proceeds to knock it down by showing that such an Agreement was not concluded. Well this exercise, this exercise, Mr. Chairman, is completely beside the point.

I repeat, Canada is not a party to this dispute, or to the present arbitration, and the law applicable to the arbitration, as I will demonstrate presently, is not Canadian, but international law. The question at issue in the arbitration is not whether Canada agreed with the Provinces, but whether the parties agreed as between themselves, on the line dividing their respective offshore areas.

I will now turn, Mr. Chairman, members of the Tribunal, to the mandate of your Tribunal and the law applicable to this phase of the arbitration.

CHAIRMAN: Are we allowed to ask questions? I'm not sure which is better. We can ask them now, or we can ask them at a period later.

MR. FORTIER: We're in your hands, Mr. Chairman.

PROFESSOR CRAWFORD: It may be better if we develop the argument a bit more on the question of the applicable law, and then -- then I have a question, but --

MR. FORTIER: Professor Crawford, I'm coming to that precise point in just about -- just a few minutes.

PROFESSOR CRAWFORD: I look forward to it.

MR. FORTIER: So before I consider the mandate of your Tribunal in this phase of the arbitration, and in particular the application of principles of international law to the dispute to be resolved, I would wish to highlight two fundamental characteristics of international maritime boundary delimitation.

First, as members of the Tribunal know very well, in the vast majority of cases concerning international maritime boundary delimitations, the maritime boundaries between and among states are determined by agreement of the States concerned. Second, the case law of the International Court of Justice and other international tribunals on maritime boundaries is overwhelmingly concerned with those atypical cases in which agreement between States has not been possible.

It is not surprising that States prefer to negotiate boundary agreements rather than rely on adjudication to delimit their maritime areas. In a negotiation, the parties are able to assess their own positions and make those compromises and trade-offs that they determine best reflect their interests.

The give and take of negotiations and the unique nature of agreements concluded as a result of such a process, cannot be duplicated by a tribunal in an

adversarial proceeding, and this is particularly the case where, as is the case with the 1964 Agreement, multiple, five parties are involved.

Now given these advantages, it should not be surprising that international law accords precedence to boundaries resolved by agreement and that international tribunals are reluctant to substitute their judgment for the freely expressed will of the parties.

Where, however, there is no agreed boundary in place, international tribunals are called upon either to create a boundary or to instruct the parties as to the appropriate principles on which such a boundary should be negotiated. And the body of international law that has developed around maritime boundary delimitation is, as a result, largely concerned with the principles that govern the drawing of a boundary tabula rasa.

Now this arbitration, the present arbitration, is very different. It is not a typical case of maritime boundary dispute submitted to a tribunal for adjudication. But what is typical, and, in fact, quite representative of state practice, is that the parties have actually negotiated a delimitation.

In this case, however, the dispute arises because one party, the Government of Newfoundland, seeks to disavow that agreement. The Tribunal, therefore, is asked to

determine a boundary where the slate is not clean. As a result, as we saw, the Terms of Reference defined by the Minister require this Tribunal first to adjudicate on the validity of the boundary established by the parties' agreement.

Now what is the question to be determined by the Tribunal? Well, the jurisdiction and the mandate of your Tribunal are clearly established by Article 3 of the Terms of Reference -- your Terms of Reference, which provide, as you can see on the screen initially, "Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the Parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times."

The article continues. The Tribunal shall, in accordance with Article 3.1 -- which I just read, the Tribunal shall, in accordance with Article 3.1, determine the line dividing the respective offshore areas of the two provinces in two phases, and in the first phase, the present -- and, we are confident, the only phase -- the Tribunal shall determine whether the line dividing the

respective offshore areas of the two provinces has been resolved by agreement. And then there is a reference in 3.2(ii) to the hypothetical phase.

Now the sole question to be determined by the Tribunal in this phase of the arbitration is whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.

This is the only issue in dispute and constitutes the full extent of your Tribunal jurisdiction at this time. And once the question whether the line has been resolved by agreement is answered in the affirmative, that resolves the dispute. Only if it is determined that there is no agreement would the Tribunal acquire a mandate to determine a second separate phase of how the boundary should be drawn.

If the parties agreed upon a delimitation, as we have just seen, the Terms of Reference explicitly require that the Tribunal defer to the parties regarding the merits of that delimitation.

Insofar as the line has been resolved by agreement, there is no need, there is no justification for your Tribunal to search for the rationale of the agreed line or to examine whether it is equitable. Once the parties have determined the line, it is to be assumed that they regard

it as equitable.

I now come to the law to be applied in answering the question which has been framed by the Terms of Reference. The Terms of Reference, as we saw, require the Tribunal to apply the principles of international law governing maritime boundary delimitation with such modification as the circumstances require as if the parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times.

Now the Terms of Reference -- your Terms of Reference mandate your Tribunal to answer the question raised in 3.2(i), as well as, if necessary, the question raised in 3.2(ii) in accordance with Article 3.1. That is the Tribunal is required to resolve all aspects, all aspects of the dispute by applying the principles of international law governing maritime boundary delimitation.

Now because the Provinces of Nova Scotia and Newfoundland are not subjects of international law, the Terms of Reference expressly provide that international law shall apply as if the parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times. In other words, the nature and the effect of the parties' conduct throughout the relevant period, from 1964 to date, is to be viewed through the prism of international law. And the question

to be answered in the first phase, in accordance with Article 3 of the Terms of Reference, is whether two states -- whether two states who conducted themselves, as have Nova Scotia and Newfoundland, would be found to have resolved their mutual boundary by a binding agreement as defined by international law.

The Terms of Reference -- and this is also extremely important -- the Terms of Reference were determined in accordance with the underlying legislation, which is now shown on the screen, federal and provincial, implementing the Canada-Newfoundland Accord and the Canada-Nova Scotia Accord.

All of these instruments mandate that where a dispute arises -- that where a dispute arises in relation to any portion of the line or in relation to a line or portion thereof, the dispute shall, if necessary, be referred to arbitration.

Now clearly, the present dispute, whether the line has been resolved by Agreement, is a dispute in relation to the line or a portion thereof. And where a dispute in relation to the line is referred to arbitration, the legislation is unequivocal, and I quote -- it's on the screen -- where the procedure for the settlement of the dispute involves arbitration, the arbitrator, your Tribunal, shall apply the principles of international law

governing maritime boundary delimitation.

It is limpid. It is clear. There can be no question -- there can be no question but that the Tribunal must apply international law to the exclusion of domestic law to resolve the present dispute. Yes, Professor Crawford?

PROFESSOR CRAWFORD: On both occasions, of course, both in the Terms of Reference and in the Act, it says "With such modifications as the circumstances require." Does that not imply that there might, in fact, be two stages to the inquiry? You said earlier that although there was no requirement that Canada be a party to the agreement, that there was an agreement between Nova Scotia and Newfoundland, and you described it as a binding agreement.

Let's assume for the sake of argument that that's right. It would have been a binding agreement, no doubt, between those two provinces under Canadian law, as at 1964. At 1964, the provinces were, in fact, governed by Canadian law.

Now if there was an agreement binding under Canadian law in 1964, it would surely be appropriate in the circumstances for the Tribunal to give effect to that agreement, so this would be one of those cases where there were modifications required by the circumstances. In other words, the agreement was not a treaty, the provinces

were not states, but they had entered into a binding agreement.

MR. FORTIER: With respect, Professor Crawford, I do not agree with the premise of your question. If you look at the terms of the enabling legislation and if you look at the Terms of Reference, it is clear, and I think I would like to refer to the precise words, that "The Tribunal..." -- your Tribunal -- "...must determine the line as if the Parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times." "At all relevant times" can only refer to the period from 1964, including the time when the agreement, we say, was concluded.

PROFESSOR CRAWFORD: I quite see that, that, although, again, you have left out the phrase "with such modifications."

MR. FORTIER: No, I was going to come to that leg.

PROFESSOR CRAWFORD: Okay.

MR. FORTIER: And, indeed, I deal with it later in my presentation in a few minutes.

PROFESSOR CRAWFORD: The point I was making is that I quite see that it might be necessary for us also to ask the question whether, even assuming there was not an agreement binding under Canadian law which might require -- which might be a modification required by the circumstances

within the meaning of subsection 4. Nonetheless, if the two provinces had been States, they would have entered into an agreement on their maritime boundaries by doing what they did.

So this comes back to my point that there might actually be two stages to the inquiry. The first stage might be, and I'm simply putting this as a hypothesis, was there an agreement under Canadian law effective binding, in your words, as between the provinces in 1964?

If the answer was yes, then it would be appropriate, irrespective of -- I mean it wouldn't be a treaty, but it would be appropriate for this Tribunal to apply it to the provinces and we would do so as a modification required by the circumstances.

If the answer was no, I quite see that we might still -- because it's clear that paragraph 3, one of the Terms of Reference, is dominant -- we might then have to go on and ask, as it were, hypothetically. Even if there wasn't a binding interprovincial agreement under Canadian law, would the parties, acting as they had acted, have made an agreement on their maritime boundaries under international law. And that's really a separate inquiry.

MR. FORTIER: My colleague, Ms. Hughes, will be dealing with the law applicable to the facts, Professor Crawford. For my purposes at the moment, I beg very respectfully to take

issue with the premise of your question.

I submit that it is not a two-phase operation which your Tribunal has to conduct. It is, by the terms of the enabling legislation, by the terms of the Terms of Reference, it is a one-phase operation, and it requires the application of the principles of international law to the conclusion of the agreement between the two provinces, since they are to be treated as if they were States, at all relevant times. And at all relevant times encompasses 1964, the time of the conclusion of the agreement to the present date.

CHAIRMAN: I have some concerns about that proposition. I express it as a concern without having made up my mind, but I am concerned with the different way in which the applicable law is expressed in the Act, which, of course, is governing, and the Terms of Reference. And it's possible, I suppose, to interpret the Act as if it included those words. I leave that aside.

But looking at section 3 -- subsection 3 of section 6, the power given there is to the constitution and membership of the Tribunal and the procedures for settlement. Now procedures is a word that refers to the machinery of how the thing is done and not the substantive law, as I ordinarily read.

So the substantive law expressed in the Act is

expressed differently in the Terms of Reference, and I have some difficulty seeing where the power to make that Term of Reference in those terms comes from. That's my first difficulty. And it's important because, ultimately, the Act, of course, is ordinarily not interpreted as being retrospective.

So I have difficulty with that thing because the general thrust of your argument is to take judicial acts that took place under a different regime and give them, by virtue of the Terms of Reference, a meaning under international law, and I must say that I have some concerns with the -- whether that can be done.

MR. FORTIER: I understand your -- the concern that you have expressed, Mr. Chairman. I would question whether your concern is valid in view of the words which you can look at on the screen at the moment. In paragraph -- sub paragraph (iv) where the procedure for the settlement of a dispute pursuant to the section involves arbitration and we know that the dispute does involve arbitration.

CHAIRMAN: Yes.

MR. FORTIER: The arbitrator, your Tribunal shall apply the principles of international law.

CHAIRMAN: I have no difficulty with that. What I have difficulty is the ability of the Premiers in 1964 to act as if they were heads of State under the Act.

MR. FORTIER: But it is a fiction. It is a fiction, there is no doubt, but the --

CHAIRMAN: It is a fiction on which you are hanging on, of course, for your argument.

MR. FORTIER: But the legislature has created a fiction that the sub units of the Federal State of Canada should be treated as if they were State at all relevant times. And I submit that your Tribunal is bound by the -- that legislative fiction which found its way eventually in the Terms of Reference, which mirrors the enabling legislation.

PROFESSOR CRAWFORD: There is no -- there is no particular difficulty with that because otherwise international law wouldn't provide the answer to the inquiry because international law doesn't draw maritime boundaries between provinces of a federal state, so to that extent it's necessary to make a fictional inquiry. But if that's right the thing that puzzles me slightly is your insistence that the Agreement was binding in 1964, because --

MR. FORTIER: That the -- I'm sorry, my --

PROFESSOR CRAWFORD: Your insistence, earlier insistence that the Agreement entered into between the provinces then was binding in 1964. It doesn't -- if what you say is right, it doesn't matter whether it was binding in 1964,

all that matters is whether we now say that had the provinces been States, they would have entered into a binding agreement under international law having done what they had done. So its binding this in 1964 is irrelevant, all that matters is the result of a purely hypothetical inquiry.

MR. FORTIER: But your question is premised on the theory of intertemporal law, is it not Professor Crawford?

PROFESSOR CRAWFORD: No. My point is this, you said earlier you rejected the idea that we might reach the conclusion in two ways. I was actually trying to be helpful, but my students always say that they never know that and I see this is a more general phenomenon.

What you said is a single inquiry, which is we apply international law on the assumption that the provinces were States and ask whether having done what they did they would have had an agreement. Now if that is right and I -- I mean, it -- one can do it, it is a slightly artificial inquiry, but we are mandated by the Act to do it and that's fine.

After all the result is a distribution of revenue for the future, so it is an inquiry which can be carried out.

But if that is so, it doesn't matter whether the Agreement was binding under any other system of law in 1964. All that matters is that the conduct was such that

had the provinces been States they would have entered into a binding agreement because --

MR. FORTIER: Now you are helping me and I agree with you.

CHAIRMAN: Well I see no difficulty in the way the Terms of Reference. What I'm looking for is the authority to make the Terms of Reference in a way different from what is meant in the section.

MR. FORTIER: Well as I said, Mr. Chairman, my colleague Ms. Hughes, will deal extensively with that concern that you have expressed. For my purposes of the moment, I don't think I can add anything to what I have said.

Now is that satisfactory?

CHAIRMAN: Yes.

MR. FORTIER: And thank you for helping me, Professor Crawford.

Now I was coming to the concluding paragraphs of my expose on the applicable law. And as members of the Tribunal are -- know full well where the parties -- where the Terms of Reference which create -- which constitute a Tribunal provide explicitly for the applicable law and it is our strong submission that such is the case here, then the Tribunal has no mandate, no jurisdiction to search for an alternative applicable law. Its hands are tied.

You do not have the discretion to do other than apply the law that has been decided as being applicable to the

arbitration, and that is international law. Because the parties, the parties in their enabling legislation, have expressly consented to the choice of international law. And this is -- I think this answers in part, Mr. Chairman, the quote "concern" that you expressed earlier.

By the terms of the accord legislation, by the term of the provincial implementing Act, the two provinces have expressly consented to the choice of international law. They have passed legislation to that effect, saying that international law will be the governing law of the arbitration.

So the Tribunal is asked to determine whether on the facts of this case two sovereign States would be found to have concluded a binding agreement at international law in 1964 regrading the boundary dividing their offshore areas.

And in our submission, the most fundamental and pervasive error in the Newfoundland Memorial and Counter Memorial is its contention regarding the law applicable to the arbitration.

And we submit that in view of the clarity and the conclusiveness with which as discussed the legislation and the Terms of Reference deal with this issue, we don't believe that it is necessary to spend much time in considering the matter. But needless to say, we are prepared to address Newfoundland's arguments in this

regard. And if necessary, Ms. Hughes tomorrow afternoon will address it.

But the Newfoundland Memorial concludes, as you saw, that Canadian law is the applicable law for the determination of the question before the Tribunal in phase one. That is a direct quote from the Newfoundland Memorial, that Canadian law is the applicable law.

The reasoning underlying this assertion would result, I submit, in the complete subversion of the Terms of Reference and of the Accord Acts, all of which require that the dispute be resolved according to principles of international law.

Newfoundland's argument on the matter of applicable law boils down, as you have noticed, to one fundamentally misguided proposition, that the Terms of Reference provide no specific guidance on the applicable law for the question in phase one. Well this proposition is wrong, it is manifestly wrong.

Newfoundland's reasoning relies first on the assumption, as you will have noticed, of a non-existent distinction between delimitation by application of principles of international law and delimitation by agreement. And second, on a reading of the Terms of Reference, and in view of the questions which have been posed to me, I say this most respectively, on reading of

the Terms of Reference so selective as to constitute in effect a wholesale rewrite of your mandate, and this cannot be done.

Newfoundland claims that the issue in this phase of the arbitration is somehow distinct from the Tribunal's overall mandate to determine in accordance with international law the line dividing the parties' respective offshore areas.

Now it is obviously true, as we saw that in this phase of the arbitration, the Tribunal shall determine whether the line, et cetera, has been resolved by agreement. But what is patently incorrect is Newfoundland's assertion that this task does not require the Tribunal to apply the principles of international law governing agreements.

As the International Court of Justice declared in the North Sea continental shelf cases delimitation by mutual agreement and delimitation in accordance with equitable principles as enunciated at the 1945 Trueman Proclamation have underlain all of the subsequent history of the subject of maritime boundary delimitation.

The 1958 Geneva Convention on the Continental Shelf, the 1982 United Nations Convention on the Law of the Sea, this is very basic, very elementary. I regret having to take the time of the Tribunal with these references but in view of Newfoundland's forceful argument, I have to.

The 1958 convention. The 1982 convention enshrined the rule that the delimitation of the continental shelf between States with opposite or adjacent coasts quote "shall be determined by agreement between them". And quote "shall be effected by agreement on the basis of international law".

It is only if there is no agreement between the States concerned that the delimitation is effected by other means. And in addition, as you know, the 1982 convention provides that where there is an agreement in force between the States concerned questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Now the concept of mutual agreement was recognized as integral to the international law of maritime boundary delimitation as well by the Chamber of the International Court of Justice in the Gulf of Maine case. In its statement of the fundamental norm of maritime boundary delimitation, the Chamber found as follows: No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.

Now the notion that a delimitation by agreement of the parties is not a subject matter encompassed by the international law governing maritime delimitation is without any foundation. And, of course, as you will have noticed, the Newfoundland briefs offer not a single authority to support its claim in this regard. In fact the authorities are categorical. The delimitation of maritime boundaries by agreement is part and parcel of the international law governing maritime boundary delimitation. And Newfoundland's claim to the contrary is wrong.

The extraordinary exercise in exegesis -- I knew I would have a problem with that word. The extraordinary exercise in exegesis on which Newfoundland's argument is based is in fact absolutely unnecessary. As I have submitted and I have tried to demonstrate, the Terms of Reference are unequivocal. They do not distinguish, as Newfoundland wishes to do, the law applicable -- between the law applicable to the first phase of the arbitration and the law applicable to the hypothetical second phase.

Having engaged in such an exercise, however, Newfoundland obliges both Nova Scotia and the Tribunal to follow suit and to dissect what are patently transparent terms.

As I have suggested, Mr. Chairman, members of the

Tribunal, there is not the slightest ambiguity in the Terms of Reference regarding the applicable law. Nothing whatsoever to suggest, as does Newfoundland, that international law would be applicable to the second hypothetical phase, but is somehow not applicable to the first.

Nonetheless, from the false distinction between a maritime delimitation resolved by international legal principles and a maritime delimitation resolved by agreement of the parties, Newfoundland arrives at the conclusion that the Terms of Reference are in fact silent regarding the law applicable in the first phase.

It goes further arguing that since international law does not regulate agreement between sub-units of State, which in fact it does not, there is in effect no international law that could apply in this phase of the arbitration, notwithstanding the clear words of the Terms of Reference and of the enabling legislation. The trick, of course, is that even as it refers to the Terms of Reference, Newfoundland makes the words of Article 3.1 effectively disappear.

PROFESSOR CRAWFORD: This is the point of the disparity between the Terms of Reference and the legislation, because the phrase, as if the parties were State subject to the same rights and obligations as the Government of

Canada at all relevant times is not in the Act.

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: It's put in the Terms of Reference presumably by way of guidance, because there may have been, whoever drafted the Terms of Reference may have been aware that there was some -- a slight anomaly in applying international law rules of maritime boundary delimitation to provinces. And so those words were written -- were written in.

MR. FORTIER: But they are there?

PROFESSOR CRAWFORD: Yes.

MR. FORTIER: And --

PROFESSOR CRAWFORD: And your position is that that is a reasonable or proper interpretation of the Act. Our jurisdiction derives from the Act. And subsection 4 tells us the applicable law and doesn't use that phrase. But your position is that the only way of making sense of subsection 4 is to use that phrase or something very like it.

MR. FORTIER: Your jurisdiction, Professor Crawford, emanates solely from the Terms of Reference. Your jurisdiction, you are constituted as an arbitral tribunal pursuant to the Terms of Reference and they delimit the extent and the parameters of your jurisdiction. And the words, as if the parties were States, are found in the

Terms of Reference.

And unless the Terms of Reference had been challenged by Newfoundland before, let's say the Federal Court of Canada, you know, and until such a challenge was instituted you are manacled, you are bound, you have no discretion to do other than what the Terms of Reference say you must do.

The illusion that Newfoundland tries to create I think is dispelled by reading 3.1 of the Terms of Reference. The meaning of the words, as if the parties were States subject to the same rights and obligations as the Government of Canada at all relevant times, the meaning of those words is clear. It's abundantly clear. Yet it is nowhere indicated in the Newfoundland briefs that those words exist. It is nowhere recognized that those words exist.

So international law is the governing law of the arbitration under the Terms of Reference and the enabling legislation and it applies to the provinces appearing before you as if they were States at all relevant times. Mr. Legault?

MR. LEGAULT: You say, Mr. Fortier, that the words, as if the States were -- as if the parties, rather, were States subject to the same rights and obligations as the Government of Canada at all relevant times imply a

reference to the Government of Canada at all relevant times in relation to other States or in relation to the East Coast provinces?

MR. FORTIER: Well the -- I regret I am not sure that I understood your question. Would you care to repeat it, please, Mr. Legault?

MR. LEGAULT: Yes. We, according to the Terms of Reference, are asked to treat the issue before us as if Newfoundland and Nova Scotia were subject to the same rights and obligations as the Government of Canada.

MR. FORTIER: Yes.

MR. LEGAULT: Now the Government of Canada, I presume, can be viewed as being subject to rights and obligations with respect to Newfoundland and Nova Scotia, or it can be viewed as having rights and obligations with respect to other States, such as France, for instance, which has a territory, of course, in this area of the continental shelf.

Are you suggesting that the Terms of Reference must be read exclusively as though the government -- the rights and obligations of the Government of Canada, in this context, are rights and obligations in respect of foreign jurisdictions. So that if there were a question of looking for evidence whether Canada was a party to the Agreement that Nova Scotia alleges, and I am not

suggesting that Nova Scotia alleges that Canada was a party to that Agreement, but if that question arose, where would we look for evidence? Would we look for evidence under the Canadian law that would apply to determining that issue or to international law that would apply to determining that issue?

MR. FORTIER: Well I think a short answer to your question, Mr. Legault, is international law. It seems to me that those words in that leg of 3.1, subject to the same rights and obligations as the Government of Canada, are -- were in fact not essential. Once the Terms of Reference provided that the two provinces were to be treated as if they were States, subject to the same rights and obligations as any State at all relevant times, it would have accomplished the purpose which the drafter of the Terms of Reference was seeking to do.

PROFESSOR CRAWFORD: Well it wouldn't necessarily have done so, because there still would have been a question whether the issue of maritime -- the hypothetical issue of maritime boundary delimitation was governed by general international law or by a treaty.

MR. FORTIER: Well, yes.

PROFESSOR CRAWFORD: Presumably the effect of 3.1 is that we track the position of Canada. As a matter of fact, when did Canada become a party to the 1982 Convention as

compared with -- it's still not a party?

MR. FORTIER: It is not a party.

PROFESSOR CRAWFORD: So does that mean that we have to apply the '58 Convention, the fourth --

MR. FORTIER: Well, and customary international law.

PROFESSOR CRAWFORD: But Canada is a party to the fourth --

MR. FORTIER: To the --

PROFESSOR CRAWFORD: -- to the --

MR. FORTIER: -- to the '58 Convention.

PROFESSOR CRAWFORD: -- the fourth convention on the continental shelf.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: Technically that is the right and obligation of Canada at the present time in respect to maritime boundaries.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: It's a purely technical point. I don't think anyone thinks there is any -- these days any relevant difference between the various articles.

MR. FORTIER: No. Exactly.

PROFESSOR CRAWFORD: And your position is that it wouldn't matter for these purposes whether we applied the Geneva Convention, fourth Geneva Convention, or the 1982 Convention on Customary International Law. Each of those is going to refer to an agreement and each of those in

default of agreement is going to refer to the same --

MR. FORTIER: Absolutely. Absolutely.

CHAIRMAN: And just to underline what I am sure is clear in your mind at all relevant times to you includes time before the enactment of the Act?

MR. FORTIER: Definitely, Mr. Chairman. Definitely. Because, of course, in interpreting an agreement executed in 1964, 1964 is very much --

CHAIRMAN: Yes, I realize that. But --

MR. FORTIER: Yes.

CHAIRMAN: -- it's a slippery phrase.

MR. FORTIER: It's a very clear phrase at all relevant times.

CHAIRMAN: Well, yes. Whatever times are relevant.

MR. FORTIER: Correct.

CHAIRMAN: Having regard to the legislation.

MR. FORTIER: Having regard to legislation, in particular, and having regard to the agreement that you have to implement.

Now the illusion that Newfoundland -- I am almost -- I don't know if you -- I am almost -- I have another five minutes or so.

CHAIRMAN: I think we should probably take our break after.

MR. FORTIER: Then within 10 minutes I will be finished, Mr. Chairman.

CHAIRMAN: Yes.

MR. FORTIER: Depending, of course, on questions that may be asked.

We say that the illusion that Newfoundland tries to create is dispelled in an instant upon reading the final words of this passage which we have been addressing for the last few minutes. The meaning is clear and international law is the governing law. It applies to the provinces in this case as if they were States at all relevant times.

I now come to the last leg of the provision, those which refer to the application of international law with such modification as circumstances require, with such modification as the circumstances require.

Now you will have noticed that Newfoundland, in its pleadings, uses these words, as we have said in our brief, as a wrecking ball to demolish all distinction between fact and fiction in this case.

Now the only circumstance -- the only circumstance alluded to by Newfoundland, as requiring the application of domestic Canadian law to the arbitration is the supposed lack of any body of international law regulating agreements between sub-units of states.

In the particular circumstances of this case, this is not an issue, because the argument again misses the point

altogether and it evidences on the part of Newfoundland an obstinate refusal to read and to be bound by the plain words of the Terms of Reference.

They have anticipated -- the Terms of Reference have anticipated, and they dealt conclusively with the matter, and you are bound by the Terms of Reference. They provide that for the purposes of the arbitration, again, as you can see on the screen, and specifically as regards to the law applicable to the determination of whether the Nova Scotia-Newfoundland boundary has been resolved by agreement, the parties are not to be regarded as sub-units of a state, but as States. Nothing could be clearer.

In a final effort to justify the application of Canadian law to this case, Newfoundland attempts to invoke the notion that international law itself, provides a convenient renvoi to domestic law.

Newfoundland seeks to rely on the doctrine of intertemporal law, contending in this regard that the intent of the parties with respect to the 1964 Agreement must be considered in light of the particular circumstances of the case. And the important circumstance is again the fact the parties are provinces of Canada as opposed to sovereign States.

Now with respect, Newfoundland's argument here again are completely beside the point. The Terms of Reference

we have seen state plainly the law to be applied by the Tribunal and they settle conclusively the matter of the parties' status. The framework for the arbitration I recognize, Mr. Chairman, members of the Tribunal, the framework for the arbitration imposed by the Terms of Reference may be unique as regards the matter of applicable law. But it is coherent and it is complete. The law is international law. And for the arbitration, and specifically for the purpose of applying international law, the parties are regarded as States. That is true for the first, as well as for the hypothetical second phase of the arbitration.

The mandate of your Tribunal is to determine whether the boundary has been resolved by Agreement applying the principles of international law, and assuming for that purpose that Newfoundland and Nova Scotia were States at all relevant times.

Now the words which I am addressing at the moment are with such modification as the circumstances require.

Now I submit -- we submit, Mr. Chairman, members of the Tribunal, that the application of Canadian domestic law to the arbitration, as proposed by Newfoundland would constitute something altogether different from a modification of the principles of international law.

The word modification is defined in the Oxford

English Dictionary as the "action of making changes in an object without altering its essential nature or character".

And in Webster's Third New International Dictionary as "the act of limiting the meaning or application of a concept. The act or action of changing something without fundamentally altering it."

Applying Canadian domestic law to determine any aspect of this dispute we submit would not constitute a modification. It would be fundamentally at odds with the Terms of Reference and with the legislation from which they are derived.

Ultimately -- ultimately what Newfoundland proposes, very simply, put is that the Tribunal in effect rewrite the Terms of Reference. This, of course, your Tribunal cannot do, anymore than any party may substitute its own choice of law for that laid down in the Terms of Reference.

Mr. Chairman, members of the Tribunal, Nova Scotia submits that it is abundantly clear that for the purposes of the present arbitration, your Tribunal is constituted as a true international Tribunal whose mandate consists in resolving a dispute between two parties who are not sub-units of a federal state, but rather sovereign states. This is extremely important. For the purposes of the

present arbitration, your Tribunal, Mr. Chairman, members of the Tribunal, your Tribunal is constituted as a true international Tribunal whose mandate consists in resolving a dispute between two parties who are not sub-units of a federal state, but rather sovereign states. And your decision -- your decision will be welcomed by the international legal community as a significant and important addition to the long history of the law of maritime delimitation.

PROFESSOR CRAWFORD: Can I just, a point of clarification, the phrase which is in the Act, of course, and therefore doesn't give rise to any difficulty from that point of view, with such modifications as circumstances require, that refers exclusively to principles.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: It is the principles of international law that might require to be modified by the circumstances. So we have to take the facts as they are.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: The facts as they were in 1964 or whenever, we have to take those facts as they were with the sole difference that we are to deem the provinces to have been states for the purposes of the application of international law.

MR. FORTIER: Correct, Mr. Crawford. Mr. Chairman, members

of the Tribunal, thank you for your patience. I have come to the end of my presentation. And as I said earlier, if the International Court of Justice and Air Canada cooperate, you may hear from me again next week.

CHAIRMAN: Oh, we hope so, Mr. Fortier.

MR. FORTIER: Thank you very much.

CHAIRMAN: We will take a break now. The agreement I guess was 30 minutes for break during the day. Would this be a 15 minute one? What -- or less or what? 15?

MR. FORTIER: 15 minutes is fine by Newfoundland, who is on its feet at the moment, Mr. Chairman.

CHAIRMAN: Thank you.

(Recess)

MR. DRYMER: Mr. Chairman, members of the Tribunal, my name is Stephen Drymer, Deputy Agent for the Province of Nova Scotia.

I will address as my colleague, Mr. Fortier, spelled out earlier, the question of the conclusion of the 1964 Agreement, comprising a review of the facts and events leading up to and surrounding the conclusion of the Agreement as well as an analysis of the Agreement itself.

Now I should point out that I understand that not all of the slides for my presentation have been distributed. There are 1 to 38. I'm quite confident that's as far as I will get before lunch. The remainder will be distributed

before I continue after lunch.

CHAIRMAN: That's in the big book? Is that the --

MR. DRYMER: I think --

CHAIRMAN: Oh, you will have them on slides?

MR. DRYMER: It was just handed out a moment ago. I think Ms. Hobart might have the copies for you. Thank you. Yes. And they go into the less big leaf, the less big book, yes.

You will find a tab, I think, in the binder with my name as well as with the names of the other counsel for Nova Scotia. I think this will get easier as the fourth or fifth lawyer gets up to speak to you.

Gentlemen, as I'm the first of Nova Scotia's counsel to address the facts, before getting to the issue of the 1964 Agreement itself, I propose to discuss a few preliminary issues regarding the factual record in general, and in particular, Nova Scotia's approach to the record, both in our written submissions and in the oral presentations that we will be making today and tomorrow.

Nova Scotia encourages the Tribunal to engage in a careful and full reading of the documents that make up the factual record. We encourage the members of the Tribunal to look at the facts in their entirety in order to appreciate the full weight of the evidence, including the accumulated weight of over 30 years of practice.

The question to be determined by the Tribunal, whether the line has been resolved by agreement requires an appreciation of the big picture, the whole picture. That entails an examination of specific elements of the factual record, but also a broader perspective.

The significance of particular facts must be considered as part of a larger fact, as dots or strokes in a painting can be appreciated sometimes only by taking a step back.

Yes, you will have noticed that there are gaps in the historical record. The documents filed by the parties span over 30 years, specifically in regard to the question of negotiations between the provinces and Canada on the ownership of offshore mineral rights, and during those 30 years governments changed, politicians and officials changed, and the institutional memory of the various governments involved in those negotiations was not always seamless and the knowledge of particular events by particular individuals years after those events was not always complete.

I submit, however, that the facts themselves have not changed. You will have noticed, for example, that there are documents in the record that refer to material that has not been found. And there are periods, as well, for which relatively little material has been filed by the

parties.

There is even evidence in the record that politicians and officials of the day themselves acknowledged that their files were not complete at the time, and even newly elected Premier Moores of Newfoundland was reminded at one point by his Minister of Mines, Doody, that interprovincial offshore lines had been determined some time ago.

The fact, gentlemen, is that there is no single source, whether in Halifax, St. John's or Ottawa, of the documents that record the deliberations, negotiations, views, and ultimately, the agreements of the parties to this arbitration.

What the Tribunal has before it nonetheless, is as complete a record as can be compiled, and when considering that record, we encourage you to focus not on the gaps but on the composite picture that emerges. As noted by the International Court of Justice in the Fisheries case, UK v. Norway, "It is impossible to rely upon a few words taken from a single note. The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the UK Government claims to have discovered in Norwegian practice in that case. They may be easily understood in the light of the variety of facts and conditions

prevailing in the long period which has elapsed since then."

As in that case, the Tribunal in this case should not attach too much importance to what might be called the few uncertainties or contradictions, real or apparent, in the record. They may be easily understood, we submit, in the light of the variety of facts and conditions prevailing in the long period which has elapsed, in our case, between the 1950's and today.

To this end, my colleagues and I on behalf of Nova Scotia -- I see now it's not necessary, but I was going to encourage the members of the Tribunal to ask questions during our submissions. We welcome the opportunity to assist the Tribunal wherever possible to resolve any uncertainties regarding the factual record, in particular, as regards the nature and the significance of the events associated with the question that you have been mandated to resolve.

Although questions of law are to be dealt with by my colleague, Ms. Hughes, tomorrow, one issue, I believe is worth addressing now as it applies to the use of the evidence by the parties and by the Tribunal.

Newfoundland and Labrador have purported to distinguish in its Counter Memorial the evidentiary rules regarding the manner in which the formation and the

interpretation of agreements is proved. It claims that it is self-evident that the evidentiary method used to interpret an agreement including an examination of the plain words and the object and purpose of relevant documents, as well as the subsequent conduct of the parties, cannot also be used to assess the parties' intent to be bound at the time of formation.

Nova Scotia submits that that proposition must be self-evident because Newfoundland provides no evidence whatsoever in its Counter Memorial and no authority in support of that claim.

On the contrary, where, as here, all of the evidence is documentary, how can the Tribunal determine the parties' intent at the moment of formation of an agreement?

The answer can only be that it must consider the documents to see what the documents can teach us as to the intent of the parties at the appropriate time.

The evidence of the parties' boundary agreement will be assessed chronologically in Nova Scotia's oral submissions today and tomorrow by myself, by my colleague, Jean Bertrand, and by Professor Saunders, who as Mr. Fortier told you, will address the matter of permit issuance as a particular example of the parties' conduct, separately.

With rare exception, what might be called uncertainties or contradictions, real or apparent, of no material importance to the central question to be determined by the Tribunal, all of the facts adduced by the parties considered in their proper context and in relation to each other point to one single conclusion.

In 1964, Nova Scotia and Newfoundland, as it was known then, concluded a binding agreement regarding the line dividing their respective offshore areas.

Yes, gentlemen, the parties discussed other matters too, during that relevant period, as is described in Nova Scotia's written submissions and as will be discussed by my colleagues and me. But as to the question did the parties conclude an agreement resolving their offshore boundary, the answer must be yes.

Specifically the facts reveal that in agreeing on their mutual boundary, the parties intended to conclude, and did conclude, a binding agreement. They delimited the entirety of their mutual boundary out to the limits of the continental shelf, subject to Canadian jurisdiction at international law. They described their boundary accurately and completely. They regarded their Agreement as being of immediate effect. They considered their agreed boundaries applicable to all forms of right, jurisdiction or administrative arrangements relating to

the mineral resources of the continental shelf, but only to rights, jurisdiction, or administrative arrangements relating to the mineral resources of the continental shelf.

These six themes will be recalled throughout Nova Scotia's review of the facts.

In -- excuse me, Professor Crawford.

PROFESSOR CRAWFORD: Since you encourage me, I don't take much encouragement.

MR. DRYMER: I may regret it.

PROFESSOR CRAWFORD: Can we -- just to get it clear, your -- your position is, as already pointed out by Mr. Fortier, is that an Agreement was reached -- was reached in 1964 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: That we apply international law standards to the facts as at 1964 determine there's an Agreement?

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: So any reference to facts after 1964, what's the point of those facts? I mean, if there was an Agreement in 1964, okay, the -- I don't think even Newfoundland argues that if there was an Agreement in 1964 it was subsequently abrogated. So, why do we need to look at facts after 1964?

MR. DRYMER: My Lord, excuse me, Professor Crawford, I would

-- I would suggest that if you're prepared to render a decision after you hear me, my colleagues might be upset at not being able to speak. But on the other hand, our client might be relieved.

The relevance of facts after 1964 go to whatever uncertainties you might find in interpreting the intent of the parties as of '64. We believe that their conduct subsequent demonstrates an intent -- a continuing intent, but an intent that commenced as of the moment of the '64 Agreement.

PROFESSOR CRAWFORD: As a matter of being -- this is English common law, I don't know the Canadian common law. As a matter of English common law, you can't refer to subsequent practice of the parties in order to establish that there was a contract. The -- it's simply inadmissible. What's the position under international law?

MR. DRYMER: We believe that the subsequent conduct of the parties is relevant, where appropriate, where relevant can demonstrate intent at the time. Where parties acted in '72, and explicitly stated that they were applying an Agreement reached as of 1964, we contend that that is relevant as to their intent in '64.

PROFESSOR CRAWFORD: Sorry, one last question. It's not your case that what happened in '64 was the beginning of

an Agreement which matured --

MR. DRYMER: No, sir.

PROFESSOR CRAWFORD: Which matured at a later time?

MR. DRYMER: No, sir.

PROFESSOR CRAWFORD: So either we find that there was an Agreement in '64 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- or there was no Agreement?

MR. DRYMER: Precisely. We are confident that that is what the Tribunal will find after considering submissions of the parties, after hearing our arguments during this hearing, and after considering the evidence and deliberating.

In considering the period surrounding the conclusion of the 1964 Agreement, there are four relevant periods, four main events to consider.

First, the parties' initial discussions of mineral rights and interprovincial offshore boundaries during the period 1958 to 1964.

Second, the conclusion of the Agreement itself on September 30, 1964.

Third, the accession of Quebec on October 7 of the same year; and finally, the provinces' submission presented to the conference on October 14th to 15, 1964, what we refer to as the Joint Submission.

I would immediately point out that the Joint Submission is not an aspect of the conclusion of the Agreement, however, it is simply so close in time as to the relevant events that we have decided that it would be useful for ourselves, and for the Tribunal, to deal with it as part of my submissions, rather than as part of the submissions of my colleague, Jean Bertrand.

But again, I would reiterate the deal was done on September 30, 1964.

In presenting our arguments to you, an effort will be made to meld the documents filed by each party, which have been found in numerous archives, into a single coherent account of the relevant facts surrounding the conclusion of the 1964 Agreement.

As you will have noted, each party has filed documents not filed by the other party, and each party, of course, paints a different picture of what actually happened on September 30th. Here, I hope to bring together to unify these divergent themes, these various strands of the story, to present the comprehensive, lucid and we believe, convincing account of the seminal events of 1964. And what's more, as a good friend of mine is fond of saying, "Ça l'avantage d'être la vérité" -- this account of the facts has the advantage of being the truth.

The issue of interprovincial boundaries, Monsieur

Legault, est-ce-que je peut continuer? The issue of interprovincial boundaries in the offshore first arose in 1958, and it remained on the common agenda of the Atlantic Provinces throughout the period leading up to the conclusion of the 1964 Agreement.

While the actual boundaries were fleshed out in meetings of senior Ministers and officials, the forum in which the issue both originated, and to which the recommended boundaries were submitted for agreement, was the annual conference of the Premier -- excuse me, Conference of Premiers of the Atlantic Provinces.

The matter seems to have been raised initially at the Conference of Atlantic Premiers, attended by Premier Smallwood on behalf of Newfoundland, in September, 1958. Then, as now, the issue revolved around the issuance of permits to conduct mining operations, and to explore for oil and gas. In fact, the earliest known reference to the matter of interprovincial offshore boundaries is framed as "the question of a boundary line between the provinces as it related to authority to grant mining licenses and leases".

The matter of boundaries was again raised the following year at the Conference of Atlantic Premiers held in Fredericton, New Brunswick, on September 22, 1959. Again, with Newfoundland Premier Smallwood in attendance.

At that Conference the Provinces considered legal advice provided to them to the effect that they owned, or had grounds to claim from the Government of Canada, the subsoil extending from their shores to up to 200 miles into the Atlantic.

Now, in an ideal world of course, the provinces' jurisdictional claims in this regard, based on legal, equitable and political grounds, would have been recognized by Canada, and their eventual request that this recognition be formalized would have been accepted by the Federal Government. The provinces had good arguments to make in this regard, and good reason to believe that those arguments would eventually prevail if they chose to make them. But whether this was the route taken, and where that route would lead were, at the time, very much up in the air.

It is interesting to note that during this period, the provincial stand regarding what is referred to as this whole question of federal versus provincial jurisdiction was recognized as distinct from quote "The question of boundary divisions between the provinces."

Boundaries were again briefly considered in 1960, at the Annual Atlantic Premiers Conference, again attended by Premier Smallwood, this time held in Halifax on September 21 of that year, as well as at a meeting of the Minister

of Mines of all ten provinces, in Quebec City, on October -- excuse me, in October, 1960.

Here again, the relations between the provinces was distinguished from relations quote "between the provinces and the federal authority", unquote, regarding offshore mineral rights. It was recognized that in the event that any mineral find took place, it might be of the utmost importance that the provinces concerned were in agreement on their respective rights in advance of any discovery. That is their rights inter se.

Clearly, permit issue relating to oil and gas remained a driving factor as well in 1960.

The actual work on interprovincial boundaries began in earnest in 1961.

In particular, the matter was taken up at a meeting of the Attorneys General of the Atlantic Provinces held in Halifax on June 28, 1961. In attendance for Newfoundland at the time was its Attorney General, the Honourable Leslie Curtis.

At the Attorneys General meeting it was agreed that the provinces quote "should first of all agree among ourselves, among the provinces, upon interprovincial boundaries". Already the provinces were contemplating a presentation to the Government of Canada that would be made by the four Premiers in due course.

As well, the issue of the provinces' jurisdictional claim to ownership was described as relating expressly to oil, gas and mineral rights. This again goes to the question, the issue raised by Mr. Fortier earlier on, the boundary at all times related expressly to the question of delimiting the provinces' respective rights regarding oil, gas and minerals lying in the offshore, nothing more.

Now these rights to oil, gas and mineral rights in the offshore were to be claimed, according to the Attorneys General in 1961, along boundary lines to be decided upon between these provinces, and I submit that that made good sense.

These boundaries were regarded as necessary in part to manage exploration activities. And the question of mineral rights, and hence the boundaries along which they would be claimed covered, and I quote, "The Continental Shelf which extends out in the Gulf of St. Lawrence, as well as out in the Atlantic Ocean". An internal Newfoundland memorandum dated June 29, 1961, discloses the same.

The granting of offshore mineral concessions drove the discussion of the provinces' rights over the continental shelf. The provinces' immediate object was to determine the interests of each on waters between their two provinces in relation specifically to mineral and oil

rights, so that the line to be determined as among the provinces could also be used in a request to the federal government to have those areas declared to be provincial rights.

Now, I would draw the Tribunal's attention to one fact in particular. The Attorneys General considered that it was necessary for the provinces to agree among themselves first of all, on interprovincial offshore lines, both for the purpose of granting permits to industry, and also so as to support an eventual submission of the provinces' jurisdictional claim to the federal government, not as Newfoundland and Labrador now argues the reverse.

That is, at the June 28th, 1961 meeting, the Attorneys General recommended first, conclude an agreement on offshore lines delimiting, as I have said, the provinces' offshore mineral rights inter se, and then use that agreement in support of a jurisdictional claim that might define the precise nature of those rights. This, as history has shown, is exactly what happened. First the provinces agreed, they used that agreement to grant permits, and they also used that agreement in support of their jurisdictional claims to the federal government.

At all times, however, the two issues were separate, the two processes were distinct. The process leading in the first instance to an agreement among the provinces,

and the process leading in the second instance to negotiations, and 20 years later, to Accords between the federal government and two of the provinces on the question of the rights as between the provinces and the federal government over the offshore.

PROFESSOR CRAWFORD: In the minutes of the meeting of the Attorneys General in 1961 -- that was on the 28th of June, is that right?

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: There is a reference to a map?

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: It says the boundaries between Nova Scotia, New Brunswick and Prince Edward Island in the Northumberland Strait --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- were tentatively accepted according to a map presented by B. Graham Rogers. We don't -- I don't recall having seen a copy of that.

MR. DRYMER: Nor do I recall having seen a copy. And to the best of my recollection neither party has been able to find one in their files. As mentioned, that's just one of many documents that are clearly missing.

PROFESSOR CRAWFORD: But the point is work had already been done on what the lines might be by this stage at the level of least general mapping?

MR. DRYMER: It seems so. At least as between certain of the parties. The truth is we have no better evidence than that one reference to which you have just deluded as to what might have gone on before.

One further point that I would like to make about the events of this particular era, as regards the matter of a potential request to the federal government to legislate boundaries as agreed by the provinces, it is interesting that at the time the provinces seem to have misunderstood the pertinent clause in the BNA Act 1871, or at least to have misunderstood its application.

It appears that certain provinces were operating under the false assumption that Ottawa would be bound to accept whatever boundary lines were agreed by the provinces. Contrary to their stated understanding, however, of course, agreement on a boundary by the provinces concerned would not automatically be accepted by the federal government upon proper presentation.

The provinces' analysis of the role of the government of Canada in this regard and their understanding of what it meant to request federal legislation, appears to have been in error. Section 3 of the BNA Act 1871 provides -- perhaps I can read it to you if that is what you are looking for, Professor Crawford -- that parliament may, not shall, may increase, diminish or otherwise alter the

limits of a province upon such terms and conditions as may be agreed to by the legislature of such province of the BNA Act 1871.

And history has shown that the federal government did not consider itself bound to accept the agreement on boundaries eventually concluded between the provinces. More particularly given that the federal government did not accept the provinces jurisdictional claims, it did not consider itself bound to legislate offshore lines which covered the entire offshore in a manner which would have formally recognized the provinces' claims as opposed to the federal government. Nonetheless, at the time certain provinces believed that by presenting an interprovincial agreement to Canada that the result would inevitably be the alteration of their boundaries under the constitution. The essential -- excuse me.

PROFESSOR CRAWFORD: Has there been any practice of using Section 3 in respect of Maritime boundaries, I might even say territorial sea or closing lines across bays or any of that?

MR. DRYMER: I think not, sir. I could be in error. I'm sure Mr. Legault would know better.

CHAIRMAN: The boundaries understood under the 1871 Act, I take it are true boundaries or do they include possible maritime boundaries for certain purposes?

MR. DRYMER: Theoretically, yes, I believe they could have included maritime boundaries for certain purposes. As I said earlier, I think the provinces had good reason to believe that their claims -- well if they chose to make them would be accepted. And that the route that they were choosing was not an inappropriate one. The point, however, is that at least certain of the representatives of the governments involved seemed to believe that it was inevitable. We agree and the federal government will simply implement these lines.

And the point -- the point to all of this is that federal legislation was regarded as a near certainty, and as such it could not have been seen as a condition to the provinces developing boundary agreement as Newfoundland argues in its written submissions today.

I will turn now to the 1961 description and map of provincial boundaries. And the map, gentlemen, is on the side screen.

As agreed on June 28, Nova Scotia, which was the host of the Attorneys General meeting had its Department of Mines prepare "a plan and description delineating the boundaries of the several provinces of Quebec, Newfoundland, New Brunswick, Prince Edward Island and Nova Scotia.

These descriptions and plan were transmitted to the

Attorneys General of those provinces for their consideration on August 7, 1961, including to Mr. Curtis of Newfoundland. The understanding was that the boundaries "might be agreed among the provinces concerned and when agreement had been reached the several provinces would approach the federal government."

The plan and descriptions enclosed with that letter were a document entitled notes re boundaries, which described the province's boundaries by meets and bounds and an accompanying map drawn on CHS chart 4490, the map which you see projected next to the Tribunal.

Gentlemen of the Tribunal, these are the same boundaries that the Premiers of the five east coast provinces eventually unanimously agreed to be the marine boundaries of the provinces in the 1964 Agreement that they concluded on September 30, 1964. They are the same boundaries moreover that are found today in legislation implementing the Canada Nova Scotia accord.

Now I propose with the indulgence of the Tribunal to examine more closely the notes re boundaries and the map, that is the description of the boundaries and their graphic depiction later in the context of the Agreement concluded on September 30th 1964. I am, of course, prepared to do so now if the members of the Tribunal would wish. Thank you.

Before continuing, I will address an interesting issue that Newfoundland suggests to be and old Hardy Boy fans might call the Mystery of "the Missing Compass Roses". Newfoundland accuses Nova Scotia of what it calls "a significant omission" in our Figure 4, which is at Part II page 15 of our Memorial, which is a scanned version of the map prepared in 1961 and later formally approved by the Premiers.

Specifically, we stand accused of having "failed to reproduce" four compass roses that appear, I admit on Newfoundland's copy, of the map "while at the same time preserving everything else", that is on the chart accompanying the Stanfield proposal.

If is not apparent I will say it, Figure 4 is indeed an accurate reproduction of the map filed as Annex 32 to our Memorial, which in turn is a copy of the only copy of the map in Nova Scotia's possession. Apparently, our copy of the map was not as clear as the version provided to Newfoundland at the time, which it has filed with its Memorial, though misleadingly labelled I submit, Schedule B-Stanfield proposal.

And contrary to Newfoundland's other claim regarding our map, the compass roses are not the only items that are missing but clearly there is much other detail. It is difficult to see on the screen but if you look at the file

that we have filed as Annex 32, you will see that it's simply a poor photocopy. Depth soundings are missing, a chart comparing tables and meters and feet and fathoms as well as much other detail is missing on land and at sea.

I would add that Newfoundland itself has filed a copy of this same map that is also missing significant detail, and that is Newfoundland's Document number 57, which was a map attached to a letter addressed to Nova Scotia by Minister of Mines, Doody. That map will be discussed later by my colleagues, but the point is simply that various copies of the same map seem to have been more or less refined.

The copy in Nova Scotia's files, yes, was less clear than that in Newfoundland's archives. One wonders then how their understanding of the 1964 Agreement could not have been as clear as ours, but in any event, I would point out that even Newfoundland's Minister of Mines could find no better copy of the map when he needed one. I submit Frank and Joe Hardy would be proud. Mystery solved.

Of greater significance than the not-so-mysterious compass roses on Newfoundland's -- excuse me, on Nova Scotia's Figure 4 is the fact that as is noted on our figure the 1961 map was prepared prior to the identification of the geographic coordinates of the

boundary turning points. The map was not intended to depict the boundaries with precision. On the other hand, the complete and accurate description of the boundaries, including the Nova Scotia-Newfoundland line, was set out in the description contained in the notes re boundaries.

The boundary map transmitted to the provinces on October 7, 1961, was presented to and discussed by the Atlantic Premiers, including Premier Smallwood, at their annual conference in Charlottetown a few days later.

It appears that the boundary map was also presented to the Attorneys General of the Atlantic Provinces at a meeting held in Halifax on October 7, 1961, at which "This boundary line was formerly(sic), perhaps it means formally accepted." The copy provided to Nova Scotia is incomplete, I discovered this morning. Perhaps Newfoundland has a version with a full first page that could be provided to us in due course.

In 1962, the provinces were still pondering the question of policy.

PROFESSOR CRAWFORD: Sorry to interrupt. What -- when does the record show that map? I mean, I'm not concerned about the compass rose, which we'll leave to later, detective writers. When -- but in other respects, when was that map with those lines including the southeasterly line, when did -- when did that first come into existence?

MR. DRYMER: To the best of our knowledge, in 1961.

PROFESSOR CRAWFORD: Because the -- the version we have, of course, has extra material printed on it.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: So it's a bit hard to tell, but --

MR. DRYMER: It -- it -- to the best of our knowledge, on the basis of the factual record, the map was drawn on that chart in 1961. And, of course, yes, it was subsequently used in various contexts, by various people in various provinces. You will recall -- excuse me.

PROFESSOR CRAWFORD: Sorry, go on. I'm just saying that it doesn't seem from the description in the minutes of the meeting of 28 June 1961 that it was that map, because it says the boundaries between Nova Scotia and New Brunswick and Prince Edward Island and Northumberland Strait area were tentatively accepted according to a map presented by B. Graham Rogers. This map is on a grid basis. The final exact line of boundary in Northumberland Strait would have to be decided upon. There's no reference to any boundary with Newfoundland there.

MR. DRYMER: Yes. It appears that this map was transmitted to the provinces on August 7, 1961, and it was presented to, and discussed, by the Atlantic Premiers, as I said a few moments ago, at their Annual Conference in Charlottetown a few days later. So that would have been

in August, '61, and I refer you to Annex 17 of our submissions.

I'll quote from this letter. It is a letter, in this instance, addressed to Mr. Rogers of PEI, with copies sent to Mr. Curtis of Newfoundland, among others, on 7 August.

"I am accordingly forwarding to you two copies of the map and the verbal descriptions, and I am sending a copy of this letter, along with one copy of the map and one copy of the verbal descriptions to the Attorney General of New Brunswick, and the Attorney General of Newfoundland."

And the date of that letter, sir, was August 7, 1961. It's Annex 17 in our materials.

PROFESSOR CRAWFORD: Thank you.

MR. DRYMER: It also appears that the boundary map was subsequently considered by the Attorneys General after August 7, at a meeting held in Halifax on October 7, at which, and here again I was -- I referred to Newfoundland's document 5, it appears that quote "This boundary line was..." -- it says "formerly", we presume it means "formally accepted by the Attorneys General of the Atlantic Provinces."

Now, in 1962, I should say to the Tribunal that this is not an inconvenient time for me to pause if you would like, I'm fully prepared to continue. I know we're early, it's up to you, Mr. Chairman.

CHAIRMAN: Pardon me?

PROFESSOR CRAWFORD: Keep it going?

MR. DRYMER: That suits me. Thank you. In 1962, the Provinces were still pondering the question of policy regarding the provinces' approach to the federal authorities on the matter of provincial versus federal rights for the offshore. This did not, however, affect their separate initiatives recommended by the Attorneys General to first of all agree among ourselves on interprovincial boundaries.

Several options were suggested in 1962, as to the provinces' policy, or approach regarding their jurisdictional claims as against the federal government. Everything from obtaining agreement from the federal authorities that the provinces have the rights to the submarine mineral areas, to letting sleeping dogs lie.

The point, members of the Tribunal, Mr. Chairman, is that in 1962, as earlier, it was suggested that if the provinces chose to request federal recognition of their jurisdictional claims, and if such recognition was granted, thereby solving the jurisdictional issue, then one way, only one way of giving effect to this would be a redelineation of the provincial boundaries under the BNA Act 1871.

The question of how to approach the federal

authorities was still very much up in the air. Requesting federal agreement to the provinces' jurisdictional claims was one approach considered by the provinces, but clearly agreement on behalf of the federal government was far from certain. So that if the provinces chose this route, and if the federal government accepted the provinces' claims, then one potential means of giving effect to that acceptance would have been to redelineate the provinces' boundaries.

Meanwhile, as I said, agreement among the provinces on the matter of their interprovincial lines delimitating -- delimiting their respective rights continued to gain momentum.

Obviously, such as agreement among the provinces was considered worthwhile, no matter how or even whether it might ever be used in support of claims against the federal government.

In 1963, Premier Shaw was advised in a memo -- Premier Shaw of Prince Edward Island, excuse me, was advised by means of a June 13, 1963 memorandum, that the need to resolve the boundary issue was significant. Now that memorandum also reflects the consistent view that this was a matter to be resolved as between the provinces.

The memorandum discloses that the file continued to be driven in 1963 by the need to resolve oil and gas

exploration and permitting issues. I quote, "The matter is becoming more important everyday. Two oil companies are doing extensive work this summer on the Nova Scotia side of Northumberland Straits. This could be very important to us here on Prince Edward Island. Moreover, the interprovincial ramifications of settling the boundary issue, as opposed to federal-provincial concerns remain clearly front and centre." I quote, "In the boundary line division it must be remembered that PEI will be the gainer, as we will have all of one side of the strait, whereas Nova Scotia and New Brunswick will only have the portion that lies opposite each respective province."

By 1964, the boundaries as set out in the 1961 "Notes re Boundaries and Accompanying Map" had been transmitted to Quebec.

On July 2, 1964, Quebec's Deputy Minister of Natural Resources responded by declaring his Minister's full support for an agreement among the provinces regarding their respective offshore boundaries. Quote "Dr. Jones, an official in the Ministry of Natural Resources, informed me of the action taken between the Maritime Provinces in order to agree on the location of their underwater boundaries. My Minister is quite pleased with the idea of fixing the boundary between our provinces, and he agrees with your present plan."

Now --

PROFESSOR CRAWFORD: I hate to do this again. Can we just go back a moment.

MR. DRYMER: Sure.

PROFESSOR CRAWFORD: To the document of 13 June 1963.

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: That you were discussing. And I notice from your graphic, which is slide 37 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: That -- that's a depiction of the -- of the Newfoundland Annex 5?

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: And some of the words at the bottom of that page are missing.

MR. DRYMER: Professor Crawford, these are precisely the words I referred to earlier --

PROFESSOR CRAWFORD: Yes.

MR. DRYMER: In respect of which I asked our friends if they could find a clearer -- a clearer copy, or a more complete copy of this page. I read on my copy, the next meeting was in Halifax on October 7, '61, etc.. Later this boundary line was formally accepted by the... --

PROFESSOR CRAWFORD: The next word is obviously "Attorney General".

MR. DRYMER: It seems to be, yes. I can tell you no more.

Contrary to what Newfoundland calls us, we do not read crystal balls.

PROFESSOR CRAWFORD: It seems to me that formally accepted in the light of the hypothetical character of the inquiry is quite appropriate.

MR. DRYMER: Fair enough.

Now, I have referred to the response by Quebec's Deputy Minister to the boundaries that had previously been transmitted to him. In particular, his comment that his Minister is quite pleased with the idea of fixing the boundary. Now I would like to pause for a moment to draw your attention to the use of the word "fixing", as in "fixing the boundary". I submit that this choice of word is significant.

It is, of course, proper English, properly used in this context. To fix means, and I quote from Webster's Collegiate Dictionary, it was at hand this morning, "to set or place definitively; to establish; to make an accurate determination of;". Now, the word is proper English, and it is, as I have said, properly used.

To me at least, and perhaps to the members of the Tribunal, the word appears to stand out in the Quebec letter. And if it does it is perhaps because it is a literal translation from the French "fixer", which is similarly defined as "régler d'une façon déterminée,

définitive". That is to settle in a determinative, definitive manner. As in "fixer une règle, un principe, des conditions."

Either way, whether expressed in French or in English, there can be no question but that the intent was for the provinces to settle definitively "régler d'une façon définitive" the matter of their mutual boundaries in the offshore.

Moreover, it is evident that for Quebec, in 1964, just as for the other provinces, a potential request to, and the possible acceptance by, the federal government of a fixed boundary between our provinces was not essential to the provinces agreement among themselves, rather it was understood that such an agreement quote "should be accepted by the federal government so that the matter of respective jurisdiction between the provinces and the central government be finalized once and for all."

Correspondence between PEI and Nova Scotia officials during the same period illustrates a similar understanding. In response to a letter from an official in the office of Nova Scotia's Attorney General, Mr. Rogers of Prince Edward Island, the senior official of the province involved in the boundary negotiations, wrote "It must be clearly understood that each of the provinces should have the right to issue offshore licenses on their

respective sides of this accepted boundary line. And then later, if we have to argue with Ottawa about it, we will only have to do so." At all times an agreement among the provinces, and an agreement between the provinces and the Government of Canada were regarded as distinct processes, both temporally and conceptually.

First of all, the provinces had to establish their boundaries so as to settle definitively, to delimit their respective rights. The rights as between the provinces in the offshore. Then it would be up to the federal government to accept or not those boundaries, so as to resolve to delimit the rights of the provinces vis-a-vis those of Canada.

And as to the first of these questions, the delimitations of the rights of the provinces inter se, the federal government simply had no role to play. In fact, the record demonstrates that the Government of Canada had no interest in determining either how or where the provinces delimited their rights as between themselves. And this point is evident in the facts that arise later during the relevant period, and they will be addressed by my colleague, Monsieur Bertrand.

On September 23, 1964, at a meeting of the Attorneys General of the Maritime Provinces, what was to become more or less the 1964 Agreement, was formally recommended to

the various provincial governments.

Now Newfoundland's Attorney General was not present, though a memo prepared during the meeting was sent to the province the same day by the Deputy Attorney General of Nova Scotia, Mr. MacDonald. And this is acknowledged both by Newfoundland and Labrador, and it is demonstrated in our own materials, in our written submissions.

The Attorneys General, at that meeting on September 23, resolved that quote, "The boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities, and the necessary steps taken to give effect to that agreement." The Attorneys General declared these suggested boundaries, which I would remind you, were the 1961 notes re boundaries and the map, have had the tentative approval of New Brunswick, Prince Edward Island, Newfoundland and Nova Scotia.

Accordingly, the Attorneys General concluded, on September 23, 1964, and I quote, "It is recommended that these boundaries should have the more formal approval of the several governments concerned." Members of the Tribunal, Mr. Chairman, this is exactly what happened the following week at the Atlantic Premiers Conference of September 30, 1964, as will be seen in a few moments.

PROFESSOR CRAWFORD: Just looking at that document --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: In paragraph 2, which you've quoted from where the words "more formal approval" appear --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- the discussion there is essentially the Gulf of St. Lawrence, Northumberland Strait, Cabot Strait. That's right, isn't it?

MR. DRYMER: Those are the references, yes.

PROFESSOR CRAWFORD: And then there is the final words of the paragraph refer to the "more formal approval several governments concerned, it is further recommended that parliament be asked to define the boundaries as so approved by the provinces under the provisions of section 3."

MR. DRYMER: Yes, sir.

PROFESSOR CRAWFORD: Of the 1871 Act. And later on it goes on to say in paragraph 5, "It was felt that the principles stated above with respect to inland waters would and should extend to coastal waters including, subject to international law, the areas in the banks off Newfoundland and Nova Scotia".

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: Can we read from that that it may have been envisaged that section 3 would only be applicable in effect inshore to something which the provinces want to decline as internal waters?

MR. DRYMER: I think not, Professor Crawford. I think that while the initial interest may have been inshore, that interest expanded, and that the principle that had been early developed perhaps in the correspondence that you referred to earlier, that we have not seen, that those principles should be applied offshore, as well. And as I stated earlier, I believe that -- that the relevant provisions of the BNA Act would have been equally applicable offshore as inshore.

PROFESSOR CRAWFORD: Yes, the question is not whether they would have been. I mean, there is obviously a question whether they would have been.

MR. DRYMER: Mmmm.

PROFESSOR CRAWFORD: The question was what was the approach being taken by those responsible for the meeting, or the writer of those minutes. Because it just seemed possible to draw a distinction between their handling of the inshore waters, where they refer expressly to section 3, and their handling of the offshore waters, where they refer to international law.

MR. DRYMER: With respect, I do not see that distinction. With respect, the paragraph that you have referred to simply makes the point that all of these principles extend, subject to international law, to areas in the banks off Newfoundland and Nova Scotia. That is the

provinces were clearly intending to delimit as between themselves. And more importantly, to claim from the federal government areas lying not only inshore, but well offshore, as you will have seen in our written material, and as my colleagues will discuss further later today and tomorrow, the provinces were very shortly issuing permits hundreds of miles offshore. That was the area, among others, that they were seeking to claim, and that was the area that they were seeking to delimit.

I hope I have answered your question. Simply put, I do not see the distinction that you suggest is there, Professor Crawford.

PROFESSOR CRAWFORD: Well I mean, I think the document helps you in that it shows that they had in mind already the four -- I mean on the 23rd of September, the question of boundaries --

MR. DRYMER: Oh clearly.

PROFESSOR CRAWFORD: -- in the offshore areas --

MR. DRYMER: Clearly.

PROFESSOR CRAWFORD: -- associated with the banks of Newfoundland and Nova Scotia.

MR. DRYMER: Clearly.

PROFESSOR CRAWFORD: I was simply saying that it's possible to read the document as inferring that section 3 was only applicable to inland waters.

MR. DRYMER: Yes, and my response to that was simply with respect the document need not necessarily be read that way.

I reiterate at all times an agreement among the provinces and an agreement between the provinces and the Government of Canada were regarded as distinct, temporally and conceptually. Defining the boundaries by federal legislation, that is altering the territory of the provinces under the constitution, was regarded as a measure separate from the provinces' determination of their boundaries inter se. Federal legislation would have constituted, in effect, an agreement between the provinces and the Government of Canada, delimiting the rights of the provinces vis-a-vis those of Canada, which rights were being claimed, as we're aware, well out into the offshore.

Federal approval was not stated to be and was not, in fact, relevant to the boundaries to be fixed as between the provinces, a process in which the federal government had no role, but federal approval was related, rather, simply to what the Attorneys General on September 23, 1964 referred to as quote "The formal recognition of the rights of the provinces to the submarine minerals from the federal government." unquote.

And again, to return to your point, Professor Crawford, if the mechanism they were considering as a

means of formalizing their claims vis-a-vis the federal government was an alteration of the provinces' boundaries, clearly, those boundaries would have to extend as far as the rights that they were seeking to claim.

It is also noteworthy that the Attorneys General recommended -- and this is something that is nowhere referred to, as far as I can tell, in the Newfoundland and Labrador Memorial or Counter Memorial -- that the Attorneys General several recommendations would and should, as you pointed out, extend to coastal waters, subject to international law, areas in the banks off Newfoundland and Nova Scotia.

Now this is, perhaps, an appropriate place to address what Newfoundland and Labrador alleges is yet another significant omission. This time, however, the blame lies not with Nova Scotia, since the alleged omission that Newfoundland claims to have identified is in the contemporary documentation comprising the historical record in this case, and I refer to paragraph 211 of Newfoundland and Labrador's Memorial.

Newfoundland claims that because the documentation from 1964 contains quote "Not a single reference to the Laurentian Channel or to the Laurentian Sub-Basin, those areas were effectively excluded from the 1964 delimitation."

Well, aside from the fact that, as indicated and as we discussed a few moments ago, the contemporary documentation indeed refers to areas in the banks of Newfoundland and Nova Scotia, the Tribunal is well aware and the independent expert knows even better that the Laurentian Channel is a seabed feature, while the names of the bays and straits mentioned in the documents referred to by Newfoundland are surface features, and the Laurentian Sub-Basin, to our knowledge, was not discovered until many years after 1964.

As set out in our Counter Memorial, at part 4, paragraph 80, the earliest reference that Nova Scotia has been able to find in the scientific literature through the Laurentian Sub-Basin is on a map included with a 1986 publication. That is over 20 years after its supposed omission from the documentation evidencing the 1964 Agreement. Again, had they pondered the issue, I think Frank and Joe Hardy might have been proud.

I am about to discuss the conclusion of the 1964 Agreement, specifically, the events of September 30, 1964. I wonder whether this would be appropriate -- an appropriate time for the Tribunal to break. For myself, I'm more than pleased to continue.

PROFESSOR CRAWFORD: Before you do --

MR. DRYMER: Yes, sir.

PROFESSOR CRAWFORD: -- it's established, I think, that the map which contains the line going part of the way out, if I may call it that way, the map that you said was established, I think, in August of 1961.

MR. DRYMER: Yes, sir. John, can you pull it up, please? It's 28. That's it. Thank you.

PROFESSOR CRAWFORD: I mean I suppose we might call that for short the "Stanfield map", but --

MR. DRYMER: Well, some people do.

PROFESSOR CRAWFORD: Well, I'm very happy. Since you're going first, you can have the advantage of nomenclature. Would you like to call it the original map?

MR. DRYMER: Well, it was the 1961 map.

PROFESSOR CRAWFORD: The 1961 map.

MR. DRYMER: And it was also the map attached to the 1964 Agreement and it was the map proposed by all of the Atlantic provinces.

PROFESSOR CRAWFORD: Well, let's call it the 1964 Agreement map.

MR. DRYMER: Perfect.

PROFESSOR CRAWFORD: This is the plan of proposed boundaries which is mentioned in the letter by John MacDonald of 23 September, which seems to have been the covering letter to the memorandum we were discussing a moment ago.

MR. DRYMER: Yes. And we looked -- thank you.

PROFESSOR CRAWFORD: It's Newfoundland Annex 10 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- is the covering letter. There's no mention there or anywhere else that I've been able to see as to why the line stops where it does. But if you look at the memorandum which we were discussing which refers to coastal waters, including subject to international law, the areas and the banks off Newfoundland and Nova Scotia, I suppose that does provide a possible clue that at least these were coastal areas in the vicinity of the banks. Is that a reasonable hypothesis?

MR. DRYMER: Well, it's our submission that the line has an undefined terminus and was not intended to depict anything other than a line heading southeasterly toward international waters. It is further -- further, it is our contention that the term "international waters" was not understood in any technical sense at the time so that the line depicts nothing other than the beginning of a line, clearly heading seaward from the last turning point to an undefined end point.

PROFESSOR CRAWFORD: Yes, but the point is that the memorandum of 23 September uses the phrase which is, as it were, perhaps the best evidence up to now, that they weren't simply concerned with the Gulf of St. Lawrence and --

MR. DRYMER: Oh, that's clear.

PROFESSOR CRAWFORD: I mean this is evidence of that, and the phrase that's used -- coastal waters including subject to international law, the area and the banks off Newfoundland and Nova Scotia -- is there any other reference prior to the date of the Agreement which would provide any other indications as to why the line stopped, or alternatively, didn't stop there?

MR. DRYMER: If I may -- I'm accused of sometimes answering questions with questions, but you referred to the Agreement. Do you rather mean 1961 when this map was produced or are you referring to the date of the 1964 Agreement itself?

PROFESSOR CRAWFORD: Yes. What I'm asking is that is there anything prior to the 30th of September, 1964 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- apart from paragraph 5 of the --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- 23 September memorandum which might give us any clues as to what was intended by the line?

MR. DRYMER: Other than the intent to draw a line covering the full extent of Canada's claim to the continental shelf.

PROFESSOR CRAWFORD: Or even including that.

MR. DRYMER: Or even including that, of course. Again, the

point is that clearly, the intention was to draw a line that delimited, among other things, the banks off Newfoundland and Nova Scotia. This line, we do not submit, was an accurate or precise depiction of that. It was simply a graphic demonstration that the line headed out to sea in that general direction.

PROFESSOR CRAWFORD: Thanks very much.

MR. DRYMER: Thank you. Mr. Chairman, would you like me to continue or shall we break?

CHAIRMAN: I think everyone would be better for a break now.

MR. DRYMER: Very well. Thank you very much for your attention. See you after lunch.

CHAIRMAN: Thank you very much.

(Recess - 12:30 p.m. - 2:00 p.m.)

CHAIRMAN: Yes, Mr. Drymer.

MR. DRYMER: Thank you, Mr. Chairman. If I may, I would like to follow up on a question that Professor Crawford asked, as to whether or not there were in the record any evidence prior to the document we were looking at earlier, to permits or claims extending that far offshore.

The one record we have found, and at this point the only record we have found in the file, is actually the legal opinion received by the provinces in 1959, to the effect that while there is an argument the other way -- I'm referring to Annex 10, paragraph 5 of Nova Scotia's

materials -- while there is an argument the other way, a legal argument can be made that the Maritime Provinces, Newfoundland and Quebec own the submarine subsoil under the Continental Shelf which stretches from the shore to about 200 miles from Newfoundland. That, Professor Crawford, is the only other record we have found prior to this period that refers to that outer area.

PROFESSOR CRAWFORD: Thank you very much.

MR. DRYMER: You are welcome. Before discussing the crucial events of September 30, 1964, I would like to recap just briefly the submissions that I made earlier today. You will recall that the issue of submarine rights, mineral rights and boundaries arose initially in 1958. That throughout the period 1958 to 1964, the provinces considered the question of their rights inter se as between themselves distinct from the matter of their rights as opposed to the federal government. That from very early on, they contemplated the need, first of all, to agree amongst themselves on their interprovincial offshore boundaries, which agreement would be used among other things for the purpose of granting offshore permits and as well for the purpose of an eventual presentation to the federal government concerning their rights.

Their conduct in this regard was consistent, agree first, then use that agreement. This we submit is what

the provinces did.

In fact, after many years of discussion, the Premiers of the five East Coast provinces concluded an agreement establishing boundaries, including the line dividing the offshore areas of Newfoundland and Nova Scotia, for the purpose of delimiting their respective rights to minerals lying in a seabed of the offshore. And this was the 1964 Agreement concluded at the conference of Atlantic Premiers held in Halifax, Nova Scotia on September 30th 1964. The agreement to which Quebec acceded exactly one week later.

Now prior to addressing the events of the conference themselves and examining the nature of the Agreement concluded on that date, four observations of what I call a contextual nature are I believe appropriate, and may prove helpful as the Tribunal considers the evidence.

The first of these relates to the currency of the expression 1964 Agreement. Nova Scotia -- excuse me, Newfoundland derives Nova Scotia's use of the term, as you are aware, the term 1964 Agreement, to describe the boundary delimitation concluded by the Premiers on September 30th.

It alleges that there is no evidence produced to show the currency of the expression, 1964 Agreement. In fact, Mr. Chairman, members of the Tribunal, the scholars whose work is cited in the Newfoundland Counter Memorial do use

this very expression and many similar terms, including for example, the 1964 Interprovincial Agreement, which is used by Charney and others, the 1964 Interprovincial Boundary Agreement, which is again used by Charney and Smith, and, yes, the expression 1964 Agreement, which is found in Charney's and Smith's articles. A small point, but I think it's one worth mentioning, it is not a term that we invented.

I think it is also worth noting in this regard, that the map attached to the October 6th 1972 letter from Newfoundland Minister, Doody, to Nova Scotia -- and this is the same map that as we saw earlier also mysteriously omits the "compass roses", that map bears a handwritten caption that reads, "1964 Interprovincial Premiers' boundaries", that is Newfoundland Document 57.

Now presumably were he here to testify today, the author of this caption might well have told the Tribunal that these 1964 Interprovincial Premiers' boundaries were derived from the 1964 Interprovincial Premier Boundary Agreement. All told I think 1964 is a fairly handy and useful expression.

Contrary to Newfoundland's overheated prose in this regard, the term 1964 Agreement is neither a myth as it claims nor a mantra. It is rather a term that seems to have been very much in use.

Newfoundland also accuses Nova Scotia of quote "isolating the words agreed and agreement from the context that gives them meaning." And I refer to paragraph 123 of Newfoundland's Counter Memorial. In fact, the analysis of the factual record in which we are engaged and which is set out at length in Nova Scotia's written submissions is precisely an analysis of the numerous contexts in which the words agreed and agreement were used by the parties over and over again.

The evidence demonstrates that when Premier Smallwood and Premier Stanfield, among others, used these words, they understood full well their meaning. The Premiers understood then as they would today, as Premier Hamm told you he does today. That a deal is a deal. And an agreement means an agreement.

Nonetheless, in an effort to neutralize the significance of this evidence, Newfoundland claims that the parties' intent to include a binding agreement or to establish agreed boundaries, must be sought completely separate and apart from the plain words agreed and agreement. In effect, the argument as it is phrased in Newfoundland's written submissions, is that in considering the documents that evidenced the 1964 Agreement, the Tribunal should attach no importance whatsoever to the Premiers' repeated references to quote "the marine

boundaries agreed upon by the Atlantic Provinces", or that no significance should be imputed to declarations such as the conference agreed on marine boundary lines between each of the provinces. And no intention to conclude an agreement should presumably be understood by the Atlantic Premiers conference as unanimously agreed the marine boundaries of the provinces.

In truth, the documents evidencing the formation of the 1964 Agreement may certainly be interpreted among other means by reference to what Newfoundland and Labrador has called the context that gives them meaning. Certainly that's appropriate. But surely this does not mean ignoring the plain words of the documents and the plain meaning that they disclose. In 1964, as today, an agreement is and was an agreement.

It is also worth noting that in many ways the current disagreement between Nova Scotia and Newfoundland regarding the outcome of the Premiers September 30, 1964 conference, which we will examine in a few moments, concerns the nature of the Agreement reached by the provinces on that date. The question that arises from the submissions made by both parties in this arbitration is what did they agree upon in 1964?

Newfoundland and Labrador claims quote "they agreed upon a joint negotiating proposal." I refer to paragraph

125 of newfoundland's Counter Memorial. It also claims, for example, the provinces agreed to present a common position to the federal government. Nova Scotia says simply the provinces agreed upon their boundaries.

Determining what exactly Nova Scotia and Newfoundland agreed upon is the task of the Tribunal. My last contextual observation before turning to the events of the conference itself concerns another question regarding which the parties may be closer together than appears at first glance.

I refer to the issue of the underlying purpose for which the provinces agreed upon their boundaries. Newfoundland and Labrador claims the very idea of delimiting boundaries was to assist in the provinces' claims to offshore ownership and jurisdiction. And I refer to paragraph 128 of Newfoundland's Counter Memorial, which references paragraph 28 in its Memorial.

Similarly -- and Newfoundland asserts that on the 23, September 1964 meeting of Attorneys General, the Attorneys General recommended that quote "the provinces should agree on interprovincial boundaries for the purpose of placing a negotiating proposal before the federal government."

Nova Scotia for its part says quote "an agreement regarding boundaries as between the provinces was considered essential to any assertion by them of

jurisdiction over submarine mineral resources, or any political agreement vis-a-vis the government of Canada, and as well, to any granting of rights to industry."

There are numerous formulations of this statement in our written submissions. I have just quoted from Part II, paragraph 11 of our Memorial.

The formulations may differ slightly as between the parties. But I suggest that the two sides are essentially in agreement. The provinces delimited their boundaries inter alia, so as, in Newfoundland's words to quote "assist in the provinces' claims to offshore ownership and jurisdiction." We have no quarrel with that whatsoever.

This was, of course, the strategy adopted by the provinces from the outset, as we saw earlier this morning. First of all, the provinces would conclude an agreement among themselves on offshore lines delimiting the provinces' offshore mineral rights inter se. Then they would use that agreement, among other things, in support of a jurisdictional claim against the federal government, not the reverse. They needed the boundaries to make their claims, or so they thought. And they agreed their boundaries, among other reasons, so as to be able to use it in asserting claims as against the federal government.

What the provinces did not do, however, as the evidence demonstrates, was agree that their delimitation

to assist in their claims to offshore jurisdiction and ownership would apply only in the event that they attained ownership and jurisdiction.

There are no words in any document that state that they did and there was no reason for them to have so agreed. In fact, there seems to have been every reason for them not to have done so.

As we have seen, we are talking now about the period 1964, the parties have been discussing these issues since approximately 1958. Ownership and jurisdiction may well have been desired, but they were at best in 1964 and earlier and later, distant goals.

In the meantime, the provinces had to get on with the business of encouraging offshore exploration and development and securing benefits for themselves from such activities.

As my colleague, Professor Saunders, will discuss tomorrow, the federal government issued permits throughout the offshore and it continued to do so irrespective of the provinces' boundary agreement. This did not, however, preclude the provinces from issuing mirror permits to industry in their respective offshore areas. But it would have been impossible to administer a regime, let alone to attract any interest from industry, where the provinces themselves were also consciously issuing overlapping

permits, one on top of the other.

The facts in the period leading up to and surrounding the conclusion of the 1964 Agreement simply do not disclose that as Newfoundland asserts today, the 1964 delimitation accomplished by the East Coast Premiers to assist in their claims to offshore ownership was dependent on the fulfilment of those jurisdictional claims or that the delimitation was but one element of what Newfoundland calls a joint negotiating proposal, or that the delimitation ceased to have any relevance, as Newfoundland argues, once the provinces' ownership claims were rejected by the federal government.

Again, delimiting boundaries was, as Newfoundland and Labrador states clearly regarded as necessary inter alia to assist in the provinces' claims to offshore ownership, not the reverse. As at all times, both prior to and after September 1964, an agreement among the provinces and an agreement between the provinces and the federal government were regarded as two distinct processes. Related surely, but not -- but not inseparably.

Defining the boundaries by federal legislation, that is altering the territory of the provinces so as to encompass the offshore would have constituted in effect, as far as the provinces were concerned recognition by the Government of Canada of their jurisdictional claims

against Canada. Federal legislation was conceived by the provinces at the time as a means of formalizing the federal government's acceptance or approval or recognition or agreement, say what you will, regarding the rights of the provinces, as opposed to the rights of Canada, to the submarine minerals located within those boundaries. Professor Crawford?

PROFESSOR CRAWFORD: Itchy fingers. Can we just look at the 1964, the September 1964 document which as -- is the agreement. I understand your position to be that the Atlantic Premiers on 30 September 1964 agreed on the boundaries?

MR. DRYMER: May I ask are you referring to our Annex 24?

PROFESSOR CRAWFORD: I am sorry, the document I have got is actually Newfoundland, Annex 11.

MR. DRYMER: Okay. I believe that's the same document.

PROFESSOR CRAWFORD: Single page.

MR. DRYMER: That's the same document.

PROFESSOR CRAWFORD: Yes.

MR. DRYMER: That is the communique issued by the Premiers at the conclusion of their conference.

PROFESSOR CRAWFORD: So the communique is not itself the agreement, the communique is the evidence that the agreement was --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- made on that day?

MR. DRYMER: Yes, sir.

PROFESSOR CRAWFORD: And there is no better evidence so for the purposes of the -- for the purposes of the arbitration, we have to take it that the agreement of that day is formulated in the terms of the communique. Let me put it that way.

MR. DRYMER: I would suggest that of the documents you have, this is certainly the closest in time and perhaps the clearest expression, but not necessarily the only expression.

PROFESSOR CRAWFORD: No. Certainly you might have a situation where an agreement was, for example, destroyed in a fire and one could produce other evidence of what it contained.

MR. DRYMER: Right.

PROFESSOR CRAWFORD: This disagreement wasn't destroyed in a fire?

MR. DRYMER: As far as we know, no.

PROFESSOR CRAWFORD: So looking at the language of it, paragraph 4 --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- says that it is desirable that the Maritime boundaries as between the several Atlantic Coast provinces should be agreed upon by the provincial

authorities and the necessary steps taken to go -- that should be give?

MR. DRYMER: I think so.

PROFESSOR CRAWFORD: It's marvellous the effect of misprints in some of these documents.

MR. DRYMER: The age before word processing.

PROFESSOR CRAWFORD: To give effect to that agreement. Now the phrase that interested me is the last one. The necessary steps taken to give effect to that agreement. But isn't it your position that there were no steps necessary to be taken, that what happened on the 30th of September was the agreement of which this is evidence?

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: I mean, what steps had to be taken to give effect to the agreement then? I mean if I have signed an agreement and it's binding on me, I -- there may be things that I have to do to implement the agreement?

MR. DRYMER: Well the first most obvious step that the provinces had to take, and they had been discussing this for some time, was to seek the -- propose the boundaries to Quebec and seek Quebec's approval. The idea being to delimit the boundaries between five East Coast provinces, not simply these two. I think that the reference in the subsequent paragraph states this clearly, that these gathered Premiers, the Premiers of -- Premier Stanfield of

Nova Scotia, Premier Robichaud of New Brunswick, Premier Shaw of PEI and Premier Smallwood of Newfoundland, unanimously agreed, and I refer to paragraph 5, Professor Crawford, that the boundaries described in the notes, re boundaries and map, (b) the marine boundaries of the Provinces of Nova Scotia, Newfoundland, PEI and New Brunswick.

PROFESSOR CRAWFORD: And the word, "be", appearing after the word, Schedule B in paragraph 5, so shown graphically on Schedule B, be the Maritime boundaries. The words, "be there" are not subjunctive. They are performative.

MR. DRYMER: Absolutely. I wish I could say it would be easier in French, but I don't think it would be in this case. It's not they should be, it's that they are the boundaries of these provinces.

PROFESSOR CRAWFORD: In paragraph 3, the word, "be" --

MR. DRYMER: Yes.

PROFESSOR CRAWFORD: -- means should be. The Parliament of Canada be requested means it should be?

MR. DRYMER: Well be requested, yes. I would submit, Members of the Tribunal, Mr. Chairman, that these points that we have been discussing for the last couple of minutes, in particular the questions raised by Professor Crawford, will become even more clear as we examine the events of September 30th and subsequent.

I turn now finally to the Atlantic Premiers Conference itself, which took place on September 30th 1964. The proceedings of the conference and the record of the Agreement concluded at that conference are found in various documents. Perhaps the best of which as Premier -- well not yet, Professor Crawford pointed out is the communique, Annex 24, or Newfoundland document 11. But there are others as well that we will look at. Principally, the follow-up matters discussed memorandum.

Let me start at the beginning. Attending the conference were, as we have seen, the Premiers of the four Atlantic provinces, including Premier Smallwood of Newfoundland.

The second item on the Premiers' agenda was submarine mineral rights and provincial boundaries. And that's evident from our Annex 23, which is the agenda for the conference.

The title alone, I submit, is sufficiently clear to distinguish federal-provincial questions and inter-provincial matters. But the agenda itself explicitly divides the subject along those lines as follows, (a) constitutional questions, that is matters between the federal and provincial levels of government within Canada, and (b) agreed boundaries. That is, matters as between the provinces.

Against this backdrop, I turn now to the Premiers' declaration of their agreement. That is the communique issued at the conclusion of the conference. Now this communique is quoted at length in Nova Scotia's Memorial, and is in fact reproduced in full in our Counter Memorial. It is, however, virtually ignored in Newfoundland's initial written submission and given short shrift in its Counter Memorial.

I submit that it's useful to recall here and throughout both the hearing, and if you will permit me, the Tribunal's subsequent consideration of the parties' submissions. It is useful to recall and to test Newfoundland's unfounded, yet frequently repeated, theory regarding the outcome of the Premiers' conference. Specifically, its theory and nature and effect of the Agreement concluded by the Premiers on September 30th.

Although stated in various ways in its written submissions, two of which have been referred to above, perhaps the most straightforward expression of the Newfoundland and Labrador theory regarding what the provinces agreed upon and what the purpose of the Agreement was is the following: This is a quote from Newfoundland's Memorial, at paragraph 187. Quote "The lines were put forward as an integral part of a package proposal, which was submitted to and rejected to by the

federal government. They were part of a joint negotiating proposal, not in agreement in its own right that could survive rejection of that proposal."

Well the Premiers' communique is quite clear, I submit. It records the Premiers unanimously agreed on seven items. One of which was the Atlantic Premiers Conference, with Premier Stanfield of Nova Scotia, and Premier Smallwood in attendance, among others, unanimously agreed, as we have seen, that the boundaries described in metes and bounds in Schedule A, and shown graphically on Schedule B, be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, PEI and Newfoundland.

The communique just does not disclose that the Premiers agreed to a package proposal or that they agreed to present a common position to the federal government as Newfoundland claims at paragraph 33 of its Memorial.

Nowhere in the communique is there the least evidence that the provinces regarded their boundary agreement as subordinate to, or as ancillary to, or as an integral part of a package proposal, the overriding purpose of which was ownership of offshore rights. There is not a single word in the communique in this regard. Nothing that suggests, let alone states that the boundaries agreed by the Premiers and the provinces' claims to jurisdiction over the offshore were inseparable, or as Newfoundland

frequently says, inexplicably linked.

In fact, the text of the communique is clear on the distinction between matters agreed as between the provinces on the one hand and matters agreed to be proposed to the federal government on the other.

Yes, they did agree to propose something to the federal government. However, they also had agreed -- they also agreed on their boundaries. As we -- as I have said, and as we will see in a few moments, one of the purposes of their Agreement was to use it in their proposal to the federal government.

Again, I recall -- I would remind you of the agenda for the conference which we saw a few moments ago. Constitutional questions involving federal-provincial relations and rights were distinguished from agreed boundaries. Referring to an Agreement regarding the provinces rights inter se.

Items 1 and 2 of the communique deal with the issue of provincial versus federal control of the offshore.

They record the Premiers' Agreement that the Provinces are entitled to ownership and control of submarine minerals underlying territorial waters, including, subject to international law, areas in the banks of Newfoundland and Nova Scotia, that's item 1. And in item 2, Premiers' Agreement is recorded that formal recognition, sir --

MR. LEGAULT: I'm sorry to interrupt you, Mr. Drymer.

MR. DRYMER: Not at all.

MR. LEGAULT: I'm just wondering whether looking at item 1, as you have it on the screen.

MR. DRYMER: Yes.

MR. LEGAULT: And more accurately, perhaps, as you have it in your sheaf of documents before us --

MR. DRYMER: Yes.

MR. LEGAULT: -- where reference is to provincial governments rather than the provinces, we read that the provincial governments are entitled to the ownership and control of submarine minerals, et cetera.

MR. DRYMER: Yes.

MR. LEGAULT: I would like to ask you whether the meaning of that item, of that particular bullet, would be at all changed if the word "are" were to be the word "be"? And please, this is not a question of what the meaning of the word is is.

MR. DRYMER: As long as you don't ask me what "it" means, or -- I'm looking for the reference, Mr. Legault.

MR. LEGAULT: It's item 1 --

MR. DRYMER: Yes, but --

MR. LEGAULT: -- of the seven agreed items.

MR. DRYMER: Yes. But which -- which -- where is the -- which line, which word? I'm trying to follow you?

MR. LEGAULT: In the very first --

MR. DRYMER: Are entitled --

MR. LEGAULT: -- line, that the provincial governments are?

MR. DRYMER: I think "are" means "be". "Be" means "are". "Be" which is used later on, that the boundaries described by metes and bounds, you know, "be" the marine boundaries means "are" the marine boundaries. That is what is unanimously agreed.

Here they're saying they've unanimously agreed that we are entitled, not that the provincial government -- governments be entitled. That would -- wouldn't make sense.

MR. LEGAULT: Thank you.

MR. DRYMER: You're welcome.

PROFESSOR CRAWFORD: Yes, because paragraph 1 is an expression of a pre-existing --

MR. DRYMER: Precisely.

PROFESSOR CRAWFORD: Whereas paragraph 4, in your view, is an expression of an agreement dating from that day?

MR. DRYMER: From that moment, precisely right. I should have brought my OED with me, but I don't think spell check will perform the same functions.

If I may, I would draw your attentions now to items 4 and 5 of the communique, which concern the Premiers' Agreement on boundaries.

Now, item 4 states that it is desirable that the marine boundaries should be agreed upon, as we've seen. And item 5 records that the Premiers unanimously agreed that these boundaries be, in our view that means "are" the marine boundaries of the provinces.

Note that they speak of the marine boundaries, not as Newfoundland suggests at paragraph 33 of its Memorial, the proposed marine boundaries.

Going beyond that, item 6 records that the Premiers' Agreement -- excuse me, item 6 records the Premiers' Agreement that parliament be asked to define the boundaries as approved by the provinces under the provisions of section 3 of the BNA Act, 1871.

The Agreement to request federal legislation regarding the boundaries, as recorded in item 6, is in our submission, collateral to the rights and obligations of the provinces as between themselves, which they regarded, rightly or wrongly, as grounded in their boundary agreement declared in the preceding item 5.

Just as the Agreement to request federal recognition of provincial rights to ownership and control of the offshore in item 2 is collateral to the provinces' statement to their entitlement to those rights, which are described as based on legal, equitable and political grounds in item 1.

In both cases, federal recognition is neither the source, nor is it a condition of the provinces' rights and obligations. Those rights are seen by the provinces in the case of boundaries as being grounded on their agreement inter se, and in the case of ownership and jurisdiction over the offshore on law, equity and political principles.

Federal recognition is seen as just that; acceptance by the federal government of its own willingness to be bound. And although such a willingness manifested in federal legislation, or any other form, it was obviously necessarily for the provinces jurisdictional claims, that is their claims against the federal government, it was not at all necessary to the provinces' boundary agreement, which was an agreement regarding their rights inter se.

Again, I will repeat, the limiting boundaries was, as Newfoundland and Labrador also recognizes, regarded as necessary among other things, "to assist in the provinces' claims to offshore ownership." But not the reverse.

Whether or not Canada agreed to vest, and vest is the word that's used in the Joint Submission, which we will get to in a few moments, whether or not Canada agreed to vest offshore rights in the provinces, and whether such vesting were ultimately to relate, to complete or only partial rights, as indeed eventually occurred, the parties