ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 15th 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:

Professor Donald M. McRae

Brian A. Crane, Q.C.

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CHAIRMAN: Professor McRae?

PROFESSOR MCRAE: Mr. Chairman, members of the Tribunal. My name is Don McRae. I am the agent for the Province of Newfoundland and Labrador. It is my great privilege and pleasure to present the argument, along with my colleagues of Newfoundland and Labrador, to this arbitration.

As a preliminary matter, I would just identify the three volumes that we have placed before you. There is a volume of additional documents, statutes and authorities that are new to the proceeding; there is a larger two-volume set of the documents that will be used by myself and my colleagues in this oral presentation. And there is a third binder which will contain, as we progress, the visual parts of our presentation that you will be seeing on the screens in front of you. So I hope you have those materials. We will be adding to the visual material as the argument progresses.

Mr. Chairman, members of the Tribunal, on Monday you heard some very colourful characterizations of what is before this Tribunal. You heard Premier Hamm say that a deal is a deal. And you heard Mr. Fortier say that the line in question is not the Stanfield line or the Nova Scotia line, but the line. Both characterizations, of course, simply assume what has to be proved.

This Tribunal has been set up to determine the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia. It has not been set up to hear a challenge by Newfoundland and Labrador to an existing Nova Scotia line, and Nova Scotia has, of course, made a claim that there was an agreement relating to this matter in 1964. So in phase one of this process, the Tribunal

has to consider the claim by Nova Scotia that the line has already been resolved by agreement.

Mr. Chairman, I think it is important that the case is understood in this way. Newfoundland and Labrador is not challenging an existing line. Nova Scotia is claiming the existence of an agreement. Thus, it is Nova Scotia that bears the burden of proof in this case, not Newfoundland and Labrador. This, too, is important because in its written pleadings, Nova Scotia seeks to cast the burden on Newfoundland and Labrador.

Since the procedure in this case involved an exchange of Memorials, Newfoundland and Labrador had to anticipate the arguments that were to be made by Nova Scotia, but this did not pass the burden of proof on to Newfoundland and Labrador. As a result, Ms. Hughes was incorrect when she claimed on Tuesday that it is for Newfoundland and Labrador to prove that there is no agreement.

Nova Scotia cannot claim that an agreement exists on the basis of an argument that Newfoundland and Labrador has failed to prove that there is no agreement. As the Tribunal well understands, it is Nova Scotia that claims an agreement exists, and as a result, it is Nova Scotia that has the burden of proving that this is so. Moreover, that burden cannot be discharged by patching together words used in a variety of different documents of 40 years

ago and then calling the result an agreement.

Now this case, as Nova Scotia itself acknowledges, is one of immense significance. As a result, its resolution cannot be based on conjecture, impression or surmise. The line dividing the offshore areas of Newfoundland and Labrador and Nova Scotia can be found to be resolved by agreement only if there is clear evidence that such an agreement existed.

Now whether two parties have concluded an agreement is not a particular unique or complicated question. Courts and tribunals, domestic and international, confront frequently the question of whether parties have entered into an agreement. Moreover, those courts and tribunals have all approached the question in a fundamentally similar way. Whether the acts or conduct of two parties constitute a legally binding agreement depends ultimately on their intent.

And yet, although Nova Scotia appears to agree that intent is the proper criteria for showing the existence of an agreement, what they seek to show bears very little relationship to intent. First, Nova Scotia does not want this Tribunal to search for a real intent. It wants the Tribunal to look for a fictional intent. Let us pretend that the officials of the two provinces were at all relevant times playing the game of being diplomats. Then

let's rely on the intent they would have had if they were playing that game.

Secondly, Nova Scotia does not seem to want the Tribunal to take its claim that an agreement was concluded on September 30th, 1964 seriously. Although they have insisted that there was an agreement concluded on that date, in fact, they use the term "1964 Agreement" as a metaphor for a whole collection of events from about 1961 through to sometime after 1972, and even afterwards.

Third, Nova Scotia does not want the Tribunal to focus on the real events of this period, the claim of the provinces to offshore ownership and jurisdiction, but rather, on the imagined event against which offshore ownership and jurisdiction pales in significance, that is negotiations between the provinces on offshore boundaries.

History has to be rewritten to fit the objectives of Nova Scotia in this case, and so it goes on, all couched in the frequently intemperate rhetoric of the Nova Scotia written pleadings. I refer to some examples. Newfoundland and Labrador is asking the Tribunal to undo the 1964 Agreement. Newfoundland and Labrador must not be permitted to disavow its obligations towards Nova Scotia. Those are both from the Memorial.

And, of course, in the Counter Memorial, the Nova Scotia tone becomes even more shrill. Newfoundland and

Labrador, it is claimed, distorts the record. It misinterprets. It misleads. There are even hints of impropriety. Newfoundland and Labrador is accused of making false statements and allegations.

When so much smoke is thrown up by one who claims that an agreement exists to cloud what is a straightforward issue of determining intent, then doubts emerge as to the seriousness of the claim. The extravagance of the language is designed to cover the paucity of the proof, but Nova Scotia is aware of the fact that Newfoundland and Labrador's real intent in respect of the line Nova Scotia claims, and I would refer the Tribunal to what was said by the former Premier of Nova Scotia in the Nova Scotia Legislature on June 24th, 1998. We have an extract from that in tab 55 of the documents that are presented today.

The then leader, and we are showing the relevant parts shortly -- the then leader of the opposition, Dr. John Hamm, asked Premier McLellan how much of the Laurentian Sub-Basin accrued to Nova Scotia under the Canada-Nova Scotia Accord Act, and in his reply, Premier McLellan referred to the line in the Nova Scotia Accord and said, "As you know, Mr. Speaker, that, of course, is not agreed to by Newfoundland."

Mr. Chairman, if the Terms of Reference had made provision for summary judgment, then on the basis of

Premier McLellan's submission that Newfoundland and Labrador had not agreed to the line in the Canada-Nova Scotia Accord, we would have moved to have this case dismissed, but although the Nova Scotia Memorial --

PROFESSOR CRAWFORD: Professor McRae, counsel are entitled to their turn, of course. What the Premier said there, of course, is not agreed to by Newfoundland. He didn't, as it were, say that it wasn't agreed to at the time. What he was saying is that Newfoundland doesn't accept that the line was drawn, which is obviously the case. That's why we're here. So I -- it's probably a good thing we don't have summary judgment powers, but even if we did have, I'm not sure that that sentence would be enough for it.

PROFESSOR MCRAE: Thank you, Mr. Crawford. I appreciate that everything is open to interpretation. I think that Premier McLellan might well have indicated that, as we have heard in the pleadings, that Newfoundland and Labrador did not wish to disavow an agreement that was entered into, but he states there as a matter of record that of course Nova Scotia did not agree to the line in the Accord. There is no reference to disavowing agreement. There's an indication of no agreement to a line in the Accord, and that, I think, in the circumstances, is an indication of what Nova Scotia knew.

Mr. Chairman, members of the Tribunal, the Nova Scotia

claim that the line dividing the respective offshore areas of the two provinces has been resolved by agreement has been responded to by Newfoundland and Labrador in our written pleadings. In this presentation, we will take the Tribunal through the key aspects of that claim and show how it is based on a misinterpretation of the Terms of Reference for this Tribunal, how the factual basis on which the Nova Scotia claim is alleged to rest dissipates on close analysis, and how the law on which Nova Scotia relies is incorrectly stated and improperly applied.

We will divide our argument over the next two days in the following way: First, I will provide an overview of the Newfoundland and Labrador position. I will then deal with the Terms of Reference and the applicable law, pointing out the fallacies in the Nova Scotia claim.

Second, Mr. Brian Crane will review for the Tribunal the facts on which the Nova Scotia claim is allegedly based. He will show that the historical picture that Nova Scotia seeks to create is largely one of fiction and that the factual record will simply not bear the interpretations that Nova Scotia seeks to place on it.

Third, Mr. Alan Willis will review the Nova Scotia claim that there is a 1964 Agreement. He will show that the agreed standard, that there must be a legally binding agreement in order to meet the test in phase one, is

simply not met.

The events, the documents and the other information from the period in question do not disclose the intent that is needed for the conclusion of a legally binding agreement, regardless of whether the standard is that of international law or of the law of Canada. He will show that the key elements of what Nova Scotia claims is the 1964 Agreement, have not been and cannot be established.

Fourth, I will then look at the various claims that Nova Scotia makes on the basis of the subsequent conduct of the parties and show that these claims are either legally irrelevant to phase one or they cannot be sustained on the facts, let alone justified in law. And I will then draw the case of Newfoundland and Labrador to a close and summarize the key elements of our position.

Let me now turn to an overview of the Newfoundland and Labrador case. As we mentioned in our Counter Memorial, the parties are in accord over the fact that the only type of agreement that will meet the requirements of phase one is a legally binding agreement. Thus, again, we return to the fact that there is a single issue before this Tribunal. Was a legally binding agreement concluded between Newfoundland and Labrador and Nova Scotia, establishing a line dividing their respective offshore areas?

Whether an agreement exists or not is largely a question of fact. And in this case the historical events, the facts, the historical events, the existence of documents, none of this is really in dispute. The parties are not arguing over whether there was a meeting on September 30th, 1964 or whether there was a statement prepared, setting out the results of that meeting, or even on what the words of that statement were.

There are, of course, a number of created facts, such as Nova Scotia's claim that a map was presented to the East Coast Premiers, but these are rather trivial matters, rather like the -- I'm sorry, these are rather trivial matters resulting from the enthusiasm of the drafters of the Nova Scotia Memorial, who, in their desire to convince themselves that events that they wished to occur did occur, tended to embellish the record.

Now those instances of what might be described as exuberant imagination in the Nova Scotia pleadings cannot be treated as actual facts on which any conclusions can be based. Putting them aside for the moment, in respect of the basic factual story, there is little disagreement. The fundamental facts are not in contention.

As a result, what this case is about is the interpretation that is to be placed upon those events or on the words that are found in press releases or in

minutes or in statements or records of meetings. It's about what officials meant when they said words that no one disputes that they are reported as having said.

And because this case is about the gathering of intent, from the interpretation of words, that it is agreed was said, Nova Scotia's claim that intent is being measured by reference to a notional, fictional intent, based on the assumptions of the officials concerned were pretending to be diplomats, is in our submission, simply absurd.

Let me turn to the central aspects of the Nova Scotia claim that the line has been resolved by agreement.

They claim that what they call the 1964 Agreement is made up they say, of described boundaries that were to operate for any and all purposes. They claim that the line from the mid-point between Flint Island and Nova Scotia, and Grand Bruit to Newfoundland, was to run on an azimuth of 135 degrees, and they claim that such a line runs to the edge of the continental margin.

Now to get an agreement composed in this way, Nova Scotia has to make several key assumptions. The first, and in many respects, the most fundamental assumption, is that there was an intent by the two provinces in 1964 to enter into a legally binding agreement.

The second assumption which is necessary in order to

claim that there was an intent to enter into a legally binding agreement, is that the events of the 1960's and 1970's, when the alleged 1964 Agreement was concluded, were primarily about the conclusion of an agreement on offshore boundaries between the provinces.

To Nova Scotia, the related but seemingly less important issue of ownership of the offshore, is not to be confused with the question of boundaries.

The third assumption, equally critical to the Nova Scotia claim of binding intent, is that the question of offshore boundaries was an issue between Newfoundland and Labrador and Nova Scotia. The federal government was in the background, but it had no particular role to play in the determination of the offshore boundary between Newfoundland and Labrador and Nova Scotia.

And the fourth assumption, the assumption that ties all of this together, is that the applicable law in phase I is the body of international law relating to conclusion of treaties.

All four of these assumptions are essential, for if any one of those assumptions cannot be sustained, then the Nova Scotia case falls to the ground. And let me briefly look at each of those assumptions.

First, the assumption of a binding intent. If Nova Scotia is unable to establish an intent to enter into a

legally binding agreement, then its case must fail at the outset. Although Nova Scotia accepts that this is the test it must meet, as we will show throughout this hearing, the evidence of intent offered by Nova Scotia is contradicted, either by the terms of that evidence, or by other more probative evidence.

Second, the assumption of the primacy of the boundary issue. If the question of the boundary is linked to, and inseparable from the question of ownership, then Nova Scotia has the difficulty of explaining why, when everything in the proposals made to the federal government came to an end, because the federal government rejected the provinces' position, yet the boundaries remained intact? Cast in stone, never to be questioned again.

Once the true link is created between boundaries and ownership, Nova Scotia also loses the convenient device of claiming that references to proposals were references to the ownership issue, not to the boundary issue. This is the way Nova Scotia tries to deal with Premier Smallwood's interjection at a federal-provincial meeting in July of 1965.

If you will recall, Premier Smallwood stated that the boundaries were only a proposal.

Nova Scotia tries to dismiss this by saying that he was talking about the relationship between the provinces

and the federal government on the issue of ownership and boundaries, not on the issue of boundaries as between the provinces themselves.

Only if a distinction can be made between gaining ownership with the federal government and delimiting boundaries as between the provinces, can Nova Scotia's view have any shred of plausibility. And of course, even that disappears in the case of Prime Minister Trudeau and Premier Smallwood, when the actual evidence is looked at.

But as Mr. Willis will show in more detail, without the fiction that boundaries and ownership was separate, the Nova Scotia case again falls to the ground.

Thirdly, the assumption that the federal government was only in the background. If the federal government's true role in this -- in the whole question of ownership and offshore boundaries -- ownership of the offshore and offshore boundaries between provinces is acknowledged, then Nova Scotia has the difficulty of showing how there could have been an agreement between the provinces on offshore boundaries without federal knowledge, let alone federal approval, in implementing legislation. And on the basis of a proposal that the federal government rejected.

Moreover, it must never be forgotten that the provinces were seeking to delimit areas that would only be subject to their jurisdiction if they were successful in

obtaining ownership from the federal government.

Furthermore, federal government exclusion from the agreement process, and ignorance of it, is important for Nova Scotia in seeking to explain why the government -- the federal government concluded an Accord with Newfoundland and Labrador, the Atlantic Accord, which contained no reference to an agreed boundary with Nova Scotia.

MR. LEGAULT: Professor McRae, I wonder if I could ask you on this point how the federal government could possibly be relevant if the two provinces are to be treated as States at all relevant times? It seems to me that in those circumstances the federal government disappears from the scene? Or is that not correct?

PROFESSOR MCRAE: Thank you, Mr. Legault. In our view, and I will be discussing this a little later, the fiction of the provinces acting as States for all purposes, and of course we reject that, but the fiction of the provinces acting as states for all purposes will only work even as a fictional gain if the federal government is also acting as a state in this period, vis-a-vis the provinces. In other words, the fiction will work as a fiction if the federal government and the two provinces are all treated as separate sovereign states. So the relationship of the federal government to the provinces is no longer a federal

provincial relationship, but it is a state to state relationship. And that, in our view, is an indication of the absurdity of the fictional statehood for all purposes argument.

PROFESSOR CRAWFORD: The problem -- well, I don't want to anticipate your argument, because they are obviously your opening, and it may be better if we -- we come back to that. The problem is that paragraph 3, one of the Terms of Reference is applied expressly to the first phase of the arbitration to the agreement issue. And the Terms of Reference are perfectly clear.

So I agree that it's difficult to treat provincial Premiers as if they were heads of State, armed with full powers. But the difficulty we have, and you can come back to it, I mean I'm not suggesting you answer it straight away, the difficulty we have is that we seem to be directed by the Terms of Reference precisely to do that.

PROFESSOR MCRAE: Thank you, Professor Crawford. I will be coming back to deal with that issue in the context of the Terms of Reference, but let me just say at the moment, it is only a problem if you are -- if you interpret the Terms of Reference to mean that they are states for all purposes. And if one interprets the Terms of Reference as we will suggest, in the proper way that the Terms of Reference are intended, you don't have this problem. It

is a problem in our view, created by the Nova Scotia -- Nova Scotia's interpretation of the Terms of Reference, and not a problem -- a real problem for the Tribunal.

As I was mentioning, it creates a problem if we -- it goes to the fiction of statehood in looking at the Canada -- the Atlantic Accord. Because the Atlantic Accord provides for the determination of a boundary, and as I mentioned, without mentioning an agreed boundary, on a basis that's inconsistent with any existence of an agreed boundary.

You do not need to apply principles of international maritime boundary law if there is already an agreement between the provinces on where the boundary should run.

Again, as Mr. Willis will develop later, the Nova Scotia case again falls to the ground, if the true role of the federal government is properly acknowledged.

And the fourth assumption is the assumption that the application of the law of treaties. If the law of treaties does not apply to the relations of Newfoundland and Labrador and Nova Scotia, then the question of whether a legally binding agreement was concluded must be determined in the light of the Law of Canada.

The question then becomes whether what occurred in the 1960's and 1970's constitutes a binding intergovernmental agreement.

Now, Nova Scotia knows that it cannot meet that standard. That is why it never attempted to make that case in its written pleadings. Nor has it attempted to do so in these oral pleadings.

But as we will show, the Nova Scotia view that the relations of Newfoundland and Labrador, and Nova Scotia are governed by the law of treaties for these purposes cannot be sustained.

These assumptions of Nova Scotia are critical to its case. But they also show, in our view, why the Nova Scotia case must fail. There is no dispute that if there is no binding intent, then there is no agreement. That's the case -- the fate of Nova Scotia to demonstrate the necessary intent is fatal to its case.

But the other assumptions fall to the ground, as well. Can it be seriously maintained that the events of the 1960's and 1970's relating to the East Coast Provinces about the offshore, were about boundary delimitation, rather than about offshore ownership? What would they be delimiting if they did not get ownership?

And can it be seriously maintained that provinces, by themselves, can enter into legally binding agreements? Agreements that relate to areas of federal jurisdiction over which they hope to obtain control, without the approval of the federal government, and without federal

implementation? And can it be seriously entertained that this case can be decided on the basis of a fictional intent of the two provinces to enter into a legally binding agreement that is contradicted by the actual intent of the officials at this time? We will be developing that in further, but I suggest that to pose the question simply is to answer it.

So Mr. Chairman, Nova Scotia's assumptions in the end must all fall to the ground. Beyond this, however, Nova Scotia is also unable to establish the central elements of its claim. As we will show, although a description of boundaries did emerge from the 19' -- September 30th, 1964 meeting, the other elements of Nova Scotia's claim did not emerge, were they emerged at all, until much later. There simply could not have been an agreement on September 30th, 1964, on those elements. Nor, in fact, as we will show, could there have been agreement on them later.

And furthermore, as we will show what was agreed to on September 30th, 1964, were elements of what was to be proposed to the federal government on ownership of the offshore. And the proposal contemplated that should it be successful, the conclusion of an agreement on boundaries. An agreement contemplated for the future was certainly contemplated, but it was never concluded.

Mr. Chairman, let me turn more specifically to the

central claim of Nova Scotia in this case. The fundamental issue, of course, as we have said, is whether there is an agreement that is legally binding, and that depends on the intent of the provinces to enter into a legally binding agreement.

As I have said, this must be a real intent. It must be based on the intent that the parties had at all relevant -- at the relevant times.

And thus in determining that intent, account must be taken of the fact that the parties are provinces of Canada, operating within a domestic constitutional framework. And it does not matter whether one gets to that domestic constitutional framework of Canadian Law by the route of international law, or the route of Canadian Law. And later in this presentation I will review for the Tribunal how the Terms of Reference specifically direct the result of looking at the intent of the parties in the light of the actual legal and factual context they're operating under at the time.

But whether under domestic law or under international law, both bodies of law require that an agreement be based on real intent, and not on the basis of some kind of artificial assumption that officials were pretending that they were clothed with an authority they did not have.

The applicable law for an agreement has to be the law

that is proper to that agreement. It can't be based on fiction.

And when the correct legal framework is applied to the actual claim of Nova Scotia, then we will suggest that it can be seen that the claim cannot be sustained.

What is the Nova Scotia claim? Nova Scotia claims that an agreement establishing boundaries was concluded on September 30th, 1964.

Nova Scotia is quite specific about this. It says, in its Memorial, and I quote, "On September 30th, 1964, at a conference of Premiers of the Atlantic Provinces held in Halifax, Premier Stanfield of Nova Scotia, Premier Smallwood of Newfoundland, Premier Shaw of Prince Edward Island, and Premier Robichaud of New Brunswick, concluded an agreement on offshore boundaries between their provinces." And this is what Nova Scotia refers to throughout as the 1964 Agreement. That is the claim, and that is what Nova Scotia's case has to be measured against.

Thus, what must be decided by this Tribunal is whether an agreement on boundaries was concluded by the Atlantic Provinces on September 30th, 1964. The date is important to Nova Scotia.

PROFESSOR CRAWFORD: Professor McRae, it is true that that was the case as pleaded by Newfoundland in its written

arguments and indeed counsel did at one stage say if there wasn't an agreement in 1964 there was no agreement.

Subsequently, however, counsel did say that if -- even if the Tribunal were to conclude that the 1964 Joint Statement did not resolve the boundaries within the meaning of the Terms of Reference, that it was open -- that it could be open to the Tribunal so to conclude on the basis of, for example, of the 1972 Joint Communique.

So my understanding -- and obviously I will be corrected by Nova Scotia in the second round if I'm wrong -- my understanding is that they now argue in the alternative, either there was an agreement on 30, September 1964 or at least there was an understanding then which matured into an agreement at some later stage.

PROFESSOR MCRAE: Professor Crawford, we didn't quite get that impression from what they said. We had the impression -- and again, Nova Scotia on Monday will have an opportunity to explain what they meant. But we had the impression they were saying that there was an agreement on September 30th 1964, but there may be some aspects of that agreement that are open to interpretation. And that then the Tribunal would have the task of doing that interpretation.

But that seemed -- it seemed to us that they rejected the number of invitations that were made to expand their

frame beyond September 30th 1964. And that the agreement that they referred to later was an agreement on the precise delineation of the boundaries as a result of the JMRC process in 1972. But the fundamental element of intent to create an agreement they fix on September 30th 1964.

And with your permission, rather than making an assumption about where they are and finding out on Monday that we failed to argue it because our assumption is incorrect, I think we will make clear that we do not think the -- it can be sustained on the basis of September 30th 1964 and nor can it be sustained later on.

The date September 30th 1964, seemed to be, certainly in their written pleadings and as we understand it in their oral submissions, important to Nova Scotia. In their written pleadings, they derided Newfoundland and Labrador for assuming in its Memorial that the agreement that Nova Scotia claims to exist was to be found in the submission by Premier Stanfield to the federal government on behalf of the Atlantic Provinces in October 1964. We claimed, of course, that the Stanfield submission did not constitute an agreement on boundaries. Nova Scotia confirmed this.

In its Counter Memorial Nova Scotia states in paragraph 3.4, or paragraph 4 of section 3, "The Joint

Submission" -- which is how Nova Scotia styles the Stanfield Submission -- "The Joint Submission, however, was not the 1964 Agreement." And then just in case the statement that the Joint Submission was not the 1964 Agreement was too subtle, Nova Scotia states in parentheses, "And the 1964 Agreement was not the Joint Submission." And then the crowning statement, "Newfoundland's fatal flaw in its treatment of the historical record is to confuse this fact."

Well we are happy to stand corrected. We had always said that we did not understand the basis for the Nova Scotia -- for Nova Scotia's claim that an agreement existed, so we are very pleased to have Nova Scotia confirm that we truly did not know.

I might add, nevertheless, that as Mr. Willis will point out, in fact the document on which Nova Scotia relies and the Stanfield submission have to be considered together, and he will deal with that tomorrow.

In any event, after all of this, I think there can be under no illusion that what Nova Scotia believes to be its case, and as I suggested despite the invitations earlier in the week, to move from that position, we understood counsel for Nova Scotia to be quite adamant. The 1964 Agreement claimed by Nova Scotia was concluded on September 30th 1964.

So let us turn to look at a copy of the alleged agreement. There is no signed document evidencing the 1964 Agreement, although Mr. Bertrand said on Tuesday that he wishes that there was one. So much for the myth of an agreement signed by Premier Smallwood. All that there is instead is just an unsigned, undated statement recording what happened at a meeting.

What does the statement say? Not surprisingly, Nova Scotia focuses on the preamble to the statement which provides that the Premiers unanimously agreed, and in the understated style of the Nova Scotia written pleadings, they put this in bold. In fact they do it twice on the same page and it looks and sounds impressive.

But what did the Premiers unanimously agree to in respect of boundaries? You have to go to paragraph 4 of the Joint Statement, a provision that never finds itself in bold in the Nova Scotia pleadings, for paragraph 4 shows what it was that the Premiers unanimously agreed to. And this was that it is desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities and the necessary steps taken to give effect of that agreement.

So the Premiers unanimously agreed that it was desirable that boundaries should be agreed upon.

Desirable that boundaries -- marine boundaries should be agreed upon? That constitutes an agreement on boundaries?

And if I agree with my friend that it is desirable that we should agree that he buys my house we do not have a legally binding agreement for him to purchase my house. We have agreement on what is desirable and on what we think should be done. But that is not the same thing as a legally binding agreement, for as every first year law student knows, an agrement to agree in the future is not a presently binding agreement. So perhaps Newfoundland and Labrador can be forgiven for focusing on the Stanfield submission in trying to understand what Nova Scotia meant when it claimed that an agreement existed.

In the Stanfield submission, the words "had agreed" were used in relation to boundaries, although it was referred to tentative boundaries, so we foolishly thought that Nova Scotia would base its claim of an agreement on a statement that the parties had agreed, not on a statement that it was desirable that the parties should agree at some time in the future.

Of course, Nova Scotia glosses over paragraph 4 of the Premier's Joint Statement and rushes to paragraph 5. And then the bolding frenzy begins again. They place in bold the following words from paragraph 5, "that the boundaries described by metes and bounds in Schedule A and shown

graphically on Schedule B be the marine boundaries of the provinces." And of course what they do is link the words from the preamble "unanimously agreed" to these words, so that it appears that the Premiers unanimously agreed that the marine boundaries are those set out in Schedule A and described graphically on Schedule B.

The problem with this is that is not what is in, that is not what paragraph 5 says. Paragraph 5 does not say that the boundaries described are the marine boundaries, it says that the boundaries described be the marine boundaries. The term "be" could mean "are" or it could mean "shall be", or it could mean "should be" or it could mean "will be".

Now in its Counter Memorial, Nova Scotia cleverly places the words "unanimously agreed" between different parts of paragraph 5 so that it reads, "The boundaries described by metes and bounds in Schedule A and shown graphically on Schedule B are unanimously agreed to be the marine boundaries of the provinces." And just in case we don't get it, they bold the words "the marine boundaries".

Now that, Mr. Chairman, is precisely how Nova Scotia wishes that paragraph 5 had been written, but of course there is a major problem with this. First, paragraph 5 was not written that way. It does not say what Nova Scotia wants it to say.

Secondly, if paragraph 5 did say what Nova Scotia wishes then it would contradict paragraph 4, which says that an agreement on boundaries is to happen in the future. No wonder that Nova Scotia touches on paragraph 4 so lightly, because paragraph 4 and Nova Scotia's interpretation of paragraph 5 renders paragraph 4 meaningless.

Of course it is well accepted that an interpretation of the provisions of an instrument that renders other provisions of that instrument meaningless has to be rejected.

The problem with Nova Scotia's approach is that it does not follow the fundamental rule of treaty interpretation set out in Article 31 of the Vienna Convention and the law of treaties, a provision they frequently apply and refer to, we suggest, incorrectly elsewhere in their pleadings.

Article 31 requires that words be given their ordinary meaning in their context. So that even if one were to agree with Nova Scotia that rules of international law govern this issue, those rules would direct that the words of paragraph 5 are to be given their ordinary meaning in their context. And thus paragraph 5 has to be interpreted in the light of the rest of the Premier's statements.

MR. LEGAULT: Professor McRae, could paragraph 4 not be read

as a preambular disposition, for instance, whereas it is desirable that the boundaries be agreed upon, and then moving to paragraph, 5 therefore the boundaries be, et cetera?

PROFESSOR MCRAE: Well, Mr. Legault, I would defer to you on the negotiation and conclusion of treaties, but it seems to me that where you do have a preamble and you do have several items that are said to be unanimously agreed, you can't then reinterpret one of those provisions in a preambular fashion when all of the other provisions are set out as substantive provisions of the agreement. So I would suggest the structure of this document would suggest that the preamble finishes with the words "unanimously agreed".

MR. LEGAULT: Thank you, Professor McRae.

PROFESSOR CRAWFORD: Professor McRae, there is obviously some tension between paragraphs 4 and 5, and I quite see the force of the argument that you can't negate paragraph 4 by reference to paragraph 5. But don't you have the difficulty of the converse situation that you are -- that you want to negate paragraph 5 by reference to paragraph 4? I mean, are you saying that paragraph 5 was literally without effect in terms of the intentions of the Premiers?

PROFESSOR MCRAE: What I'm suggesting, Professor Crawford, is that paragraph 5 sets out a statement by the Premiers

of what the boundaries are going to be in the agreement which they will -- when they conclude the agreement. It's a present indication of what those boundaries are going to be, so in that sense they have come to an agreement on what they will conclude in their future agreement. But as I mentioned before, that's still an agreement to agree in the future and they still haven't entered into that agreement. And as we would suggest, the reason they don't is that it is all tied to this issue of offshore ownership.

PROFESSOR CRAWFORD: So that the effect of paragraphs 4 and 5 is to say well -- to use the -- the useful distinction that my contracts teacher always used to insist on, there is a distinction between an agreement on the terms of an agreement and an agreement to be bound by it. And what they were doing was setting out the terms but without agreeing at the time to be bound by them?

PROFESSOR MCRAE: That is correct. They are setting out the terms on which, when they do enter into an agreement, they will use these terms. And that is consistent with -- we would suggest, with the process that continued. They refined the turning points in the boundary. And these -- the terms -- if they ever got ownership of the offshore they would enter into an agreement on these terms. That's the force we would suggest of paragraph 5. So we would

suggest that paragraph 5 -- what they are suggesting it will be on the terms set out in paragraph 5 when they enter into an agreement. So paragraph is not a present agreement on boundaries, as Nova Scotia suggests, it is a statement about what the boundaries will be when an agreement is entered into.

it is clear therefore, we would suggest, that the statement in which the whole of Nova Scotia's claim rests that an agreement was entered into on September 30th 1964 does not express the requisite intent to constitute an agreement. By its terms it expressed an agreed desire to enter into an agreement at some point in the future provided certain other conditions were fulfilled.

And of course that's obviously what the Premiers would have done. They were making a political statement of what they planned to do in the future. They knew that the process of concluding an agreement on boundaries is much more complicated than the Premiers simply wishing that it was so. And that is why the press release that did emerge from the conference did not announce any agreement on boundaries. That is the press release that is found in tab 11 of these proceedings. It is found in document 22. tab 11 of the volume we set up -- that we sent up this morning.

PROFESSOR CRAWFORD: I see.

PROFESSOR MCRAE: There are two things that emerged from the September meeting. One is this joint statement and the other is the press release. And there it properly says that the question of boundaries had been considered.

So we would suggest that the only documents emerging from the September 30th 1964 meeting do not evidence the intent that is required to create an agreement on boundaries.

We would suggest indeed that the statement in paragraph 5 of the Premiers contradicts that intent, because it states expressly that an agreement is to be entered into in the future. This, we would suggest, explodes the myth that all Nova Scotia lacks is a signed copy of the 1964 Agreement. Even if the statement on which Nova Scotia relies had been signed, it would have made no difference.

On its face, the statement of the Premiers fails to express any intent to enter into an agreement. In fact it expresses an intent not to enter into an agreement at the present time.

So as a preliminary matter, Nova Scotia simply has not met the standard it set for itself to show that an agreement on boundaries was concluded on September 30th 1964.

All that was agreed to on September 30th 1964 was that

it was desirable to conclude an agreement on certain defined boundaries at some stage in the future.

That, Mr. Chairman, is the sole substance of the so-called 1964 Agreement.

PROFESSOR CRAWFORD: That's not quite right in terms of what you have said. It was agreed that it was desirable to have agreed boundaries. And it was also agreed that the boundaries as set out in the Notes and Boundaries would be or some other -- some other verb, but that they would be the basis for the boundaries conceivably with possible modifications. But there was a further element.

PROFESSOR MCRAE: Perhaps -- I am sorry, Professor Crawford, perhaps I have misunderstood. I said it was an agreement. It was desirable to conclude an agreement on certain defined boundaries.

So we accept that the boundaries were described and defined. That was part of what I was -- I was not meaning to suggest anything else.

PROFESSOR CRAWFORD: So, on your view, paragraph 5 provides the defined element?

PROFESSOR MCRAE: That's right.

PROFESSOR CRAWFORD: Of 1964, but subject to what would be, as it were by analogy, a process of ratification or a process of subsequent formalization?

PROFESSOR MCRAE: Well it's a process of entering into an

agreement, because if one takes, again to go back to the basic contracts model, neither party is committed until the agreement is entered into. They may have put all the issues down and agreed in a -- that this is what they will agree on, but until they actually enter into the agreement, both parties are in a position to walk away. Mr. Chairman?

CHAIRMAN: Well I think the purport of my question is very much the same. They could have been agreeing to the fact, first of all, that it's desirable to put it there, is clear enough. But they could be agreeing as to what would be in an ultimately properly written contract. But they might nonetheless still have agreed in that sense that the document has to be prepared or possibly prepared, but in fact, and it will contain this particular probation.

PROFESSOR MCRAE: Mr. Chairman, we don't have any problem with that characterization, because no one denies on the Newfoundland and Labrador side that they did set out those as in the September 30th '64, the boundaries that they were referring to. And those were the boundaries that were to go into the agreement.

Now we would argue, first of all, that it's not just a question of entering into the formal document. There are other things that had to be done as well. And we would also argue that in certain of those matters, there was an

insufficient precision and definition to indicate that there really was a full understanding of the full extent of those boundaries. But we don't dispute the fact that the boundaries referred to were the ones they contemplated putting into the agreement. To that extent, they were agreed on what they were planning to do.

PROFESSOR CRAWFORD: This may be again another matter to which we want to come back later. Obviously, there was a process going on which continued for quite some time.

Is it your position that until the final document was there, with the ink wet on the pen, as it were ready to become dry on the page, that right up until that time anyone could simply withdraw, as well, without consequences? I mean at what stage in that process was there something that could be described as an agreement for the purposes of the Terms of Reference?

PROFESSOR MCRAE: Well we would suggest, Professor Crawford, that nothing for the purposes of the Terms of Reference constituted an agreement, because the agreement was that we will make this proposal with these boundaries that we will enter into agreement onto the federal government. And that happened on a couple of occasions. And each occasion, the federal government rejected it. But, of course, all of those are political commitments.

If one of the provinces, at the time the proposal is

being made, said we have decided we don't want to continue with this, there may have been annoyance, there may have been regret, but there was no commitment that anyone say a Premier was committed to in terms of making a proposal to the federal government.

So all of this has to be seen in the context of a political commitment, and not legally binding commitments on boundaries.

CHAIRMAN: The part of the difficulty is at the moment is that we are schizophrenic as to what law to apply. The Premiers would have recognized if these were real boundaries that they had to get -- they had to get a British Act. But they were agreeing among themselves as to what should be. Not a British Act, excuse me, a Canadian Act. But they were agreeing as to what should be in that Act.

Now taken on the national plane, there is no agreement till that is done. Taken as a treaty, an agreement between themselves about what they would want in a document by a third party makes it a little more complicated. But at the moment we are still schizophrenic as to which legal system to apply.

PROFESSOR MCRAE: Thank you, Mr. Chairman. I think we would hopefully narrow the range of the schizophrenia, because we are quite clear on which system should apply, in our

point of view.

But we would suggest that that problem is again a created problem. And it points out again the absurdity of trying to deal with this on a totally fictional basis. We will also argue, when we get to the issue of the applicable law that, as I mentioned earlier, the question of intent to enter an agreement is ultimately a question of fact. And even the application of international law does not allow you to go and look for a fictional intent. You have to look at the actual circumstances, the actual context. And that you are unable in those circumstances and that context to disregard the reality that you were referring to.

MR. LEGAULT: Professor McRae, I don't want to prolong your inquisition. Very briefly, could you go back, this is related to the questions my colleagues have just been asking, could you go back for a moment to what you have outlined as elements of the alleged agreement? Namely, the second point, an alleged agreement for all purposes, and just recapitulate again why you believe that document was not a document for all purpose, for all seasons, so to speak?

PROFESSOR MCRAE: Mr. Legault, this is something that Mr. Willis will deal with. I don't want to be seen as passing everything off. But I will try and share my passing off

between Mr. Willis and Mr. Crane.

But I would simply say that what we are saying here is that on September 30th, 1964 there is none of those elements are there. The idea of all purposes, we will suggest, comes from the later discussion in '72.

So, therefore, as I will point out, you have to bring -- go to '72 and bring things back in order to construct an agreement.

This is my point at the present time saying September 30th, '64 you could not have --

MR. LEGAULT: Thank you very much.

PROFESSOR MCRAE: The result, we would suggest, is that the -- there is the sole substance, as I have mentioned, of the 1964 Agreement, is this agreement to conclude an agreement on the future on certain defined boundaries.

As a result, the whole of the Nova Scotia case rests on documents and events after September 30th 1964 in order to try and show something that is simply, in our view, incapable of proof. That is, although the Premiers never expressed the intent at the time, and indeed, as I have suggested, expressed the contrary intent, they really did intend to be bound on September 30th 1964.

But you cannot contradict the intent actually expressed on September 30th, 1964 with information and conduct subsequent to that date in order to try and show

that the intent of the Premiers was really different from what they themselves said it was.

So Nova Scotia's arguments about conduct and events subsequent to September 30th, 1964 are simply irrelevant to the question of whether an agreement was concluded on that date. They might have been relevant to the question of whether an agreement was concluded after that date. But that, in our view, was not a claim that Nova Scotia has made. In fact, our understanding was they had disavowed that in the discussions and the hearings.

However, we will show throughout the course of the presentation of our case that not only are the subsequent events and conduct unable to create an intent that is retrospect to September 30th, 1964, they do not do so. And what is more, they prove conclusively that the future agreement spoken about on September 30th, 1964 was never in fact concluded.

Properly viewed, as we have pointed out in our written pleadings, what is alleged to constitute an agreement on boundaries was an agreement on a position in negotiations with the federal government over ownership of the offshore.

The September 30th 1964 statement of what the Premiers unanimously agreed sets the stage for what occurred through this period. The provinces were unanimously

agreed that they were entitled to ownership. They would request the federal government to recognize that right of ownership. They agreed that it would be desirable to have marine boundaries agreed upon between the provinces on the basis set out in Schedule A and Schedule B. And they would request the Parliament of Canada to define those boundaries. And all of this dependent on the federal government granting to the provinces ownership of the offshore.

So in many respects the September 30th, 1964 statement sets out precisely the position of Newfoundland and Labrador in this case. There was a claim to ownership of the offshore. There were boundaries that the provinces would agree to as part of this process. But that everything, ownership and boundaries depended upon federal government recognition, approval and implementation. And, of course, federal recognition never came, nor did any process of provincial approval of the boundaries ever come about.

As Mr. Crane will make clear in his presentation of the factual record in this case, the pattern of formulating a position on provincial ownership, which included a proposed delimitation of boundaries, continued through this period until about 1973, when Newfoundland and Labrador went its separate way.

But the Allard letter follows precisely the same pattern. It called for an agreement by the provinces. It did not evidence an agreement. And the agreement never materialized.

The June 18th 1972 communication from Premier Regan to Prime Minister Trudeau asserting provincial ownership of the offshore and boundaries by which the areas could be defined showed precisely the nature and purpose of a common provincial approach on boundaries.

The provincial claim to ownership and the claim to a right to set provincial boundaries were peremptorily rejected by the Prime Minister. There could be no binding agreement on offshore boundaries without federal recognition and approval.

PROFESSOR CRAWFORD: Mr. McRae, by 1972 you had had a Supreme Court decision admittedly concerning British Columbia. But any sensible -- any sensible lawyer, and one would expect any sensible Premier with access to legal advice, would have realized that whatever the position of Newfoundland, because of the special circumstances, the general position of the Atlantic provinces was very unlikely to be better. So wasn't it the substance of what was being discussed in the period after 1968 really not so much about the question whether the provinces did include the offshore, but whether an arrangement would be made

with the -- with Canada, whereby the provinces would benefit from the offshore. Doesn't that put those negotiations in a different light?

PROFESSOR MCRAE: Again, this will be elaborated on later, and I don't want to undercut anything my colleagues will say. But I would suggest, Professor Crawford, that there always were two tracks. One of asserting ownership by the possibility of litigation, and getting the legal right that the provinces claimed they had established. And the other, by negotiation with the federal government.

Negotiation with the federal government involved the federal recognition of ownership. And therefore, the negotiation route did not change. It was still a route to try and get the federal government to agree that the offshore rights that the provinces claimed, regardless of the different levels of legal validity of that claim or what the legal validity might be of that claim, it still was an approach to get federal recognition of that.

PROFESSOR CRAWFORD: Even if one accepted that, what actually happened was that Accords were negotiated in different terms with the two provinces, which included dispute-settlement provisions, which allowed for the laying down of boundaries which Canada could implement, if necessary, unilaterally.

So you might say that looking at it functionally, what

the Tribunal has been asked to do is applying international law standards of some kind, even if only good faith, to look at the relationship between the provinces over time and to say whether what they have done amounts to an agreement disposing of the boundaries. Agreement not necessarily taken in any very formal way, but in substance, in pith and substance, an agreement by which it is reasonable that the provinces should be bound.

I don't want to formulate Nova Scotia's argument better than they have done and I couldn't do so, but I just wonder whether one can't look at our function a bit that way.

PROFESSOR MCRAE: Again, I would preface that by saying, Professor Crawford, that I am not sure I have heard that argument for Nova Scotia, but let's assume that they were to at this late stage make that -- make that argument. It still is a question of coming back to the basic provisions of the Terms of Reference. And that is, whether the boundary has been resolved by agreement.

And of course, as Mr. Willis will point out, the word, "agreement" is used in a variety of ways.

But to resolve something by agreement means something that is binding. It is not resolved, it has not been bound. So there are not various gradations that can be dealt with here. Either there was an agreement that is

binding, or there was an agreement that was not binding, or that there was something happened is not binding, a political agreement, a political understanding.

The other question, of course, whether you get there by the route of international law or the route of Canadian law, we have said that really doesn't matter, because both routes direct you to the same question. Did the parties intend? And at that point we really diverge with our colleagues who say you must ignore their actual intent. That is the fundamental difference I think in this case.

Furthermore, if I may continue, a further difficulty in the Nova Scotia position that there was an agreement on boundaries in 1964 is to explain how any agreement relating to boundaries in respect of areas over which the provinces were unsuccessful in claiming ownership should revive when the provinces obtained the quite different rights of management and revenue sharing, and this is partly a response to Mr. Legault's point. For this, Nova Scotia has to, what we would say, borrow forward. It takes from the Allard letter, and we would suggest, perhaps, wording that it claims suggests that boundaries were intended for any and all purposes.

So in 1964, the provinces were really thinking about what they were later to say in 1972, and that's truly a remarkable premonition. Equally, Nova Scotia has to get a

description existing on -- has to get a description existing on September 30th, 1964 of the line running from the midpoint between Flint Island and Grand Bruit, and then southeasterly to international waters to a line which appears in the Nova Scotia -- Canada-Nova Scotia Accord as running from that midpoint on an azimuth of 135 degrees.

To do so, Nova Scotia has to vault over the line that appeared on the Stanfield -- the map attached to the Stanfield submission and over the map prepared in the context of the work of the JMRC, which shows no such 135 degree line. It has to ignore the fact that it was in the implementation of the failed 1982 Agreement that the 135 degree line emerged. How can what happened in 1982 be evidence of an intent that is retrospective to 1964?

Well, at this point, Nova Scotia suddenly remembers the federal government. It claims that a federal official had maps with 135 degree line on them. D.G. Crosby, a federal official who was not at the September 30th, 1964 meeting, but who seems to have been an expert in the use of the crystal ball, drew the 135 degree line which the Premiers had intended to draw in 1964, but actually had never even mentioned. So that Nova Scotia claims that the 135 degree line was in existence much earlier and was binding on Newfoundland and Labrador.

Of course, Nova Scotia does not pause to realize that

this argument explodes its theory that the boundary negotiation track did not involve the federal government.

However, as Mr. Willis will point out, the point remains, there was no 135 degree line in 1964. Again, the 1964 Agreement has to borrow forward.

Nova Scotia also seeks to rest its argument on acts which it is alleged should have been protested by Newfoundland and Labrador. The conduct that Nova Scotia relies on in this regard falls into two broad categories.

The first relates to the consequences of negotiations between Nova Scotia and the federal government. And the second relates to the issuance of permits by Nova Scotia and by Newfoundland and Labrador.

With regard to the former, the negotiations to which Nova Scotia refers did not involve Newfoundland and Labrador. The 1977 MOU in which Nova Scotia suddenly gained a new found interest, having rejected it decisively some 23 years ago, did not involve Newfoundland and Labrador. The 1982 Agreement and the subsequent Canada-Nova Scotia Accord were negotiated bilaterally between the Government of Canada and Nova Scotia. Newfoundland and Labrador has no knowledge of what went on in those negotiations, and we would suggest it is revealing that Nova Scotia has not chosen to disclose those negotiations to the Tribunal. Presumably, they do not support the Nova

Scotia position, because if they did we can be assured they would have been quoted in bold at every available opportunity.

And, of course, the point is that by 1982, it was clear that any line that might appear in a bilateral agreement with a province would be changed in the light of any dispute over that line. The federal government specifically reserved in the 1982 Agreement the power to draw the line -- redraw the line after a dispute. Then the Accord's arbitration became the mechanism that was to be used to determine the line in the event of a dispute. Even the fiction of statehood favoured by Nova Scotia -- even if it were to be applied to such circumstances, the need -- even if it were to be applied, the need for objection or for protest simply is not there.

As far as the permitting practice is concerned, similar considerations apply.

PROFESSOR CRAWFORD: Professor McRae, before we get to the permit process, on the question of the Accords, wouldn't it be -- as you say, we don't have the travaux preparatoire, if it's permissible to refer to the travaux preparatoire of an Accord leading to legislation, but wouldn't it be a reasonable inference from the various Accords that the federal government really didn't mind where the provinces as between themselves decided to put

their boundaries?

It was aware that there was a disagreement between the two provinces and was simply, as it were, put each province's position in its own respective legislation, leaving it to agreement or arbitration to sort that out. So it wasn't so much that the provinces needed federal approval. It didn't matter to the federal government one way or another.

PROFESSOR MCRAE: Well, it would matter, with respect, Professor Crawford, in one respect which I will be referring to later. The federal government would certainly not have wanted to do anything that might prejudice its position with respect to its claim against France in respect to St. Pierre and Miquelon. So that would be a major factor in federal government thinking about where any boundary lines should go.

But the remarkable point in relation to all of this is if this was a large dispute over an agreement and if that was the issue that was front and centre, it defies anyone to think that federal officials would have agreed to draft a Terms of Reference that referred to international maritime boundary law as resolving a question of what essentially would be had the provinces agreed on where the boundaries should go? A different set of Terms of Reference would be adopted if that issue was front and

centre.

That's why we suggest the Terms of Reference themselves are quite revealing in where this issue of agreement was at that particular time. We would suggest the issue of agreement is really quite a recent issue that has come up, and the intention at the time of the Accords was to use international maritime boundary law to draw a line, not to decide whether there was an agreement between the two provinces.

PROFESSOR CRAWFORD: But when you say the Terms of Reference, you are really referring to the arbitration provisions in the Accord --

PROFESSOR MCRAE: In the Accord.

PROFESSOR CRAWFORD: -- because of course the eventual Terms of Reference do clearly apply the principles of international law to the question whether there is an agreement. But what you are saying is that that wasn't the original contemplation of the arbitration clauses?

PROFESSOR MCRAE: That is correct. By "Terms of Reference", I meant the Terms of Reference set out in the Accord for any arbitration that would be established under the terms of the Accords and the implementing legislation.

As far as permitting practice is concerned, similar considerations apply. There was no reason for Newfoundland and Labrador to protest Nova Scotia's

permitting practice. Permitting was a way of making a statement to the Government of Canada about provincial claims to ownership, and in practice, a response to requests from companies. It had nothing to do with asserting claims vis-a-vis other provinces.

Although Nova Scotia has sought to represent otherwise in figure 28 of its Memorial, as we have shown in our Counter Memorial, Newfoundland and Labrador and Nova Scotia were issuing permits in areas that, in fact, overlapped. Nova Scotia seeks to deny any overlap in respect to the Katy permit, but it only does so through an act of, what is essentially, in our view, prestidigitation. As Professor Saunders confirmed, the line drawn by Nova Scotia as a representation of the Katy permit is based on what it is presumed that the drafter of the permit intended.

What Professor Saunders did not explain was that how -- was how that Accord, that is that line accorded with the fact that the permit map shows the Katy permit to the west of the Mobil permit. Even a cartographically challenged drafter, such as the one depicted by Professor Saunders, who did not understand the difference between Mercator and Lambert conformal projections surely could see that difference on the Katy permit.

However, Professor Saunders' description of permits

being issued without a system of adequate knowledge and experience does make an important, although different, point. Why is the record here so fragmentary? Why are there lines drawn that appear incomplete and contradictory? Why are there references to international waters or to southeasterly without any precision?

I think that it is important to remember that all of these events took place at the early stages of development of interest and understanding in the continental shelf. The provinces were becoming interested in ownership, but expertise in the technical aspects of maritime delimitation was far from developed, and what real expertise existed in these matters resided with the federal government, not with the provinces.

And that is why the determination of the precise coordinates for the turning points seemed to the provinces to be a complex and technical task. There was, of course, an expert in Ottawa who could have determined those coordinates quite readily. The provinces had no such person.

The point of all this, Mr. Chairman, is not that we should therefore make presumptions about intent. It is that such a fragmentary, incomplete and contradictory record is not a basis for concluding that there was an intent to enter into an agreement or to follow a

particular line.

The standard this Tribunal must set for the determination of whether the line has been resolved by agreement cannot be met by selectively drawing from such a problematic record. As far as permits were concerned, both parties issued permits. Newfoundland and Labrador did not protest Nova Scotia's issuance of permits and Nova Scotia did not protest Newfoundland and Labrador's issuance of permits, and there is a good reason for this. It lies in something that Nova Scotia wishes to keep in the background, although Professor Saunders hinted at it in his comments on Tuesday.

The events of the whole period relating to the offshore were all about the provinces getting jurisdiction over the offshore. It was an issue between the provinces on the one hand, and the federal government on the other.

They would not diminish their chances of gaining ownership by being seen as provoking quarrels with each other over the offshore. Everything was subordinate, the objective of securing offshore ownership. The provinces were not dealing with each other independently about boundaries. They were dealing with boundaries in the context of claims to the offshore.

To suggest that there are two parallel tracks, one on boundaries and one on ownership, is to engage in a

fictional rewriting of the historical record that would come as a complete surprise to any observer of events in Canada relating to the offshore at that time.

Without ownership, boundaries were meaningless, and that is why no agreement on boundaries was ever concluded. Since the federal government rejected the ownership claims of the provinces, there was no need to go ahead and conclude the agreement that, on September 30th, 1964, the Premiers unanimously agreed was desirable.

Nor would there have been any federal incentive once negotiations on ownership failed to have the provinces engage in offshore delimitation. The federal government had the Gulf of Maine dispute to resolve with the United States. It had the St. Pierre and Miquelon dispute to resolve with France. The last thing it needed was to have principles of delimitation used in an interprovincial delimitation quoted against it in either dispute.

And I suggest it is revealing that it was after the resolution of the St. Pierre and Miquelon dispute that the federal government turned to Newfoundland and Nova Scotia -- to Newfoundland and Labrador and to Nova Scotia and called on them to settle a boundary.

The boundary issue had been there since the conclusion of the Atlantic Accord, but nothing was done about it until the resolution of the dispute with France. And the

federal minister called on the provinces to begin discussions on the determination of the boundary, not to give effect to a pre-existing agreement.

Indeed, the issue of agreement seems to have only come to light after the Federal Minister had taken steps to establish the Terms of Reference for this arbitration. It's not mentioned in the Accords. It's mentioned nowhere in the correspondence before the Tribunal leading to this arbitration. It first appears, it seems, in the Terms of Reference, talking about a two-phase process.

Now Nova Scotia has made clear that a phase of the arbitration dealing with the issue of agreements was crucial to it, and as we have pointed out in our Memorial, such a phase, in our view, is unnecessary.

So, as is clear from the record, the idea of delimiting in accordance with a pre-existing agreement appears to have been something that occurred to Nova Scotia recently, once the question of arbitration arose.

Mr. Chairman, I'm about to turn to a discussion of the Terms of Reference and the applicable law. I'm in your hands as to whether to continue or whether to take a break at this particular time.

CHAIRMAN: It seems like a good time to take a break. Have you any suggestions as to time?

PROFESSOR MCRAE: We seem to have developed a pattern of 15

minutes. And so if that's acceptable to the Tribunal and acceptable to Nova Scotia?

CHAIRMAN: That's fine. Thanks. Fifteen minutes, then.

PROFESSOR MCRAE: Thank you.

(Brief recess)

PROFESSOR MCRAE: Mr. Chairman, members of the Tribunal, I will now turn to the Terms of Reference, and the applicable law.

The Terms of Reference require in this phase a determination, as we know, of whether the line dividing the respective offshore areas of Newfoundland and Labrador, and Nova Scotia has been resolved by agreement. And both parties agree that resolved by agreement means that there has to be a legally binding agreement. And both parties agree that the test for determining whether a legally binding agreement exists is intent, so on the face of it, the task of the Tribunal is very straightforward.

However, the parties disagree over how that intent is to be measured.

Nova Scotia claims that intent is to be measured by adopting the fiction that at all relevant times the officials of the Provinces of Newfoundland and Labrador, and of Nova Scotia, were representatives of sovereign states.

So it is not the actual intent that Nova Scotia seeks,

but rather a fictional intent. One that disregards who the officials were, and what they actually intended.

The Nova Scotia approach assumes that when officials acted, they did so consciously, knowing they were acting as if they were representatives of sovereign states. The fact that the officials in question did not realize they were meant to be representatives of sovereign states does not seem to matter. Real intent has nothing to do with Nova Scotia case.

And in listening to the Nova Scotia argument earlier this week, one had the feeling that the Nova Scotia team arrived in Fredericton three weeks late. Their arguments belong in a Jessop Moot Court Competition, where all is assumed, and one deals with make believe states and imagined intent. But it does not belong in a proceeding where it has to resolve real issues between two provinces of Canada in accordance with law.

Newfoundland and Labrador's argument, by contrast, focuses on the actual intent of the relevant officials. That is why we have said that the actions of the officials have to be considered in the light of the legal frame work in which they operated.

And that legal frame work is the frame work of Canada's constitutional system, and the domestic law of Canada.

Now this difference between the parties is quite fundamental, and it goes to the interpretation of the Terms of Reference.

Nova Scotia derives its position by focusing on some of the words of article 3.1 of the Terms of Reference, ignoring other words, and giving the words they do focus on an expanded meaning. We would suggest that none of this is justified by accepted rules of interpretation.

There are two parts of article 3.1, which now appears on the screen, of the Terms of Reference, that are central to the Nova Scotia position as set out in its Memorial.

First, Nova Scotia refers to the opening words of article 3.1, which require the Tribunal to apply the principles of international law governing maritime boundary delimitation.

Second, Nova Scotia refers to the closing words of article 3.1, which say "as if the parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times."

And in its Counter Memorial Nova Scotia abbreviates this requirement down to the more convenient, as we will point out for Nova Scotia, form "as if they were states".

Now, there appeared to be two consequences that flow from the use of these words and the Terms of Reference for the Nova Scotia argument.

First, Nova Scotia claims since international tribunals settling maritime boundary disputes apply the international law of treaties in deciding whether an agreement exists, the international law of treaties applies in this case.

And secondly, Nova Scotia claims that since the parties are to be treated as if they were states, then the nature and effect of the parties' conduct throughout the relevant period is to be viewed through the prism of international law. Hence the mandate to ignore real intent, and to search for a fictional, sovereign state intent.

Mr. Chairman, none of this stands up to a serious analysis. In focusing on the opening words of article 3.1, Nova Scotia brushes by the more inconvenient words that follow; the words "Principles of international law governing delimitation of maritime boundaries". That phrase continues with the words "with such modification as the circumstances require".

Nova Scotia notes this in its Memorial, but does not explain what that phrase means, or why it does not apply in this case.

In its Counter Memorial Nova Scotia does address the words "with such modification as the circumstances require". And it does so by claiming that it has already

discussed the meaning of these words in its Memorial. Indeed it claims that they have provided an explanation of the words, that is, and I'm quoting from the Nova Scotia Counter Memorial, Part II, Paragraph 25, an explanation that is, and I quote, "reasonable, practicable, and true both to the instruments in which the words are found, and to the circumstances of this unusual dispute." It is an impressive if somewhat extravagant claim.

However, the claim becomes less impressive when one refers to the place in the Memorial where Nova Scotia claims that it discussed and provided an explanation of these words. For there -- and that is at paragraph 30 of Section I of the Nova Scotia Memorial, for there, far from discussing the words with such modification as the circumstances require, the words in fact are not even mentioned in that paragraph.

Perhaps because Nova Scotia was under the illusion that it had already dealt with this issue in the Memorial, it did not find it necessary to be clear in its Counter Memorial, because its discussion there of the phrase "with such modifications as the circumstances require" is somewhat obscure.

But what Nova Scotia seems to be suggesting, and this was confirmed, I believe by Mr. Fortier on Monday, is that regardless of what the words "with such modification as

the circumstances require", regardless of what they mean, they do not apply in the circumstances of this case.

What Nova Scotia is suggesting is that the addition of the words, and to use Nova Scotia's terminology, the "as if they were states" words, the addition of those words was designed to remove any need for any modification, even though the circumstances may require it.

Of course, the abbreviation of the words of article 3.1 to "as if they were states" is itself somewhat misleading, because it removes from consideration the further words "subject to the same rights and obligations as the Government of Canada at all relevant times." The addition of those words indicates that the "as if they were states" concept was not an open-ended one. It focuses on the rights and obligations to which Canada was subject, and thus gives a clue to the interpretation of the "as if they were states" provision.

And I would suggest that Nova Scotia's removal of the qualifying words directs attention away from them.

Now, I'm going to return to the interpretation of that "as if they were states" provision in a moment. But for the present I wish to draw the Tribunal's attention to the fact that what Nova Scotia is claiming is that the Tribunal cannot modify the application of the principles of international law governing maritime boundary

delimitation because of the particular circumstance that the entities involved the provinces, even though the Terms of Reference provide that it can, because that would contradict the "as if they were states" provision of the Terms of Reference. That's quite a novel claim.

The words "with such modifications as the circumstances require" are in the governing legislation, and the Accords, and the implementing legislation. The words "as if they were states" are not. So Nova Scotia's argument that the words "with such modifications as the circumstances require" can be ignored, must be predicated on the view that the Minister added words to the mandate for this arbitration that override the words of the statute setting out the Terms of Reference for an arbitration, an arbitration of this kind. Now surely that was not the Minister's intent.

Indeed, Mr. Chairman, as you yourself implied in your exchange with Mr. Fortier on Monday, the Minister would have no legal authority to do such a thing.

It is important that it is realized how fundamental this position is to the Nova Scotia claim. Nova Scotia is claiming that the intent of the provinces in 1964 is to be determined as if they were states, that is under international law. It has refused to show how they could have the necessary intent if the matter is determined in

accordance with domestic law, with the Law of Canada. The law under which those officials were in fact acting.

In essence, Nova Scotia is admitting that it cannot prove that there is a legal and binding agreement under the Law of Canada. Its only hope is to rely on a retroactive and fictional application of international law.

So, Mr. Chairman, Nova Scotia is saying that although there was no agreement in 1964 between the Premiers under Canadian law, by requiring the Tribunal to apply the principles of international law to the two provinces as if they were states, the Terms of Reference have retroactively created an agreement between them.

Moreover, the provisions of the Terms of Reference that does this is the provision that was added by the Minister, and does not exist in enabling statutes. In effect, the Nova Scotia position is that the Minister added the "as if they were states" provision to the Terms of Reference so that Nova Scotia could win a case on the -- that on the basis of the statutory wording it could not do.

Mr. Chairman, at this time I would like to address the issue raised in the discussion between the Tribunal and Mr. Fortier on Monday. That is, what is the relationship between the Terms of Reference and the enabling statutes?

The statutory provisions, and I will refer to that -- the one set out in Section 6 of the Canada-Newfoundland Accord Implementation Act, they authorized the Minister to establish an arbitration under subsection (3). That's subsection (3) on the screen, which is to determine the procedures for the settlement of a dispute.

That, as the Chairman said on Monday, relates to the process of an arbitration.

The applicable law for such an arbitration is stipulated in subsection (4) of section 6. It is, as is well known, as follows: "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 delimitation with such modifications as the circumstances require."

The Terms of Reference take these words, slightly modify them, circumstance becomes circumstances, and then add additional words, so article 3.1 provides "Applying the principles of international law governing the delimitation of maritime boundaries 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." And that's the provision, of course, that does not appear in the enabling statutes.

Notwithstanding the obvious differences between the mandate in the enabling legislation and the mandate in the terms of reference, Nova Scotia says that the hands of the Tribunal are tied, manacled I believe Mr. Fortier said in a rather revealing metaphor. Moreover, Mr. Fortier said that it was up to Newfoundland and Labrador to challenge the terms of reference in another forum.

Ms. Hughes appeared to take a slightly different tack. She implied that somehow the parties had agreed to the Terms of Reference. She said -- and I quote from the transcript on March 13th, page 312, "It must be borne in mind that the Terms of Reference were determined following more than a year of consultations and negotiations. Its terms are quite deliberate and did not come out of the blue."

Mr. Chairman, the Terms of Reference were established by the Minister. They are decidedly not agreed Terms of Reference even though there were consultations for over a year. We have already indicated, for example, in our Memorial, our view that a two-phase process was unnecessary. Thus, the Tribunal cannot treat these Terms of Reference as agreed Terms of Reference. In interpreting them, the Tribunal must seek to ascertain the

intention of the Minister and not make any assumptions about the intentions of the parties.

What then should the Tribunal do in the face of the differences between the wording of the enabling legislation and the wording of the Terms of Reference.

In our view in establishing the arbitration, the Minister cannot override the statute. The Minister cannot, by means of the Terms of Reference set up for this dispute -- by means of the Terms of Reference set up for this dispute, take away from a Tribunal functions that are mandated in the statute.

However, it is for the Tribunal to interpret its mandate as set out in the Terms of Reference. In doing so, it should interpret the Terms of Reference in a manner that is consistent with the enabling statues. It must start with the presumption that the Minister did not intend to exceed his powers and thus the Terms of Reference are to be interpreted in a manner that is consistent with the statute.

In the present case a conflict between the statue and the Terms of Reference arises only under the Nova Scotia interpretation. That is Nova Scotia views the non-statutory words, the "as if they were states" provision, they view those words as overriding the statutory wording, "that the Tribunal may modify the application of the

principles of international law governing the delimitation of the maritime boundaries if the circumstances so require".

And what it does, therefore -- the Nova Scotia position therefore creates a conflict between the Terms of Reference and the statute. That of itself is reason enough why the Nova Scotia interpretation must be rejected.

Furthermore, the proper approach to the interpretation of the Terms of Reference is that all of its provisions must be given meaning and effect. Some of the provisions, the "as if they were states" provision, cannot be allowed to override the "with such modifications" provision. That too is a reason for rejecting the Nova Scotia interpretation.

How then should the "as if they were states" provision of Article 3.1 of the Terms of Reference be interpreted? Those words in full -- and again I quote -- "As if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times."

Now although that provision may be imprecisely drafted, it appears simply to be designed to give some added precision to the content of the principles of international law governing the delimitation of maritime

boundaries that are to be applied by the Tribunal. It might be seen, for example, as specifying which international obligations can be taken into account at which times. Without such a provision it would not be clear which treaties might be relevant, for example.

However, where there is such an interpretation creates a conflict between the Terms of Reference and the enabling statue is not something that arises in this phase of the interpretation. There are no treaties that are relevant to the question of whether the line has been resolved by agreement. Therefore, although the Tribunal may have to address the question of the relationship between the "as if they were states" provision of the Terms of Reference to the enabling legislation during the second phase, it does not have to do so in phase one.

PROFESSOR CRAWFORD: Professor McRae, Canada is party to the 1958 convention on the continental shelf and not to the 1982 convention?

PROFESSOR MCRAE: Correct.

PROFESSOR CRAWFORD: And it would seem to follow from this formula and it would seem an entirely reasonable thing for the Minister to do to direct this Tribunal to apply those rules of international law which would apply as it were to Canada, within Canada between the provinces. So there is no -- you may be right in saying that there is no

difference between the two -- the two treaties, but which treaty we apply is determined by the treaty rights and obligations of Canada.

PROFESSOR MCRAE: That is a possible interpretation. I say this without prejudice to arguments that I will be making in phase 2 of this arbitration. But with that --

PROFESSOR CRAWFORD: I certainly wasn't inviting you to make those arguments now, Professor McRae.

PROFESSOR MCRAE: Thank you, Professor Crawford.

PROFESSOR CRAWFORD: But you seem to be reading that clause as if that was the only purpose of the clause. And surely acting within the scope of the Minister's authority under the Act, he was entitled in effect to direct the Tribunal to consider the issue, because of course you didn't want a nugatory result where the Tribunal said well the principles of maritime boundary delimitation don't apply to provinces, they only apply to Canada. That would have prevented -- that would have frustrated the object of the arbitration.

So it was really a clarification of the underlying intention of the section. You are to treat these provinces as if they were states for the purposes of applying rules which don't actually apply to them in truth because the provinces are not states.

PROFESSOR MCRAE: Professor Crawford, I would agree with

that but up to some kind of limitation. That of itself though does not give authority for the Tribunal to apply rules that would be -- result in absurd result, and we would argue that applying principles of international law in a way that would treat the provinces as if they were states and create a fictional intent as the basis of an agreement, would be an improper way to apply that provision.

PROFESSOR CRAWFORD: But, I mean, part of the problem is they are talking about a fictional intent. Okay. Let's assume that the Premiers in 1964 or in 1972 agreed on the terms of a future settlement, but clearly had it in their minds or clearly understood or can be taken to have understood that this wasn't the last word, that other things still had to be done. Now if they had been heads of state, heads of government or ministers of foreign affairs, that wouldn't have changed what was in their heads. What was in their heads was that something more needed to be done. And therefore, that arrangement, had it have been made between states, wouldn't be any more binding than it would be under Canadian law.

PROFESSOR MCRAE: Well with respect, Professor Crawford, what they had in their heads when you say what still had to be done is informed by the Canadian legal and constitutional framework. And that is why you cannot

separate that from the question of what they had in their heads, which is why we have said intent has to be considered in the light of that actual framework. So they would have known the point at which a commitment would be a commitment, the point at which a political commitment transfers into a legal obligation.

And as we understand it, Nova Scotia is saying that that is precluded from being considered. Because we are applying international law we preclude that, we assume that they are representatives of the states who would assume a treaty making process and not a domestic law making process. And that is the sense in which we are saying intent at that point becomes totally fictional.

PROFESSOR CRAWFORD: The rules of international law are about the making of agreements don't involve high levels of formality. It may be that they involve considerably less formality than would be required for the making of interprovincial agreements, at least on some subject matters. But at some level they are underpinned by the notion of good faith, reasonable dealing, et cetera, reliance and so on.

If one could -- I mean, in the context in which the arbitral process is established by law, it is not as you say established by agreement. It is not an executive process. It is established by laws of all the relevant

actors.

The reference to international -- indeed the notion of modification might entail the modification that we are not looking at a formal treaty making process, but we are applying the spirit of international law concerned with issues of good faith to a real relationship in which the parties seem to have been, or for the sake of argument, seem to have been at some point intending to commit themselves to particular lines.

It wouldn't be unreasonable for the -- for Canada to say well if the provinces have gone to the point of making commitments to each other, even if it's true that those commitments weren't binding under Canadian law for want of legislation under the 1871 Act, nonetheless we are prepared to treat those commitments as binding. Isn't it a reasonable interpretation of the arbitration provision?

PROFESSOR MCRAE: Well, Professor Crawford, I think that it still requires some assessment of in what context good faith operates. Because where parties are operating in circumstances where it is well understood that although you have a political commitment, no one is held to anything until you reach a certain process, then you can only apply the concept of good faith to that particular context.

If we were dealing with a regional custom between

states where it is understood if your treaty was international context wherein the relations of those states it was always understood that nothing would be binding until a particular event occurred, it would not make sense to apply a principle of good faith that would contradict that process. And in these circumstances, that is a situation we are talking about. You cannot apply the concept of good faith without looking at the context to know what the parties themselves would regard as an appropriate walking away.

And we referred many times to the 1977 MLU. No one thought it was inappropriate for the provinces to back away from something that they had in one sense formally indicated an agreement. Nothing nearly the kind of suggestion of agreement we have got here. So within that context you must take that into account in applying any concept of good faith.

We would suggest -- and we would suggest furthermore, Mr. Chairman, that whatever the interpretation the tribunal is to accord to the "as if they were states" provision, it cannot justify ignoring appropriate modifications in the applications of principles of international law. That is something -- the difficulty we have with the argument is that the "as if they were states" provision is being taken as taking away from the

Tribunal the right to make modifications, to take into account the fact that these are provinces. It's that application of it that we find unacceptable.

It cannot justify ignoring appropriate modifications, nor can it justify retrospectively clothing provincial officials with the intent to act as representative of sovereign states.

Article 3.1 of the Terms of Reference determines the applicable law. It does not provide a basis for changing facts or for changing the surrounding circumstances. And the idea that there could be a retrospective rendering of the parties as states for all purposes of this arbitration makes no sense for a further reason, and this really responds to the question that was asked earlier.

Although Nova Scotia argues otherwise, one cannot take the federal government away from the context in which this whole -- these whole events occurred. The question of a boundary involves Newfoundland and Labrador and Nova Scotia and the Government of Canada.

So to make the "as if they were states" theory work, as I indicated before, there has to be a presumption that throughout this period the federal government was always -- also acting as a state in respect of its relationship with Newfoundland and Labrador and Nova Scotia and not acting as the federal government.

So what the "as if they were states" theory of Nova Scotia has to do to make any kind of sense out of what was happening in these circumstances is to place the federal and provincial governments, which have widely divergent spheres of authority on a fictional equal footing for the purposes of divining the significance of acts on officials. And of course, that flies completely in the face of any reality.

Federal officials act as federal officials. Provincial officials act as provincial officials. Both guard jealously their respective areas of authority. It is simply an act of supreme fiction to presume that officials were interacting during these times as if they were representatives of equal sovereign states.

Now, Mr. Chairman, I have dealt with this question at some length because it appears to us that it is quite fundamental to the approach of Nova Scotia to the applicable law. That is their interpretation of the Terms of Reference lead to their interpretation of the applicable law. Everything flows from it. The fact that the provinces are states for all purpose, under the Nova Scotia point of view, allows Nova Scotia to argue that the Terms of Reference incorporate the rules of international law relating to the conclusion of treaties.

The fact that the provinces are states for all

purposes means that Nova Scotia can say that in -- that conduct has to be measured by diplomatic practices relating to protest, and invoked earlier in their pleadings, acquiescence and estoppel.

But none of these arguments really hold up if one looks at the practical reality. Newfoundland and Labrador and Nova Scotia are provinces. They acted throughout as provinces. That cannot be ignored in any search for the intent that has to be shown in order to establish a legally binding agreement.

Nova Scotia wishes to avoid any suggestion before the Tribunal that the question for the Tribunal is whether two provinces entered into an agreement that is binding on two Canadian provinces. Now Nova Scotia has related, but in a sense alternative route to avoid looking at the real intent of the parties, is to focus on the wording of Article 3.1, which requires the Tribunal to apply the principles of international law governing the delimitation of maritime boundaries. And from this Nova Scotia deduces that the Tribunal must apply the principles of international law governing the conclusion and interpretation of international agreements in order to decide whether the line has been resolved by agreement.

Nova Scotia appears to derive the authority, it would refer to the international law of treaties, from the fact

that international tribunals dealing with maritime boundary cases refer to the law of treaties when the question of an agreement arises. That seems to suggest to Nova Scotia that a reference to the principles of international law governing maritime boundaries must be a general reference to the whole corpus of international law.

But as we pointed out in our Counter Memorial, such an approach ignores the fact that the Terms of Reference do not say, "all of the rules of international law."

The Nova Scotia approach ignores the expressed wording of the Terms of Reference that limits the incorporation of international law to the principles of international law governing maritime boundary delimitation. And there is nothing in the governing statutes that suggests a broader interpretation.

Nor does reliance on the practice of international tribunals dealing with the question of agreement in the context of a delimitation of maritime boundary prove what Nova Scotia claims it does.

A tribunal dealing with the law of treaties, in considering a question of an agreement between two real states does so because the law of treaties is the proper law of the parties' relationship. It's not because the law of treaties is part of international maritime boundary

law.

In this regard, Mr. Chairman, Ms. Hughes' discussion on Tuesday of the fact that the principles of international maritime boundary law stipulate that the parties should effect their delimitation by agreement is in a phrase favoured by Nova Scotia simply beside the point.

International law directs, as a matter of process, that parties seek to resolve the delimitation by agreement. Failing such an agreement, the principles of maritime boundary law involving such matters as equitable principles, relevant circumstances and so on, can be applied to determine the line.

Ms. Hughes quoted from the first half of the fundamental norm of delimitation set out in the Gulf of Maine case, she quoted the first paragraph, which now appears on the screen. But she should have completed the quotation.

Paragraph 2 reads as follows, "In either case delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring with regard to the geographic configuration of the area and other relevant circumstances an equitable result."

It's the second paragraph where one finds the content

of the principles of international law governing maritime boundary delimitation, not the first.

PROFESSOR CRAWFORD: Professor McRae, I mean the fact is that both Article 6 of 1958 and Article -- I always get the numbers wrong -- 83 of 1982 refer to agreement?

PROFESSOR MCRAE: Yes.

PROFESSOR CRAWFORD: So you start out from the notion of agreement. And by reference to agreement in those formulas, he has clearly intended an agreement binding on the states, not merely as it were a concordance of -- an independent concordance of minds. But an agreement that they have reached between them.

So one doesn't have to say that the reference to the applicable law in the act is to the whole of international law. It's a reference to a particular principles of maritime boundary delimitation, which themselves refer to the question, what is the binding agreement.

Of course, we then have the problem what the word, "agreement" is to be taken to mean in this context. And we can at least be guided in that by the as if formula, surely, without treating the as if formula as overriding the rest of the applicable law clause.

PROFESSOR MCRAE: But, Professor Crawford, it simply appears to ask that the reference in international law that -- in both the treaties and in customary international law to

some extent, the boundaries are to be resolved by agreement simply doesn't get us anywhere in the discussion.

The Tribunal has a mandate under its Terms of Reference to decide whether the boundary has been resolved by an agreement. You don't need to go to international law of maritime boundary delimitations to get any authority in the tribunal. The question is whether or not you -- the question is once you look for an agreement, what do you take into account in looking for that agreement?

And the international law of maritime boundary delimitation doesn't have anything to say about that. You go to the law of treaties. And as I suggested, you do that not because the international law of maritime boundary law suddenly incorporates the whole body of international law, you do that because the parties are governed by international law. The question of agreement is to be determined by international law. It is the proper law governing the parties' relationship.

We would state even that doesn't get you anywhere as far as this dispute is concerned. It's all pretty much irrelevant, because the whole question comes down to the fact, when you search for intent, do you take the context of what people at the time knew and understood they were

doing, into account?

PROFESSOR CRAWFORD: The answer to that question is you do under either --

PROFESSOR MCRAE: Exactly.

PROFESSOR CRAWFORD: -- Canadian law or international law. So I suppose it's a false conflict.

PROFESSOR MCRAE: That was what I was precisely coming on to say in a few minutes, Professor Crawford that --

PROFESSOR CRAWFORD: Well I will let you say it.

PROFESSOR MCRAE: Perhaps it will be a repetition now to say that. But we would suggest that it is creating a false dichotomy in -- I would suggest before I move on to that point, another point I wish to make.

I think that there is another way to look at this issue. And I think that this issue has been clouded to some extent, because of a Phase 1 and Phase 2 process that has been set up here.

If there had been a single phase to this arbitration, and Nova Scotia has argued in the course of the proceeding that the two provinces had already resolved the boundary by agreement, then the Tribunal would have to address that question. Not as if the two provinces were fictional states, but on the basis of whether there was a genuinely, legally binding agreement between them. They would have looked at the real intent of the provinces.

As a matter of fact, would have looked at the real intent of the provinces as a question of fact and determined on the basis of their actions and expectations what the consequences should -- what consequences should be attached to their actions.

There can't be a different approach simply because we are in a separate phase of the arbitration, just because the question of agreement has been separated out and dealt with on a phase of its own.

So we would suggest that the requirement that the Tribunal apply the principles of international law governing maritime boundary delimitation does not entail as a consequence that the law of treaties be applied to determine any question of agreement.

In fact, Nova Scotia's argument that it does is simply another version of the argument that this whole issue is foreclosed by the "as if they were states" provision of Article 3.1. And that's an argument which I have pointed out cannot be sustained.

CHAIRMAN: The "as if they were states," is in a sense inherent in the statute itself. Because obviously you couldn't have this arbitration if you didn't treat them as states. And I am concerned as well with the question of at all relevant times.

If Canada were to be involved in an arbitration that

involved its actions before it became a sovereign state, one might conceivably come to the view that the actions it took before were not relevant to it as a sovereign state. It may have some relevance. I wouldn't go that far. But that it would have a different legal effect or could have a different legal effect.

In other words, what I am posing is whether this addition may not be looked as inherent to what the statute -- in what the statute says.

PROFESSOR MCRAE: Mr. Chairman, I think you have to take the provision "as if they were states" apart into its three parts. As if they were states subject to the same rights and obligations as the Government of Canada and at all relevant times. And I think that you have to look at it to some extent as a package.

I agree with you, "as if they were states" must be inherent in the enabling legislation. You couldn't do this unless you treated them as states.

Subject to the same rights and obligations as the Government of Canada does appear to say something more than as if they were states, because one would have to look at the Canada's legal obligations at a particular time. And at all relevant times, that would have to be defined in terms of the times at which the issue was relevant for the purposes of the arbitration.

So for our purposes, and I say this with some hesitation, because I feel that we are moving into phase two arguments without -- and positions parties take here may be different or may be the same, and I want to say that without prejudice to any position that might be taken in a phase two process.

But here one -- obviously in this context, we are looking at 1961 all the way through. So if that is the relevant period in a phase two arbitration, the question of what agreements was Canada party to during that period, might be a relevant question. And if Canada became party to something before or after, that might be a relevant question in the phase two arbitration. So I think you have to put them together. But I think the only part that is actually inherent is taking the word, "states" alone. The rest potentially adds something more.

PROFESSOR CRAWFORD: But what it adds, and one can understand the concerns that might have motivated the Minister in insisting on this. And in particular, for example, Canada is now bound by the arbitration with France on St. Pierre and Miquelon. And it's obvious that this Tribunal can't affect that decision.

So the areas that this Tribunal can deal with in the event that we get to phase two is the relevant area minus the area which is determined or affected by that award.

So that one doesn't have to even infer that this addition is ultra vires. It was addressed at a particular sort of problem.

PROFESSOR MCRAE: I agree. I don't think we have to stop with the assumption at all that it's ultra vires. All I was arguing, Professor Crawford, was the way it is argued by Nova Scotia, which means that it overrides the ability of the Tribunal to modify, would mean that it was ultra vires. And that's -- therefore, that argument can't be sustained.

PROFESSOR CRAWFORD: Moving back to the question of modifications, could you perhaps make it precise. And in due course, I will be interested in Nova Scotia responding to the same question, precisely what modifications, in your view, if any, should the Tribunal make in the exercise of the power that we have under the Act? Are any modifications required?

PROFESSOR MCRAE: For the purpose of this arbitration, if you were to conclude that (a) international law applied, (b) international law meant that you ignored the actual intent of the officials and gave them a constructed fictional intent, we would suggest that in those circumstances a modification is required. We would suggest you would not interpret international law that way. And it comes back to the point that I am going to

deal with, that it really doesn't matter which one -- approach you take.

But if you were to reach that result, then we think that the modification route is appropriate. And actually I am planning to come onto it, to explain that in a short period of time.

MR. LEGAULT: Professor McRae, always on the same point in a very practical sense, if one looks at the meaning of the terms, as if they were states at all relevant times, and like Professor Crawford, I would very much like to hear from Nova Scotia on this point at the reply stage, would it be possible or would it be mandatory in the light of that provision regarding the two provinces as states, treating them as states at all relevant times, to take the view that in 1964, they owned the continental shelf, they had proprietary rights and jurisdiction and had the right to divide it on the spot in 1964 without reference to any one. After all, if they are independent states, would they have had -- they would have had this right. Does our obligation to treat them as if they were independent states at all relevant times impose an obligation to take that interpretation? They had the rights. They didn't need to ask for them. They had them. And they could have divided them on the spot.

PROFESSOR MCRAE: Mr. Legault, with respect, that argument,

which obviously we would reject as an appropriate interpretation, because it simply means that this case was decided by the Minister. It would mean that the Terms of Reference impose, because -- impose a solution rather than asking the Tribunal to determine a solution.

Because what it would do is to completely treat everything that happened as totally irrelevant, because the -- everything happened in the context where they were negotiating with the federal government. And therefore, all you would say is that there was an agreement, we would still an agreement to agree -- it hadn't happened, but you'd still be essentially saying that as states they divided it up and the federal government had nothing to do with it?

MR. LEGAULT: Therefore a modification is required?

PROFESSOR MCRAE: Therefore a modification is required. It -- it reduces the Terms of Reference to an absurdity.

Furthermore, in arguing Canadian law should be excluded from any consideration by this Tribunal, the whole matter will determine on the basis of international law, and here I come to a point raised by Professor Crawford, Nova Scotia is really placing international law and Canadian law unnecessarily in opposition. It gives the appearance that there is a large question of principles for the Tribunal to resolve. This is not so.

The issue of the applicable law, we would suggest, is being blown out of perspective.

Under both international law and the law of Canada, the key element for determining intent -- determining the existence of an agreement is intent. So from that point of view it doesn't matter.

The task of the Tribunal is to determine whether the two provinces had the requisite intent to enter into a legally binding agreement. Whether that intent is found is essentially a factual question, either under international law or under the law of Canada.

The only question -- the only question, therefore, is whether in assessing that intent, the fact that the provinces were operating as provinces within the Canadian Federal system should be the background against which intent is to be assessed. That is the fundamental issue that divides, in a sense, the parties on the question of the applicable law.

Nova Scotia says no, you must ignore the reality of what occurred and pretend that the provinces all along were acting as states. But this, in our view, requires the Tribunal to apply the Terms of Reference, and implicitly the abling statutes retroactively, and to engage an inquiry that really flies in the face of political reality.

An interpretation that produces such a result can't be justified under any principles of interpretation. It's simply not necessary, Mr. Chairman, for the Tribunal to engage in a long protracted discussion of whether one body of law applies, or the other body of law applies. If the law of -- international law relating to treaties were to apply, they would direct that the actual intent, and not a fictional intent, be found.

This means for international law, the Canadian legal frame work is simply the factual background against which intent is to be measured. In this regard I would point out that we are totally perplexed by Nova Scotia's claim that the rules of international law relating to the interpretation of treaties applies to the question of whether a treaty exists, and we'll come back to that point in subsequent arguments.

If the principles -- we would suggest, as I say, that under international law the same result would apply; international law does not require the search for a fictional intent.

If the principles of Canadian law applied to the formation of agreements, then the alleged 1964 Agreement simply cannot meet the test of intent, and Nova Scotia doesn't seem -- even seem to contest this, preferring not to make any arguments on the basis of domestic law,

although Ms. Hughes did suggest with that elaboration on Tuesday, that there was no settled Canadian Law on the -- the subject. We would feel that it doesn't matter, therefore, whether one applies the principles of international law, or figures of domestic law.

But then let me reiterate a point that I made in response to a question from Professor Crawford. Even if the principles of international law relating to treaties were relevant, and even if contrary to our argument, those principles did permit the ignoring of real intent, and presuming an intent that the parties did not have, this would be an appropriate circumstance justifying a modification, as contemplated by article 3.1.

Now Nova Scotia seeks to avoid the consequence of any application of article 3.1, first of all of the provision relating to modifications. First of all, as I have mentioned, by saying it's overridden by the "as if they were states" provision. But then it does it go on to define the meaning of modification in its Counter Memorial. And it refers to dictionary definitions of the word "modification". It means, they say, changing something without altering its essential nature, or changing something without fundamentally altering it.

Now we have no quarrel with these definitions. But Nova Scotia goes on to say, at paragraph two -- paragraph

34 of Part II, applying Canadian -- and I quote "Applying Canadian Domestic Law to determine any aspect of this dispute would be fundamentally at odds with the Terms of Reference and with the legislation from which they were derived."

Well this whole arbitration is a creature of Canadian law. It's Canadian law that determines its scope. It's Canadian law that established the powers of the Minister, and then puts limitations on those powers. And we are quite certain that if in the process of this arbitration some aspect of Canadian law is not complied with, our friends from Nova Scotia would quickly discover a new interest in Canadian law. Indeed, Mr. Fortier certainly had a role for the Federal Court in mind in respect of this dispute when he spoke on Monday.

Furthermore, it is nonsense to suggest that modifying principles of law that require real intent to be -- be ignored in order that a fictional intent be given effect to, we find it inconceivable that this is a fundamental change in the Terms of Reference. Or to put it another way, how can it be seen as a fundamental change in the Terms of Reference if principles of international law are to be modified in order to avoid making something legally binding on the provinces, which is not binding under the law of Canada? In sum, Nova Scotia is simply claiming

once more that the Terms of Reference must be interpreted in a way to allow it to claim rights that it admits it is not entitled to claim under Canadian law.

The final area I wish to refer to, Mr. Chairman, relates to acquiescence in estoppel. There is of course a simple answer to Nova Scotia's contentions about acquiescence in estoppel, they simply do not belong in this phase of the arbitration.

The Terms of Reference require that the Tribunal shall determine whether the line dividing the offshore areas of Newfoundland and Labrador, and Nova Scotia has been resolved by agreement, not resolved by some other means.

Moreover, Nova Scotia can't have it both ways. The objective of separating this arbitration into two phases, if it is to make any sense at all, is to separate the question of agreement from the question of what are the relevant circumstances that are to be considered in maritime boundary delimitation. But this objective is defeated, if factors that can be considered as relevant circumstances are brought into phase one of the arbitration relating to agreement.

However, Nova Scotia has made no submissions on this -- on the issues of acquiescence in estoppel in its oral presentations, and it would appear that they're not pressing these issues before the Tribunal. In those

circumstances, unless things change, we would not plan to address those issues, and refer the Tribunal to our written submissions.

Let me conclude, Mr. Chairman, by summarizing the position of Newfoundland and Labrador.

Nova Scotia has asserted that the provinces entered into an agreement on September 30th, 1964. They claim that the agreement described the boundaries, that it was an agreement for all purposes, that the boundary in the outer area is defined by an azimuth of 135 degrees, and that it went to the outer edge of the continental margin.

All of this rests on four key assumptions; that there was an intention to be legally bound; that the issue of boundaries was distinct from the issue of ownership; that the federal government was irrelevant to the process; and the law that governed the conclusion of an agreement by provinces in 1964 was the international law of treaties.

As I have indicated, and we will show throughout this oral presentation, none of those assumptions can be sustained. Furthermore, Nova Scotia has to construct an agreement that it says was entered into in 1964 by relying on events and claims that were much later than 1964. That is the basis of its claim that the boundary was for all purposes and of the claim relating to the 135 degree line and its claim that the line extended to the outer limit of

the continental margin. None of these existed in 1964.

So that at the end of the day, all that Nova Scotia was able to show is that the Premiers agreed, in 1964, September 30th, that it was desirable to enter into an agreement in the future in respect of certain, at that time, defined described boundaries.

None of this comes anywhere near, Mr. Chairman, meeting the burden of proof that the line dividing the offshore areas of Newfoundland and Labrador, and Nova Scotia, was resolved by agreement.

I thank you, Mr. Chairman, members of the Tribunal, for your attention. Unless there are further questions, I would ask the Chair to call on Mr. Brian Crane to review the factual elements of this case?

CHAIRMAN: Thank you, Professor McRae.

PROFESSOR MCRAE: Thank you. It will probably take a couple of minutes while I transfer this contraption to him.

MR. CRANE: Mr. Chairman, members of the Tribunal, it's my task to go through some of the paper record in this proceeding. And I thought that I could start perhaps with some minor administrative review of what we filed.

We filed this morning Volume I and II, which are the -- as it were, the aids to the oral argument. Volume I contains the documents from the early sixties right up to the 1972 period. And that's the one that we're spending

-- I will be spending most of the time on.

Volume II of the documents brings that up to date to the early 1980's. And in addition at the end, around tab 58 and 59, are some additional permit information, which we will be addressing very briefly at the end of this document review.

After tab 58 and 59 we get into some materials which Mr. Willis is going to use, relating to legal materials. And so I won't be referring to any of those.

So that's the -- that's where we are. In addition, there is a book of additional materials which are added to the record, which is filed separately, but I don't think you need to look at that, because they are all duplicated in the large oral argument books.

So what I propose to do is to take the Tribunal through the record using the key documents that are in these books that we have handed up. And to make certain points in terms of the interpretation of the materials. To set the factual record in a context which we think is appropriate, regardless of the legal standards which are to be applied, the legal tests which are to be applied to the documents. Because whatever the appropriate legal tests are in terms of the Terms of Reference and the governing statute, they don't alter the facts. The facts have to be considered, using international law tests, or

using domestic law tests, as they appeared in history. We can't rewrite the facts, we can't change the actors, and what they are -- what they were doing at the time.

And what they were doing at the time, in our submission, is acting in accordance with Canadian Law. But you have to understand the total context. That's about the only legal submission I'll probably make.

Now, starting then at the beginning, I think I just reaffirmed what others have said, that there isn't much -- there aren't many fighting grounds on the documents. They're not that difficult to understand. There are a couple of gaps, but that's the fault of the historical record, it isn't something that one should draw any inferences from.

And the -- I think in terms of the history, the record is reasonably clear. I could just say a couple of things about a summary of the facts, if that would be helpful.

The first point I would make is that in 1964, following a period of interprovincial discussions, the Atlantic provinces, with the support of Quebec, developed a common position to be advanced to the federal government to claim ownership. And we say that was the -- that's the guiding point in those early documents, that there was a common position prepared. Premier Stanfield described the claim as a claim to the proprietary right in minerals.

And this is when he made his statement or submission in October 1964, a claim to the proprietary right in minerals contained in the submarine lands belonging to the province where the lands -- submarine lands were contiguous. And it was an integral part of this common position that the provinces themselves had worked out inter se their problems as far as interprovincial boundaries were concerned, and I will come to that when I review the Stanfield statement. And I hope in doing this I won't get into unnecessary repetition. I don't plan to do that, and there is Premier -- I almost said Premier McRae there. He has covered some of these materials, and I'm not going to go over that again.

So that the third point then, is that there -- is that there was a request to the federal government to agree to this proprietary claim of the provinces and to the boundaries that the provinces have arrived at, and that the -- this recognition by the federal government should be formally approved in the -- in an amendment to the British North America -- under the British North America Act. That would require legislation by Parliament, and it would require legislation first by the provinces. So first thing, there would have to be a concurrence expressed by the provincial Legislature, second, provincial -- or federal legislation, so that those steps

both were necessary.

Fourth, there is no dispute that the Stanfield initiative -- and Stanfield was speaking on behalf of the Eastern provinces. And when he made his submission, he was not speaking on behalf of Quebec. Quebec was present and gave its support, but the Stanfield proposal was the proposal of the coastal provinces.

There is no dispute that this initiative was completely rejected by the federal government. The federal government took the position that Canada owned the offshore and it would seek a judicial determination in order to confirm this. That's not in issue. It's on the record.

Finally, a number of events took place after 1964 in the period up to '72, and in general format these were the work of the JMRC and the approval by the various Premiers in 1972 of the JMRC report. And that's the -- in our view, the extent of the general submissions I would make at the outset.

This political strategy held up at least until 1972, but it began to deteriorate and Newfoundland and Labrador went its own way. It went its own way on a broad basis. It wanted to negotiate directly with the federal government, and it developed a very elaborate plan which was set out in 1973 in an independent proposal.

And the issue that is to be resolved by the Tribunal is whether the result of these politically driven efforts starting in 1964 amounted to legally binding obligations which had the effect of resolving the boundary dispute. I say that that -- that is our position, that there has to be legally binding obligations created.

PROFESSOR CRAWFORD: Mr. Crane, when was the point at which it became clear that Newfoundland had abandoned the common effort? And my second question, which may relate to a different point, when did Newfoundland first make it clear that as part of that process it did not or no longer accepted the boundaries which would be part of any package?

MR. CRANE: The sequence of events is that there was a formal proposal made in 1973 by Newfoundland to Canada, a bilateral approach. That's recorded in the documents, and I will refer you to them, so that was in mid-1973. The reaction of the other provinces and of Canada was -- but first, the other provinces, the team members, as it were, was very direct and abrupt. Premier Regan, who was then Premier of Nova Scotia, wrote to the federal government and said that Newfoundland was divorcing itself from the group, and Premier Hatfield of New Brunswick wrote to Moores, Premier Moores and said that -- it took some considerable umbrage and said that I take it that you are

withdrawing from our common approach, and ended his letter by saying, "There is no point for officials to meet." So that by '73, to answer your first question -- by the mid '73, that withdrawal had taken place. With respect to the boundary, I think at a political level the boundary was viewed as a more technical issue. We have the Doody correspondence that was referred to, and that was in 1972, after the Premiers had met. The Doody correspondence was in the -- I think October 1972. After that there is a series of events, which I will go through, indicating that that line -- that there was a problem with the boundaries between Newfoundland and Labrador and Nova Scotia persisted right through the 70s. It was known at the time of the 1977 MOU and it was known right up to the present day, in our submission. So there is a series of events which I will try and highlight after the break.

PROFESSOR CRAWFORD: But to summarize, your position is in relation to the second question that the divergence on the boundary began to be clear, at least from the Doody letter of 1973, and that it continued thereafter, though at a technical level because it was overshadowed by the sort of political divorce?

MR. CRANE: That's my -- that's my conclusion drawn from the materials.

May I first turn then to the early events, and I will

now deal with the period leading up to the 1964 events, and quite briefly cover those. They are covered in the first volume, which is the Volume 1, and the first volume -- first item in the record is at tab number 1, which was the 1959 letter. And this is a letter to the Attorney General -- or memo to the Attorney General from the Nova Scotia Deputy Attorney General. And that letter discusses the whole situation, but what I wanted to refer to appears at the end, and this is a theme which comes right through the period. And he suggests a course of action, after having said that this is a matter that we should address and give great importance to.

At the bottom of page 2, he sets out what the course of action should be, and he says, "1) the province should determine what stand it proposes to take on this whole question and also on the question of boundary divisions between the provinces. 2) the matter should be made the subject of immediate discussion, either at the dominion/provincial level or, in the first instance, among the Atlantic provinces. 3) if a solution can be arrived at to the satisfaction of all concerned, it should be incorporated in an amendment to the BNA Act." That's a constitutional amendment. "Fourth, if a solution cannot be agreed upon, the question should be made the subject of a reference to the Supreme Court." That was the method

that he recommended.

The matter was returned to, and this is dealt with at tab number 2, at the Premiers' conference, that's the Atlantic Premiers' Conference in the -- September 22, 1959, and it's an item on the agenda there. It's headed "Submarine Mineral Rights", and at page 6, which is about -- we haven't reproduced all the pages in this book, but page 6, the Premier, who is then Premier Stanfield, says in the middle of page 6, the second matter I wish to refer -- to which I wish to refer is submarine mineral rights. Who owns submarine minerals? There is, first of all, a constitutional question as to whether submarine mineral rights belong to Canada or the provinces. And then the next sentence, if it is conceded that these rights are vested in the provinces -- and I take it he means conceded by Canada -- then the second question arises as to the rights of provinces bordering on common territorial waters.

I take it at that that he is talking about the submarine boundary as between provinces. And thirdly -- then he goes on to say -- there are international questions between various surface rights, rights in the subsoil and rights in the subterranean subsoil.

The next paragraph, he just says, this is an urgent matter and we should deal with it. He says at the last

sentence on page 6, "We lost all our rights to a share of the northern lands because of our geographical position, and surely, we cannot stand aside and lose valuable mineral rights."

There was -- the next --

PROFESSOR CRAWFORD: Mr. Crane, I'm sorry. I'm puzzled -- and of course the documents are not at all consistent in their use of terminology, which may be a reflection of the early stage of the debate about the distinction between territorial waters, internal waters, continental shelf, et cetera, but the reference to common territorial waters is a bit -- is a bit curious. Is he talking about the territorial sea or is he talking about the continental shelf?

MR. CRANE: I take it that he is talking about waters which are in either the three-mile territorial sea or are inland waters. A big part of their position was that this was an inland,- Cabot Strait was inland waters, and that if one proceeds down that way, the territorial waters would be all of the Cabot Strait area.

PROFESSOR CRAWFORD: Yes.

MR. CRANE: That would be what I -- which would be shared, and they had to cut the pie, as it were.

PROFESSOR CRAWFORD: I mean, the word "territorial waters" in British practice goes back at least to the Territorial

Waters Jurisdiction Act, which was enacted after the decision in The Queen vs. Cane in 1878. So it was clear that the word "territorial waters" meant the three-mile limit or --

MR. CRANE: Yes.

PROFESSOR CRAWFORD: -- whatever limit was adopted. And you think the word is being used at least subliminally here in that meaning?

MR. CRANE: Because they are talking all the time about another theme which -- partially relevant here, but another theme being that these various waters in the Gulf and the Cabot Strait are inland waters and should be -- and Canada should stake that position internationally. That was another theme of the Stanfield 1964 submission. So that's how I would interpret it.

CHAIRMAN: And, Mr. Crane -- and I say, it only seems to be making a distinction when he says, and thirdly there are international questions involving the distinction between surface rights, which I assume -- by which he is -- one would think he is thinking there what we now call the continental shelf rather than territorial or inland waters but difficult to say, of course.

MR. CRANE: And he is making a statement at a Premier's meeting. he is not speaking as a technician but he must have had some script before him, I guess. So that's about

as far as I can help you with on that.

The next that's reflected also in the press release is -- which is -- you don't need to turn up, but that press release is at tab number 3. And at page 2 of tab number 3. It gives also a general reference to this subject.

I wanted to turn up tab number 4 because this was -- another important political event, was a resolution passed in Quebec City in October 1960. And that resolution is at tab 4. It appears in a letter to -- addressed to the Attorney General of Newfoundland. "The Mines' Ministers unanimously agree" -- this was a conference of Mines Ministers from right across Canada -- "unanimously agree and assert that offshore mineral rights within such distances offshore from provincial lands as seen reasonable and just and consistent with the Terms of Union pursuant to the BNA Act are the resources of the province and subject to provincial jurisdiction." So that was a political statement by the provincial Mines Ministers.

The next item I won't read it, but tab number 5 is an internal Newfoundland Labrador memorandum which reports on a Minister's meeting that took place in Halifax in 1961. it only -- it refers to the common theme that the provinces should join together in a request to the federal government to change the boundaries.

There is a document at tab 6 that I would ask you to

look at, and that is a document from the Deputy Attorney General of Nova Scotia to Mr. Graham Rogers, who is a geological officer in Prince Edward Island and is the key player at the Prince edward Island table in these discussions. And this refers to the work that is being done in Nova Scotia in drawing up a map and the notes that my friend has referred to earlier.

The document at -- in the first paragraph, the second sentence again returns to this theme. And it was our understanding -- MacDonald writes -- It was our understanding that the boundaries so delineated might be agreed upon among the provinces concerned or at least this would provide a basis for further discussions. And when agreement had been reached, the several provinces would approach the federal government for a setting of the -- settling of the boundaries as provided in the BNA Act.

And that is the theme that we see throughout the correspondence. We will agree among ourselves then we will go to the federal government and ask that the boundaries be changed and that we get proprietary rights to minerals. it's treated as a single question. It's treated as a political approach.

The next document, which is at tab number 7, is a -- nothing -- there is not much correspondence in the subsequent years to 1964. And this document at tab number

7 is a letter from the Nova Scotia solicitor, Malachi Jones. And he writes to Mr. Rogers in Prince Edward Island who has written to him and asking whether they can reach an agreement with respect to the Northumberland Strait, which was between the provinces.

And Malachi Jones in the second paragraph of the letter says this, "Until such time as there has been an agreement with the federal government and the provinces concerned with reference to the boundary question or a determination of the issue by the courts, I do not think it is possible to finalize any agreement between the various provinces concerned with respect to the Northumberland Strait area." Then he goes on to talk about practical arrangements that can be worked out with respect to oil and gas permitting.

And the other document I would refer to which is in this time period is at tab number 8. And that is a letter from the senior official in Quebec, the Department of Natural Resources, to the Deputy Minister of Mines in Nova Scotia, Dr. Nowlan.

And this is the first mention of what you might call the Quebec position on the -- changing the boundaries. And it's a position that is reflected very rigorously right through the piece. In the third paragraph -- this is -- they had obviously had discussions. "My Minister is

quite pleased with the idea of fixing the boundary between our provinces and he agrees with your present plan. We are of opinion that such a project should be accepted by the federal government so that the matter of respective jurisdictions between the provinces and the central government be finalized once and for all.

In order to achieve this, it would be advisable for each province to appoint a boundary commissioner." And then he goes on to talk about the description should be acceptable. "And which should be included in a project of legislation to be passed by the provinces and by the Government of Canada."

And that theme is a theme that's repeated by Mr. Allard in 1969 when he says what we have to do is we have to reach agreement between ourselves. We have to have legislation. We have to go forward and have that legislation passed provincially and federally. And that's the whole focus and in the relation of the debate of ownership of offshore minerals. It's one piece that the -- both at the political level, which the focus is on ownership. And at the bureaucratic level the focus is more technical. What steps are required to be done. But throughout it all, the theme is get ownership, get it agreed to by the federal government and put it in law. And that all of the approach -- the approach in 1964 is

the -- is to get that agreement from the federal government. And to go into those meetings with a common front, a common position.

And that's what is stated there. And perhaps that might be a good -- I'm now going to get into the documents around the 1960' -- the fall of '64. Perhaps before starting that segment, we could have our luncheon break.

CHAIRMAN: It sounds fair to me, Mr. Crane. Thanks, Mr. Crane.

(Recess - 12:30 p.m. - 1:30 p.m.)

CHAIRMAN: Mr. Crane?

MR. CRANE: Mr. Chairman, members of the Tribunal. When we broke, I was just about to get into the fall of 1964 period, which is the crucial segment for the documents surrounding the agreement, and the first is at tab 9, which records a meeting that took place on the 23rd of September. This was a meeting of officials and it was obviously preparatory to the Premiers' meeting a week later. And many of the points that are mentioned in this memorandum are also reflected in the statement that has been discussed.

At the bottom of paragraph 2, for example, it talks about the preparatory work that was done and then the middle of the paragraph it says, "These suggested boundaries have had the tentative approval of New

Brunswick, PEI, Newfoundland and Nova Scotia and, as understood, are also acceptable to Quebec. It's recommended that these boundaries should have the more formal approval of the several governments concerned. It is further recommended that Canada be asked to define the boundaries."

And then in the next paragraph they go on to refer to the need to -- that Canada should assert the status of the Gulf and so on, including Cabot Strait. And here, the expression Mr. Crawford has used as "inland waters" or "territorial waters", so it seems that they are using those terms interchangeably at that point.

And then in the final paragraph -- well, I should say also paragraph 4, is that "Formal recognition of the rights of the provinces to submarine minerals should be obtained as essential to the expeditious and economic and orderly development of mineral exploration."

Then in paragraph 6, "If agreement is reached by the Atlantic provinces, an immediate approach should be made to Quebec so that a united presentation may be made to the federal authorities."

Now there is only one document in the record that sets out the position that was taken by those officials, and that is that document, so there is no other paper in that.

PROFESSOR CRAWFORD: Mr. Crane, in paragraph 2, the

reference there to the more formal approval of the several governments was presumably a reference to the forthcoming meeting of the Premiers.

MR. CRANE: It's a little ambiguous at that point. I think that it's more likely that they were talking about legislative approval, whatever was necessary as a pre-requisite to have the amendment because they go on to say, "It is further recommended Parliament be asked to define the boundaries". And that of course has to be on receipt of a legislation or a formal consent by the provincial legislature or the provincial legislatures concerned.

Now turn to the September 30 meeting, and I just wanted to --

PROFESSOR CRAWFORD: Sorry, Mr. Crane. Just to come back on the question of terminology. As you say, they use the phrase "internal waters" and "territorial waters". They also use the phrase "coastal waters" in paragraph 5, and, of course, coastal waters is also used in paragraph 1. Do they have any idea of what coastal waters may be as compared with internal or territorial waters?

MR. CRANE: It sounds like something beyond because they are talking about the banks and that this is -- that Canada should make a wider assertion to jurisdiction.

There is not much precision in some of the documents, so there is a certain amount of -- don't know that I -- we

can answer all those questions, but that seems to me in that context that's what they are using.

Now the meeting of Premiers on September 30, Mr. McRae referred to the -- what we call the "press release" and that is found at tab 11 and is in the documents at Annex 21 and document 9.

Now this document is clearly a press release, in our submission. It's drafted in the sense of a handout and the first paragraph, for example, say "The Atlantic Premiers convened in Halifax today", so it obviously was prepared on September 30 and issued.

With respect to boundaries, it goes on at the bottom of the page to say -- this is the only reference in terms of submarine mineral rights and boundaries. The conference considered the matter of submarine mineral rights. The Premiers were agreed that submarine mineral rights should be vested in the provinces and considered, not agreed -- they didn't use the term "agreed" in this document -- and considered the matter of provincial boundaries in relation to submarine mineral rights. That's a very interesting coupling there.

The manner of presentation of the province's case at the next federal/provincial conference was agreed upon so that they -- our view of this and stand to be corrected, but our view of this is that this is the press release or

communique that was issued to the public.

What then of the statement which everyone has been referring to? Well, there is no clear indication from the document itself that that was issued to the public. What did happen was, of course, that that document was sent to the other Premiers, presumably after the meeting. It was also sent to Quebec, and it was described in the communication to Quebec as a statement of the position. So it would appear to be a statement of position rather than any sort of recording of agreement, and in our view, it is the statement of the political position that would be taken at the forthcoming meeting, and that it would be inappropriate for this document to be in the public arena if it was going to be used by the Premiers in preparation of a joint position.

That's what we take from those documents, and we haven't found any evidence that the statement itself, which is at tab 10, was distributed to the public. What we do know, and there is a couple of articles in the press and they appear at tab 12 -- what we do know is that the press appears to have had the press release. That is at tab 12, the Halifax Chronicle of October 1, and if you just look at the bottom of the page there, in the second to last paragraph, that's tab 12, at the second to last paragraph, it says, "The Premiers also considered

boundaries for offshore areas and the manner of presentation of the provinces." Now that is a direct lift from the press release, that phrase, "The Premiers considered boundaries and the manner of presentation." And the same is I think -- yes, that's the Halifax Chronicle Herald, and the meeting took place in Halifax.

Now the next document is the -- what's been referred to as the "Matters Discussed Document", which is at tab 13. And that is a document prepared for the Premier of Nova Scotia dated October 2, which he sent to his colleagues in the other provinces. And it attaches a memorandum talking about the Matters Discussed, and that's at page 2 of the attached memorandum, item number 3, "Submarine Mineral Rights and Provincial Boundaries". And it goes on to talk about "The conference agreed on the marine boundary lines. The conference further agreed that Parliament should continue to assert the status of the St. Lawrence, the Gulf of St. Lawrence, et cetera, and further agreed that the Province of Quebec should be kept advised of the action of the four Atlantic provinces and its concurrence solicited." Action. Premier Stanfield was to write to Quebec and to ask the Province to support the stand of the Atlantic provinces, and he was to prepare a presentation.

So again, it is a stand to be taken by the provinces

that is being worked on here. And if one turns again to -- or over to tab 14, this is the letter to Premier Lesage of Quebec, also dated the 2nd of October. And in this letter the -- Premier Stanfield says that he is enclosing a statement setting out the position of the four Atlantic provinces on this question. So that throws some light, I think, that the statement itself that we have been looking at is a statement of a position to be advanced at that meeting. He encloses the notes, the metes and bounds description and the map. And then he says, "I understand that these proposed boundaries have been referred previously to the province. Conference agree 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. I was directed further to seek the concurrence of Quebec in our course of action."

Now Quebec -- then there is a final paragraph on the next page. "This is a matter of great importance and it will certainly strengthen our position if the four Atlantic provinces and the Province of Quebec are in agreement." And Lesage does the necessary, and sends back a telegram to that -- that Quebec agrees.

Now that's not in any sense an adherence as being characterized by -- or an accession, excuse me, an

accession. That's not an accession by Quebec to a treaty.

It's an agreement in a political stance. And when Premier Stanfield goes to Ottawa and makes his submission, that submission is not made on behalf of Quebec. That submission is made on behalf of Nova Scotia, New Brunswick, PEI and Newfoundland. Quebec is at the meeting and gives its support, but there is no -- Premier Stanfield is not speaking in that submission for Quebec.

Now the submission, itself, and there are several versions -- I shouldn't say several versions, I think the versions are all the same, but there are several different copies of this in the materials.

The one we have here at tab 16 is from our materials, and I think it's the easiest one to read. It's the -- I think the most clear.

And I will just very quickly give the highlights of that submissions. It's at tab number 16 of the book. Turning to the first page of tab 16, halfway down the page, we see that in opening his statement at the conference -- by the way, the conference was a general conference. It wasn't a conference on this subject alone. There were a number of items on the agenda. But this was some distance into the conference, Premier Stanfield made his submission.

And he says at the bottom of the first paragraph, "The

questions with which we are concerned are that of the proprietary rights in submarine minerals, as between Canada and the provinces, whatever the extent and nature of these rights may be and boundary lines between the provinces. These are the only questions that it would be appropriate to discuss."

And then he gives his main theme, which is followed up later in the statement. "The position of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland is that the proprietary right in minerals contained in submarine lands belongs to the provinces, where those submarine lands are contiguous to a province."

And then he says, "Indeed, it's a matter of some surprise to us that any question should be raised as to the ownership of such mineral rights."

The rest of the early part of the statement is on certain legal points. And then at page 3, he refers to the fact that it is essential for economic development that this question be resolved. And it's the middle of paragraph 1 on page 3.

And then on page 4, he turns to the matter of boundaries. And just to go through what he says on page 4. He says, "Reference has been made to boundaries, but I do not think that that general question need be discussed at length or be decided at this conference." And perhaps

he got wind at this time that the Feds were not going to cave in on this issue.

But then he goes on to say, "Section 3 of the British North America Act provides the procedure for changing boundaries, and in effect, it is primarily a matter for agreement between the provinces concerned. I can say, however, that the Atlantic provinces have discussed this question among themselves and have agreed upon tentative boundaries of the marine areas adjoining these provinces. These boundaries have been set out by metes and bounds and have been graphically delineated on a map. Hereto attached is a copy of the map and the description of the boundaries."

At the back of the statement are the notes which were attached. And then he says, "Speaking on behalf of Nova Scotia and as authorized by the Premiers of the Provinces of New Brunswick, PEI, and Newfoundland, I request the federal authorities to give effect to the boundaries thus agreed by legislation."

Again, consistent strategy to have this -- an amendment of the BNA Act put in place.

Then he goes on to say, "It may be that before actual legislation is prepared, the description by metes and bounds should be reviewed and revised, and the attached map, if necessary, varied accordingly. But for all

practical purposes, the attached description and boundaries represent the agreement of the Atlantic provinces."

And that's the gist of his statement on the boundaries.

He does go on on page 5 to talk about the recognition of the Gulf and Cabot Strait as inland waters. That's at the middle of page 5. That just duplicates what we have been talking about earlier. And then he concludes by saying, "This submission is presented on behalf of the four Atlantic provinces" -- not Quebec, Quebec, again, is not mentioned -- "pursuant to agreement reached at the Atlantic Premiers' conference."

The whole context of this is a political position, which has been expressed at the meeting, pursuant to what was agreed to on September 30 at the Premiers' meeting. That's the nature of the agreement that we are talking about. Agreement on a joint stand to be taken with the Government of Canada.

PROFESSOR CRAWFORD: Mr. Crane, on page 5, this actually occurred in an earlier document too, and it's slightly odd, he asks the Government of Canada to continue to assert the status of the Gulf of St. Lawrence as inland waters or territorial waters.

My understanding is that the Government of Canada has

never asserted that the whole Gulf of St. Lawrence was inland waters.

MR. CRANE: Can I take that as notice of --

PROFESSOR CRAWFORD: Yes, sure.

MR. CRANE: -- myself or a more learned member of the team can give you the historical perspective on that. I can't -- I don't know the answer to that precisely.

PROFESSOR CRAWFORD: Thank you.

MR. CRANE: Now there was a response at the meeting by Canada. And the next document is notes on the conference prepared by members of the Privy Council Office, the Federal Secretariat. And the Prime Minister, Mr. Pearson, made some interventions here that were very, very specific.

He said in paragraph 110 -- this is at tab number 17. It's the procès verbale, or the notes of the Premier's meeting. And paragraph 110, Mr. Pearson said, "That whether the submerged resources off Canada's coast were under the jurisdiction of the federal government or the provinces was a matter of law to be settled by the Supreme Court. It was clear, however, that no province could claim a right to exploit the resources under the continental shelf beyond territorial waters." So that was the statement that was made there.

And later in the meeting, the next page over,

paragraph 114, the Prime Minister closed the discussion by observing that there was a clear difference of opinion on this matter. And it was obvious no conclusion could be reached at this conference.

He reiterated the view that the federal government had no intention of diminishing any established provincial rights and emphasized that the federal government's desire to arrive at a solution acceptable, but with which would at the same protect federal rights. The views would be regarded as a preliminary examination of the subject by the federal government. There were a couple of other -- that was the end of the discussion.

The next tab over --

PROFESSOR CRAWFORD: Sorry, Mr. Crane, while we are on this document, Mr. Pearson also said in paragraph 80 that the elucidation of the legal question, he seemed to be in absolutely no doubt that whatever the Supreme Court might say about inland waters and territorial waters, it would say that the continental shelf was federal. And, of course, he was right.

MR. CRANE: Had a lot of confidence in that position.

PROFESSOR CRAWFORD: But he said that this is without prejudice to a possible future settlement of this issue, meaning a settlement which would not necessarily simply adopt the legal position that might involve, if you like,

the return or the concession of rights to the provinces.

So to the extent that there may have been a provincial agreement on boundaries, the flat refusal of the federal government at this meeting, and subsequently to accept the submission on mineral rights, didn't put an end to the point of having discussion. The provinces still had a hope that this might produce something later on.

MR. CRANE: Yes.

PROFESSOR CRAWFORD: So there was still some point in their agreeing on boundaries, was there not?

MR. CRANE: Very definitely. Because, of course, there was a mechanism to change the boundaries. And while the Prime Minister was confident about the position and expressed that, he didn't intend to foreclose the discussion. In fact, he said later, we are going to consider your position in any event.

And the position that was taken in the next tab, the -- 18, was a letter of December 11 from Mr. Pearson to Mr. Smallwood, and I think similar letters were sent to the others, the other Premiers. And he, in that letter, says that we have considered the views and decided that the matter should be referred to the Supreme Court. And so there is the statement by the Prime Minister that the matter is going to be referred.

At the bottom of the second page, the final paragraph

of the letter says, "Once the legal position has been settled, i.e, by a reference, there will undoubtedly be important practical problems to be settled. I do not see how these can be effectively considered, however, in an atmosphere of conflicting claims and legal doubt." So by that he appears to be foreclosing the possibility of immediate negotiation on practical matters.

PROFESSOR CRAWFORD: The point though is that after the Supreme Court had resolved the legal doubt as the continental shelf in favour of the federal government, there was something still to be negotiated about. And the provinces could still have thought it was useful entering into an inter se agreement or maintaining a previous inter se agreement for the purposes of whatever solution might be arrived at.

MR. CRANE: Yes, that's correct, sir. And in fact in the period -- sort of in the '69, '72 period, there is definite -- the provinces have by no means abandoned the idea that there will be a transfer of jurisdiction to them. That is very much on their -- on their agenda.

Again, it is the perspective of their discussions that this is going to be a matter we must have a transfer of jurisdiction to us.

There is one more reference in this group of papers, because the provinces did not take this idea of going to

court very happily. They were -- they were much -- they wanted to deal, they didn't want to -- and in our view, there was no deal as suggested by Premier Hamm earlier this week. But they wanted some sort of deal.

And they did return to this matter at another federal-provincial conference, and that was one held on July 21st. That one is the next tab over, tab 19. And there is a section reproduced there of the minutes, prepared again by the federal authority.

And the first paragraph there said, in the final sentence, towards the end of that longish paragraph, the Prime Minister is speaking, and he -- and the notes indicate, "He stressed that the federal government considered that the question of legal ownership and legal right should be settled before any reasonable and equitable arrangements could be negotiated."

He suggested a modus operandi for the interim period, whereby both the federal government and the provincial government involved in an offshore region would issue duplicate permits to companies without prejudice to each other's claims.

And at the bottom of the page, in paragraph 114, Mr. Stanfield reiterates the position taken, and he said it was unsatisfactory to proceed to the Supreme Court to get this matter resolved.

Later in the discussion --

PROFESSOR CRAWFORD: Mr. Crane, sorry to keep interrupting, I think it's a case where equitable distribution of questions.

The Prime Minister's suggestion that there be parallel permits, this seems to be the first time that this emerges, and it's a sort of -- it has continued to be the case, as we know, that there has been sort of a parallel permit system. He is talking, of course, about the interim period prior to an agreement between the federal government and the coastal provinces. The very system of a parallel issuing of permits would have implied at least a modus vivendi between the provinces as to the areas that they would permit.

In other words, okay, there was no agreement between -- between the federal government and the provinces, but if there was going to be parallel permits, the provinces would at least have to work out a modus vivendi as to how they would -- they would operate. And so to say that things hadn't been resolved was not inconsistent with saying that there was nonetheless an operating agreement between the provinces on boundaries.

MR. CRANE: It's a reasonable -- reasonable conclusion. I think that the practice shows a less than perfect modus vivendi between the provinces.

One or two other references here that perhaps I should -- should go to on the same paper, and the -- on the next page over, at page 28, halfway down the page, paragraph 116, the -- Mr. Shaw returns to the fact that there has been an understanding, or agreement, between the provinces. And he said there is no legal question, and it's -- we have agreed, that's the end of it.

And then the Prime Minister, at 117, says this: "The Prime Minister pointed out that adjustment of provincial boundaries without federal participation would be an arbitrary action, and he stressed that provinces do not have the constitutional authority to adjust provincial boundaries unilaterally."

Mr. Smallwood attempts to deal with this probably confrontation point in the meeting, and says, "Mr. Smallwood interjected that these interprovincial boundaries in the Gulf were merely a proposal. And that the provinces had not attempted to make them law."

And then he goes on to say, "He then mentioned that in one case at least, his province and the federal government had issued permits to the same company, and that this company was now carrying on an extensive offshore exploratory drilling program."

And Mr. Shaw, in the next paragraph, says much the same thing, that they have issued permits already to a

number of companies.

So at this time there is permitting going on, and that's the -- that seems to be reflective of a mutual assertion of territory, that -- and it's perhaps not as disruptive as my friends have alluded to earlier.

That pretty well completes the documents that have reference to the period of the agreement that is alleged in this case. And in our view, they don't establish anything like a binding agreement, let -- let alone an actually binding agreement. What they do establish is a common front, a political position which was advanced at the time, to the federal government.

There is one more reference, I don't know if I gave this to you, it's at the procès verbale, at the last of the meeting, it's referenced at paragraph 140, another statement by Mr. Smallwood, where he says, "Mr. Smallwood stated that certain permits issued by Newfoundland had been purposely designed to overlap federal permits." Pointed out that in such cases companies could reach agreement between themselves.

But that completes the -- that segment dealing with the agreement. And in our view, there is nothing there that -- on which the Tribunal could make a finding that the issue of boundaries has been resolved by agreement.

As to the nature of the understanding that was reached

between the Premiers, the only -- without getting into the argument of legally binding or not, but the only material on which they reached a consensus as to a common position were the Notes re Boundaries, and the map.

Can I have the Stanfield map on the screen? That's the -- that's the map that was in hand, and the notes are attached to the Stanfield submission. And as we have touched on previously, the line on the map goes out into -- on an azimuth of something about 125 degree bearing, or something like that. It's a line that hasn't been used.

But this map was certainly what was agreed to, if you like, by the Premiers. The quality of that agreement we debate about, but that -- that was what was before them, as well as the notes. There's no other raw material for an agreement.

PROFESSOR CRAWFORD: I notice at paragraph 128, Mr. Smallwood says, well the provincial claim is not based on the continental shelf convention or on its national law. They go back until about 15th century, I believe, depending on -- on the age of the province. And I just wonder whether the legal basis of those claims, it sort of reminds me of Selden and Mareclausum, and things like that, whether there isn't any link between that and where the line stops on the Stanfield map.

I mean is it plausible to think that, at least in the

outer areas, they weren't asserting a continental shelf claim at all? They're asserting something else about the historic rights of the provinces?

MR. CRANE: I think all I can say is that they were considering inland waters as territorial waters. And that is probably a basis for the line, or for the vast part of it. But it's -- we don't have the technical back-up in this case to say this was why they went to this point, or that point. There's nothing on it.

There is, I should say, Newfoundland and Labrador had a case historically that was quite different from the other three provinces.

So the next group of materials is -- refers to the establishment of the Joint Mineral Resources Committee, the JMRC. Nothing -- neither side has produced anything of relevance up to the sort of 1969 period, or -- end -- 1968. So that the matter seems to have been dormant, there is no implementation or anything of anything. It was just a piece of, in our view, a piece of political business that was just held in abeyance, or kept on the shelf during those years.

What does happen is that in 1968 there is the establishment of what we call the JMRC, the Joint Mineral Resources Committee, and I think the first point to make is that the JMRC was a committee -- was a political

committee. It was a committee of Ministers.

And that was the -- that was -- when we talk about meetings of the JMRC, we're -- as a committee, we're talking of meetings of the Ministers from each of the provinces. So it wasn't just a study group. These were -- this was a pretty high level ministerial committee. And its intent was to deal with a number of matters having to do with offshore resources.

One of the items on the agenda was the question of boundaries. And they established, in their structure, they established a sub-committee, that was a committee which you might call a committee of Deputy Ministers, senior bureaucrats, and they established a group of technical committees. The technical committees were specialists.

And there was a technical committee to deal with boundaries. And the technical committee met in the fall or so of 1968, they were established that year. And by the early part of 1969 had worked out coordinates, and the latitude and longitude, or turning points. And in addition, had prepared a map of which showed their findings.

The establishment of that technical committee is described in a letter which was sent by the Vice-Chairman, Mr. Allard, representing Quebec, and I will just turn to

that, it's tab 22. And it has been referred to before, and it will be referred to again. That letter, in its opening paragraphs, talks about how the committee came into being. And it says at the end of the first paragraph, it says "To guide the technical committee..." and here he is talking about the Boundary Technical Committee, "...in its task, it was provided with copy of the notes concerning the boundaries of the Atlantic Provinces made at Atlantic Premiers Conference to a chart...", that's the map -- showing the Atlantic Coast, et cetera, and more particularly drawn thereon the proposed boundaries of Atlantic Provinces and Quebec.

And then a copy of the submission, and that was the one that we just went through, the Stanfield submission. At the end of that, it says that "Premier Lesage of Quebec agreed with the submission of Mr. Stanfield and the proposed marine boundaries agreed upon by the Atlantic Premiers."

It goes on to say this, "The notes garnered from the conference state that the purpose for delineating the boundaries related expressly to the ownership of minerals in the submarine areas or lands and in their common terrestrial border zones." These words, of course, are not used, however -- these words, of course, are not used; however, the meaning is the same.

So that was Mr. Allard's take. They were proposed boundaries and they were related for the purpose of delineating the boundaries in relation to the ownership of minerals.

Now after the -- I should say slightly before the technical work had been done, there was a proposal brought forward by Canada, and the Prime Minister, who was Pierre Trudeau by that time, wrote to the Premiers and put forward a new proposal. There had been at this time --

PROFESSOR CRAWFORD: Mr. Crane, I'm sorry. Before we get on to the Trudeau letter, could I just ask you about the Memorandum of Agreement itself, which is tab 20 -- the 16 July Memorandum of Agreement which establishes the JMRC? In your view, is that intended to be legally binding?

MR. CRANE: Well, it would -- there is certainly a better argument for that being legally binding than anything in this case, but there is another aspect. The establishment of that committee had some fiscal implications. The committee had -- there were common expenditures. They had to be shared. There was sort of a practical argument for making sure that that was -- that was agreed to.

So whether it would stand the test, I don't know, in terms of a legally binding agreement.

But here we have, of course, the signatures on behalf of all the provinces. They agree to set up this committee

to study it. For those purposes, it certainly would commit the provinces to share in the expenses and, you know, to perform in good faith. So in that respect --

PROFESSOR CRAWFORD: So the answer is yes?

MR. CRANE: Yes. It doesn't go -- doesn't take them too far.

PROFESSOR CRAWFORD: Just waiting for the answer, that's all.

MR. CRANE: Yes. Okay.

So I was talking about the letter from Prime Minister Trudeau. By that time, the BC Offshore Reference had been handed down and the Trudeau letter is found at tab 21. And in this letter which is sent to the other Premiers -- this one in the book is to Premier Robichaud of New Brunswick -- and there is a proposal to have a sharing of revenues, maintaining federal control over management, but to share revenues based on what are called mineral resource allocation lines. And there is a little map attached to the letter which shows -- or mineral resource administration lines. That little map shows how they drew these lines right around the provinces, in some cases, quite close to the shore. So there wasn't a great deal of sharing as far as this original proposal went, and those are the -- this is the light lines that appear to connect big bays and other places, in most places, hug the shores.

So that is put forward as a proposal, and there is one part of the letter -- the bottom of page 2 of the letter, there is one part which talks about the basis or principles for provincial sharing in offshore revenues, and there are a number of alternatives talked about there. They say there are, of course, various criteria which could be taken into account. Could be divided on the basis of geography in accordance with the relevant links of the lines or on the basis of their total fiscal capacity, as in equalization payments. So there is a number of sort of suggestions on how revenues might be shared.

So this was intended to open discussions, debate with the provincial government, negotiations and so forth. In fact, the provinces did not want to negotiate on this basis. They still worked to develop a position of ownership, and they worked through the JMRC in that context.

No reply was given to the Trudeau letter for a period of two or three years -- no formal reply, so that that was -- this brings us to the second part of the Allard letter, which -- well, I won't deal with it right now. Took a little bit out of context because the second thing that happens after the Trudeau proposal was that the work of the JMRC went to the big committee. It actually went

through what is called the "Subcommittee of Deputies" and then it went up to the big JMRC committee. And that's found at tab 24.

And the technical committee had recommended that there be an agreement entered into by the provinces and that -- this is with respect to the boundaries -- that there be an agreement entered into by the provinces and that that agreement be confirmed by legislation of the participating provinces. So that that was still working along the lines that had been suggested before. You would have to have that -- you would have to have legislation and then you would go to the federal government to get an amendment.

Tab 24 is the meeting of the -- shall we say the Ministerial Committee. That's the -- you see the names of all the Ministers there. There is one or two deputies, but there are a number of Ministers there, and this annexes the report of the technical committee. This is tab 24, annex A, talks about the technical committee. And this is the location of turning points had been determined, but the technical committee has not discussed the merits of such definition, but it precisely located the points.

The large committee receives the report and then at the top of page 2 -- in the first paragraph at the top of page 2, it says, "The meeting was in agreement that once

this matter was finalized to its satisfaction, it would..." -- oh, sorry, that's just an extract from the report.

Then we go down to the next paragraph, where it says, "The meeting..." -- and that's the meeting of the Ministerial Committee -- "...directed that the coordinates and maps showing the turning points were to be forwarded to the secretary..." -- that's the secretary of the JMRC, who, I think, was Mr. Walker from Nova Scotia -- "...who, in turn, was to draft an agreement between the participating provinces and forward the same to Ministers, who, in turn, were to obtain the approval of their governments."

And this, again, is along the lines that there should be an agreement, approval of governments to the agreement and then legislation and then change the boundaries.

PROFESSOR CRAWFORD: Well, that is not exactly what it says because the proposal by the subcommittee specifically -- this is at tab 24, page 2 -- specifically envisages that there be an agreement entered into by the provinces as to the boundaries, which would be confirmed by legislation by the participating provinces. That's very clear.

And then it says "The meeting directed that there would be an agreement between the participating provinces to be forwarded to the Ministers who were to obtain

approval of their governments to its contents", so there's actually a difference.

It sounds like they're envisaging an agreement, perhaps like the JMRC agreement itself, which would embody the agreement of the governments on the contents of the boundary. The discussion of legislation is in the context of paragraph (b) which deals with administration, not with boundaries.

MR. CRANE: Well, that's true. They didn't put that phrase in. I was thinking that that was just a follow through and they didn't mention it. There is certainly no explanation of why they didn't mention it.

PROFESSOR CRAWFORD: No.

MR. CRANE: Perhaps I should read paragraph (b). It says "The meeting directed the secretary was to continue to study the appropriate mines legislation of the participating provinces and a draft legislation for their consideration, the intent being that if possible, the legislation of the various provinces should be uniform." So I have assumed in reviewing that that this does refer to provincial legislation that would implement this.

There is another meeting of the JMRC held in June, and I will refer to that specifically. It's at the next tab, but perhaps we could look -- perhaps we could look at tab 22 first because it comes in sequence here.

Tab 22 is the Allard letter, and I had gone over this before and explained the first part of it. But at the end of the letter, Mr. Allard goes on to deal with the position, the strategy that should be followed by the JMRC and by governments. And in the -- on page 3, in the middle of the page, it says, "As you are well aware, the JMRC has also been instructed with the task of providing recommendations to the five governments about the proposal made by the Honourable Pierre Trudeau", et cetera.

The approach in this connection must be that the submarine areas between the provinces belong to the adjoining provinces and the boundaries must be determined with that concept in mind. He is saying to his colleagues keep your eye on the ball. This is what we have got to achieve.

Then he deals at the bottom of the page with the steps that have to be taken. And he says, one, he wants to have a feedback from his members about the action that they are proposing -- they are prepared to take. He says, I want you to commit. The first one is that your government agreed that the map herewith enclosed setting forth the turning points delineates the boundaries.

Second, that your government agrees that the map setting forth the turning points delineates the boundaries.

Third, that the boundaries are effective for all purposes. And in particular, mineral rights for the -- in the submarine areas. And I think this is the origin of the expression "for all purposes", at least the first use of it. And in particular, mineral rights in the submarine areas are the property of the province within whose boundaries the area is.

Fourth, your government will confirm the map and the turning points for the purposes set out herein by agreement.

Fifth, your government will confirm the agreement by legislation.

Sixth, your government will join with the four provinces in seeking legislation from Canada.

And that's his strategy. At the next meeting of the JMRC there is a certain inconsistency in reaction. That's the meeting of June 13, which is at tab 25. And I don't think I need go through it but we -- I think it's fair to say that the reaction of the various provinces -- they are not all going along with this legislative proposal. Or at least they are not all going along with the particular -- maybe they are just not prepared at the time, not ready for making that commitment. But he does ask them each to respond. They all respond in somewhat different ways.

Now the JMRC meets again in September, and this is

found on tab 26. And it deals with ongoing discussions that are being held with the federal government but there is a paragraph in this letter that relates to boundaries, that is found at page 3.

And at the bottom of that paragraph we find the following. The meeting instructed the chairman of the sub-committee to have a further meeting of the technical committee on the delineation and description of boundaries of the participating provinces in the submarine areas to determine if there are any matters not resolved in respect of the boundaries of the provinces.

I take that to mean that the Chair is saying, we want to be sure that you have addressed all the problems as to the boundaries.

And that I think has great significance in relation to one aspect of this matter. We know that the technical committee has come up with its turning points. We know that they have put those on a map. And we know that there is nothing else in the record apart from the recommendation of the JMRC to the Premiers that they approve the map, they approve the turning points. And the argument on the other side is that this is somehow a refinement or a extension of the 1964 lines.

In our submission, reading these documents as a whole, the technical committee was asked to address all problems,

not just define the turning points. When they were getting to the point when this was going to go to the Premiers, they were saying, look at this on a technical basis, are there any other problems? And we know that when the JMRC approved this, it came back and this is what it brought, the map that showed the end of the turning points at 2017. It doesn't go further.

PROFESSOR CRAWFORD: That's clear in relation to that map. Leaving aside the question of the status of the Agreement, just looking at its content, is there any difference apart from minor precision between the points identified in the Notes on Boundaries and the turning points on this map?

MR. CRANE: There were two -- one or two areas that were identified by the technical committee as requiring some sort of political decision. I'm not sure they affect the area we are concerned about but they did highlight Restigouche or something of that sort in one of the earlier documents. But to my knowledge at this point, I think there wasn't anything further.

What I'm saying is that this -- the technical committee appears to have been asked to say is there anything more to be said. And for one reason or another there wasn't, and this was what was -- what was the -- "agreed to" in quotes at the Premiers' meeting. And that is not going off anywhere else, on any sort of azimuth.

CHAIRMAN: But I want to be clear about what you are -- what this is. The committee here wasn't putting up for grabs the whole boundary. It was seeking to locate problems, rather than getting -- when it got the technical committee to examine it, it wasn't throwing the whole thing up for grabs, it was -- or was it?

MR. CRANE: That was the first approach. The technical committee was -- got for a guide -- Mr. Allard said they got this for a guide, the materials, and they located the turning points. That was in their report. But bear in mind that the JMRC is a committee of Ministers, you know, and as I would read this, they are saying to the technical committee, is there anything else? And is there any other -- is there anything else that we have to have to have this understanding between the provinces, which we are going to use for political purposes in getting ownership? And that is -- they -- this is what was come up with.

I just put this forward as a response to the argument that really what they were doing was ratifying, approving, extending the earlier Stanfield lines. My reading of the minutes is that they did a great deal more than that. They looked at this as an independent task. Their first stage of that was to locate the turning points, then they were asked here is there anything else.

PROFESSOR CRAWFORD: The curious thing in the context where

there had now been quite a lot of work done and, you know, presumably a much better understanding of the issues. Anyone looking at the Stanfield map and looking at this would say hey, where is the line --

MR. CRANE: Exactly.

PROFESSOR CRAWFORD: -- beyond 2017? And is there nay explanation of that? Obviously Nova Scotia says that the line beyond 2017 was -- which didn't involve any further turning points was in effect incorporated by reference in this map. That may be an inaccurate way of putting it but anyway, there is clearly a link in -- from Nova Scotia's point of view, between the earlier map and this map.

MR. CRANE: I think that the JMRC, bearing in mind its a political level committee, it has to do with sorting out its problems with the federal government, it asked the committee to come up with the boundary and they did it.

I don't think there is -- there is no reflection in these minutes apart from that letter from Mr. Allard. There is no reflection in -- sort of going back to the original agreement, referring to it or anything like that. It's just at this stage it's part of history. That's are -- my assessment.

PROFESSOR CRAWFORD: We explained this by saying that these were at least the areas which on a provincial view could be taken to be within the provinces in the territorial

water sense, so there may be a question about continental shelf, but at least this was -- these were the limits of the provinces.

MR. CRANE: That's a possible explanation. But I -- there is nothing in the -- we do know at this time that there is a certain amount of difference of view. We don't know the particulars. There is reference of differences of view about -- involving Newfoundland, involving Quebec with respect to boundaries in some of the materials. It's found in tab 27.

And for example, a memorandum from New Brunswick which -- that's in September 1971. So there are -- obviously at the level of the JMRC, a lot more is talked about on a sort of macro level that one would not expect with meetings of a technical committee.

To bring this section to a close, we have the final meetings of the JMRC in -- and this is in 1972. And there is a meeting on May 24th 1972 in Halifax, again, this is the ministerial level, immediately before the Premiers' meeting. And the minutes of that meeting are at tab 29.

So if you turn that up you will see that there is a number of Ministers again are present, as well as a number of Deputy Ministers. And that gives a recommendation to the Premiers, again as I say, it's a ministerial level meeting.

And you look at page 3 of the minutes, and particularly on page 3 at items 3 and 4 where the position is staked out and using the Allard formula. 3) says, Ownership of the mineral resources in the submarine areas or lands within the provinces and in their common terrestrial border zones is in the provinces and not in the Government of Canada.

4), the governments of the four Atlantic provinces and Quebec should confirm the delineation and description of the boundaries and the turning points, et cetera, as was requested by the Honourable Paul Allard. A copy of the map showing the delineation and description of the boundaries and the turning points is attached.

So that is the recommendation or the principles that are to go to the Premiers. And in the bottom of the page in a paragraph that has been marked at some point, it says, the above principles should be conveyed by each member of the committee to his respective Premier or Prime Minister for consideration at a meeting of those Premiers in June. The chairman was directed to write a letter. So that is the -- that's the meeting.

There is a internal memorandum which is at tab number 30, dated May 24, which is a report. That's by a New Brunswick official. And that memorandum on the second page deals with a number of principles that were

formulated for the Premiers to discuss. And they say in item -- or the writer says in item number 2, on page 2, "Interprovincial boundary lines in submarine areas must be confirmed and ratified at the earliest convenience."

And the next document takes us to the meeting of the Premiers. And we have two source documents for that meeting. The meeting was in June 18th. One is the communique, tab number 31, and the other document is the -- is a letter. And the letter is in much the same terms as the communique. It is a letter to the Prime Minister of Canada and that's dated June 18. And this is along the lines of the 1964 proposal, in which it says the First Ministers -- and I am looking at the letter that's at tab 32. "The proposal concerning offshore mineral resources made by Canada on November 29, 1968..," -- this is the one that was made several years previous, "..is not acceptable to the five Eastern Provinces." Quebec was participating in the meeting. "The governments have agreed to the delineation and description of the offshore boundaries."

And as I mentioned, the only material before them, in our submission, is the -- the only material is the turning points and the map.

And then it goes on to say, "the five Eastern Provinces assert ownership of the mineral resources in the seabed." So there is the -- a claim to ownership. And

then it goes on with a number of other political statements that they will seek discussions concerning arrangements related to the development of offshore and administration and so forth.

PROFESSOR CRAWFORD: Mr. Crane, you didn't read the whole of that paragraph. It said, the second paragraph from the top, "the five Eastern Provinces assert ownership of the mineral resources in the seabed off the Atlantic coast and in the Gulf of St. Lawrence in accordance with the agreed boundaries."

But if you look at the turning points map, it's stretching it to say that the map covers the Atlantic coast. It's stretching it to say that the map covers the Atlantic coast. I am sorry, covers the seabed off the Atlantic coast. It sort of goes up to the beginning of the Atlantic more or less.

And I take it -- take it, well a way of putting the Nova Scotia argument, I don't mean to put words in peoples' mouths, is the way of putting the argument is that the map was merely a clarification of turning points in relation to an earlier map, which was still at least notionally on the table. And that it was always understood that it dealt not just with the Gulf, but also with the Atlantic.

MR. CRANE: I would put it a little differently, the

boundaries issue concerned the boundaries between provinces.

The Premiers weren't content with that. They were making a claim, I think perhaps for the first time, it may have been earlier, but they were making a claim for the offshore of the Atlantic where boundaries were irrelevant, just going out. And that was certainly reflected in Nova Scotia's later assertion of jurisdiction in terms of going out to the continental shelf. And Newfoundland also made claims in that area. It was going -- which were unrelated to the interprovincial issue.

PROFESSOR CRAWFORD: In terms of the document, which is at tab 30, which is the JMRC meeting, immediately -- I take it this is more or less immediately prior?

MR. CRANE: This is a report on -- my tab 30 is the memorandum of May 24th?

PROFESSOR CRAWFORD: Yes.

MR. CRANE: Is that the one?

PROFESSOR CRAWFORD: That says, "interprovincial boundary lines in submarine areas must be confirmed and ratified at the earliest convenience." Do you say that communique involved that confirmation and ratification?

MR. CRANE: No. I would say that when the -- the ratification is meaningless unless one refers back to a Allard's letter which talks about the formal -- a formal

agreement and approval by legislation. That's the ratification.

I mean you wouldn't use the word, "ratification" to talk about a statement coming from heads of government. It refers to a formal process of approval.

PROFESSOR CRAWFORD: But the word, "have agreed" in the memorandum, itself, it means what it says, they have agreed?

MR. CRANE: As Premiers they had -- they had agreed.

PROFESSOR CRAWFORD: And that included Newfoundland and Labrador?

MR. CRANE: Yes. They had reached that agreement, but they reach it in the context of making a claim to offshore resources with Canada. That was what the focus was. And so that there is no questioning that.

In fact my friends have talked about the statement by Premier Moores to the Legislature coming along the same -- the next day. And what Premier Moores did was to in effect read the press release to the Legislature. It said these are the items. But he was pretty careful, as many political leaders are, to allow himself a little bit of wiggle room. And he said, well, of course, we didn't intend to reach agreement on any finite subjects, any specific subjects.

And he said that in his statement at the end of the

verbatim report, which is at tab 33, where he says the -- at the end of -- I think it's on page 2. Let's see, no, it's the -- yes, it's page 2 of the verbatim report. He says in the middle of the page about four paragraphs down he says, "It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meeting succeeded only in creating a common philosophy on the question and a procedural method will follow through."

MR. LEGAULT: Mr. Crane, are you suggesting that the wiggle room line, as I think you described it, the suggestion by Premier Moores that no decisions had been made on any precise topic overrides the very specific, the very concrete, flat assertion that the Ministers had agreed on the boundaries?

MR. CRANE: I am not sure I would parse it in that way. I think that what you got -- what you have got here is a political agreement by the Premiers. There is no question that he said they agreed and we are not challenging that. But it's a far different thing to say whether they intended that agreement to have legally binding effect. There is nothing in writing. Nothing signed. It's a political position.

MR. LEGAULT: That is a totally different issue.

MR. CRANE: Yes.

MR. LEGAULT: But you do not challenge the accuracy of the Premier's statement that the Premiers had agreed on the boundaries. He said they agreed. The communique said they agreed. And you are not challenging the fact of that agreement, whether it's a binding agreement or otherwise?

MR. CRANE: That's what the record here says.

PROFESSOR CRAWFORD: It would have been pretty -- I am grasping for words in relation to provincial Premiers. I know which words I would use in relation to Australian Premiers.

MR. CRANE: I won't take issue with whatever you say.

PROFESSOR CRAWFORD: Would it have been unusual for the Premier to have said, oh, we agree on the boundaries, except of course for this ridiculous boundary in the Atlantic, which we don't agree with at all? I mean if he said that they agreed on the boundaries and didn't mention that in the context of all of this history, it would have been regarded as a bit odd. That, you know, even a bit underhand for him to say we agree on the boundaries and then fail to mention that there was a massive disagreement on the boundary beyond point 2017.

MR. CRANE: Sure. But what was before the Premiers is the map and the turning points. And it's not -- it doesn't -- the most rational conclusion, I would submit, is that the -- you have got the -- that's what was before them.

And whether they agreed in the legal sense or not, that's what they were concurring with, the map. And the map was to 2017. And that's the evidence.

The evidence of the agreement is the map and the turning points. You can't somehow say, oh, but they agreed out to -- they agreed on a bearing of 135. I mean that just ain't there, in our submission.

PROFESSOR CRAWFORD: No, I can see that, that's open. I wonder if we might just change the situation. Let's assume that this arbitration was under equivalent legislation, but between say Prince Edward Island and Quebec. And obviously there were some friction in the early memorandum from Prince Edward Island about the Quebec position being rigid.

But let's assume that the Premiers of Prince Edward Island and Quebec have agreed in terms of this communique, and what they have agreed to is perfectly clear. There is not the uncertainty beyond 2017. They have got turning points all the way around. Could we say that there was an agreement between them which resolved their boundary?

MR. CRANE: I think it's -- the position that we are advancing here is that this is -- if the Premier of Quebec came along the next year and says, well we had a meeting and we agreed, but I was elected after that meeting and I am sorry, all bets are off, we are not agreeing, he could

do that.

And that was -- it's something like in one of the documents here, Mr. Kirby, a senior Nova Scotia official, says that there is some problems with the boundaries. And this is in the mid-70's. There is some problems with the boundaries and the federal official says, and most of the administrations have changed, haven't they.

It wasn't -- it wouldn't have been something that was -- had resolved the question.

It at most resolved it until a different position was taken. It was a resolution on a political level.

CHAIRMAN: Now I can understand that point. But it seems to me that there was the other argument about the third or fourth paragraph from the bottom that you cited. It seems rather doubtful in the face of the clear expressions before about the boundary and so on that these -- that these weasel words were intended to move away from the fact that they had agreed. I am not saying political or legal.

MR. CRANE: I don't think that we are relying on Premier Moores to say that he is changing the -- changing the position, that they had at that point a common position. We are not suggesting that. We are responding to the emphasis placed by Nova Scotia on Premier Moores' statement that it, you know, that that's an emphasis that

they have placed on it. And we don't say that it was a moving away at that point.

MR. LEGAULT: Mr. Crane, what you said about being able to walk away from this agreement, would that apply in your view, to the agreement on turning points and on the map, which in effect you allege are the only things that were agreed on, the only things that were before the Premiers? It applied specifically to those points of agreement, this view of yours that the Premiers could walk away at any time?

MR. CRANE: In our submission, that's one of the prerogatives of political life. This isn't a -- this wasn't ratified by Legislature. This wasn't put in legislation or whatever.

MR. LEGAULT: Thank you very much.

PROFESSOR CRAWFORD: The question was not whether it was ratified by legislation, the question was whether it was agreed?

MR. CRANE: Whether it was for the purpose of this arbitration resolved by agreement.

PROFESSOR CRAWFORD: Yes. And your answer to that is no, because although it was agreed, it wasn't agreed in a form binding on the provinces, and therefore, it wasn't resolved?

MR. CRANE: It was not -- at the -- well there is a number

of ways that one can respond to that. It was not resolved insofar as the line out to the continental shelf is concerned.

PROFESSOR CRAWFORD: No, no, let's leave that point.

MR. CRANE: That's a separate issue. And the degree of agreement has got to be considered in relation to where it was going. Where it was going, we say there was no difference in 1972 qualitatively from what happened in 1964. They were going to make a claim on the federal government for ownership of the -- they were going to put forward a position, staking their position, their stand for ownership of the resources. They required approval from the federal government. They required an amendment to the BNA Act.

All those things were in place. All of them are coupled with this deal, if you like. That's what it was about.

Now it's now nearly 3:00 o'clock. Perhaps this would be a convenient -- I don't mind going right through, but I am just -- whatever?

CHAIRMAN: Take a break. For the usual time?

MR. CRANE: 15?

CHAIRMAN: Yes.

(Recess)

MR. CRANE: Mr. Chairman, I'm going to try to complete the

review of the documents this afternoon, and the -- I think I have covered the key events in terms of the -- what is before the Tribunal.

I should mention that very shortly after the Regan letter, or Telex to the Prime Minister, the federal government responded. Prime Minister Trudeau wrote a letter, I guess three or four days later, stating clearly that -- it was on June 22nd, and I don't think we need turn it up, it's at tab 34, but it -- it's stating that the provincial proposal was unsatisfactory, and that Canada was now prepared to proceed with another Supreme Court reference, which would be specific to the East Coast.

That position was eventually maintained, but there was a period in the subsequent years leading up to the early eighties, when there were efforts made to negotiate solutions. And it's with this period that I now look at the attempts to make arrangements dealing with revenue sharing. And the focus of the discussions has shifted, that further debates will not prejudice the legal position of any of the parties. That's clear from the outset.

PROFESSOR CRAWFORD: Just for my information, why wasn't there reference on the East Coast Provinces? My understanding is that the Newfoundland case came by -- on appeal from the Newfoundland Court?

MR. CRANE: What happened there, and I'm not -- don't have all the sequence at my fingertips, but what happened there was that there were two references. One by the Province; the Province has a Constitutional Determination Act, so it can make a reference. But it can only make a reference to its Court of Appeal. The federal government can make a reference directly to the Supreme Court of Canada. So they went sort of tandem. And that's for their own purposes, that's what the Newfoundland --

PROFESSOR CRAWFORD: But none of that -- none of that directly concerned the other East Coast Provinces?

MR. CRANE: No, it concerned the situation of Newfoundland. I suppose that it might be said that Newfoundland had the strongest case for a separate historical background, and if they lost, then the others would flow. And there were interventions, of course, in those cases from all the provinces, so that all the points of view were being -- were being advanced.

PROFESSOR CRAWFORD: In Australia when a -- when a State intervenes in a constitutional case it's bound by the result, but that evidently doesn't follow in Canada

MR. CRANE: Sort of called an advisory opinion here. It's -- the -- so there was a subsequent meeting of the Premiers in August. That didn't result in any further approach to Ottawa. There was no consensus reached on that.

And the next event, or relevant event here is the Doody-Kirby correspondence. And this is at tab 37, and is the -- there are -- the letter from Minister Doody of Newfoundland and Labrador to Mr. Michael Kirby, who was then serving as Principal Secretary to the Premier of Nova Scotia, is -- has already been talked about in the record, and there has been a fair amount of discussion around that. It was accompanied by a map, and the -- the map was a -- while it was put forward in rather conservative terms in the letter, the actual position of the map, as expressed by the dotted line, was a significant divergence from the top line, which is the -- I think the Stanfield line.

So that that was an effort by Minister Doody to start discussions with Nova Scotia about the area moving off, roughly speaking, turning point 2017. An area which we say had not been determined by the JMRC.

There was no -- there was a reply to that letter from Mr. Kirby to Minister Doody, and that's in the -- that's in the same tab. And that was in acknowledgement on October 17 and in which Kirby indicates that he's going to take the matter up with officials and see if we can't get together to discuss it. There was nothing further from Nova Scotia, and as a result, Cabot Martin, who was serving as Legal Adviser to Minister Doody, wrote a

follow-up letter on November 17.

And I think my friend, Mr. Drymer, must have misspoken on this, because he said it was only 11 days after or something, it was actually some 47 days after the October 6th letter.

But the thing about the Martin letter is that he wants a reply. And he said that this is a matter of considerable importance to us, and we would like your comments. And then he talks about whether they have heard from Graham Walker, and so on.

So the record doesn't disclose any further reply from Nova Scotia, to what must have been by any -- by all accounts, a significant proposal, although conceded in Mr. Doody's letter, in Minister Doody's letter, to be not a accurate representation on the map, but it was -- in other words, he's not saying this is a precise scientific determination, but this is where we think the line should be in general terms.

PROFESSOR CRAWFORD: The Doody letter does -- does imply agreement with turning point 2017, does it not?

MR. CRANE: Certainly the map sort of does -- does indicate -- indicate that. The letter itself doesn't seem to get into any precision on the point.

It says merely, "Attached hereto is what we consider a more accurate reflection of the general principles of

division to which we have agreed. I hasten to add this version is meant for explanatory purposes only, and is itself inaccurate because of the limitations of the maps used in its preparation."

So I don't think we can approach it on the basis of specifics, but it certainly was a very -- a significant proposal.

Now, from this point forward I'm going to move a little more rapidly, because the -- there is a significant development that brings to an end sort of federal-provincial discussions, or shouldn't say federal-provincial, interprovincial discussions between Newfoundland and Labrador, and the other Atlantic Provinces.

That is the launching, if you like, of a separate proposal by Newfoundland and Labrador to the Government of Canada. A separate independent proposal.

Before I do that, there's one quick note. And that is that I will be giving the Tribunal some references with respect to comments made by officials at federal-provincial meetings, which indicate that there was an outstanding piece of business here that hadn't been resolved; the question of the boundary between Nova Scotia and Newfoundland and Labrador.

The -- there is, at this time, in this sequence, one

of those entries, and I will just deal with it now to give it -- to give it to the panel. It is found at tab 38, and these are minutes of a federal-provincial meeting at which Newfoundland and Labrador was in attendance. And there is an extract at page 8 of a statement by Mr. Kirby, the same Mr. Kirby, where -- where he -- this is at tab 38, and it's at page 8. And he says -- have I got -- oh maybe I've got the wrong --

PROFESSOR CRAWFORD: Yes, it's got 9 at the bottom of the page.

MR. CRANE: Oh yes, it's right. It's poorly reproduced, but it's the page that has "9" at the bottom. And the reference is at the middle of -- the top part of the page, where Austin, who was the Federal Chair of the meeting, reads out item F-2. F-2 was a Federal Discussion Paper which actually appears at the same tab, in which the question of boundaries between adjacent areas was raised as an agenda item.

And there is some discussion there between various representatives about whether there was an agreement on the boundaries as to adjacent provincial areas. And there's a reference there from Kirby's statement remarked that he understood that Newfoundland did not agree as regards portions of the boundary line in the northeast Gulf of St. Lawrence region. Suggested that in any case

the problem of provincial offshore boundaries could be set aside for the time being.

And there is further reference, which my friend has already given you, at what appears to be page 12, but is actually page 11, at the bottom of that page, where after the Newfoundland representatives had joined the meeting, there is a -- there is a discussion about whether Newfoundland had accepted and then Mr. Barry indicates that Newfoundland had not decided on a final position, and that has been given to you before.

Now what happened in -- a few months later was that there was a separate proposal made to Canada by Newfoundland. This proposal appears at tab 39, and was an attempt to open serious bilateral discussions with Ottawa.

This is a proposal that failed. It didn't go anywhere because the federal government said it would not negotiate on that basis and that it would -- and negotiations continued with the other provinces.

You have had some discussion already about the definition that is in this agreement on adjacent submarine area. That was the language that was put in the draft agreement or regulations, and Mr. Bertrand explored that with the panel. This is -- in addition, there was -- it was assumed that there would be provincial legislation, federal legislation to follow. The relevance of this is

twofold. One is that there was, at this point, a separate demarche, if you will, with Ottawa by the Government of Newfoundland, and it broke away from the common front to the united position with the other provinces.

The second point is the terms of the definition, a more technical argument as to what it means. Our position on that is that what it does not mean is that it recognizes any agreement. It is cast, at best, in neutral terms and when we read it the first time we thought it referred to a prospect of agreement. When friends across the way read it, they drew the exact opposite conclusion. So we both were very extreme in the Memorials we put to the Tribunal, but at the very least, this is an ambiguous reference. It does open -- it does not contain any -- in our view, any basis for the Tribunal finding that there is any sort of recognition by Newfoundland and Labrador of any agreement on this point, and I don't think I can say very much more on that.

The clause is quite short and simple. It does refer to any lines which are agreed to. So it's certainly open to either construction, but it does not, in our strong view, recognize any existing agreement.

Now in terms of the other references I would give you -- and I will move rapidly over these -- there were a number of federal/provincial meetings that took place. I

should mention, just for the record, that -- and the correspondence is in your book -- just for the record, that as soon as Newfoundland had submitted its proposal, Premier Hatfield of New Brunswick, and I referred to this earlier, wrote, saying that he didn't feel that at this point there was any point in officials from his province meeting with Newfoundland. In other words, they regarded it as a complete break. That's at Document 63. And Premier Regan wrote to Prime Minister Trudeau and used very strong language in his letter saying that Newfoundland is divorcing itself from the meeting of the committee of officials. And from that point forward, Newfoundland and Labrador officials did not meet with the other provinces and the federal government, so at that point, matters were at a difficult pass, one might say. Those two references are tab 60 -- tab 40 and tab 41.

PROFESSOR CRAWFORD: Is there anything in the record -- I may have seen it and forgotten -- but a response by the federal government to the Newfoundland proposal?

MR. CRANE: Yes, there is. Let me turn that reference up. Trudeau -- Mr. Trudeau writes to Premier Moores. This is not in your book, but I will give you the reference. Prime Minister Trudeau writes to Premier Moores, January 28, 1974, and it's Document 65. It basically says, "Your proposal could not provide an acceptable basis for

negotiations." Pretty plain language, too.

So that after this period, there are federal/provincial meetings, but they are with the other provinces and the federal government, not with Newfoundland present. There is at tab 42 a record of a meeting, and I think that I would like to refer to that briefly. And that's at page 6 of tab 42. Here there are representatives from the provincial governments and a large delegation from the federal government. Michael Kirby is in attendance and so on.

One of the points that the federal delegation wanted to clarify was that where were we now that Newfoundland had withdrawn. And all of page 6 is devoted to a debate on that subject, starting at the top where Dr. Kirby was asked to secure a written confirmation that Newfoundland has withdrawn from the East Coast provinces group and has no further interest in these negotiations or their outcome.

I won't read it all, but it does -- Kirby does go on to say that -- as regards boundaries, he said, "Kirby indicated his understanding to be an agreement on boundaries among the provinces some years ago, but that Newfoundland claimed they had no written evidence of Newfoundland's acceptance of these boundaries." Then there is a general discussion ending with Mr. Smith, who

is a legal advisor from Canada, saying that even if the provinces had made an earlier political agreement on boundaries, this does not necessarily mean they were locked into the arrangement. That would be the -- that was Smith's view. So that is an example where the issue came directly to a federal/provincial meeting.

After that, there are two other documents. There is Document -- tab 43. Again, that's a note of the -- from a Mr. Thorgrimsson, which he wrote after the federal/provincial meeting, and the important reference is at page 3. This is an internal note, so he is writing to file or whatever, and the -- at page 3 (d), in the middle of the page it says "What territory will the agreement cover? The withdrawal of Newfoundland from the negotiations and the possible refusal of that province to accept the interprovincial boundaries drawn up in '64 has raised this problem which is essentially a problem for the provinces."

The next is tab 44. This is a memo from Kirby to the Federal/Provincial Committee. This is the officials' committee. At least, it's the provinces' committee, but -- of offshore oil and gas. He was the Chair, I believe, of that committee. That's at tab 44. His reference to boundaries is at page 5. It's the last page, para 10, and he states, "Unequivocally" -- in para 10 -- "there are a

number of technical problems which have not been resolved, but which officials believe can be resolved by further negotiations. (a) an agreement indicating precisely where the boundaries lie between east of the five eastern provinces.

Now the next reference is at tab --

PROFESSOR CRAWFORD: It seems to address the question not of legal bindingness, but of precision, and yet in the light of the agreement on turning points -- okay, leaving the Atlantic to one side, but in the Gulf of St. Lawrence, I didn't think there was any problem about precision any more, so is this lack of understanding of the situation or what --

MR. CRANE: There appears to be some difficulty with Quebec, as well. That's referred to in some of the -- some of the documents, so that Quebec and Newfoundland are noted as areas which need to be further addressed.

I hope you will forgive me for turning to the next tab. Tab 45. This is a 1976 memo and this entry -- this is a meeting of federal government and provincial governments, and we have a reference particularly on page 13. The meeting is Chaired by Gordon McNabb, who was Deputy Minister of Energy, Mines and Resources of Canada, and Dr. Crosby, whose name has come up before, was in attendance. And at page 13, about five -- four headings

down, McNabb noted the provinces would have to agree among themselves as to how they would share revenues, raised the question of the territory to be covered by the agreement. Walker -- Walker is Nova Scotia, and he was the secretary of the JMRC, so he was very much actively involved throughout this period. Walker commented there be only one area of controversy, that is that between Nova Scotia and Newfoundland.

McNabb remarked it would be necessary to consult Quebec and Newfoundland with regard to the interprovincial lines of demarkation.

The final reference here is this -- was the time when the so-called MOU was starting to take shape. This is the 1977 MOU. And this was a memorandum for Cabinet. The date is July 12, 1976, a federal document, tab 46.

The reference there is at the bottom of page 12, para 20, the whole of that paragraph shows that there is a -- some considerable difference of opinion on the question of the boundaries. In fact, halfway down that paragraph, the statement is made, "However, it appears that at least certain representatives of PEI and New Brunswick are not entirely satisfied with these lines and that the Newfoundland government does not accept them in their entirety."

Now the next -- that then is the -- sort of history of

the federal provincial meetings and comments made by senior officials as to the unsettled state of the boundary question.

The 1977 MOU has been touched on already. It was an agreement entered into in a formal manner, although expressed not to have legal effect. This was an agreement entered into between Nova Scotia, New Brunswick, PEI and Canada providing in principal for a scheme of revenue sharing. And the agreement was intended to be followed up by a formal agreement. So it was sort of an agreement in principle not to have any legal binding consequence, but to be followed up by a formal agreement and by legislation. It's found at tab 48. It provided that the demarkation lines for purposes of revenue sharing would be on the basis of the '64 lines, the 1964 lines.

That agreement, which did not include Newfoundland was at the time denounced by Newfoundland with various political politicians' statements. And they are excerpted, one is at the -- in the record here. It was in fact also rejected by Nova Scotia in 1980.

So that Nova Scotia entered into this agreement and there was a change of government in 1980. And the new government of Nova Scotia, the Premier of Nova Scotia rejected the 1977 MOU. That was done by statements in the House of Assembly. And the answer on this is given at tab

51, in particular pages 1940 to 1942.

At the bottom of page 1940, for example, Premier Buchanan, who had just shortly before had been elected, saying, "We are prepared to negotiate a settlement of this contentious issue." He is talking about offshore revenue sharing. "And we are prepared to do so as quickly as possible. However, we reject the type of agreement entered into in 1977 by the previous government." And there are various other references making it quite clear that Nova Scotia was disassociating itself completely from the 1977 MOU.

PROFESSOR CRAWFORD: The MOU envisaged a formal agreement?

MR. CRANE: It envisaged a formal agreement. There were some meetings of officials, but no formal agreement was ever entered into.

PROFESSOR CRAWFORD: There is no document even representing a draft of the formal agreement?

MR. CRANE: I don't think there is in the record. I will take that as notice that there might possibly be something, and come back on that tomorrow. But the -- it certainly -- there was no formal agreement executed and no legislation.

Now another event occurred --

PROFESSOR CRAWFORD: I'm sorry, just one further question. Would the agreement have required legislation?

MR. CRANE: That was contemplated that the legislation -- it was not tied with the agreement. There wasn't a ratification of the agreement. It was assumed that since third party interests would be involved that legislation had to be in place.

The next event that took place is also in 1977. And in part it was a response directly to the 1977 MOU. This was a White Paper issued by Newfoundland and Labrador proposing a new scheme of oil and gas regulation.

By the way, I should mention before I leave the rejection by Premier Buchanan that at this time in addition to rejecting the 1977 MOU, Newfoundland -- Nova Scotia introduced legislation in the House of Assembly on oil and gas. There were two or three separate pieces of legislation. And there is no reference in those legislations in any way to the -- any form of agreement, interprovincial agreement. But those -- that was legislation that was tabled. And as Mr. Bertrand said yesterday, it was not formally proclaimed. But it was an expression of jurisdiction way out into the offshore.

Now to turn again to the 1977 Newfoundland White Paper, this document was not reproduced in your Book. And it's quite a lengthy document. It is at Document 75 of the record. It contains draft regulations, an opening statement in which there is a general discussion about the

-- that the MOU would not protect our interests. That's the 1977 MOU. And a number of proposals with respect to legislation, including a grid system for permits and so on. It includes proposed management zones of jurisdiction. After the -- this was put out to the public for industry to comment in May 1977.

In October 1977, regulations were enacted by Newfoundland and Labrador setting out a management proposal. And in those regulations is a figure, which displays the management zones proposed to be regulated by the province for oil and gas. This is a figure -- this is a reproduction of what is already in the -- in the record. It was first seen in the White Paper and then also was seen -- also is seen in the statutes. And that's supplementary statutes number 7 where the regulations are depicted. And just to state, the numbers are the numbers of the management zones that are given on that sketch. That is not a line, which is a 135 line, I might say.

So that there was an assertion there set out. And these were formal regulations distributed to industry.

CHAIRMAN: You say it wasn't a 135. It was closer to Nova Scotia, I take it?

MR. CRANE: It was.

CHAIRMAN: That's what I want to hear.

MR. CRANE: The other item of history, and this is not a --

this is an item that is more of interest constitutionally, was that in the late 1970s and early 1980s there were a number of constitutional conferences leading eventually to the repatriation of the Canadian Constitution.

In the course of those debates, which were at a very high level of intergovernmental debates, there was established a committee on offshore resources. And this was an attempt -- it turned out to be a failed attempt, but it was an attempt to have a resolution of a question of provincial jurisdiction over the offshore.

That -- in the course of that debate, Newfoundland proposed -- made a proposal to the -- what was called the continuing committee of officials and later the committee of ministers, made a proposal to amend the constitution by adding a new section 109, which would provide specifically for the resolution of boundary disputes between provinces. And the text of that is in the material.

And what is of interest is that Newfoundland -- or did I say Nova Scotia -- Newfoundland was the province that put this amendment forward and that the amendment proposes that if there is a boundary issue, that that issue should be resolved under international law of principles. And if there is -- if it can't be resolved, there should be resort to arbitration.

This was a theme that Newfoundland advanced in these

years as being an important question. And it is consistent with the fact that they did have an outstanding -- outstanding boundary issues, not only with Nova Scotia, but also with the province of Quebec.

So that material is in the record. It's found -- I will just give the references to that. The tab 52 at page 2 is the reference of the section 109 as proposed by Newfoundland and the actual text of the amendment is found at Appendix 1. The proposal in Appendix number 1.

That takes us then to 1980. And I think that it can be said that there were a number of events that took place in the 1970's leading up to 1982, which was the first accord or agreement that led to the legislation in issue in this case. That was the 1982 Agreement with Nova Scotia, Nova Scotia and Canada.

And the -- it was followed of course by the other -- by later accords, replaced by later accords and then eventually by the legislation which was enacted in '86 and '87.

But I think it's fair to say, and I submit to this Tribunal, that the -- a number of events that have -- we have talked about in this period after 1972 show the existence of an ongoing boundary controversy between Nova Scotia and Newfoundland and Labrador in relation to the offshore. And those events can be summarized as follows.

First, there was the Doody correspondence and the assertion by Minister Doody of unsettled question relating to the area covered by his map.

The second, there was the 1973 break away by Newfoundland and Labrador and the proposal of the text in the Newfoundland proposal, the text dealing with the definition of submarine areas.

Thirdly, there were a series of discussions and debates in federal-provincial meetings without Newfoundland present. And those debates indicate that there was an ongoing unfinished piece of business relating to the offshore.

There was the Newfoundland White Paper of 1977, followed by the regulations which set out a claim to territory which certainly does not reflect any agreement interprovincially. And there were finally during the constitutional talks in 1979 and 1980, proposals for constitutional amendments which would resolve interprovincial boundary issues by means of maritime law -- international maritime law and by arbitration.

CHAIRMAN: I don't want to interrupt you, but can you -- just as a matter of curiosity, where is the dispute so far -- or the latent dispute between Quebec and Newfoundland?

MR. CRANE: Can I take that -- I would be happy to respond if I was able to, but in terms of where it is at,

that's --

CHAIRMAN: It can wait.

MR. CRANE: I can -- I have a general notion but I would rather give an accurate reply to the Tribunal.

PROFESSOR CRAWFORD: If there was a real boundary dispute between the provinces -- by real, I don't mean that this is not real -- I mean that if the -- take a dispute about a land boundary between two adjoining provinces, would this -- would the Supreme Court not have jurisdiction over that under the constitution?

MR. CRANE: The --

PROFESSOR CRAWFORD: It's a layman's question.

MR. CRANE: Yes. I will give you a short answer. There would be jurisdiction if it came up through a judicial proceeding or it's by way of a reference. I might say that what I can say is that the Province of Quebec has never conceded the title of Newfoundland to Labrador. And so that is the -- and flowing from that are claims in the offshore. So that's a very general -- but a more specific response will have to wait.

The -- in the -- mention was made on Tuesday by Mr. Bertrand about the statement by Mr. Laracy, who was an official or an advisor to the Newfoundland government. And there are a couple of references which I can give to the Tribunal on statements of this kind and I will do that

very quickly just to indicate the -- they are not in the book but it would be convenient just to give them, and I can do this quite shortly.

The Canada-Nova Scotia Agreement, the date of that was March 1, 1982. And there was a public statement made by Minister Marshall of the Government of Newfoundland and Labrador, September 1, 1982 criticizing this Agreement. And in that statement, which is not in your book, but it is in Document 94 of our materials. "It is said that the Nova Scotia type Agreement would give Ottawa the right to unilaterally finalize our offshore boundaries with Quebec and Nova Scotia." That statement by Minister Marshall indicates that there were outstanding issues with respect to the boundaries offshore with Quebec and Nova Scotia.

The -- on January 6th 1986, where -- this is in the period prior to the legislation, in the period of negotiation between Newfoundland and Labrador and Canada, there was a letter or memo sent to the Newfoundland Minister William Marshall, a draft memorandum of Cabinet, which is -- the Cabinet memo is not in your materials, but the letter of Mr. Laracy is at tab 102. And he says in that memo at page 20, "The specific boundary lines between the offshore areas of the various provinces must be defined in the future." So that they were -- it was assumed at that stage that that was a matter of future

business.

Finally, as a -- as the -- to draw the circle to a close, and before I say a word about permits which will be quite brief, the St. Pierre and Miquelon controversy ran its course and in 1992 Minister Epp from the -- the Canadian Minister of Natural Resources wrote to Newfoundland and Labrador and to Nova Scotia and said -- and that was August 1992, at Document 111. And he said that the -- in that letter, now that the St. Pierre and Miquelon dispute is -- has been resolved, the issue of the determination of the boundary between Newfoundland and Labrador and Nova Scotia must be addressed. So throughout there is a constant theme of unfinished business here between the two provinces.

I have now got some brief submissions on the questions of permits and I should be able to complete that in about 15 minutes.

If I can shift gears a little on this one. I don't propose to be reviewing documents with the panel, but I would like to make some comments on the presentation made by Mr. Saunders the other day with respect to the permitting practice of Newfoundland and Labrador.

Mr. Saunders' submissions to the Tribunal were largely concentrated on two permits which were issued in the early years, a permit to Mobil, which was issued on February 20,

1967 and a permit to Katy Industries, which was issued in 1971. These permits at this stage of administration were authorized at the level of the Executive Council of Newfoundland, approved by Orders in Council. Mr. Smallwood, as we have seen, was quite familiar with this type of business, and the permit that was issued to Mobil -- and I wonder if we could have the slide on that -- that was -- is shown here -- and the western boundary of the permit is -- follows -- is in general conformity with the 135 degree line that we have talked about.

Now I wanted to say that --

PROFESSOR CRAWFORD: I'm sorry. Finish what you are saying.

MR. CRANE: Well, I want to say that there is no reference in any of the documentation to an agreed boundary or an agreement at all, but what we do know is that -- and from Mr. Saunders' presentation, that the permit to -- that Mobil also received a permit in Nova Scotia and that the Nova Scotia permit was received before that of Newfoundland. Nova Scotia's permit was issued on February 20, 1967, immediately to the west of the parcel that we see depicted, and the permit was issued by Newfoundland and Labrador some seven months later.

The question of the westerly boundary may be a question that the company itself applied for the balance of the lands that it wanted. And the answer to that

question, why was the westerly boundary follow the 135 line, may simply be that they did so because it was in response to the request from Mobil, which had already got its permit from Nova Scotia.

Now after that -- and perhaps -- do you have a question on that, Mr. Crawford?

PROFESSOR CRAWFORD: It wouldn't be the first time that an oil company had drawn an international boundary, but I have heard of arbitrations between oil companies on international boundaries in the absence of the states concerned. But is this the first time that the 135 degree line appears on a map?

MR. CRANE: On a permit.

PROFESSOR CRAWFORD: On a map. It didn't appear on a map, it appeared on a permit, you say?

MR. CRANE: It appeared on the permit, yes. It appeared on the permit.

PROFESSOR CRAWFORD: Is it the first time that it appears on a document?

MR. CRANE: It may well be.

PROFESSOR CRAWFORD: Presumably, it appeared on the permit from the Nova Scotia side seven months earlier?

MR. CRANE: Yes, it would. It would have -- as I say, that would have been -- that would have happened in that way.

PROFESSOR CRAWFORD: And this is before the federal

intervention, as it were, which occurred a couple of years later, from recollection?

MR. CRANE: The discussion that we had talked about earlier today about the --

PROFESSOR CRAWFORD: When the federal official -- what was his name, Crosby?

CHAIRMAN: Crosby.

PROFESSOR CRAWFORD: Crosby came out with a version of the southeasterly line along 135. My recollection was that was in '69. Is that right?

MR. CRANE: Yes, it was later.

PROFESSOR CRAWFORD: Yes.

MR. CRANE: That was later, yes. So that -- but the evidence on the Mobil permit is just that. It was there, and it may well be a situation. It doesn't represent a provincial representation of anything, in our view, in terms of something that this Tribunal should take cognizance up of in terms of permitting practice.

Now the other permit --

PROFESSOR CRAWFORD: Well, I mean, you grant the permit to Mobil on the 135 line?

MR. CRANE: That's right, but I'm saying we don't -- we are not aware of the -- of any particular reasons for this happening and that, in fact, as things happened, we do know that Nova Scotia was applying a certain principle

with the issuance of its permits.

CHAIRMAN: So far as Nova Scotia was concerned, it thought that its -- that its jurisdiction extended at least to there?

MR. CRANE: Well, certainly for purposes of the -- of its operating procedures.

CHAIRMAN: Mmmm.

MR. CRANE: Yes. See, in terms of the -- of Katy, this -- Katy comes along in 1971 and seeks to obtain lands, and this is depicted here in the green on the -- it asks for several parcels of land. What it receives by Orders in Council and an Interim Permit, as Mr. McRae mentioned earlier, are the lands as laid out on this -- on this depiction. The westerly boundary is extrapolated to show how it would relate, and that is the 135 line.

Now we were taken through quite a lecture by Mr. Saunders in terms of how the draftsman would have drawn this and how the draftsperson made a mistake, in his submission. We can't really figure out the draftsman's intent no matter how hard we try, but what we can see is what actually was done in this case, and that it is based not on a metes and bounds description, because the permit in the Katy case was not a permit which is issued with metes and bounds, it was issued in accordance with a map. So the Orders in Council and the Minister's order issuing

the Interim Permit -- and we have put the documents in the record on these are -- show that Katy is west of Mobil, and that's how it is depicted.

The orange section there, which is Mobil, is depicted as "M" on the map, and Katy is to the west, and what the government did was to issue rights to Katy west of Mobil. Now there is no doubt about that because the map is part of the permit, and it is made so by terms of the Order in Council and the Interim Permit itself. The words refer to a map and the map itself is in the record. It is at Document 80 -- or Annex 80 of the materials filed by Nova Scotia.

CHAIRMAN: Just to make sure I didn't misunderstand something here, do I take it that part of Katy would overlap the Nova Scotia Mobil licence?

MR. CRANE: It appears to do so.

CHAIRMAN: Yes.

MR. CRANE: But unless that licence by this time had lapsed -- and that -- this is four years after the Mobil permit was issued by Nova Scotia.

PROFESSOR CRAWFORD: We are in a situation -- Professor McRae doesn't want to talk about phase two yet, and Mr. Fortier doesn't want to talk about it at all, so it may be that my question is out of order.

Was there any actual exploration activity in the area

which seems to have created an overlap between Katy and Mobil just in that area of the line? Do we know what --

MR. CRANE: At the time?

PROFESSOR CRAWFORD: At the time, or around this time.

MR. CRANE: If I can take that one as notice, we will do what we can to see what is -- there may be some material in the record on that.

PROFESSOR CRAWFORD: I mean, I'm just interested to what extent these permits were just pieces of paper as part of a paper chase or something, or whether they actually gave rise to activity.

MR. CRANE: Well, we do know, and I guess it's appropriate to move -- I guess -- the point I make with Katy is simply that this is not an issue of a draftsman's error, it is an issue of government issuing an authorization on the basis of a plan. And that all this stuff about a draftsman's error can easily be just moved aside. It isn't probative in terms of where we actually are.

Now what happened the next year, the -- this was '71. What happened in the early 70s -- and we can have the next slide -- is that these are permits issued from 1973 to 1975.

And they -- this slide shows that permits were issued to Hudson's Bay and Texaco in this area, and that another permit was issued to -- to Texaco down there. The permits

that were issued to Texaco were for seismic operations, they were for one year duration. Though the seismic operations could be completed in a much shorter time. The company was allowed a year to carry out its exploration activity.

It doesn't seem to have been much of a concern that they were over the line. There was certainly no conformity with a 135 line when those permits were issued.

There were other permits issued, Amoco was issued, that's number 3. And that's all the pink showing on the map. And Pacific Petroleum was issued also. That was in 1975. Pacific Petroleum is number 7, which also overlaps.

Now the -- so that none of these permits respect in any way the 135 degree line. Or perhaps any other line that was being talked about.

As far as this information is concerned, this affects the period '73 to 1975. The -- it may be that there were certain modus operandi, or modus vivendi between the -- between the two provinces that impacted on this. Our -- we have not relied on this permitting information as taking the Tribunal very far in any direction, but the -- but what we do see here is certainly a disregard of any sort of federal-provincial spheres of -- provincial -- interprovincial spheres of influence.

And so we think in our submission, the Tribunal should

not give much time to this -- this particular argument. It doesn't -- none of these permits give any sort of recognition to a particular agreement, or to any agreement. So we think that should be ignored.

The final point I would make is that when Mr. Saunders was discussing this issue, he referred to a Texaco application. And most of us on this side of the -- of the room thought that he was talking about a -- the Texaco application dealing with number 6 over here, which overlaps rather grossly the -- the 135 line. When we examined the materials that were filed, we discovered that what -- that the -- what he was referring to was in fact the Texaco application over here, number 5 down there, not number 6, a much smaller permit which does not purport to -- it overlaps, but it wasn't the -- the one that we thought he was talking about.

And so what we have done, in this new material we gave to the Tribunal, is to give you the same material, which is the application and the map, and the Order in Council, relating to number 6, which is here. And that is -- in the material it's -- where is the -- it's in the second book, volume II, and it -- it would be tab number 58, I think it is. No, it's 59, tab number 59.

And if one looks at tab 59 -- and this will be the last time that you look at the book today -- you see the

application for number 6, and there is a map there which shows what the company wanted to do. And that's tab 59 in volume II. And that map shows grids running across the Cabot Strait. Those grids being, I take it, seismic runs. And that shows the quite large activity that was planned by Texaco for number 6 on -- on the chart. That's as -- for clarification, because we came away from the -- as I say, the -- the -- Mr. Saunders' presentation with firm impression he was talking about number 6, but the material that he filed was with respect to number 5.

PROFESSOR CRAWFORD: Mr. Crane, when a company in the context of a federal system, we are in a federal system as matter of fact, whatever we are is a matter of law, when a company applies to do seismic work, it sets out a seismic program and applies for a permit. I mean, it's indisputable that for some at least of this seismic work, if you had any jurisdictional right, you -- they needed a permit. Is the company affirming that this is -- that, as it were, the whole of your jurisdictional area is covered by their activities, or -- or not?

MR. CRANE: I think they are obliged to make certain representations in their application, what is the work that you are planning to do, what commitments do you make for local employment, those various things which are of political importance. So in the -- I think what they have

to do is to give the plan. This may have other impacts on activities in the area, I don't know, but that's what -- that's what they are obliged to do, and this is what they did in this particular case.

And the permit that is issued is in the -- is in the materials.

PROFESSOR CRAWFORD: But the point is I'm assuming you had a company that wanted to keep everyone happy with the possibility as to what might happen in future, and I assume that was a realistic scenario. They -- they -- the company might apply to everyone in sight in order to do this -- this seismic work underground, but the permit didn't cost very much, and it wouldn't cut across anyone, so they could make -- they could have made exactly the same application to Nova Scotia.

MR. CRANE: They could -- what Mr. Saunders said -- told us earlier in the week, as I recall, was that the -- it was not necessary to do anything in Nova Scotia because it wasn't required to be -- it wasn't regulated, so that we have his affirmation there that nothing was done in the Nova Scotia side.

PROFESSOR CRAWFORD: But the point I'm making is that an application like this doesn't really constitute an affirmation by the company as to the extent of your jurisdiction?

MR. CRANE: Oh no. Oh no. I mean, that's -- I'm just saying that this -- this was clearly set out in their work plan, their work plan went over the line. And the permit was issued over the line, over the alleged 135 line. Nothing more or nothing less.

PROFESSOR CRAWFORD: The permit was issued in relation to a work program that went over the line, but --

MR. CRANE: Yes.

PROFESSOR CRAWFORD: -- but that's about as far as one can take it?

MR. CRANE: Sure. And as I say, we are not saying that this is a -- this proof really takes us too far. We are saying here that there isn't a consistent permitting practice which respects any sort of line. And that's where we are, and I don't think that there is many conclusions that the Tribunal can take from this material.

That -- subject to --, and it's answering the questions that have been left with us, that covers the presentation on the documents, and I'm grateful for the panel's consideration.

CHAIRMAN: So we are adjourning until tomorrow, I gather? Yes, Mr. Fortier?

MR. FORTIER: Thank you, Mr. Chairman. I certainly did not wish to interrupt my friend in the course of his oral argument, but I wonder if we could have, and if the

Tribunal could be provided with those figures. I have counted 10 which have been shown on the screen since he began his -- his oral presentation earlier today. My friend, Professor McRae, very kindly provided us in what I call the thick book with Figures 1 to 26, and we have seen in the course of Mr. Crane's presentation, Figures 27 to 35, but we do not have those figures, and we would like to look at them overnight. And I expect maybe members of the Tribunal would also like to see them.

PROFESSOR MCRAE: We do not have them, but we will get them as soon as we can.

PROFESSOR CRAWFORD: It's probably more important that they be provided to you than they are to us, if I may.

MR. FORTIER: Yes. I wouldn't be so presumptuous as to say that, Professor Crawford. Could we see them, Mr. McRae?

PROFESSOR MCRAE: We will get them as soon as we can. I'm just trying to get clear whether we have them all or don't have them all. But as soon as I'm clear on that I will provide them to you.

MR. FORTIER: Today?

PROFESSOR MCRAE: Today. This evening.

MR. FORTIER: Okay. Thank you. Thank you very much.

(Adjourned)

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

Reporter

Pamela Joyce