

ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR
AND NOVA SCOTIA

held on the 19th day of March, A.D., 2001, at the Wu
Conference Centre, Fredericton, New Brunswick, commencing
at 9:30 a.m.

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

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

Mtre Jean G. Bertrand

Professor Phillip M. Saunders

.....
CHAIRMAN: Mr. Fortier?

MR. FORTIER: Merci, Monsieur le président. Good morning,
Mr. Chairman, members of the Tribunal. This is the second
round, oral argument on behalf of Nova Scotia which
begins. I will be on my feet first, and I will be

followed by my colleague, Jean Bertrand, who, in turn, will be followed by Professor Saunders.

The three of us will be reviewing some of the facts, some of the documents, which have been put in evidence since the beginning of this arbitration.

I will deal with these facts and documents from their inception in 1959 until 1972. Mr. Bertrand will review some facts and some documents subsequent to 1972, and Professor Saunders will deal with the permit issue and review also the applicable law. And it will be my privilege to stand up again after Professor Saunders has completed his argument in order to offer what we of the Nova Scotia team call our closing lines.

Inevitably, in such a fact intensive case there will be some repetition of arguments made by Nova Scotia during the first round. There will be reference to documents with which I know members of the Tribunal have become very familiar. As I said, this is inevitable in a case of this nature, but it is particularly necessary in this case where, in our submission, the counsel for Newfoundland and Labrador have taken such liberty with the documentary evidence.

My good friend, Mr. Crane, in particular, last Thursday filed with the Tribunal what are euphemistically referred to as oral argument books, volumes 1 and 2.

Unfortunately, the oral argument books, volume 1 and 2, which contain a selective -- stress the word "selective" -- number of documents are not given any correlation to the exhibit numbers in the record, the annexes filed by Nova Scotia, the documents with a capital "D" filed by Newfoundland.

This can be, in our submission, very misleading, and I find it very irregular, particularly in this case because there are some key, crucial documents which are altogether missing from the Crane compendia. There are some key documents which, unfortunately, are not included in the Crane submissions, written submissions. There are also some key passages in some of the documents which are included in the compendia which were not addressed at all by Mr. Crane in the course of his presentation.

Consequently, we felt that it behoved us on behalf of Nova Scotia to file a supplementary volume, which you have before you this morning. A copy was delivered to our friends, counsel for Newfoundland, yesterday evening, and a copy, of course, has been filed with the Registrar.

So you have a book which includes the correlation between the numbered exhibits in the Crane compendia and includes, of course, the correlation with the new documents which Nova Scotia has put before you.

So this is a new book, and in the course of my

argument this morning, Mr. Chairman, members of the Tribunal, I will be taking you by the hand through these two books, the Crane volume 1 and the Nova Scotia book which is before you. And I hope to be able to demonstrate that there can be no doubt that the line dividing the respective offshore areas of Nova Scotia and Newfoundland have been resolved by agreement.

The process may be a little tedious, but, unfortunately, it must be done. I trust, Mr. Chairman, members of the Tribunal, that you do have the Nova Scotia book and it will be necessary that you also have volume 1 of the Crane compendia. I think I note that one or two members of the panel do not have the Crane volume, and I'm in your hands as to whether you wish for me to continue or wait until they are delivered from your retiring room.

I begin my presentation this morning, Mr. Chairman, by reincarnating myself, if I may use the expression, as Premier Frank Moores. The place is St. John's. The locale is the General Assembly of Newfoundland. The date is Monday, 19th of June, 1972. The recently elected Premier of Newfoundland, the Honourable Frank D. Moores, is the speaker. Members of the Tribunal will recall that the date, Monday, 19th of June, follows the two-day meeting of Premiers which had been held in Halifax during the weekend, on the 17th and the 18th.

Mr. Moores said, "Mr. Speaker, I would like to make a statement to the members of the House regarding the meetings in Halifax over the weekend of the five eastern provinces with the four Atlantic Premiers and the Vice-Premier of Quebec. The result of those meetings was a seven point agreement, outlining the areas of cooperation between the provinces. In arriving at the seven points, a number of topics related to offshore resources were discussed, including ownership, financial arrangements and development.

The seven points are: (2) The Governments of the five eastern provinces -- the four Maritime provinces plus Quebec -- the Governments of the five eastern provinces have agreed to the delineation, not the delimitation, to the delineation and description of the offshore boundaries between each of these five provinces. (3) 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 the seabed off the Atlantic coast and in the Gulf of St. Lawrence, the two areas of particular concern to the Province of Newfoundland, in accordance with the agreed boundaries." This is tab 33 in volume 1 of the Crane compendia, gentlemen, tab 33.

"Mr. Speaker", continued Premier Moores -- this is on page 2 -- "Mr. Speaker, apart from the agreements

themselves..." -- agreements in the plural -- "...the meetings also provided two very real benefits. Steps..." continued Premier Moores, "...have been taken to inform the Prime Minister of Canada of the decisions that were made", dixit Premier Moores on the 19th of June, 1972 in the General Assembly of Newfoundland.

What followed that declaration? We saw the reference to steps being taken to inform the Prime Minister of Canada. If you turn to document 32 in the -- in volume 1 of the Crane compendia, you see the text of a telegram from the Honourable Gerald Regan, who was president of the conference, to the Right Honourable Pierre Trudeau, Prime Minister of Canada, and I read -- "The first Ministers agreed that the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these five provinces as between themselves." Inter se, they have agreed to the delimitation -- to the delineation and the description of the offshore boundaries between each of these five provinces.

So, yes, reference the -- the Agreement was notified to the Prime Minister of Canada. If you read the press release issued, the communique, that's under tab 31, issued following the meeting of the -- in Halifax during that weekend.

The First Ministers agreed that the governments of the five eastern provinces have agreed to the delineation and the description of the offshore boundaries between each of these five provinces.

Was there any wiggle room, to use Mr. Crane's words, in that Agreement? An extraordinary expression used by my good friend, Mr. Crane. They left themselves some wiggle room.

I invite you to turn in the new book -- I invite you to turn to exhibit 31(a), and together we will seek to ascertain whether the five Premiers really meant what they said when they referred to an agreement.

This is one of the many documents which is missing from the Crane compendium.

You will see in that bundle 31(a), notes of telephone conversations which a federal official, whose name should be well known to you by now, Mr. D. G. Crosby, notes of telephone conversations which he had with Mr. McLeod of Nova Scotia, and Stu Peters of Newfoundland, on the -- on that very day, on the 19th of June. On the very day that Premier Moores was making his statement to the General Assembly of Newfoundland.

Mr. Crosby reported to his Deputy Minister that he had had a telephone conversation with Stu Peters. Who was Stu Peters? He was Executive Assistant to Premier Moores,

and if you thumbed your way through that Exhibit 31(a), you come to the note for file. Telephone conversation with Stu Peters, Monday afternoon, June the 19th, the very afternoon following the Premiers' meeting. The very day that Premier Moores was making his statement, of which I have read some extracts earlier.

Mr. Peters, Executive Assistant to Premier Moores, probably wrote Premier Moores' statement that was delivered that very afternoon. And what did Mr. Peters say to Mr. Crosby?

In summary, and I quote, it has been highlighted in your book. "In summary the seven points agreed upon were, 2), the Premiers agreed to mutual interprovincial boundaries in the offshore." Second page, Mr. Crosby delivers himself of some important thoughts. "There is nothing", he writes, "startlingly new as concerns points one through four." And he goes on point two, the one about the agreed boundaries. Surprise, surprise, point two, says "the Executive Assistant to Premier Moores, involves jurisdictional offshore boundaries that were agreed upon by provincial governments years ago. And presented to the federal government in 1964."

Any wiggle room? If you read on to the last paragraph of that note, "I inquired of Dr. Peters as to whether this was a negotiating stance on the part of the East Coast

Provinces, or whether they were quite serious about each of these items. Dr. Peters stated he felt that the first premiers were, quote, "dead serious". Wiggle room. They were "dead serious".

I will return to this document later on in my presentation.

PROFESSOR CRAWFORD: Mr. Fortier, one of the things that is puzzling about this, okay, you say that in effect 1972 was a demarcation of the boundaries which were delimited in '64?

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: So using the international analogy, or whatever it is, it -- one was delimitation one was demarcation?

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: The curious thing is that no one seems to have noted that the 1972 map didn't show the southeasterly line, which is on the 1964 map.

MR. FORTIER: The -- I think the conclusion can only be that, and I will be -- I will be referring to the work of the JMRC to demonstrate that the turning points which were delineated by the members of the committee, of the sub-committee, approved by the committee, did not need to go beyond point 2017. And that Mr. Moores had been presented in days preceding the weekend meeting of the Premiers, had

ben presented with the 1964 map. So it all fits together Mr. Crawford. It all fits together.

If you turn now to exhibit 33(a) in the new book, another document which was not included in Mr. Crane's compendium, you see that there was another meeting of the First Ministers, a short month and a half later. First Ministers of the Atlantic Provinces and Quebec. And if you look at the agenda, it's exhibit 33(a), item 3, boundaries between the provinces.

And you turn to agenda number 3, the governments of the five eastern provinces will request the Government of Canada to accept the delineation and the description of the offshore boundaries between each of the five eastern provinces, which delineation and description was agreed upon by the First Ministers, at their meeting on June 17 and 18. The area within the boundaries delineated and described of a province is referred to hereinafter as a provincial offshore area.

Wiggle out of this one, Mr. Crane, I say.

PROFESSOR CRAWFORD: Mr. Fortier, you touched on a point that I -- that hasn't been explained, at least so far, which relates to the minutes of that meeting. The paper you have just referred to is the -- were the agenda papers put together for the meeting.

MR. FORTIER: For the August meeting?

PROFESSOR CRAWFORD: Yes, for the August meeting.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: The actual minutes of the August meeting are at tab 35 of what we might call the Crane Compendium, volume 1. And if you look at -- on the first page of tab 35, it says "In dealing with the agenda item concerning the boundaries between the provinces..." and then there follows the proposal which you have just read.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: More or less verbatim.

MR. FORTIER: That's right.

PROFESSOR CRAWFORD: Then it says no consensus was reached on this suggestion. The meeting agreed that the position concerning the boundaries should be that taken at the meeting of June 17 and 18.

I find that baffling, because first of all, there had already been a communique. I mean what had happened in June had already been notified in the telex to the Prime Minister. And secondly, it wasn't that they were varying the position concerning the boundaries, they were affirming it.

But they said no consensus could be reached. Do we know what that means?

MR. FORTIER: I think the only possible interpretation, in view of the record, is that no consensus was reached as to

the presentation to the federal government of the agreement, Professor Crawford.

PROFESSOR CRAWFORD: There is no indication as to why or to who was responsible for the lack of consensus, of course.

MR. FORTIER: That is correct.

PROFESSOR CRAWFORD: And I suppose it's pure speculation.

One possible interpretation, and I just put it forward because I have been puzzling about it. One possible interpretation is that some members thought that in presenting these boundaries for approval by Canada, they were in some sense derogating from what they thought was an agreement within their own domain.

So they might have said well why -- why do we need federal approval, these are our boundaries. We have already agreed to them. We have already notified them. We don't have to go off and ask for them to be approved.

MR. FORTIER: You took the words right out of my mouth, Professor Crawford.

PROFESSOR CRAWFORD: Well I'm sorry, I put them back. I don't -- I didn't mean to do that.

MR. FORTIER: No, no. I --

PROFESSOR CRAWFORD: I mean, I was just trying to work out what it meant. It's unfortunate that we don't have more - more specifications.

MR. FORTIER: You will be referred to later by my friend Mr.

Bertrand, about a contemporary Cabot Martin memo after the meeting, where he says it's no longer a constitutional issue, and that explains why the consensus in respect of that suggestion, there was no consensus, because it was not necessary. The feds were, as it were, a third party. This was, as it had been since the beginning, an agreement inter se with -- as far as the provinces concerned were -- as far as the provinces were concerned.

PROFESSOR CRAWFORD: There is a problem there with that, though, because as we know from the advice which the Deputy Attorney General was giving the Nova Scotia Government, frankly, the Nova Scotia Government could not have believed, and did not believe, that they actually owned the offshore, whatever the position with respect to territorial waters.

Obviously they -- that was still their position from a formal point of view, but they didn't have much faith in it, and they were -- they were right.

Newfoundland was different, because Newfoundland had had a different history, and it was adhering to the entirely arguable position that it had a continental shelf in 1949.

But Nova Scotia couldn't make that argument. So there is a problem with the sort of lack of consensus, as it were, implicit as between Nova Scotia and Newfoundland.

Newfoundland said they didn't need federal agreement, because these were their boundaries.

MR. FORTIER: Mmmm.

PROFESSOR CRAWFORD: Nova Scotia, well it's not clear what Nova Scotia thought, but it's very hard to see how they could actually have believed that.

MR. FORTIER: Well I think it's abundantly clear that whether the lines were to be used in the form of an amendment pursuant to section 3 of the BNA Act 1871, whether they were to be used as administrative lines, whether they were to be used as to delimit the sharing of the so-called Atlantic Pool, it mattered not, as between themselves, they had agreed the lines, which allowed any one of these arrangements, be it of a constitutional or other nature, to be implemented.

PROFESSOR CRAWFORD: The gist of it is that the words, no consensus was reached on this suggestion, although it's not precisely clear what they mean, actually support your position, rather than being, as it were, the introduction of yet another Crane at Wiggle as we might call it?

MR. FORTIER: Absolutely, Professor Crawford, yes. Mr. Bertrand refers me to the supplementary annex of documents and I have the Cabot Martin memo of August 1972, a copy sent to Frank Moores. It is tab 10. And you see there on page 3, Newfoundland took the position with regard to

approaching Ottawa with respect to the approval of these lines, that this course of action should not be followed for two basic reasons.

So it was felt by the Newfoundland delegation that the approval of these boundaries in whatever form possible would be part of the final agreement between the provinces and the federal government. But the approval should not be followed and for the reasons which are set out in that memo. That is one answer, Professor Crawford, to your question as to the lack of consensus.

PROFESSOR CRAWFORD: Yes. Well I think it is the answer.

Because this establishes that it was Newfoundland which opposed the proposal and the reasons were two-fold. First of all, the concern now was the division of areas of jurisdiction for limited purposes and not the extension of provincial boundaries and in the meaning of section 3.

MR. FORTIER: Right.

PROFESSOR CRAWFORD: And secondly, that they thought that the feds wouldn't agree.

MR. FORTIER: That is correct. And I think unwritten but suggested is they didn't care as far as the feds were concerned. Because as you know, it's at that point in time that the creation and the sharing of the so-called Atlantic pool comes into being that has nothing to do with ownership, but it's a use to which the agreed boundaries

could be put.

Now what was Premier Moores' state of mind? How informed was he when he attended the meeting of First Ministers on the weekend of 17th and 18, June? What was his intent when he agreed with his colleagues on the delineation of the boundaries? What knowledge did he have?

Well, Mr. Chairman, members of the Tribunal, let us review very briefly three documents which surprisingly are missing from the Crane compendium.

The first one is 30(b) in the book which we delivered to you earlier today. These are minutes -- keep in mind, Mr. Chairman, members of the Tribunal, that Mr. Moores had become Premier of Newfoundland, he had succeeded Mr. Smallwood earlier that year, in January of 1972. That is of some significance.

So he took it upon himself to be briefed about the offshore area situation. And here is a memo from the Deputy Minister of -- Mr. -- the Honourable D. S. MacDonald, who was a Minister of Energy at the time, the Federal Minister of Energy. Minutes of a meeting between the Honourable D. S. MacDonald, Premier Franks Moores of Newfoundland, the Honourable John Crosby, Newfoundland et cetera. The Honourable Mr. Doody in the first Moores cabinet. Mr. Doody will be referred to later, was

appointed Minister of Mines. And he attended that meeting. The Honourable Cheeseman, Newfoundland Minister of Fisheries. And Stu Peters, the Executive Assistant to Premier Moores.

They went to Ottawa on May the 9th to be briefed about this situation. And I invite you to turn to page 2 of the -- of this memorandum. And look first, if you would, to the point number 7. Premier Moores raised the question of the distribution of the provincial portion of offshore revenues amongst the provinces, and was reminded by Mr. Doody, who I open a parenthesis, had become Chairman of the JMRC at that time, when he was appointed Minister he became Chairman of the JMRC. We will see that later.

So Mr. Doody reminds his premier that the five Atlantic Provinces had some years ago agreed on boundary lines and spheres of interest. Mr. Doody himself says to his Premier, I remind you that the five Atlantic Provinces, the four Maritime Provinces plus Quebec, had some years ago agreed on boundary lines and spheres of interest. He was well informed, and he shared that information with his Premier at that meeting.

Look at point number 6, Mr. Chairman. The Minister, that is Mr. MacDonald, stated that he would arrange to have two or three officials of the department go to St. John's for the purpose of reviewing in detail the

background of events since December 1968.

If you now turn to exhibit 30(d) in the supplementary book, 30(d). Was there a meeting, as Mr. MacDonald had said should be arranged? Yes, Mr. Crosby and other officials went to St. John's as per the Minister's instructions on June the 6th, less than two weeks before the meeting in Halifax.

Who attended that meeting? If you turn to page 2 of that exhibit 30(d). The film is abundantly clear. In accordance with the Deputy Minister's instructions I made arrangements with Stu Peters for myself, and et cetera, to visit with Premier Moores and certain of his Ministers and officials to discuss matters relevant to the offshore mineral rights situation.

Who attended those meetings? The Honourable Frank Moores, Stu Peters and Mr. Cabot Martin of Memorial University. Please turn to the following page. "Premier Moores began the opening session..." -- he is informing himself. He wants to know what's the lay of the land or the lay of the sea. He wants to be informed -- "...began the opening session by asking my opinion on how we should proceed, where upon I assured him that we were completely at his disposal. The result was that I began with a review of the offshore situation from the beginning, utilizing an overall map of the eastcoast region that we

had constructed for the occasion."

I will have the opportunity later on demonstrate to you that this map is figure 9, which is in your book.

PROFESSOR CRAWFORD: Yes. I think there is no doubt that it was figure 9. It was clear that that was a federal map which showed the areas and showed a 135 degree line.

MR. FORTIER: I'm pleased to say that -- that there is no doubt in your mind, Mr. Crawford, that that's -- so there is no need --

PROFESSOR CRAWFORD: Well, of course --

MR. FORTIER: -- no need for me to spend any time --

PROFESSOR CRAWFORD: -- no -- I mean -- well, I mean, I speak only for myself, but there are certainly indications that that map was a federal providence. And that it was being discussed at the time.

MR. FORTIER: And the line was going 200 miles out. It did not stop at 2017 on that map.

PROFESSOR CRAWFORD: The word "constructed" of course, occurs in that memorandum, as I understand it. And obviously these -- we are still discussing all of this.

This is the first occasion that a 135 degree line or something that looks like a 135 degree line was shown on a map, is that right?

MR. FORTIER: To Newfoundland, yes.

PROFESSOR CRAWFORD: Well to anyone? I mean, I haven't seen

any earlier map which shows a 135 degree line. Obviously Crosby later on talked about it in his attempts to redefine the work of the JMRC.

MR. FORTIER: Mmmm.

PROFESSOR CRAWFORD: But this appears to be the very first attempt that anyone tried to draw the line out to the outer limits of the continental margin?

MR. FORTIER: Well you have, as you will do -- as you of course will be doing, you have to look at the totality of the evidence. You could refer to the Mobil permit, for example, and you would see coincidence of coincidence, you know, that it abuts a line that runs on 135 degree course, azimuth all the way into -- off the edge of the continental shelf.

PROFESSOR CRAWFORD: Yes, but as I understand it, the Mobil permit didn't go that far down? Well let me put it --

MR. FORTIER: Except it was on the 135 degree azimuth.

PROFESSOR CRAWFORD: It was on the 135 line. Yes, I think Newfoundland accepts that. But let me put it in terms of a question. Is there an earlier map showing a 135 degree line taken in effect from turning point 2017 in existence?

MR. FORTIER: I'm -- with a caveat that figure 9 had been shown to Nova Scotia earlier, there is no other map in the record which went -- which went as far as the figure 9 did, no. And so there is -- federal officials recount

that using an overall map of the eastcoast region that we had constructed for the occasion, I described Canada's submerged continental margin off the eastcoast explaining what it consists of, it's aerial distribution, it's aerial distribution and so on.

The words "aerial distribution" I think are clearly indicative that there were boundaries, interprovincial boundaries that were depicted on the map that was used, and indeed this is the case with figure 9.

MR. LEGAULT: Mr. Fortier, would the expression "aerial distribution" not apply equally to a map showing no boundaries, but showing the continental shelf off Labrador, off Newfoundland, off Nova Scotia?

MR. FORTIER: In the context of this -- of course the answer is yes, Mr. Legault. But in the context of this case, I think that this would be -- this would not be a reasonable interpretation of the words.

MR. LEGAULT: Thank you.

PROFESSOR CRAWFORD: It's interesting that -- and of course the map attributed different areas to Nova Scotia and Newfoundland based on the 135 degree line. It's interesting that it doesn't seem to have taken any account of St. Pierre and Miquelon?

MR. FORTIER: We will be reverting to St. Pierre and Miquelon later, Professor Crawford. But I invite you to

bear in mind that for Premier Moores, the Premier of Newfoundland, if there was one area offshore of his province after the Gulf of St. Lawrence in which he had an interest, it was that very area beyond point 2017.

And I think that this explains, you know, his keen interest in being informed of the situation. What are we talking about here? Are we talking about delimitation? No, we are taking about delineation. And he is being briefed, and when you seek to ascertain his intent when he joined into the Agreement of June -- during the weekend of June 17 and 18, you cannot make abstraction of this knowledge which was imparted to him with the map, with figure 9.

You can only characterize the state of his intention, the state of his mind by looking at the material which was used in order to brief him. His meeting in Ottawa earlier that month. This meeting with Mr. Crosby and others. And that will assist you in determining his state of mind.

And if you look to page 4 of the Crosby memo, please, Mr. Chairman, gentlemen, during the course of the meetings several materials were given to the Newfoundland people. The eastcoast map used in my presentation is one of them. They left that eastcoast -- that figure 9 with Mr. Moores.

And I think the -- I will have more to say about the burden of proof at some point. But I think that this is

fodder for the Nova Scotia submission, that the burden of proof insofar as the intent of the provincial Premiers was concerned, the burden of proof has shifted.

I think that we have demonstrated, demonstrated in a patently convincing way, that Premier Moores had the intention to bind his province to these boundaries, including the offshore area beyond point 2017.

I am reviewing in turn the information which Premier Moores had when he went to Halifax the weekend of June 17th. I have shown you the minutes of the meeting in Ottawa the 9th of May. I have shown you now the minutes of the meeting of 6th of June in St. John's.

I invite you now to look at exhibit 30(a), another document which Mr. Moores was given. It is in our book. It is the letter by the Secretary of the JMRC, which reads, as you will recall, that the Minister -- the Chairman of the JMRC, at the May 24, 1972 meeting of the Committee had been directed to write to the First Ministers of the five eastern provinces and inform them of the views of the Committee in regard to offshore minerals, and I'm writing you directly as Secretary of the Committee and you -- you will see that a copy of the minutes of the meeting of May 24, which is annex 28(a), to which I will be returning later, is annexed to the Walker letter.

If you turn to page 2, Frank Moores -- the Honourable

Frank Moores is told -- it's item 4 -- in preparation for the meeting to take place on the weekend of the 17th, this is additional knowledge which is imparted to the Honourable Frank Moores. Item 4, the governments of the four Atlantic provinces and the Province of Quebec should confirm the delineation and description of the boundaries of the said five provinces in the submarine areas and the turning points in longitude and latitude relating thereto, as was requested by the Honourable Paul Allard, et cetera. A copy of the map showing the delineation and description of the said boundaries and the turning points is attached to the minutes.

PROFESSOR CRAWFORD: That map was the JMRC map. It didn't show the southeast line?

MR. FORTIER: That is correct, Professor Crawford. That is absolutely correct, but it was not the role of the JMRC subcommittee to do other than identify the turning points, and I will be -- there were no turning points beyond 2017.

PROFESSOR CRAWFORD: If this had been an international operation, I mean really as distinct from Terms of Reference laid down subsequently, and you had told a group to go away and produce what amounted to a maritime demarcation -- I mean it's rather like that -- of the 1964 Agreement, it would be incomprehensible not to work out where the southeast line was because it is one of the main

uncertainties in the 1964 document.

I mean, you can -- taking the description of what they thought they were doing in 1964, it's possible to work out turning points, and Crosby did it, but as he said, you could only work out the southeast line by making a series of assumptions.

MR. FORTIER: Actually, by making only -- it's not even an assumption. You could work it out in only one possible way. Southeast 135 degree azimuth beyond the last turning point -- that is indeed what the legislation -- the Nova Scotia legislation says, if we look at the description.

PROFESSOR CRAWFORD: That's not what the 1964 map actually did, so there was a contradiction in the '64 business because the map showed a line that wasn't a 135 azimuth, and then you had the description -- the two different descriptions of what that line was to be.

So I mean, there was a problem, and if you had been demarcating with more accuracy, I mean it's surprising that the JMRC didn't do that.

MR. FORTIER: Well, I question whether, given their mandate, Professor Crawford -- given their very explicit mandate, and I will be dealing with it later, I question whether there was any obligation on the part of the sub-committee, and, indeed, the committee, to do other than identify all of the turning points and beyond turning point 2017 to

refer back to the 1964 line.

It all fits together. Are there gaps in the record? Of course there are, but it all fits together and it's the only possible interpretation of the totality of the '64, the '68, the '72 documents to find that beyond point 2017 the line extended to the edge of the continental shelf, which I repeat again was of vital interest to the Province of Newfoundland.

So what we have seen in the last many minutes is a Frank Moores statement following the meeting of First Ministers in Halifax, weekend of 16th of June. I took you to some contemporary documents -- a telephone -- note of telephone conversation with Stu Peters, the extract from the meeting of First Ministers of 2 August with reference to the agreed boundaries and then asking the question, was Mr. Moores informed? Was Premier Moores informed?

We went through the -- I mean his extensive briefing in Ottawa on May 9, in St. John's on June the 6th, and finally, the letter from the Secretary to the JMRC on the 16th of June, and this was -- this constituted the information, the knowledge which he had when he, with the four other Premiers who had previously been in the loop, so to speak, which he had when he joined the other four Premiers in reaching an agreement on the delineation of the boundaries.

Now where did this story begin? 1972 is an important year, a very important year in the history of the boundaries as between the five concerned provinces. Where did it all begin?

Well, we know that it all began in 1959, and that is the first document in Mr. Crane's compendium. It all began in 1959. It was driven by -- it was driven by an application or applications for mining licenses and leases. This was the motor which led to the consideration by the Maritime provinces of boundaries.

There were mining licenses that were applied for; there were leases that were applied for in the search for petroleum offshore area, and you see the reference to the area surrounding and including Sable Island and extending considerably more than three miles beyond the boundaries of Sable Island. That's paragraph 2 of the document number 1.

This document recites the two issues, and there are two distinct issues, ownership versus boundary. The state of the political situation in Canada is reviewed in that memorandum. Ottawa takes the position that they -- ownership is vested in the Crown in right of Canada. This official -- provincial official says he disagrees with the view expressed by the Minister, and we will see presently that other learned persons disagreed with that views --

with that view.

You see at the bottom of page 2, "It is suggested that some steps along the lines of the following should be taken without delay. (1) The province should determine what stand it proposes to take on this whole question." That's the question of federal versus provincial ownership. "And also on the question of boundary divisions between the provinces."

Right from the beginning, right from the inception, if you look at the genesis of the story, right at the outset this official says there are two problems. There are two separate problems. Who owns the offshore and what about the boundaries of the provinces inter se? And they have to be tackled, as they were, separately from one other throughout the process.

PROFESSOR CRAWFORD: But Mr. Fortier, the second issue only arose if the first issue was resolved in favour of the provinces, surely?

MR. FORTIER: With respect, Professor Crawford, no. We see the evidence of that in 1972 when the feds say, you know, let's create a pool. And the provinces -- and the feds say, and I'll be referring to -- no, it's up to the provinces to decide how they divide it.

But how could they divide it unless they had boundaries, they had areas? And it's the same with the

so-called administrative line which Prime Minister Trudeau alluded to in 1968, and we will be coming to these letters. No.

PROFESSOR CRAWFORD: Mr. Fortier, I don't want to put you off your line of argument, but I say this knowing that it would be impossible. At some point, I hope you will address the correspondence between Mr. Doody and I think it was -- this is later, in '72 -- Mr. Doody and Mr. Kirby.

MR. FORTIER: Yes, we -- I'm using the papal, we will.

Professor Crawford, my friend, Mr. Bertrand, at that point will be on his feet, but we have already seen references, though, to Mr. Doody. He knew about the 1964 Agreement. He told his Premier, look, these lines have been agreed in 1964. And a few days later the delineation of the lines was -- so please bear that in mind as you wait impatiently for Mr. Bertrand's presentation.

So 1959, first document, document number one, there are two issues, ownership of the offshore area, the feds take the position that they own. Mr. -- Mr. whatever his name is. Excuse me. The Deputy Minister anyway, of Nova Scotia says that I disagree with that view.

And then there is the question of the boundaries. And it doesn't matter how you cut it, it doesn't matter how you look at it, it doesn't matter how you view it, these

were in 1959 considered to be two separate issues, and throughout the piece they remained separate issues.

The boundaries were for the provinces to agree between themselves, ownership needed to be negotiated, in the fullness of time needed to be determined by the Supreme Court of Canada.

I said that Mr. -- the Deputy Minister was not -- was not alone in being of the view that the -- it wasn't the feds -- it wasn't the federal -- the Crown in Right of Canada, but rather the Crown in Right of the Provinces, which owned the offshore area.

And there was a legal opinion which is in the record. It's filed as exhibit 2(a). And the conclusions of that legal opinion have to be borne in mind when you seek to determine, when you seek to ascertain, the frame of mind of the Premiers when they agreed the delimitations, when they agreed the boundaries in 1964. When you are trying to -- when you are trying to determine, to characterize the -- their frame of mind, bear in mind that that legal opinion had been delivered to all of the, as we will see, to all of the provinces which participated in first, the meeting of Attorneys General in 1964, and then the meeting of the Premiers.

The Provinces believed on the basis of a legal opinion that they had received from the Special Advisor to the

Premier of New Brunswick, they believed that they were entitled to ownership of the offshore area to the edge of the continental shelf. That is paragraph 5 of the conclusions. That informs the Premiers and their officials in the lead-up to the September 30, 1964 Agreement. This is, as I said, exhibit 29(a).

We then -- we then come, and I assure you that I will not be dealing with all of the documents, only those which I consider are the most relevant, the most crucial ones, I would like to -- I invite you to turn to 5(a), exhibit 5(a).

There was a meeting of the Attorney Generals of the concerned provinces in June of 1961. And there is a reference in these minutes, it has been highlighted in your book, that is 5(a), the question of the continental shelf, which extends out in the Gulf of St. Lawrence, as well out in the Atlantic Ocean and who owns oil, gas, or mineral rights has to be decided upon. That is in the mind of senior officials at that time. And eventually is conveyed to the minds of the Premiers.

If you look at page two of exhibit 5(a), Mr. Chairman, members of the Bar -- members of the Panel, you see after a new complete grid map is prepared and some other data gathered, there is to be a meeting, et cetera.

So we see an invitation, or an offer, for a map to be

prepared. And as far as I could determine, that is the first reference to the -- to the necessity of having a map, and having description of the boundary.

Then if you turn to -- if you turn to document number 5 in Mr. Crane's compendium, you see a memorandum which followed the meeting of the Attorney Generals to which I have just -- to which I have just referred. Exhibit 5(a). This is an internal Newfoundland Memorandum, drafted as I said, the day after the meeting of the AG's.

And I invite you, in the course -- in the quiet of your deliberation room, to read this document. We discussed provincial rights to the three mile limit, and also twelve miles offshore. We also discussed continental shelf. Other participants had a copy of the report made by someone who is referred to as Professor Forest, which --

PROFESSOR CRAWFORD: I was going to say we have got

Professor Forest's report. I thought there might have been a second -- a second opinion.

MR. FORTIER: I -- that's exhibit 2(a).

PROFESSOR CRAWFORD: Was Newfoundland represented at that meeting? I can't see from the earlier --

MR. FORTIER: At that meeting of June 28th?

PROFESSOR CRAWFORD: Yes.

MR. FORTIER: Oh yes, the Honourable Leslie Curtis, Attorney

General of Newfoundland. The third name on exhibit 5(a), Professor Crawford. Mr. Curtis, Attorney General of Newfoundland.

PROFESSOR CRAWFORD: Yes. Now he was at the June 28th meeting, but -- oh I see, yes he was. Yes, right. Sorry.

MR. FORTIER: And if -- you know, this Memorandum goes on, we should get a copy from New Brunswick, et cetera. Someone in our government must have a copy of this report, and it should be located. If not, we should get a copy. So all the players have a copy of the report, and say we don't have it, but we have to get it.

They have done considerable work on this. Their immediate object -- their immediate object is not ownership, it is to determine to draw boundary. Forget ownership. The immediate object is to determine the interests of each on waters between their provinces. The idea being to draw a line, et cetera. This is all that is at issue. Because of what? Because of the permits. Because of the riches of the soil.

PEI and Nova Scotia have already -- who have already shown on a map the line between their two provinces, that was going on a parallel course, will define the offshore mineral and oil rights of the provinces. They were delimiting rights, not territory. They were delimiting rights.

And then reference to the fact Quebec -- that Quebec will be consulted, and asked to join in a request to the federal government to have those areas declared to be provincial rights under the provisions of the BNA Act, which authorized the federal parliament to define provincial boundaries.

First you agree boundary, then you assert jurisdiction. Not the other way around, as Newfoundland would have you believe. First you agree boundary, then you assert jurisdiction.

MR. LEGAULT: Mr. Fortier, assert boundaries to what?

MR. FORTIER: Assert boundaries -- in the minds --

MR. LEGAULT: To the jurisdiction you claim, presumably?

MR. FORTIER: Yes. In the mind of the Premiers on the basis of the legal opinion which they had, they needed to -- they needed to have those boundaries sanctioned by a constitutional amendment under section 3 of BNA 1871.

But they -- as it turned -- excuse me, Mr. Legault.

MR. LEGAULT: But -- I'm sorry, Mr. Fortier. But doesn't the legal opinion of the distinguished Professor Forest suggest that one of the first things they have got to do is obtain jurisdiction?

MR. FORTIER: One of the first -- one of the first things they have to do, if you look at the --

MR. LEGAULT: While there is -- I'm reading from the

opinion, conclusion 5. While there is an argument the other way, a legal argument can be made that the Maritime Provinces, so on, own the submarine subsoil under the continental shelf, which stretches from the shore to about 200 miles from Newfoundland.

Wouldn't the natural inference from that be that the provinces have to go out and make those arguments, perfect that potential claim?

MR. FORTIER: This could only -- this could only be done if initially they had agreed between themselves as to where the line should be drawn.

MR. LEGAULT: Yes. But the lines they would be agreeing upon would be the lines pertaining to what they claimed?

MR. FORTIER: You know, Mr. Legault, I follow you. That's an important question. And we can argue today as to whether the Premiers' strategy was correct. We can argue whether their strategy at that time was correct.

It's very easy for Newfoundland to assert that without ownership of mineral rights there was nothing for the Premiers to delimit. It's just as easy for Newfoundland to stand up and argue that the provinces permitting activity is irrelevant, since they had no legal right to issue permits.

But the question is not what Newfoundland thinks today, it's what it thought and what it did in that

period. And what they thought and what it did is what I'm trying to -- is what I'm trying to demonstrate.

MR. LEGAULT: I most certainly would not wish to get into an argument with you, Mr. Fortier, thank you very much.

MR. FORTIER: The Premiers were determined, I think it's clear, first of all -- first of all, let's agree the boundaries.

PROFESSOR CRAWFORD: There is a problem of form, isn't there, and this is for the sake of argument accepting your position that the Terms of Reference require the application of international law and not Canadian law, but there is still a question of form.

I -- whether there any other cases -- I mean, they envisaged that if their claim succeeded it would be implemented by way of section 3 of the 1871 Act. Is there any examples of changes in provincial limits under section 3 which involved prior provincial agreement on what those -- on what the limits would be?

This is a question you may want to take on notice, but I'm quite interested to know --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- I mean, if someone is interested in changing their boundaries with another provinces --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- and they have to get agreement from

that province, what form does that agreement take?

MR. FORTIER: Yes. I have a recollection that you asked that question last week, Professor Crawford, but I will take it on notice, if I may, and certainly before we -- we will provide you with the answer.

Now, I invite you to turn to document number 6 in the Crane compendium. We come to the follow-up to the June 28th meeting of Attorneys General. And the date is August the 7th, 1961.

A copy was sent, as you see, to the Attorney General of Newfoundland. And to the Attorneys General of the other concerned provinces.

MR. LEGAULT: What is the number of the annex you are referring to?

MR. FORTIER: I'm referring to document number 6 in Mr. Crane's book. Thank you, Mr. Legault. The document number 6 in the long book. Yes.

This is a very -- this is a very -- another very important document. "At the meeting in Halifax on the 28th of June..." -- that's 5(a), you may wish to note on your copy of the letter, "...we undertook to request our Department of Mines to prepare a plan and descriptions delineating the boundaries between the several provinces of Quebec, Newfoundland, New Brunswick, Prince Edward Island and Nova Scotia. It was our understanding that the

boundaries so delineated might be agreed upon among the provinces concerned or at least would provide a basis for further discussions, and when agreement had been reached..." -- when agreement had been reached. You have got a time line here.

First, we must agree the boundaries. That's abundantly clear, crystal clear.

"When agreement had been reached, the several provinces would approach the federal government for a settling of the boundaries between the provinces as provided for in the BNA Act 1871. It was further our understanding that you, Mr. Rogers, would discuss the situation generally and the suggested boundary lines in particular with the appropriate officials of the Province of Quebec.", who were, of course, not represented at the June 28th meeting.

"I am, accordingly, forwarding to you two copies of the map..." -- that's annex 32, as you well know by now -- "...and the verbal descriptions, the Notes re Boundaries... -- annex 31 -- "... and I'm sending a copy of this letter along with one copy of the map and one copy of the verbal descriptions to the Attorney General of New Brunswick and the Attorney General of Newfoundland."

So as of August of 1961, the map and the Notes re Boundaries, the descriptions, the detailed descriptions of

the boundaries are in the hands of the interested provinces at one of the highest political levels, the law officers of the provinces, the Attorneys General.

From 1961, they -- since 1961, they have had the map. Since 1961, they have had the detailed descriptions of the boundaries, and they are reminding themselves now, firstly -- in the first instance, we have to agree the boundaries. Unless and until we agree the boundaries, we cannot approach the federal government. Rightly or wrongly, that was the strategy. Rightly or wrongly. We must have an agreement amongst ourselves on the boundaries, and here is a map that we have prepared that shows the boundaries, that describes the boundaries over seven pages, and we continue.

And we come to -- we come to document number 6(a), Mr. Chairman, members of the Tribunal, in your new book. 6(a) is yet further evidence of the process, the two-step process that was envisaged by the provinces. There is a reference to exhibit 2(a), the report that I referred to earlier. In 1959 there was a report that was presented, and it contains some argument as to ownership by the provinces of submarine lands extending the width of the continental shelf.

Page 2 -- you will recall that arising out of a meeting of the Atlantic Province Premiers you called a

meeting of the Attorneys General in June, 1961 -- minutes are document 5(a) -- at which time it was agreed that we should, first of all, agree amongst ourselves upon interprovincial boundaries.

We should, it was agreed -- we agreed to agree, to use an expression which is current in this case. This is the agreement to agree and the Agreement came in 1964. We should, first of all, agree amongst ourselves upon interprovincial boundaries.

At our request, Dr. Nowlan prepared a plan and a verbal description of the suggested boundaries between the five provinces. I sent copies of this plan and descriptions to all concerned, and then and only then -- if you go to the following paragraph on page 2 -- is there a reference to how we should approach -- how the provinces should approach the federal authorities.

Now that is a question of policy. That's different from the agreement on boundaries. What our approach should be to the federal authorities; what our political approach should be -- that's a question of policy. That's for the politicians to determine. But with respect to boundaries, that's up to ourselves because we must agree amongst ourselves upon interprovincial boundaries.

It's crystal clear that on the one hand, the first question to be resolved is the boundaries. That's up to

the provinces. And on the other hand, the second question, the approach to the feds -- well, that's a question of policy. That's the political tenet of the situation.

Document 6(b), Mr. Chairman, another one --

PROFESSOR CRAWFORD: In fact, the sentence which you haven't highlighted that seems helpful is following that paragraph where he says that "This would..." -- that is the use of section 3 -- "...involve eventual federal legislation, but for the time being, a commitment would be quite sufficient for our purpose."

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: And I suppose the crucial question is what his purpose was.

MR. FORTIER: The purpose was to get in place a system which would allow the provinces to issue permits. That's the purpose from the beginning.

You know, there are all these oil companies, these hungry oil companies who are out there. They think that there is oil and gas in the offshore area, and they want a system in place -- the oil companies want a system in place that will allow us, the provinces, to issue permits.

We -- as it came to pass, it was -- and as exists today, you know, there are boards in place which issue permits, but you cannot issue permits and send some of the

royalties to the provinces unless you have an agreement on boundaries. So that's the purpose, Professor Crawford.

PROFESSOR CRAWFORD: He might have been saying, well, let's at least get agreement between us in the sense of an understanding. He may not have been addressing the question whether that agreement per se was legally binding as an executory agreement.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: He might have said, well, look, it's sufficient that we have an understanding between us on the basis of which we will act in issuing permits. Now if two states had done that -- had in effect, had a modus vivendi and had then issued permits --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- one might very well take that into account in delimitation, not because it was an agreement, but because it was, in effect, an estoppel. I mean we --

MR. FORTIER: That's a word which I like to hear, Professor Crawford.

PROFESSOR CRAWFORD: Well, I'm glad you like to hear it, but the question is when you like to hear it.

MR. FORTIER: Later.

PROFESSOR CRAWFORD: Yes, but not a lot later.

MR. FORTIER: But you are absolutely right. In fact, in going through that document in particular and others, too,

yesterday, I remember saying to some of my colleagues, I think we should highlight the whole document, because these documents are all demonstrative of what the parties' frame of mind was during that period of time that led to the September 30th, 1964 Agreement on boundaries.

Their frame of mind, I think, is ascertained very convincingly by looking at these scraps of paper -- another expression which we heard last week from our friends from Newfoundland. These scraps of paper. Frame of mind of the provinces was let's agree on boundaries and then let's agree on an approach to the feds, but that's a question of policy. And for the time being, as this official says, a commitment by the feds is sufficient so that we can have stability in the area, so that we can have some permanence of stability in the area.

I come to -- I had mentioned document 6(b) which is in our book. The number one question is summed up in the first paragraph. "The following is a resumé of the events to date in connection with the efforts being made by the Atlantic provinces, et cetera, to establish a definite boundary line in Northumberland Strait so that..." -- Professor Crawford -- "...so that any oil, gas or mineral rights under the Strait would clearly be defined as to ownership."

That is the number one question, establishing a

definite boundary line, and then the purpose -- the purpose follows. And if you go to page 2 of that exhibit 6(b), the Attorney General of New Brunswick had a gentleman with him who had made a study in this connection, and he thinks that if any two provinces decide on a boundary line between them that they can then apply to Ottawa under the terms of the BNA, and the boundary line decided upon would be made final.

He thinks that in the case of Northumberland Strait, if New Brunswick, Nova Scotia and Prince Edward Island officially made representation to Ottawa and agreed on the boundary line as outlined on the marine chart drawing, annex 33, that Ottawa would be bound to accept this as a boundary line.

Now the learned gentleman may not have been right, but it matters not. He was informing his principals that it would be automatic if the provinces agreed, so it could not be a condition of the Agreement.

This is very important, again, when you seek to ascertain the frame of mind of the Premiers in September of 1964. They had been told by the -- by this learned jurist that it would be automatic. If the provinces agreed, then Ottawa would be bound to accept this as a boundary line.

CHAIRMAN: Where do you take this opinion? I don't see it

there.

MR. FORTIER: No, I'm just referring to the interpretation of the opinion given by Mr. Rogers. Agreed -- sorry, that's on page 2. Yes, on page 2, Mr. Chairman.

PROFESSOR CRAWFORD: Of course, he is talking about the boundary there between Nova Scotia and Prince Edward Island and New Brunswick --

MR. FORTIER: Oh, yes.

PROFESSOR CRAWFORD: -- and Prince Edward Island --

MR. FORTIER: Oh, yes. Yes.

PROFESSOR CRAWFORD: -- just on the basis of a clear opinion that, at least as to internal waters and territorial waters, these belong to the provinces. So he is not deciding -- I mean he is not expressing any view about the continental shelf --

MR. FORTIER: No, not --

PROFESSOR CRAWFORD: -- and his opinion --

MR. FORTIER: Not here. Not here.

PROFESSOR CRAWFORD: Not here. And his opinion, very fairly at the time, said, well, the arguments are not as strong about the continental shelf. And that was -- and that was proved to be right. There was a good opinion, although it lost in Australia and it lost here, that the territorial waters, at least, were provincial. The argument that the continental shelf was provincial had a hair on it, if I

can put it that way.

MR. FORTIER: But my point is that there was no automaticity. That's the point of my submission here, that there was no automaticity. If the provinces agreed, even, say PEI and Nova Scotia, and applied for an amendment under section 3, we know that section 3 uses the verb "may" -- the federal government "may", so it was not automatic.

MR. LEGAULT: Mr. Fortier, is there any evidence at all that anybody believed this gentleman from New Brunswick?

CHAIRMAN: The thing -- I have not referred and you have not referred to the original document, but I must say it strikes me as odd that it would be automatic when it says that -- the Act itself says, you know, the Federal Parliament --

MR. FORTIER: May.

CHAIRMAN: -- may, with the consent. It is the motion -- the operative part of this is a federal statute, with, of course, consent in by legislation.

PROFESSOR CRAWFORD: Interesting point --

MR. FORTIER: Yes, I agree, Mr. Chairman. I agree.

PROFESSOR CRAWFORD: It's an interesting point. If you assume the distinguished gentleman was right on the territorial sea or internal waters on both sides, so the only question was the delimitation of areas already

conceded to be, within principle, within the limits of the provinces, there is a respectable argument that the provinces could have decided that issue for themselves applying, in effect, the Crosby case, that it would have been --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- an executive concession as to where things were and not a constitution of something that was not there already.

MR. FORTIER: I agree.

PROFESSOR CRAWFORD: Yes.

MR. FORTIER: I agree with you, Professor. What is relevant here, Mr. Chairman, members of the Tribunal, is not what that gentleman said; it's what the provinces believed. And this is the evidence which is before you, what the provinces believed. And when you are framing -- when you are characterizing their frame of mind, their intent, you have to go on the basis of what the documentary record reveals as to what they believed.

MR. LEGAULT: Mr. Fortier --

MR. FORTIER: Yes.

MR. LEGAULT: -- again, I would suggest that this is what they heard. We have no evidence as to their belief.

MR. FORTIER: Well --

MR. LEGAULT: Thank you.

MR. FORTIER: -- it only makes -- with respect, they -- it only makes sense if that is what they believed. It only makes sense if you look at the totality of the evidence.

PROFESSOR CRAWFORD: In any event, I mean who is going to fathom the subjective intentions of provincial Premiers? I mean we are not into Willen's theory or anything like that. The question is what can we deduce from the documents that --

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: -- they did, and that's an objective question. That's --

MR. FORTIER: That's what I'm trying to demonstrate.

CHAIRMAN: When you come to a convenient point, Mr. Fortier, I think a break might be in order.

MR. FORTIER: Very well. Oh, I didn't realize it was this late. Can I take about another five or ten minutes and then come to the 1964 Agreement, or is it imperative that --

CHAIRMAN: Five minutes. Five minutes.

MR. LEGAULT: That, Mr. Fortier, is a personal question.

MR. FORTIER: I was trying to -- I was trying to use a neutral word, Mr. Legault.

I will go very quickly through a few more documents before we adjourn.

If you look at document 7(a), we are getting close to

the 1964 -- 7(a), not in the Crane compendium. A very important document when you seek to interpret the Agreement which we maintain was reached on September 30, 1964.

You see this letter, 7(a). Thank you -- Mr. Malachi Jones, thank you for your letter, et cetera, in connection with the Agreement regarding the boundaries, et cetera, acceptable to Nova Scotia, acceptable to New Brunswick and to PEI.

The thought back of the original letter which was signed by the AG's of the three provinces was accepting the boundary line set forth on the marine chart which covers the Atlantic Coast Gulf and the River St. Lawrence, et cetera. If you go to the -- so here is the '61 map and then you go to the bottom of the page. It's clear that as between the provinces this was an Agreement inter se. This line was accepted as a boundary line.

And I think it's about as far as we can go at the present time, but I feel it must be clearly understood that each of the provinces should have the right to issue offshore licences on their respective sides of this accepted boundary line. That was the purpose.

And later -- the last line on 7(a). "And later if we have to argue with Ottawa..." -- that rarely happens in Canada -- "...but if we have to argue with Ottawa about

it, we will only have to do so." Crystal clear as to what their intention was.

Paragraph -- sorry, exhibit 8 in the Crane compendium. That's the letter to -- from Quebec. Quebec, as we know, is a very interested province, as are the Atlantic Provinces. And you were referred to this letter by my friend, Mr. Drymer.

Mr. Allard says, "My Minister" -- the third paragraph -- "My Minister is quite pleased with the idea of fixing the boundary between our provinces. And he agrees with your present plan." And the last paragraph, again, we have, you know, a two-step process.

PROFESSOR CRAWFORD: Let's assume that -- we are not talking about internal waters here, we are talking about the offshore. Let's assume that I don't actually have the authority to make an agreement as to the offshore simply because I don't own it but I have a permitting practice. And I reach an understanding with my neighbor that we will both issues permits on one or other side of the line, and we do, so we rely on that arrangement.

You might argue that that is -- okay that's not an agreement because you didn't have authority, it simply gives rise to a situation of vested rights based upon legitimate expectation or estoppel.

But is that really what we are concerned with here? I

mean, is that an agreement disposing of the boundaries within the meaning of the Terms of Reference?

MR. FORTIER: In our submission, yes, Professor Crawford, unquestionably. Unquestionably.

PROFESSOR CRAWFORD: But the point is in that situation a mere executory, that is an unimplemented undertaking or understanding if it's not -- if there is no authority, as it were, to contract is not binding per se. What makes it binding is reliance. So you would say that this wasn't the realm of agreement, this was the realm of estoppel and relevant considerations.

MR. FORTIER: Which is one of our -- our arguments in our Memorial, in our written pleadings, which I'm told and I have seen the record. Unfortunately Ms. Hughes did not have a chance to deal with last Tuesday because she ran out of time.

But we -- contrary to what Newfoundland has said, we don't abandon our acquiescence and estoppel arguments, quite the contrary, as being confirmatory of the 1964 -- the conduct being confirmatory of the 1964 Agreement.

PROFESSOR CRAWFORD: The problem I have -- and I'm sorry, I just want to spend a little time on this. I think it is important. The problem I have with estoppel -- I mean, you can have an estoppel as to a contract because a party may be estopped from denying that they have entered into a

contract by conduct and that would give rise to a legal situation which was equivalent to agreement.

But in the normal situation of an estoppel, in effect a proprietary estoppel or something like that, you wouldn't have an agreement, you would have a situation which might have the same legal results as an agreement but it would be analytically distinct?

MR. FORTIER: I would -- an answer to your observation and question, Professor Crawford, would require a little more than just the five -- the two or three minutes which I promised I would spend before the break, but I will deal with it later, if I may.

And before we come to the 1964 Agreement, we have the document 9 in the Crane compendium. Members of the Tribunal will recall that a week before the meeting of the Premiers, there was a meeting of the Attorneys General of the -- of four provinces. Newfoundland was not present at that meeting.

But if you look to document 9(a), which was unfortunately not included in Mr. Crane's compendium, you will see 9(a), that this memorandum which we have come to now, which is reflected in exhibit 9, this memorandum was sent to the Deputy Minister, et cetera, in St. John's, Newfoundland.

So it is not of any moment to state well Newfoundland

was not present. They received a -- they received the memorandum and they were informed by the memorandum. And this -- you are -- you remember this document, this was the memorandum, the AG's are meeting. They are in agreement on the following points and they make recommendations to their respective governments.

And we will -- we -- that's what the Premiers of the five provinces were seized of when they met a week later. And if you look at paragraph 2, I have to read the whole paragraph. And then that will conclude my argument before the break.

"The meeting felt that it was desirable that the boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities, and the necessary steps should be taken to give effect of that agreement. In this respect a plan was prepared." We have gone from the level of officials to the level of Attorneys General, the law officers of the provinces. "In this respect, a plan was prepared by the Nova Scotia department setting forth graphically and by metes and bounds the suggested..." -- of course the officials could only suggest -- "...boundary lines covering the Bay of Fundy, Northumberland Strait, the Gulf of St. Lawrence, including the Bay of Chaleur and the Strait of Belle Isle and Cabot Strait. These suggested boundaries have had the tentative

approval of New Brunswick, PEI and Newfoundland and Nova Scotia, and it is understood are also acceptable to Quebec."

The AG's cannot the bind the provinces. They have had -- so that's step one. They have had the tentative approval. "It is now recommended that these boundaries should have the more formal approval of the several governments concerned." That's for next week. That's for September 30th. That's when they make the deal.

"It is further recommended that parliament be asked to define the boundaries as so approved."

So you have the three steps. The first one, the agreement on boundaries. The second -- by the AG's. The second more formal approval by the Premiers. That's to come later. And then the third step, if you look to paragraph 4, it comes into focus.

It's a formal recognition of the rights of the provinces should be obtained from the federal government. That's their approach. And lest there be any doubt as to what the area which was being delimited included, you look at paragraph 5, the principles stated above with respect to inland waters would and should extend to coastal waters including, subject to international law, the areas and the banks off Newfoundland and Nova Scotia, which is exactly what the map represented, which is exactly what was to --

which was found in the description.

And then we come to the Agreement reached by the Premiers, whether you call it a statement, joint communique. I have a suggestion to make. Let's just call it the 1964 Agreement.

Thank you, Mr. Chairman.

MR. LEGAULT: Mr. Fortier, if I may, just a very brief question. Does the memorandum of this meeting of 23rd September 1964, in your view, reflect accurately what is contained and suggested and implied in the earlier correspondence that you have referred to this morning?

MR. FORTIER: The answer is yes, Mr. Legault. I think if you look at the paper trail, you know, you have a number of meetings by officials at different levels. And then you come to the meeting of the Attorneys General. And then you come to September 30th. And it is consistent with only one deal, one agreement, that's the one which the Premiers reached on September 30, 1964.

MR. LEGAULT: Thank you very much.

MR. FORTIER: Thank you, Mr. Legault. I'm taking more time than I expected but then I'm getting more questions than I expected. 10, 15 minutes, Mr. Chairman.

CHAIRMAN: 15?

MR. FORTIER: Sure. Thank you.

(Recess)

MR. FORTIER: Mr. Chairman, members of the Tribunal, before the break I, in answer to a question from Mr. Legault, I stated that it was demonstrably clear that the events -- the key events of 1964 were the culmination of a process that had begun in 1959. And that the Agreement which the Premiers reached on the 30th of September of that year, was informed by the series of meetings, documents, et cetera, that had seen the light of day in the course of the previous 15 years.

There was an agenda for the September 30 meeting. It was not included in the Crane compendium. We included as item 9(b) in our book. And it shows that there were two separate questions which were on the agenda of the Premiers when they met and considered submarine mineral rights and provincial boundaries.

The first one, 2(a), were the constitutional questions. That was a matter of federal-provincial matter. A matter of federal-provincial concern, interest. And then (b), there were the agreed boundaries. On the agenda, the agreed boundaries as between the provinces inter se. That's document 9(b). Sorry, 9(a).

And then we come to the 1964 Agreement, that's item 10 in the Crane memorandum -- in the Crane compendium. And I question whether I can say more than has already been said about that document. What -- save the following. In

Newfoundland's written submissions, their position was that the 1964 Agreement was not an agreement, that it was a proposal. That is abundantly clear from their Memorial and their Counter Memorial.

But last week, what we heard from their learned counsel, was that it was the 1964 document was a present indication of what those boundaries are going to be. It was an agreement to agree in the future. It was no longer characterized as a proposal.

Well, whether it is characterized as a proposal or as an agreement to agree, I fail to see how on a reading of the document in question, one can even doubt that the Premiers knew very well what they were doing.

To believe the Newfoundland submission is in fact to treat these Premiers as morons, that they didn't know what they were doing. That the words that the Premiers, you know, at the highest political level, the provinces were represented by their First Ministers, and the document says they unanimously agreed that -- I turn to paragraph four -- that it is desirable that the marine boundaries as between the several Atlantic Provinces should be agreed upon by the provincial authorities, and the necessary steps taken to give effect of that agreement. It's desirable that the boundaries should be -- should be agreed.

And then five -- well that the boundaries described in Schedule "A", that the boundaries shown graphically on Schedule "B" be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland. Where is the ambiguity? Where can it be argued, on the basis of this document, that the boundaries were not agreed by the Premiers?

I'm not going to take you to the dictionary, my friend Mr. Drymer did that. When the Premiers wanted to say "should be" they said it. Look at paragraph two, "should be obtained." Look at paragraph four, "should be agreed." Look at paragraph seven, "should be made." When the Premiers wanted to say "be asked", look at paragraph six, "that the Parliament of Canada be asked".

But when they wanted to say that they had agreed on the boundaries, they said that the boundaries described be the marine boundaries, et cetera. There is not any ambiguity whatsoever in the wording of that Agreement. The Premiers understood very well what they were doing. And they had agreed on their boundaries as between themselves.

Now, the nature of the document has been put into question. But what was it really? Was it a joint communique? Was it a statement? As I said, it's a 1964 Agreement. It's clear, that's what it is.

Need I remind distinguished members of the Tribunal that the Truman Proclamation in 1945 was a press release? 1948. My mistake. 1948. But it was a press release.

And it was followed by -- it has been followed since that day by, you know, the nations of the world.

PROFESSOR CRAWFORD: It was followed by American Proclamations under various pieces of legislation, but it's true that the --

MR. FORTIER: Initially.

PROFESSOR CRAWFORD: -- the statement that was made was in the form of a press release.

MR. FORTIER: Yes.

So, once you have ascertained intent, and I have tried before the break to show you what was in -- what was in -- what could only have been in the mind of the Premiers, and you read the communique, you cannot reach any other conclusion but that the boundaries described on the map which they had, that the boundaries described in the Notes re Boundaries, are the very boundaries which have been agreed.

That's the deal, that's the Agreement, that is the -- that is the contract that was made, and in respect of which Newfoundland would like to wiggle. Would like to weasel, to use another word which was also found itself into the record. Well this they cannot be allowed to do.

You can only follow the Newfoundland argument, Mr. Chairman, if you ignore the plain words of the 1964 Agreement.

And lest there be any doubt, lest there be any doubt, may I ask you to turn to document 13 of the Crane compendium? I think this is the most vivid and the most telling statement of what the 1964 Agreement was all about. Because it puts into focus what was agreed and what remained to be done.

I refer to page 2 of the matters discussed at the Atlantic Premiers Conference. Under the heading "Submarine Marine Rights and Provincial Boundaries", the conference agreed on the marine boundary lines between each of the provinces.

Where is the ambiguity here? Where is the word which requires interpretation? Where are the words that require interpretation? The conference agreed on the marine boundary lines between each of the provinces. There is nothing about the involvement of the federal government here. Absolutely nothing, because it has been agreed as between the provinces.

But there was some action items. Yes, but that comes later. And you get action item, Premier Stanfield will forward a copy of the proposed boundaries, marine boundaries and the map to Premier Lesage, and seek his

agreement.

And then, two, Premier Stanfield will prepare a presentation for the pending conference setting out the position of the four Atlantic Provinces with respect to submarine marine -- mineral rights, and the agreed marine boundaries.

You have the words again, vis-a-vis the feds -- vis-a-vis the federal authorities, the provinces have agreed to the boundaries. And they will make a presentation.

That is one of the use to which the agreed boundaries is to be put, for the claim of ownership. One of the uses. As we see through the history of the record, other uses were envisaged. Another usage is in place today.

MR. LEGAULT: Mr. Fortier, I regret cutting into your time. I will try to make it very, very brief. The document to which you are now referring is headed "Matters Discussed at the Atlantic Premiers Conference in Halifax, September 30, '64, requiring further action"?

MR. FORTIER: Mmmm.

MR. LEGAULT: But under point three -- heading three of that document, and specifically under the sub -- subheading "Action", Premier Stanfield does not purport to list, or at any rate, does not in fact list all the action that was required in relation to this particular item. Action that was required, if we look at the document of September

30th, is, for instance, point four, "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."

MR. FORTIER: Yes.

MR. LEGAULT: That is not mentioned here under the heading "Action to be taken", so I think we have to read this document of October 2 bearing that in mind, that not all of the items of action required are listed under this heading.

MR. FORTIER: With respect to the agreement concerning the marine boundary lines, there was no action that needed to be taken. The conference had agreed. The Premiers had agreed between themselves.

And if there were any additional steps to be taken to give effect to that Agreement, that could be -- it could be envisaged that those steps would be done by the individual provinces. But that was not the key. The key was that there is an Agreement on the boundaries. We've agreed on the boundaries. And that is the end of the matter, as far as the -- as far as the Agreement is concerned.

But with respect to the action, well you get under the heading, you know, presentation to the feds, presentation

to Quebec, and then you go to page 3, Mr. Legault, and you see that again, it goes to did the Premiers know what they were doing?

When they wish to record a political position, or a common approach, they use the words. The conference discussed a common approach to economic development in the Atlantic Region. The distinction between the Agreement and a common approach, or a political statement, finds its expression in the words of the document.

I now turn to the, very briefly, the documents have been referred to extensively. The Premier Stanfield to Premier Lesage letter. Those are items 14 and 15. And it's clear that Mr. Lesage is asked to agree, and that Mr. Lesage did agree the marine boundaries agreed upon by the Atlantic Provinces. I repeat, it's document 14 and 15.

You then come to the submission which is made to the feds at the October Federal-Provincial Conference. As I said earlier, one of the uses to which the Agreement on boundaries was made was in respect of a claim to ownership. We have agreed the boundaries, now we are asking for recognition of provincial ownership of the area within those boundaries. And this is the first practical application of the agreed boundaries.

I refer you, insofar as that document is concerned, the submission by Mr. Stanfield to pages one, four and

five of the document. You see that there Mr. Stanfield says to the federal representatives, "The questions..." -- plural, "...which with we are concerned, the proprietary rights, and the boundary lines." Those are the only questions with which we should deal.

And you go to paragraph -- to page four, as far as provincial boundaries is concerned, it's primarily a matter for agreement between the provinces concerned. And we discussed this question amongst ourselves and we've agreed tentative boundaries of the marine area.

Vis-a-vis the feds they were tentative, not as amongst -- as between themselves. And they -- he refers to a copy of the map, and a description of the boundaries.

Again, the consistency of the actions taken by the provinces. The map and the description, which saw the light of day 1961, now find themselves in the record of a federal-provincial conference. It's the same map, it's the same description, of the boundaries. And how can you read that presentation without concluding that the provinces had reached an intent to be bound by the boundaries?

They say, "We request the federal authorities..." -- on page four, "...to give effect to the boundaries thus agreed upon." We have agreed, please give effect now. As I said earlier, it may have been the wrong strategy, but

that's not the question. The question is, what was their position? Their position is we are bound, we intended to be bound, and we invite you to legislate pursuant to section 3 of the British North America Act.

The Notes re Boundaries are attached to the submission, as you know, and I will be very brief, because my colleague, Mr. Bertrand, will address, you know, the -- and Mr. Drymer on Monday of last week, referred to the words "thence southeasterly to international waters." That is found at page 2 in the Nova Scotia definition of one segment of the Nova Scotia boundary. And in one segment of the Newfoundland boundary it's "SE to international waters". He told you that SE, southeast, is a cardinal point on the compass. It's 135 degree. The -- I know that the line has a 125 degree azimuth. And I suppose it would be open to the Tribunal to find in its interpretation of the line beyond 2017 that the azimuth should be 125 and not 135. That could be an interpretation if there is ambiguity and you have the obligation to interpret the Agreement. Nova Scotia has never claimed the 125 degree line which is closer to Newfoundland, but I'm instructed to say that if that was to be your interpretation, Nova Scotia would accept it.

PROFESSOR CRAWFORD: Yes. A generous undertaking, I'm sure.

The problem we have is that if we were to interpret 1964

as an agreement, we can't tell which of the two is right. I mean if you give them equal status, you might say, of course, that the text prevails over the map.

MR. FORTIER: Yes. Well, the map is secondary, as you know, Professor Crawford. I mean I remember the Mali -- I think it's in the Mali -- help me -- Burkina Faso decision of the Court where the evidentiary value of maps is gone into extensively. And I would submit, applying the passage of the Court in the Mali Burkina Faso that in this instance where you have a description and where you have a map, that the map is secondary to the description.

Now I'm trying to go as quickly as I can, and I have come to the JMRC which was created in July of 1968. Now it is interesting, I believe, to note that if, as Nova Scotia argued in its written pleadings, the Agreement of the Premiers on boundaries was so closely linked to their submission on ownership, it is interesting to note that four years later, in July of 1968, the Agreement on Boundaries has not died.

The Agreement on Boundaries, again, adopting the Newfoundland position at some point in this case, I guess you could say, is resurrected from the ashes, and it's -- let us see, and I'll do it very briefly -- how it is -- what is -- first of all, what was the mandate of the JMRC and how, again, there is continuity; there is a continuum

between what was agreed by officials, what was agreed by the AG's in June of 1964, what was agreed by the Premiers in respect of the boundaries, and then what was undertaken in 1968 by the Joint Mineral Resources Committee, and more specifically, by the subcommittee. I refer you --

PROFESSOR CRAWFORD: Mr. Fortier, I don't want to stop you from saying anything you want to say, but I mean there's no difficulty whatever in accepting that the JMRC thought they were giving effect to the 1964 statement. They were trying to identify more precisely the points of that statement. I'm told by our technical expert that they did better than Mr. Crosby, so that's an interesting point. And, of course, Nova Scotia, as I understand it, has used the JMRC points and not the Crosby points.

MR. FORTIER: That is correct.

PROFESSOR CRAWFORD: So I don't think that's the problem. The problem with respect to the JMRC is to link what they did with the southeasterly line. You have already spoken about that, and if you have nothing more to say, that's fine. I mean I understand the argument so far, but if there's any -- if there's any further explanation as to why the JMRC didn't try to clarify the obvious discrepancy as to where that line was to be, I mean given its vast importance -- and it's one thing to join two lines with a -- in a direction described as southeasterly because the

point to tell you where you are going; it's another thing to describe the line.

And, of course, in the southeasterly area, the further you go, the more any divergence in direction matters, so from the point of view of technique, it was hugely important which direction that line went. The question that interests me is why didn't the JMRC address that question.

MR. FORTIER: I have said what I wanted to say, and Mr. Bertrand will be going -- no pun intended -- would be going further shortly.

CHAIRMAN: Would -- I wonder if the paragraph 6 in the 2(a), which you described with some exaggeration as having been written by an eminent authority of some kind, whether that does not strengthen your argument that they were very much aware of the non-legal arguments and were pushing for them too. And indeed, Mr. Stanfield refers to -- he kind of mixes it all up together.

MR. FORTIER: Yes, he does. I agree with you, Mr. Chairman. I agree.

CHAIRMAN: Incidentally -- I'm putting this as a question. I just wanted to -- incidentally, the panel would -- the Tribunal would like to see a copy of the document.

MR. FORTIER: Not just the conclusions.

CHAIRMAN: The document.

MR. FORTIER: Very well.

CHAIRMAN: I'm dying for my colleagues to read me.

MR. FORTIER: We will, of course, provide the distinguished Chairman and his colleagues with a copy of the full document. Yes, definitely.

So I invite you to look to document 19(a) in the book which I gave you this morning because 19(a) consists of the minutes of the first meeting of the JMRC when the JMRC was created. And you see that Newfoundland, of course, is represented. In fact, played a very active role in JMRC. Some of their officials became chairmen of the committee.

And if you look to page 2 of the minutes, and this has to be dealt with because it's a very important passage -- page 2, a subcommittee was created and the committee declared that the subcommittee established various technical committees, et cetera to consider and study the management and report back on the following matter.

And committee number 1, the subcommittee number 1 was charged with the delineation -- I mention again not the delimitation; the delimitation had been done, had been agreed. Now it's the delineation and the description of the boundaries of the participating provinces.

And if you, in the submarine areas, go down the page, you see that the Chairman of that subcommittee was Mr. John C. Smith. And you go to document number 20(a) --

these are all new -- these are documents which were in the record, but which -- to which you were not referred last week, unfortunately, by Mr. Crane. 20(a), the Chairman of the committee, Mr. Smith, writes to his colleagues. It's a two-page document. You see that a copy was sent to, amongst others, to Newfoundland.

And the Chairman reports, "The Lands branch of our department has completed the plotting of the turning points. These points have been calculated as described in the agreement reached by the Atlantic Premiers." It's a familiar refrain. "These points have been calculated in latitude and longitude using a computer program. I would hope that our recommendations regarding the establishment of the boundaries will be presented at the Ministers' meeting."

And then if you go to document number 20(b), again, it's the following document in your book. "As requested by Mr. Smith, the Chairman of the committee, I enclose a list of the points named in the Notes re Boundaries, a copy of the computer output and a map of the Atlantic provinces on which a proposed turning point has been plotted."

Then if you go to document 20(c), and I certainly don't invite you to read the document, but here is -- here are the points named in the Notes re Boundaries. It's a

very detailed -- it's a technical exercise and it's being done with care.

Then you -- if you go to number 21(a) because it has been sent to Newfoundland. And look at 21(a), the Chief Engineer of Newfoundland, having received the material that I have just referred to, reports to his Deputy Minister re the list of points, Notes re Boundaries, et cetera. I have separated out the list those -- out of the list those that refer to the boundary of Newfoundland. That's an official in Newfoundland, the Chief Engineer, Department of Mines.

The points -- circles on these plans agrees with the points are referred to in the description of the boundary of Newfoundland. And at the bottom of the page, the handwritten note "seen", and you have the initials of the Deputy Minister.

So what was the mandate of the committee? Look -- I invite you to go to number 24(a), because it's abundantly clear. 24(a), the minutes of the meeting of a committee which was held in January 1969, they had before them a report of the subcommittee, if you go to the bottom of the page. Mr. John C. Smith, the Chairman, reported that the turning points and longitude and latitudes have been located, and the members of his committee were in agreement as to these turning points and a written report

would be submitted by him.

He produced at the meeting a map showing -- drawn thereon the -- thereon the boundaries as determined by his committee and pointed out that there is a problem in respect of two or three areas, the Restigouche River. He expected these would be cleared up in the near future.

And there are some words here which are deleted, which were not deleted on the document -- in the accompanying document which Mr. Crane filed last week. And I invite you to go to appendix A of that document 24(a). It's a short document, but it bears reading. And I think it answers in part, Professor Crawford, your question and your concern about why did they not -- why didn't the line go beyond 2017.

Upon the instructions of the Joint Mineral Resources Committee, the technical committee has determined and agreed upon the location and the methodology for defining the turning points as described in the Notes re Boundaries as set forth by the Atlantic Provinces' Premiers in 1964. This is the last piece of paper in document 24(a).

The technical committee has not discussed the merits of such definition of boundary. That was not their job. Their job -- their role was to precisely locate those mid-points described therein. The coordinates of each turning point was determined and submitted to committee members

for checking. We saw that Newfoundland checked it. It is my understanding that members of the committee are now satisfied with the coordinates as calculated.

Their role was not to plot the line. Their role was simply to define the turning points. And that's what they did. And beyond 2017 there were no turning points. So it was -- I submit that it was sufficient for the technical committee to do exactly what they did and for the line to stop at the last turning points.

Because the note says and then southeast to international water. What could be clearer? If there is any ambiguity, if there is any need to interpret, you refer back to the notes, which as I said earlier take -- I submit take precedence over the map. And it's clear that then from 2017 you have to extend following the azimuth of 135 degrees to international waters.

Now I'm going to go very quickly, because there are some important matters that Mr. Bertrand and Professor Saunders have to say and I'm taking up some of their time. And I have no doubt, as I said earlier, that in the quiet of your délibérer you will be going through these -- attentively and carefully through these documents. I stop here insofar as the work of the JMRC is concerned. But I open a parenthesis.

During that period there were some proposals which

were made by the federal Prime Minister to the provinces in respect of offshore areas. And I refer to document number 21 in the Crane compendium where there is a reference to an administration line and where you will see that as far as the definition of the line is concerned, the Prime Minister, Mr. Trudeau, we leave that to the provinces. That's up to them to settle.

And then you have another letter from Mr. Trudeau, it's included in our additional material. It's 25(a), where there is a reference to governmental administrative arrangements. And what should be the administration line. And there is that very helpful -- helpful to Nova Scotia's case, reply by Mr. Smallwood, the Premier -- then Premier of Newfoundland. It's 25(b). 25(b), Mr. Chairman. A letter to Mr. Trudeau which bears reading.

I start with the second paragraph. "I agree fully with you as to the urgency of establishing administrative arrangements." We are no longer talking about constitutional amendments pursuant to section 3 of the BNA Act. The mandate of the JMRC had not been created to help the -- only to help the Premiers to assert their claim for ownership.

In the words of the Premier of Newfoundland at that time, "There is an urgency in establishing administrative arrangements for the orderly exploration and the

subsequent development of petroleum and natural gas off Canada's seacoast. Indeed this precisely was the motivation of the Premiers in the eastern provinces in 1964" -- in fact it's in 1968 -- "when they made provision for the establishment of the existing Joint Mineral Resources Agreement."

So here is the Premier -- he is not trying to wiggle out of an agreement, the Premier of Newfoundland. He is saying that's precisely what the JMRC was instructed to do in order to -- in order that we can have in place administrative arrangements which will be workable, which could be implemented. Where each province will have an area within which it will be entitled to some of the royalties in -- following the issuance of permits and licences.

Abundantly clear that there were many uses which the provinces could make, did make of the boundaries which they had agreed as between themselves.

PROFESSOR CRAWFORD: I take it the existing Joint Mineral Resources Agreement is the reference to the '68 Agreement --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- not to the '64 Agreement?

MR. FORTIER: Yes. That's our submission. I would think that this should be common ground between the parties.

PROFESSOR CRAWFORD: They could have done no doubt with some cartographers, but they could have done with some proofreaders as well.

MR. FORTIER: I have noticed that. I'm -- and you notice that it finds itself not only in communiques, but also in letters signed by the Premier of a province.

I have -- there is an interesting document, it's document number 28 in Mr. Crane's compendium, on page 3. He is writing a memo to one of his fellow Ministers. And he says -- I invite you to read the bottom of page 3 and the beginning of -- the start of -- the beginning of page 4. Again, you know, different strokes for different folks.

"The federal government..." -- the bottom of page 3, document number 28 -- "...has never recognized these..." - - we know that -- "...these purported offshore boundaries, although its possible they could be utilized for purposes of revenue sharing should it eventually be decided under the terms of the Federal-Provincial Agreement that Coastal Provinces should receive a special entitlement with respect to those areas offshore." Crystal ball. That's exactly what happened. That's exactly what's in place today.

And here's Mr. McDonald, in 1972 saying, well if they agree boundaries you can use the boundaries for many

purposes. That's exactly what the provinces were saying.

The -- I have almost -- I have almost gone full circle. I started seems to me, a long time ago. I apologize for being on my feet for so long, but I started with the statement by Premier Moores. And I sought to demonstrate to you that Premier Moores, who had recently become Premier of Newfoundland, came to the meeting with his fellow premiers of Quebec and the three other Maritime -- Atlantic Provinces. He came to the meeting with -- now he had been briefed.

He was -- I think you can say that is level of knowledge about the offshore boundary issue was on a par with that of the other provinces, which because of the briefings that he had received from his officials, the briefing that he received from officials in Ottawa, and the -- and the documents which he was shown.

I refer, Mr. Chairman, very quickly, I refer you to document 30(a), which I referred to, I think at 9:05 this morning. "Dear Mr. Premier; We've come full circle...". I refer you to document 30(b), the minutes of the meeting in Ottawa. I mean, that's the culmination of this whole paper trail. Scraps of paper, as we heard last week.

30(c) is a document which I hadn't referred to earlier, but which I must bring to your attention. 30(c) is extremely important. It's in your book -- the book we

submitted, notes related to revenue sharing map for a briefing session with Premier Moores on June the 6th by Mr. Crosby.

And you see the square mile data which is in every respect consistent with the one which is shown on figure 9, the East Shore Offshore -- East Coast Offshore Map, et cetera.

And so Mr. Moores was aware of the border, which appears on this map, before the June 17, June 18 meeting. I repeat again, those areas are lifted from Figure 9.

Then we have the meeting of June the 6th, 30(d). The agenda for the meeting of the -- that's 30(e), the agenda for the meeting which took place on the 17th and the 18th of June, and which was reported on by Mr. Moores in the House of Assembly the following day. I invite you to look at the agenda. That's number 30(e), as in earnest, and I will sit down in earnest, I assure you. Financial arrangements, eastern resources revenue pool, et cetera.

And then this morning -- earlier this morning, I referred to the notes of the telephone conversation. The notes of the telephone conversation between Mr. Crosby and Mr. Stu Peters. There was also a -- a note of a telephone conversation which Mr. Crosby had with a Nova Scotia official, it's in 31(a). And it's Mr. McLeod, did not serve the logistics of my presentation earlier this

morning to refer to it, but you see the telephone conversation with Mr. McLeod on Monday morning, June the 19th. Mr. Crosby is doing the rounds. What -- what was agreed during the weekend? What is this I have read?

Look at the first page of that telephone -- the report of that telephone conversation. Mr. McLeod said that they, the Premiers, had agreed on interprovincial offshore boundary lines, and in response to my direct question, confirmed that these were the same offshore boundaries that had been presented to the federal government by the then Premier of Nova Scotia, Mr. Stanfield, at the Federal-Provincial Conference in -- of October 14, 1964.

In other words, the Premiers simply reconfirmed the same offshore boundaries that had been negotiated amongst their predecessors some years before for the purpose of subdividing respective so-called areas of provincial jurisdiction in the east coast offshore.

I rest my case, Mr. Chairman, members of the Tribunal.
PROFESSOR CRAWFORD: Before you do, just very briefly, your document 36(b), is that going to be dealt with by anyone else?

MR. FORTIER: 36(b)? Yes, my friend, Mr. Bertrand will.

PROFESSOR CRAWFORD: Right.

MR. FORTIER: I'm sorry for having taken up so much time. I have a few more -- well let me -- maybe just to answer a

couple of questions. You asked me, I believe it was Professor Crawford, whether there is in the -- in Canadian Statute Books evidence of agreement on boundaries, and changes on boundaries. The answer is yes, as Mr. -- as Mr. Willis -- my friend, Mr. Willis, said in answer to a question put to you last week. But you asked has section 3 ever been used for maritime boundaries? Mr. Willis, no. We agree with our friends from Nova Scotia. That's at page 627 of the transcript.

On acquiescence and estoppel, I think I answered in part your question earlier. We don't argue, as Newfoundland suggests, that the 1964 Agreement was established by virtue of Newfoundland's subsequent conduct. But we do argue that having concluded the Agreement in 1964, as evidenced in the contemporaneous documents and the circumstances of its conclusion, Newfoundland's subsequent conduct confirms the intention to be bound in 1964, and demonstrates the nature and extent of what was agreed. And that was written by Ms. Hughes, to which I -- for which I am very grateful, because I happen to agree with her.

CHAIRMAN: Before you sit down, Mr. Fortier, you had mentioned that you would like half an hour, I understand, longer for your people?

MR. FORTIER: Yes.

CHAIRMAN: And that there has been some discussion between the parties, and I gather that there is no agreement, because the -- Nova Scotia wants to have time for preparing. That was one of the considerations.

The panel has thought about this in the light of it, and we wonder if the parties would be agreeable to 15 minutes after the end of each presentation?

MR. FORTIER: Well we will do whatever the panel decides. I -- I'm disappointed that my friends believe that an extra half hour today would somehow prejudice their preparation for their second round submission tomorrow. I would have thought that if -- in view of the number of questions that were asked, which we welcome, and which I tried to answer as best I could, I would have thought that an extra half hour this morning, and a corresponding extra half hour for my friends tomorrow, in other words, we could start at noon instead of 12:30, would respect, you know, the equal treatment of the parties. But if you should decide that it's only 15 minutes, it's -- half a loaf is better than a full loaf.

CHAIRMAN: You have something to say about that, Mr. McRae?

PROFESSOR MCRAE: Again, I -- in light of discussion between the parties --

CHAIRMAN: I'm sorry.

PROFESSOR MCRAE: -- the Registrar, my comment simply was

that an extra half hour at the end of today, and an extra half hour at the beginning of the schedule tomorrow was an hour out of our preparation time. And simply observed that yesterday Mr. Fortier was very scrupulous about issues of fairness. And I felt that that point ought to be made.

We in fact had -- would not stand in the way if Nova Scotia feels that they need an extra half hour today, we would not stand in the way of them having an extra half hour. And if necessary, and we will advise you later if we need the extra time, we will ask that we start at 12:00 instead of 12:30.

MR. FORTIER: I'm very grateful to my friend, Mr. McRae. I accept his invitation.

CHAIRMAN: That's fine, Mr. Fortier.

MR. FORTIER: Thank you very much.

CHAIRMAN: Thank you, Mr. McRae.

MR. BERTRAND: Mr. Chairman, with your permission, I will try to apply one of the rules that Mr. Fortier, who is not only my partner, but also a friend and a colleague, has taught me a long time ago. To be good, to be quick and to be out of here.

What I would like to cover is, as I did in the first part, not return on the actual events after the '64 meeting, but actually focus on subsequent conduct of the

party in terms of the MOU, the exchange of correspondence, the alleged admission of Nova Scotia that there was a dispute at one point in time, and I think this is actually captioned, after having heard Mr. Crane's argument. It is captioned at pages 537 and 538 of his submissions, which we find on March 15 -- the March 15 transcript.

He said then that there was a number of events that he had talked about in this period after 1972 that show the existence of an ongoing boundary controversy, he called it, between Nova Scotia and Newfoundland and Labrador in relation to the offshore.

Nova Scotia has challenged that position and continue to challenge it. At the bottom of 537, Mr. Crane said that those events in the period after 1972 could be summarized as follows, and he goes on to list them at 538. The first item he refers to is the Doody map, the Doody letter of October, 1972. He then talks about the 1973 breakaway of Newfoundland from the common front. He then referred to federal-provincial discussions which, in Mr. Crane's words, indicate that there was an ongoing unfinished piece of business relating to the offshore. That's at 538.

Subsequently, he talks about the Newfoundland's White Paper in 1977 and the subsequent adoption of regulations in 1977 regulations. And finally, he refers to the

Newfoundland proposal in the context of constitutional discussions in 1979 and 1980.

Time permitting, I will try to cover each of these issues very briefly.

The first one has to do with the Kirby letter of October 6, 1972. Mr. Crane, at 521 of the transcript, March 15, says, "It's an effort by Minister Doody to start discussions with Nova Scotia about the area moving off, roughly speaking", he says, "turning point 2017; an area", he says, or he represents, "Newfoundland had not agreed to or an area that had not been determined by the JMRC." And we submit that several comments are in order in respect to this representation of what the Doody letter is.

First, I would like to draw your attention to -- again, back to the text of the letter. Mr. Doody, the Minister then of Mines in Newfoundland, says, "I would like to draw -- would like to take up a matter which I have previously discussed with you informally. This is the matter of the precise determination of the interprovincial boundary between Nova Scotia and Newfoundland. In so doing, the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation."

The next paragraph, he says, "Attached hereto is what we consider a more accurate reflection of the general

principles of division to which we have agreed."

Now those general principles are found in the Notes re Boundaries. Yes, Mr. Crawford. They are found in the Notes re Boundaries. If you look at the map -- at the map, at the sketch that was -- stay where you were -- if you look at the sketch that Mr. Crane used during his oral presentation, it's figure 28.

You asked the question, I believe, Professor Crawford, whether or not there was -- this map indicated that there was an agreement until 2017. Said, "Well, it appears that the line that was added by Newfoundland starts from 2017." I think it does, and this is our position.

So if, indeed, the 1964 Agreement doesn't deal with the area beyond 2017, what is the Minister talking about, a line in the outer segment to which the principles of which had been agreed before and are not disputed by Newfoundland?

PROFESSOR CRAWFORD: Because that line is drawn on the Stanfield map. It doesn't --

MR. BERTRAND: I don't like the designation of Stanfield map. The 1964 map.

PROFESSOR CRAWFORD: Well, on the 1964 map.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Let's not waste time.

MR. BERTRAND: Very well.

PROFESSOR CRAWFORD: The point is this. Let's assume, for the sake of argument, that there had been a demarcation agreement of a general character in 1964. I think we can't deny that it created a problem in the area about 2017. I mean there was an uncertainty. The JMRC made a very decent effort to solve the uncertainties in relation to the turning points over a period of time involving all the parties. Fine. They didn't do anything about the point beyond 2017.

Let's assume, however, that you have an agreement as at 1972 on those turning points. Now if these had been states and one of the states had written the Doody letter to the other, I would say that requires a response. There's a serious problem here which has not been addressed, and in the -- especially when one looks at the Kirby reply to this letter, you would say, okay. Well, there's something that has to be fixed here. There's a problem.

Simply to go back and to add the uncertain 1964 line to the relatively certain 1972 JMRC delimitation doesn't solve your problem in the light of what Kirby has said. So okay -- now again, it's a question, but I want you to address that.

MR. BERTRAND: Well, I think that clearly the metes and bounds described in the Notes re Boundaries provide for

delimitation beyond 2017. That is clear. And as Mr. Fortier pointed out earlier today, and I think I stated when I argued Tuesday, if the Tribunal needs to interpret what "SE" or "southeasterly", thence "southeasterly to international water" means, we don't think it needs to be interpreted. We think it's clear. It's unambiguous, and I will show you why it's unambiguous, but I think that there is an agreement there already.

Now suppose the parties had not provided for the JMRC in 1968 and we were left today only with the '64 Agreement. I think the answer to the first question of your mandate would still be yes.

PROFESSOR CRAWFORD: That's not the point I'm asking you. I'm asking you what about the situation of the parties after this exchange of letters, because whatever went before has to be read in the light of this exchange of letters. So I mean you talk about subsequent practice and about expectations. Well, I would have thought that Newfoundland had an expectation that this issue be addressed. They reminded Nova Scotia about it and nothing was done.

MR. BERTRAND: Kirby wrote the letter -- reply, first, saying he would look into it.

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: The record doesn't show that he got back to

Minister Doody or --

PROFESSOR CRAWFORD: The record does show he was reminded by Cabot Martin that it was a matter of importance to Newfoundland.

MR. BERTRAND: Appreciate this; however, the record doesn't show -- and I addressed this, again, in my main submission -- why is it if it was so important for Newfoundland that we find no trace of it subsequently? Can one not conclude that the matter had been addressed to the satisfaction of Newfoundland?

PROFESSOR CRAWFORD: It apparently hadn't been addressed to the satisfaction of Newfoundland. I mean as it were, the last letter was written by Newfoundland. If you toss the ball over the net and it doesn't come back, then where is the onus of proof?

MR. BERTRAND: Well --

PROFESSOR CRAWFORD: These cases shouldn't be decided by onus of proof.

MR. BERTRAND: Well, at your invitation, I'll deal right away with document 36(b) in our complement to Mr. Crane's compendium. And this is an account of a meeting between federal and provincial officials held in the spring of 1973. We have talked about these meetings earlier this week. There were three meetings at that time, and Newfoundland -- these are the last meetings where

Newfoundland participated as part of the common front.

And again, the first page, we see that present there were Mr. Kirby, among others, Graham Walker, both from the Nova Scotia government, and then Mr. Martin from Newfoundland.

We turn to page 44 of this account of the meeting and Mr. Austin from the federal government, the DM of Natural Resources Canada, inquires about the list of problems, which we see -- the list which we see -- not problems, but rather check list of points to be covered by an eventual agreement between the federal government and the provinces.

And one of these points is obviously the area to be covered. We have underlined in this document the exchange. Mr. Austin asks at the meeting another problem to look at is that of the boundary between provincial adjacent areas. He queried Dr. Crosby whether we have the lines decided upon between provinces, Crosby confirmed same.

Cabot Martin doesn't react and say, oh, we don't agree.

PROFESSOR CRAWFORD: Who wrote the word "no intervention" on that piece of paper?

MR. BERTRAND: I'm sorry, it's our -- it's our -- I believe it's ours.

PROFESSOR CRAWFORD: So it's not --

MR. BERTRAND: It's not my handwriting, but I believe it's
ours.

PROFESSOR CRAWFORD: It's not a contemporary note?

MR. BERTRAND: No, no, no, no, no.

PROFESSOR CRAWFORD: People weren't sitting around waiting
to see if --

MR. BERTRAND: No, no.

PROFESSOR CRAWFORD: -- he would jump.

MR. BERTRAND: Well as you -- as you see, Professor
Crawford, these documents were secret at the time. And it
was the federal account of what had happened at those
meetings. I don't believe they were available to
Newfoundland at the time. And they were -- they became
only known to the parties recently in preparation for this
hearing.

PROFESSOR CRAWFORD: Mr. Bertrand, I'm sorry. I mean, if
these were two states -- this is -- I mean, it's a bit
like the Temple case, I suppose. But it would be very
difficult to say that this account of a remark made by one
federal official to another in the context in which a
Newfoundland person remained silent was sufficient to make
the 135 degree line opposable to Newfoundland. I mean,
that's really stretching it, I'm afraid.

MR. BERTRAND: Well I think it's in the context, this is one

piece of information and it's one we have put in this book because it had not been referred to earlier. And I think I have gone to great lengths last Tuesday to go through the various pieces of communications, of account of meetings, tried to invite the Tribunal to reads them in a certain context.

And I invite you -- I will invite you to go back to these documents and to go back to the slides of my presentation on Tuesday, and to reread these documents and really make up your mind as to whether or not these indicated that Newfoundland was disagreeing with the 1964 Agreement or was it expressing some doubts about the line, the way that the 1964 Agreement had been put on a map and had been drawn on a map. I think there is a distinction.

And I think this is what we see here effectively with Mr. Doody, is that he doesn't agree with the way that the 1964 Agreement has been depicted on the map. But he doesn't disagree with how the metes and bounds have been agreed upon and the principles that --

PROFESSOR CRAWFORD: But the problem we have is that the map he doesn't agree with is the 1964 map.

MR. BERTRAND: I know.

PROFESSOR CRAWFORD: I mean, that's what he is talking about. I mean, I could understand it if he didn't agree that a later map was not in accordance with 1964. His

disagreement is with the 1964 map. Moreover, the 1964 map doesn't state any principle by which that line was drawn. I mean, we still don't know why that line was drawn, where -- in that direction or why it stopped there.

MR. BERTRAND: It's roughly 125 degrees. And we don't know. I don't have an explanation for this. What we see though on this map is that this is the 135 degree, this is the Mobil permit.

PROFESSOR CRAWFORD: Yes. And it was already there.

MR. BERTRAND: And remember again, that when -- well I can't ask you to remember, but when the conservative party came into power in the spring of 1972, they undertook a review of all the permits.

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: And that's how they initiated -- it's Doody who asked for the JMRC to convene again on May 24, 1972. It's Doody who -- it's Newfoundland who was pushing that whole initiative. That's the most ironic part of it, is that they are now trying to say that Mr. Moores didn't really agree, when it was his province that was pushing for the initiative for a common front and for an approval of the turning points.

Now on this map clearly -- this is 135 and this is probably more than 145, were they trying to gain some wiggle room? I mean, that's the -- obviously they were

not satisfied with the way it had been drawn. They were not questioning the principles. And they were just saying, well, this is what it should be. Few --

PROFESSOR CRAWFORD: It's quite a big wiggle, that's what I would say.

MR. BERTRAND: That's a lot of wiggle room, I guess.

Now this map is -- this sketch actually used by Mr. Crane is not the actual map that Mr. Doody attached to the letter. What is the actual map is much bigger in an attempt obviously to magnify the discrepancy between the '64 line and what he was now saying the line should be. They have blown it up to show -- to increase the discrepancy.

This is -- what we see now is the real map.

PROFESSOR CRAWFORD: The real attachment is your document 57?

MR. BERTRAND: Their document 57.

PROFESSOR CRAWFORD: I'm sorry, their document.

MR. BERTRAND: Correct. And what we -- what -- by doing so what it not only accomplished magnifying the discrepancy, but also eliminating the bottom inscription there on the document 57 map, which we will see there, yes. And this is -- the map that Doody used is the map that bears the inscription Newfoundland, Nova Scotia, New Brunswick, PEI 1964 interprovincial Premiers boundaries.

So Minister Doody when he wrote was -- knew what he was talking about when he talked about an agreement. He knew what this was.

Now should there be any doubt in your mind still that -- on the issue of whether the 1964 Agreement reached by the Premiers of the eastcoast provinces covers the outer segment of -- off of turning point 2017, Mr. Doody's depiction of the line agreed between the provinces as including a segment of approximately 160 nautical miles from turning point 2017 speaks volume about Newfoundland's understanding of the fact that the Notes re Boundaries and not the turning points developed by the JMRC purported to delimit the boundary between Newfoundland and Nova Scotia, from the last midpoint between Flint Island and Grand Bruit as determined by the JMRC to be turning point 2017 to international waters.

The '64 line went approximately 85 nautical miles past turning point 2017. And Mr. Doody goes out to 160. We see the Mobil permit alongside it. So obviously even Newfoundland understood that the 1964 Agreement was meant to delimit the area well out on the offshore.

And while I'm on the issue, I would like to draw your attention to first the Joint Submission found at annex 31. The first use -- yes. I will read from it and you are familiar with that document. You can go to it later.

The first use that is made of the 1964 Agreement is in support of the Joint Submission in October. When Stanfield presented the Joint Submission, he said in the first paragraph, "The questions with which we are concerned are a) that of proprietary rights and submarine minerals as between Canada and the provinces, whatever the extent and nature of those rights may be."

So it was clear that they intended to claim whatever Canada was entitled to encroached by St. Pierre or not, whatever Canada was entitled to.

Of the second page, which -- second sheet, which is the third page of the presentation, page 18 of document 31, second -- first full paragraph, second -- third sentence, he continues, "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 those provinces. These boundaries have been set out by metes and bounds and have been graphically delineated on a map."

This is the claim -- this is the boundaries over which the claim of ownership is made. He said, first page, that they are claiming whatever Canada is entitled to, and he says, here are the boundaries as between the provinces.

We submit that this is clear that -- clear indication that the provinces intended, in '64, to delimit all of

their offshore areas, and not only until turning point 2017.

There is a further indication of that, but it is in 1972, just for the record, you may refer to it in the transcript later. It's annex 145, which is an account, a draft account of the meeting of August 14, 1972, between the Eastern Provinces. It was the continuing committee on offshore minerals, soon after the June meeting at -- of the Premiers, where they agreed on the turning points.

Mr. Kirby was in attendance, Mr. Doody was in attendance, and Cabot Martin was in attendance. At page 6 you will find a mention, and the second full paragraph, "To clarify the geographical area involved, the members agreed that they were concerned about the offshore area claimed by Canada in international law, an area which included portions of the continental shelf."

It's very clear that this is what they wanted, and this is why -- and that the 1964 Agreement was meant to delimit that area that they were claiming.

Now, the Doody letter obviously is something that there is no answer as such. But we would submit this in the end, that whatever wiggle room they were trying to obtain for themselves is more or less irrelevant to the extent that if there had been an agreement, and if you -- if you shall so find, either in '64 or in '72, the matter

is pretty much moot. It's a matter of whether or not they have breached that agreement, and whether or not this agreement is enforceable. And that will be an issue dealt with by Professor Saunders shortly.

I would like, as well, to address an issue which was raised on a number of occasions during oral submission, and that is the comparison, or conformity of the '72 map, or the '64 map, or the Crosby map with the other maps. And we have prepared a few slides to show how these compare.

First map we have is annex 32, this is the 1964 map. And if we, on this map, put the turning points developed by the JMRC, this is what we obtain.

One thing I would like to note right away is that as we -- I think as was mentioned earlier, is that in the Bay of Fundy, the '64 map does provide for an outer segment past the last turning point.

Now if we superimpose on this map the actual 1972 map, you will see how it plays out. It's pretty much the same.

Finally, if over this map we superimpose the 1972, which is actually the 1971 map of Dr. Crosby, this is what we will obtain.

Now by plotting this it appears that the 1972 map of Crosby, the outer segment actually was plotted from probably point -- not the last turning point, but rather

from turning point 2016, thereby creating a deviation at the last turning point. So this map is obviously not accurate, as obviously probably something like 133 degrees, or something like that.

We have the four maps, and it's a new figure, figure 30, which we have included in your binders, or at least provided copies to be included in your binders this morning.

Now, coming back again to the '64 map with the 1972 turning point showing on it, I would like to point out, as I did earlier, that the distance between the last turning point on the -- from turning point 2017 is 85 nautical miles, but similarly in the Bay of Fundy the distance is 67 miles.

Moreover, the line in the Bay of Fundy, which is described in the Notes re Boundaries as going generally southwest 225 is actually 226. Now why is it that the line which is supposed to go southeast, or southeasterly, which in our submission would be even more southeast than generally southwest, has been drawn to -- on an azimuth of 125 degrees, we don't know. But as you've noticed, Nova Scotia, in its legislation, has always interpreted the Notes re Boundaries as meaning not 125, but rather 135, which is compliant with the behaviour of the parties with respect to permit issuance.

PROFESSOR CRAWFORD: You might say it was more equitable.

MR. BERTRAND: We always seek to be fair. Mr. Fortier tells me that we don't wiggle, so.

Just going quickly through my notes. A trap in the floor is about to open. So this is essentially an issue of interpretation, if there is one issue, as opposed to determining whether there has been acceptance or the necessary consent to an agreement back in 1964.

Coming back on the submission of Nova Scotia on the role of maps, that submission in our brief materials is found in part four of our Memorial, under paragraphs 28 and 29.

I will not take -- spend much time on the other issues. We have seen the 1973 outbreak of Newfoundland. I wish only to remind you that this breakaway was not linked in any way to an insatisfaction of Newfoundland over the boundaries, but rather over the content of what was on the table during the discussions between the federal government and the provinces in respect of the degree of control that the provinces would be entitled to exercise pursuant to that administrative arrangement.

It seems to us that it is clear from the exchange and from the proposal of Newfoundland that these boundaries were not put into question, and they were actually never put into question. The lines, it became clear, may not

have been found satisfactory as of 1972, and especially the line running to the international waters from turning point 2017, but the agreement -- and I jump to my third point -- dealing with -- which deals with the various documents, either where Newfoundland would have protested the lines or the agreement or whether -- where Nova Scotia would have acknowledged that there was a dispute, we ask you to read them in the context of making a distinction between the 1964 Agreement, as Mr. Doody did in his letter of October and whether or not a line appearing on a map depicts accurately the Agreement that was entered into in 1964.

The argument about the MOU -- and I'm sorry -- je va faire du coq à l'âne -- the line about -- the argument of Newfoundland with respect to the MOU is that -- well, if it is something that Nova Scotia can get out of, how is that they all -- they apply a different standard for us, for Newfoundland?

And the answer to this is found in the text of the MOU. The MOU is an agreement to agree. The MOU is subject to the parties entering into a comprehensive and detailed agreement providing for the administration and management of the mineral resources of the area. That's the first article of the MOU which you will find under annex 67.

And it makes an additional point which we believe in our favour. That is the Premiers knew very well the difference between an agreement to agree and an agreement, period. They knew that in 1964; I believe Mr. Fortier has drawn your attention to it, and they know -- they knew it in 1977.

I don't think that -- without any disrespect to Mr. Crane, I don't think that the argument of Newfoundland with respect to the content of the proposed amendments in the context of the constitutional discussions merit any reply. And with your permission, I will ask Mr. Fortier to -- Mr. Saunders to come and say a few words.

PROFESSOR CRAWFORD: Sorry. Just before you do, on the MOU, you are quite right in saying that the duration clause of the MOU refers to the duration that the formal agreement will have, not -- it doesn't -- it's not a duration clause in relation to the MOU. Is it your position that the MOU is non-binding?

MR. BERTRAND: It was probably -- is it non-binding? You are asking a civil lawyer.

PROFESSOR CRAWFORD: We are going to take five minutes.

Perhaps you might like to think about it.

MR. BERTRAND: Okay. Very well. Thank you.

CHAIRMAN: We will take five minutes.

(Recess)

PROFESSOR SAUNDERS: Thank you, Mr. Chairman. Before I begin, Mr. Chairman, members of the Tribunal, I would like to address one small issue that was left from Mr. Bertrand's presentation relating to information that was introduced during Newfoundland's oral submissions and provided with their tabs.

If I could turn you to the -- one of Mr. Bertrand's slides. These are the Newfoundland and Labrador Petroleum Regulations 1977. You will be wanting to go forward a bit. It's figure 30. Yes. This is the magnified version of a map attached to the Petroleum Regulations showing the Schedule "B" Management Zones.

The actual map, which is a little less dramatic -- if we could have the next slide -- on the full page doesn't quite draw the attention of the observer as quickly to the divergence from the 135 line. But more important, in terms of any purported objection that Nova Scotia should have made to these regulations when they were promulgated -- if I could have the next slide -- the dominant feature in these regulations was the establishment well after 1971 in the Katy permit, actually, of the permit grids for Newfoundland and the quadrangles defined the areas in which permits can be granted.

If we can have the next detail slide? This is section

12 of those regulations. Now read it, notwithstanding section 8. "Boundaries of all quadrangles shall conform with the provinces' onshore and offshore boundaries with the other provinces and the Northwest Territories."

Marginally relevant, I would have thought. It does, admittedly, and I'm sure this will be mentioned, refer to the Northwest Territories, with whom there was no boundary. Of course, there couldn't be. But I think that the other provinces might have been entitled to think that the reference to the existing offshore boundaries referred to the ones they had agreed with Mr. Moores and Mr. Smallwood.

PROFESSOR CRAWFORD: Or without any other properly established boundary --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- but the point is that you might have said that this gave you some assurance against the need to protest. On the other hand, the map was there and the map clearly contravenes your view of the 1972 -- or 64/72 boundary.

PROFESSOR SAUNDERS: Well, we would submit, Mr. Crawford, that it's not all that clear when you look at the 8½ by 11 inch photocopy that was magnified to create the version that makes it clear that it does diverge, the original version of a very poor scale and no identified projection

doesn't make that clear at all.

And as you say, the section 12 provision is rather definite, at least, on there being boundaries or at least boundaries being a possibility, and although it may have left wiggle room, the other provinces might not have spotted it, or had no particular reason to.

Now if I can turn to my own presentation. I will apologize in advance. Given the compression of time, I'm going to try and reduce a number of issues, and I may skip over some sections, but we have submitted material and we have submitted slides that you may refer to, as well.

I want to address very few issues arising out of Newfoundland and Labrador's submissions respecting the issuance of permits by the parties. And then I want to deal, with some trepidation, because of the schizophrenia involved, with some matters respecting the application of international and domestic law, particularly respecting the question of the parties' intent to be bound as a matter of fact, or as of fiction.

Start with the permits. Very few remaining issues from Newfoundland's oral submissions. Most of Newfoundland's oral submissions, in our view, consisted of a denial of the technical and scientific information provided without any particular evidence.

I do want to reiterate -- if I could have the next

slide -- that Nova Scotia's behaviour in issuing the permits along the boundary was clear; it was consistent; it was open, as shown on this map. The conduct shows only the application of the agreed boundary, including the 135 line, and as far as we can tell for the 135 line, beginning at least in 1967. Nothing Newfoundland has presented has rebutted that.

The Mobil permit, if I can move to slide 4. You will, of course, recall the Mobil permit -- and actually back up one. Thank you.

Newfoundland largely avoids talking about this -- the implications of this permit, and with good reason. Mr. Crane on Tuesday briefly addressed it, and said that it may have been the case that Mobil simply asked for the lands to complete its holdings on the other side.

Well the permit did match the Mobil lands as shown here and as we had pointed out. But apart from that, there is not much to support Mr. Crane's contention at all. It's unlikely, in the first place, the location of the line wouldn't have come up.

PROFESSOR CRAWFORD: When was the Mobil permit granted on the Nova Scotian side?

PROFESSOR SAUNDERS: February 1967.

PROFESSOR CRAWFORD: And on the -- and it was later in '67?

PROFESSOR SAUNDERS: September in '67, I believe.

PROFESSOR CRAWFORD: Okay. So chronologically Mr. Crane could be right?

PROFESSOR SAUNDERS: Chronologically he could be right. Cartographically we suggest they are having trouble again. If you look at the upper portion, the reference point in the permit description and the -- Mr. Crane had -- has waffled a bit on whether this line was shown on a map. This was shown on the permit map as well as being described in the permit. And the reference point was used to draw the line from the southern limit to the north. They didn't stop the permit there. They just ran it up to the north. So that northern reference point has nothing to do with the mobil lands.

I mean, that's how the permit was drawn. The permit was drawn by joining two points on the agreed boundary and then blocking it off part way up, as you can see here at the end of the permit, but it was drawn to connect to that line there -- or that point, rather. So it doesn't quite fit the facts.

In the end Mr. Crane's explanation for the permit really comes down to the following, at page 544 of the transcripts. It was there and it may well be a situation. And we submit it is a situation.

PROFESSOR CRAWFORD: How long was it there? When was it relinquished?

PROFESSOR SAUNDERS: We are not sure. I would -- it carried on at least after 1972, '73, because it was part of the revision and revival of the permit rights at that time. So at least to that point.

PROFESSOR CRAWFORD: What's the matter -- which -- I would be interested in knowing how long -- how long it lasted. What about the -- on your side of the line?

PROFESSOR SAUNDERS: They were relinquished at different times right through till the late 70's and then a number survived to the 1982 Nova Scotia Agreement with Canada and had a transition period during which they died and their rights were transferred.

PROFESSOR CRAWFORD: We are talking about Mobil?

PROFESSOR SAUNDERS: The Mobil lands, in particular some of them were surrendered, this is from memory, I believe in the mid-70's.

But what this permit does show in 1967 is that Newfoundland did know of or had seen on a map the 135 line and applied it, contrary to the flat assertion that the line was not invented till 1983. Despite the fact that Mr. Blaickie in '83 had nothing to do with the legislation, as has been shown in our Counter Memorial, despite the Crosby offshore map that was shown in 1972 to the Premier, and despite the Nova Scotia permit map which had been in effect for years, and despite this permit, in

Mr. Willis' presentation on Friday, we heard again that the 135 line first saw the light of day in 1983. And it's just not so.

I will turn briefly, if I may, to the infamous Katy permit and the variance between these next two diagrams. I'm not going to repeat the lecture for the sake of everyone. But I would not that Mr. Crane did concede in the transcript at page 545, "We can't really figure out the draftsman's intent no matter how hard we try." Yet their entire theory as to how this permit should be placed depends on having figured out how the draftsman drew the line.

Newfoundland asserted in its Counter Memorial that they did know, that it was the permit grid. Now the permit grid is nonexistent and they don't know. But they still know that it had to have been done in the right way for their side.

In the end, in reality we are left with Mr. Crane's acknowledgment that they don't know for sure and neither do we. We did, however, offer this explanation for why the permit was drawn this way, as shown in this illustration. We think the drafter worked from this inner segment and extended the straight line.

The result, a line with a starting azimuth very close to 135 and running down the side of a permit that runs

about 300 miles offshore.

There is no response to this other than to deny the argument. And there is no response to Nova Scotia's argument on the transference of this permit to a Mercator projection chart. No explanation for the coincidence. The obvious recognition of the boundary in 1971, when it did not exist in Newfoundland's theory, and for both the Mobil and the Katy permit's critical point they existed at a time leading up to the 1972 Agreement. And along with the map shown by Mr. Crosby to Mr. Moores, would have informed the understanding of Newfoundland as to what the line was in the outer segment.

Yes, Professor Crawford?

PROFESSOR CRAWFORD: Neither side took any steps to try to get the -- a line beyond 2017 incorporated texturally or graphically in 1972?

PROFESSOR SAUNDERS: No.

PROFESSOR CRAWFORD: It's very puzzling.

PROFESSOR SAUNDERS: It is, Professor Crawford, but I would also point out that neither did they do so in the Bay of Fundy. The line stops there in the Bay of Fundy as well.

I suspect -- or would suggest that the natural reticence of technical staff to go beyond their instructions may have had something to do with it. But Newfoundland has made no assertion that we are not

claiming the waters of Passamoquoddy at this point or that there was any problem with New Brunswick. At both ends they stopped the line.

PROFESSOR CRAWFORD: Associated perhaps with the natural inattention of politicians to detail?

PROFESSOR SAUNDERS: Far be it for me to say.

PROFESSOR CRAWFORD: The problem is they left a gap. I mean, the --

PROFESSOR SAUNDERS: That's correct.

PROFESSOR CRAWFORD: -- the combination of reticence and inattention?

PROFESSOR SAUNDERS: Yes. And what we would suggest is that the combination of other materials surrounding it that clearly informed their understanding, as Mr. Fortier has presented earlier, overwhelms that evidence, coupled with the fact that they did do this at both ends of the map. And at the other end there is nothing to explain it that is suspicious in any way.

Now in terms of inattention --

PROFESSOR CRAWFORD: But of course there wasn't any correspondence such as the correspondence that occurred in 1972 about the uncertainties beyond 2017?

PROFESSOR SAUNDERS: No, that's true, and it's a very good point. However, if we want to understand what happened with correspondence we haven't seen or the dog that didn't

bark in the night, it's an equally plausible explanation that Mr. Doody, once he spoke to his Premier, realized that what he was complaining about was not in fact the line that the parties were using. That the line in -- on the 1964 map as drawn, not as described, would cause a problem for Newfoundland. However, if Mr. Doody inquired and found that it was the 135 line, he would have no reason to pursue it further, and on the record it never came back to the Premiers.

PROFESSOR CRAWFORD: That is, with respect, pure speculation?

PROFESSOR SAUNDERS: Yes. As is any speculation as to what might or might not have happened in the correspondence afterwards.

Yes, Mr. Legault?

MR. LEGAULT: Mr. Saunders, just a very simple question and forgive me if I have been left behind here, what line is followed on this chart by the western limit of the Mobil permit?

PROFESSOR SAUNDERS: On the Mobil permit -- that's another contention actually Mr. Crane made in his presentation and I believe Mr. McRae as well. The contention is that the Katy drafter must have known because the Mobil permit --

MR. LEGAULT: I'm not interested in what the Katy drafter must have known. You showed representation of the Mobil

permit just a few slides back?

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: Which I thought you said followed the 135

degree --

PROFESSOR SAUNDERS: Yes, it does,

MR. LEGAULT: -- azimuth.

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: Does it still do so here?

PROFESSOR SAUNDERS: Actually, yes, it does. And that

was --

MR. LEGAULT: Well then what is the Katy permit -- what line

is the Katy permit following, also the 135 -- is that

azimuth in two different places?

PROFESSOR SAUNDERS: Actually, yes. If I may explain again.

I'm going back to the lecture.

The Katy permit is drawn over a much longer time. The Mobil permit had coordinates that defined its end points, which kept it more accurate. It's as simple as that. When you draw from here to here -- it isn't 135, it's near 135. But the longer you extend it down, as we showed the other day, the more the error goes. So this line could have a starting azimuth here at around 135, but it will be substantially off that azimuth by the time it got to here.

There is no evidence that the same person drew these both on the chart at the same time. Rather, it looks more

like there is a plan that has been provided.

MR. LEGAULT: This is on the Conic presentation?

PROFESSOR SAUNDERS: Yes, that's right.

MR. LEGAULT: But is the Katy permit west of the Mobil permit on a Mercator?

PROFESSOR SAUNDERS: Fractionally. Only fractionally.

MR. LEGAULT: Okay.

PROFESSOR SAUNDERS: Thank you. This response to the question of inattention that was raised a moment ago, I had to do some scrambling, it was quite a surprise the other day.

During Mr. Crane's presentation on Thursday, you will recall this figure, the two seismic permits in the -- between Cape Breton and Newfoundland, showing how Newfoundland drew the Texaco permit in the Gulf, and of course, the missing St. Paul Island, which we could have back again, please. Thank you.

In general, the response to this was that Mr. Crane explained, and this is at pages 549 to 550 of the transcript, that after Newfoundland quote, "examined the materials that were filed they discovered that I was talking about the wrong Texaco permit, one well away to the south on the Newfoundland side of the line." At page 550 he puts it clearly.

We came away from Mr. Saunders' presentation with the

firm impression he was talking about number six, but the material that he filed was with respect to number five. If this were true, of course, then everything I said about the caveat that limited the area of the Texaco permit would be the result of sheer incompetence on our part. But of course, it's not true.

To be very, very clear on this point, at this time, this is the permit document that we filed with respect to permit number six. It is very clearly labelled as Newfoundland Supplemental Document Number 50, and it is. It shows both the permit area at latitude 4730 north, clearly the Texaco permit off Cape Breton. Number six, that is. And it shows the permit caveat on the same document. And, of course, this material was provided to Newfoundland in advance of the hearing. And it is their document.

Now, later in my presentation, specifically dealing with permits to the south, I also talked about Texaco's other permit and the application form which is shown here. It's also clearly and correctly labelled as Nova Scotia annex 159.

This is an important point, it affects the structure of that permit and how Newfoundland drew it. I look forward to Newfoundland's explanation of the careful examination of documents that led to this allegation. But

we stand by our submissions, the permit was drawn by Newfoundland in a way that does accord with the permit description.

But for now, and Newfoundland's oft repeated phrase, "let's return to reality". This map, looking at the next slide, shows what Nova Scotia contends is an accurate representation, as best the practice can be reconstructed, of the permit activities of the parties to the 1964 Agreement. And here we have the Newfoundland response.

That we have clearly shown, and it has not been rebutted, that the seismic permits were of a different type, and do not represent an attempt to a certain jurisdiction, so we can move to the next -- those are none. Next, and of course, the famous Texaco permit. Which leaves us with the Katy permit, for which we have yet to see a credible factual response on the proper location of the Katy permit, so we're back to what we started with.

I would note that we did dispense with our bold faced type, we can move to the next -- thank you. But we found these nice red X's lying around the hearing room, so we thought we might use them instead.

Now, again, the reality is this is the pattern of behaviour. The conclusion that we draw from this is the following, and I will keep this as brief as I can. We

rely on our earlier submissions, which have not shown -- been shown to be incorrect. In particular, all parties continued to use the boundaries in their offshore activities long after it was dead and gone, in Newfoundland's version.

At least by 1967 the 135 outer line was in use by Nova Scotia and Newfoundland, which is significant, both in interpreting the relevant words of the 1964 Agreement as subsequent conduct, but also in understanding what the parties intended in 1972, conduct before the Agreement.

Newfoundland's unsupported, but still maintained theory, it saw the light of day in 1983.

Now Mr. Chairman --

PROFESSOR CRAWFORD: Well I mean, you have shown it's clear that there was a map in existence which showed something like a 135 degree line --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- in the early 70's. Constructed, I think was the word, by the federal government.

PROFESSOR SAUNDERS: We would say first late 60's the use of the 135, or mid to late 60's the use --

PROFESSOR CRAWFORD: No, but I'm talking about the map --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- coming from official sources, which took the line all the way down.

PROFESSOR SAUNDERS: Yes, and the origin of that --

PROFESSOR CRAWFORD: But the problem you have got is to show that this oil practice, even leaving aside discrepancies, is referable to an agreement, because it might equally be referable to an understanding not amounting to an agreement, that until some -- I mean, there was no doubt that -- that this final agreement on one or other of the various proposals that have been made was still -- was still weighted. I mean, okay, there was negotiations going on, the memo used there were individual proposals, the white papers, whatever.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: None of those things came about until the 80's. In the meantime the parties got on with issuing permits. Admittedly, sometimes on the basis that if it turned out that they couldn't have issued the permit the company would get its money back. But nonetheless they issued permits. All of that is -- isn't it arguable that all of that is equally consistent with the hypothesis that this was a modus vivendi, as that it was an agreement?

PROFESSOR SAUNDERS: Yes, Professor Crawford, it would be if there were evidence that the parties had entered into a modus vivendi. And we're looking -- I agree that the permits, if they're out there on their own, without reference to the other material that has been shown by Mr.

Fortier earlier, consistently referencing the Agreement and the consistent transposal of that Agreement in different contexts, it would be less convincing on its own. However, we are referring back to the Agreement, and we're using it to show that number one, the parties respected exactly what had been agreed, but also on the interpretive exercise on the one part that may be ambiguous, that this is significant practice in light of the interpretation. But yes, it does assume that there's an agreement.

PROFESSOR CRAWFORD: Of course, a modus vivendi can be an agreement, it's just an agreement which is not binding. It's an agreement which is an understanding pending the conclusion of an agreement. And there are lots of them around, and they are quite common in the -- in maritime boundaries.

So, it's not that there isn't, as it were, a meeting of minds. It is the meeting of minds of a particular kind.

PROFESSOR SAUNDERS: That's right. And we would submit that there is nothing in the documents that has been pointed to other than flat assertion that anything really amounted to a modus vivendi. In fact, Newfoundland's own theory is contrary to that. They say it was a proposal about something else. They haven't alleged, except as a fall

back position on the permits, that there was a modus vivendi. They say that in fact there was a different process going on.

So the only theory on the table that explains this is by reference to the agreement. And if it's not related to the agreement, precisely related to the agreement, it's quite a coincidence.

PROFESSOR CRAWFORD: This is, as Newfoundland accepts, statutory arbitration.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: And although we have -- we have to comply with the principles of natural justice, and so on, we are not compelled by other parties' version of the case. I would say?

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: We're bound by the Terms of Reference?

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: And we're bound by the Act.

PROFESSOR SAUNDERS: I'm very glad to hear that.

PROFESSOR CRAWFORD: If we're -- and we've had the debate about the relationship between the two, but we don't have to get into that. If we came to view that the proper explanation of what happened, again this is a question, if we came to the view that the proper explanation for what happened was that there were discussions going on with a

view to an eventual settlement which would be legally binding, in the meantime the parties acted on the basis that certain lines would be the lines in that agreement.

PROFESSOR SAUNDERS: Mmmm.

PROFESSOR CRAWFORD: That wouldn't amount to a legally binding agreement on the lines, it might amount to something else.

PROFESSOR SAUNDERS: It might amount to a commitment, particularly in the circumstances, and something I might have a few minutes to address later on, the difference between an agreement that might have legal rights as between the parties in this case, but lack enforceability at the time, because of the lack of a forum, or the lack of applicable law to deal with it. This is something that's raised consistently in the literature on intergovernmental agreements that Newfoundland cites, and we have referred you to a case in the latest material that we've cited -- the potato case, oddly enough. Yes, I prefer to think of it as the PEI Ferry Case, to give it a little more dignity, but --

MR. LEGAULT: Mr. Saunders, a brief question requiring an even briefer answer, can you tell me what the distance is at the southern most point between the line of 135 degrees and the western limit of the Newfoundland permit?

PROFESSOR SAUNDERS: I have seen that number, it's over --

it's beyond the 200 mile limit, I know that.

MR. LEGAULT: No, no. The --

PROFESSOR SAUNDERS: I don't know the exact --

MR. LEGAULT: The distance --

PROFESSOR SAUNDERS: Oh, the difference?

MR. LEGAULT: -- between the limit, the 135 degree limit and the western limit of the Newfoundland permit? It could be provided later.

PROFESSOR SAUNDERS: Yes, it could be provided. We'll get that for you. It was 64 in the original projection, then it goes down to quite a bit less.

If I could turn briefly to another central issue in this arbitration, and one that has raised some difficulty for the parties in their initial submissions, the question of how the Tribunal is to apply principles of international law as required by the Terms of Reference and as agreed by the parties and in their legislation to parties who were, in fact, not states in 1964. Because the Terms of Reference create the legal fiction that the parties were, at all relevant times, states, but where does the fiction end? How far can it be taken before we are retrospectively changing the facts and not just ensuring the application of the proper law, and specifically, in the context of the intent of the parties at the time, intent of Premiers and officials determined

by the application of international law but never forgetting they were, in fact, Premiers and officials of provinces?

Newfoundland acknowledges that both parties view intent to be bound as the litmus test by which the Tribunal can determine whether an agreement existed, and that intent is a matter of fact. But again, this is consensus only up to a point because the fact of intent is determined by the application of criteria and tests which are matters of law, and the parties differ fundamentally on the legal tests by which the fact of intent is to be determined. Newfoundland applies what it alleges, and I emphasize the "allege" -- that it was the domestic law at the time. Nova Scotia applies international law.

Indeed, Newfoundland goes further and says that to find an agreement -- yes, Professor Crawford?

PROFESSOR CRAWFORD: You say "allege"?

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Are you going to address that?

PROFESSOR SAUNDERS: Yes, if I have time, I certainly will, even if it's very quickly. The primary argument for Newfoundland is that domestic law governs all aspects of phase 1, that's slide 25, please. I won't quote these passages from the Newfoundland Memorial and Counter Memorial, but you will have them before you. So

Newfoundland considers that the rules governing both the existence of a binding agreement and the interpretation of that agreement must be governed by Canadian law. And we disagree.

If I can turn to the question of fictional intent versus factual intent, the specific problem. Nova Scotia has submitted from the beginning that the intent of the parties, in fact, is what must be determined in determining whether they intended to be bound at 1964 or 1972.

Further, we assert that the domestic context including the domestic legal context and what the Premiers would have known of it is relevant to determining that intent.

In fact, we have argued that the fact of the Premiers' request for binding legislation or constitutionalization under Canadian law was obviously relevant to determining their intent. They tried to be bound. They intended to be bound.

Thus, we consider, as well, the significance of Premiers jointly stating to the federal government their agreement, in the past tense, of a Premier making a formal statement to the House of Assembly confirming his agreement on delineation and description. All of this is consistent with factual intent.

What Nova Scotia has not argued, has not asserted, is

what Newfoundland has kindly argued on our behalf. Professor McRae, in the transcripts at page 420, attributes to Nova Scotia the view that the Tribunal should use make believe states, imagined intent, that we have them playing the game of diplomats.

Real intent, he tells us, is not part of Nova Scotia's case. With respect, these are not our arguments, these are not our words, and that real intent is our case.

We assert and maintain, however, that the legal criteria by which intent should be determined are the criteria found at international law. I'm not going to run through them in detail again, but things like the terms of the agreement, the circumstances of its conclusion, and yes, subsequent conduct in the right circumstances.

Yes, Mr. Chairman?

CHAIRMAN: I take it that what your submission is, to put it in other words, is that even if the Premiers are entering into a political agreement, they may, nonetheless, really intend to be bound in that their actions indicate a -- they are doing all they can?

PROFESSOR SAUNDERS: Yes. Thank you, Mr. Chairman. That's precisely it, and much more quickly than I could have done it.

If we take the situation in '64, the Premiers didn't know by then what the likely outcome of the offshore

debate was. They did ask for what would have bound them in their knowledge under Canadian law. Canadian law. They also, by the time they came to '72, knew that it was a less likely proposition. At that point, they were also asking for plain federal legislation.

Two outcomes to the offshore. It's provincial, in which case something constitutional is needed. It's federal, in which case, legislation does the job.

Yes, Professor Crawford?

PROFESSOR CRAWFORD: The problem with that -- if you take it in '64, they are saying, this is all ours. They say, we own it. Okay. So you would expect owners, if they are going to work out the boundaries precisely between adjoining allotments, to enter into something more formal than an unsigned communique. So that's a problem with '64, and they didn't own it in '64. They didn't own international law anymore than they did this. I mean, they just didn't actually own it.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Now the position in '72 is different because, certainly Nova Scotia has been advised, you haven't got a hope on the continental shelf. And we all know that that's right, and Newfoundland thought they had a hope, but it takes two to tango in respect to an agreement. So in '72 you have the situation where they

are looking for ways in which they will get the benefit of the offshore --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- and they believe, and they may well be right, that they can, as between themselves that the federal government has no interest in where they are going to draw the line. If they decide they are going to do it on a territorial basis, they can decide it for themselves.

PROFESSOR SAUNDERS: That's --

PROFESSOR CRAWFORD: The problem is that they couched their '72 agreement, still in terms of ownership, and they declined, or at least you didn't, but Newfoundland did, they decline the invitation of Mr. Allard to accept that this is for all purposes.

PROFESSOR SAUNDERS: Well, actually, it wasn't quite that definite. One person thought that it was unnecessary to the context. I take you back -- take it back a bit, Professor Crawford. We have not accepted that it was only about ownership in '64, it's what they were asking for. Well what they wanted, in our submission, were the benefits.

The subsequent conduct is relevant because it is consistent with that interpretation of the original agreement. By '72, when the parties came together, they did ask for ownership again, but Mr. Allard, remember,

didn't just say for all purposes. He also specifically said at one point in his letter, we will ask for ownership. Afterwards, anybody who doesn't want it can do a different sort of deal with the federal government. It was for all purposes in that sense, at least.

So by '72, the other opportunity was present. Federal legislation, much like what we have now, was envisaged, and if it's federal territory, federal legislation is sufficient to implement, to hold binding the provincial governments, and that's what they asked for, and in the end, it's what we got.

Now if I may -- sorry.

PROFESSOR CRAWFORD: If I could just take you to a passage.

I mean, one of the interesting things about the diplomatic -- diplomatic correspondence, about the correspondence is that there are changes in position from time to time. I mean, Nova Scotia went into the MOU and withdrew from it and so on, and there is not much criticism -- I mean, okay, there may be a question whether you can have a meeting on the basis of a certain proposal, and at various stages, different administrations and we can't even begin to talk on that proposal. But no one is saying, oh, you breached an agreement. There is very little language of that sort and the nearest that I have been able to find -- I mean, I'm open to correction -- is a segment by Mr.

Allard again, who seems to have had a clear view about what was going on, in June, 1969, when he was answering his own question, saying, unequivocally, yes, something which Newfoundland did not do. And he went and said this, "Quebec accepted these boundaries in good faith, and further in good faith, undertook certain actions and made certain commitments concerning the area within those boundaries. Quebec has at all times considered the area within these boundaries as part of Quebec, and there is no good reason why it should decide otherwise now. Quebec accepted the boundaries at the request for the four Atlantic provinces, which request was considered by Quebec to have been seriously made, and no one has objected to its actions or activities within those boundaries."

That's quite a powerful --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- powerful statement of a position that has the virtue of being contemporary.

PROFESSOR SAUNDERS: And, to some extent, impartial --

PROFESSOR CRAWFORD: Well --

PROFESSOR SAUNDERS: -- to this particular end of the --

PROFESSOR CRAWFORD: Well, I mean, Quebec and Nova Scotia were clearly those with a strong --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- interest in --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- getting this through, and there were important equivocations from other actors. New Brunswick said they wanted to talk to the federal government, and Prince Edward said, well, this is ultra vires, and so on.

PROFESSOR SAUNDERS: But eventually signed on in 1977.

PROFESSOR CRAWFORD: Okay. Fine. But the point is this, that argument -- isn't that argument equally consistent with an argument based on reliance and estoppel rather than agreement? Isn't that what he is saying, well, this is a good faith arrangement. We may not be able to make it binding. We know where the real situation is. We are not intending to be bound as were qua agreement, but we are intending -- we are taking this thing seriously. And he is saying, listen, this is serious. We are acting on the basis of this. Isn't that position -- it's the only trace I can find of something that I would describe as opinion of a jurist, if you would like. Isn't it the only -- isn't it equally consistent with estoppel?

PROFESSOR SAUNDERS: It could be equally consistent with it, but I don't think it denies the other option, as well, and it depends on the nature of a legally binding agreement at the time as they understood it and what they had agreed to do, but both options are there.

In Quebec's view, you are right, it was consistent

throughout, and very clear headed in the documents. They knew they had done an agreement. Everybody knew they had done an agreement.

PROFESSOR CRAWFORD: Knew they had done well.

PROFESSOR SAUNDERS: Yes, of course. If I can deal very briefly with the question of Canadian law, because one of the things that -- in its oral presentations, Newfoundland has focused on the issue of the so-called fictional intent, which we think is a red herring. We think the complete application of domestic law is unnecessary to solve the problem of fictional intent, but there is also the question of Canadian law, which while denying its applicability, I think I should deal with two important points.

First Newfoundland asserts that there was a clear body of what was required formally to make intergovernmental agreements in 1964. They also assert that there was such a clear body of that law in 1986, that the -- or '87/'88, that the legislation -- that legislated drafters couldn't have thought anything else but that they were preparing for only boundary delimitation law in its narrow sense, and not for agreement, because there was such a well settled body of intergovernmental agreement law in Canada.

I don't have much time to deal with this, a few more minutes, okay. But I would like to address that very

briefly.

Newfoundland's argument is based, to some extent, on case laws. Mr. Willis said on Friday some case law quite carefully. But they have also asserted, although Mr. Willis objected to his -- using the term settled law, we'll use the term from the Memorial, "fully developed body of law" is what they have to show, what they have to prove, and the burden is on them for this.

The cases, make a short list, I'm prepared to take questions, but I will just run through this quickly, if I may. Canada Systems Plan case, 1991, is the key point in that. Has nothing to do with 1964, and it was about an agreement that was already found to be binding, says nothing about what makes them binding. The South Australia and the Commonwealth Case in 1962, decision of the High Court of Australia, interest of time, it was decided on a factual basis. And it was also decided on the basis, by four of the justices, I believe, that it hadn't been breached in any event. The true nature of the promises was the key.

The Higbie Case is referred to for another point, it is not supportive of Newfoundland. That's it. Nothing contemporaneous from 1964.

In any event, there are more fundamental problems, as well. Where did this jurisprudence come from? Until 1970

disputes of this type would not be before the Federal Court, because we hadn't had the Section 19 amendment that would make that possible. There weren't -- didn't seem to be going to the Supreme Court, and the Superior Courts of the Provinces couldn't deal with it because of inter-jurisdictional immunity. So where was this body of law, and why has Newfoundland not shown it to us?

They cite practices and customs, five. Four from the 1990's, one from '67, none from before. Out of a thousand or so, they say.

Now interestingly, we don't say how the Tribunal can automatically treat practice as law, except it seems that here they are applying international law standards, and using state practice, ironically to the one part of the arbitration where it doesn't belong.

PROFESSOR CRAWFORD: The proposition in Southern Australia and the Commonwealth, and it is cited in the Canadian sources, the proposition which was interesting and probably new, was that even if you didn't have a contract, and I don't think anyone thought that those agreements were contracts, you could have legal relations on the strength of the agreement.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: At a certain point. In other words, it was a sort of reliance question that arose from the --

from performance.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: It wasn't a contractual commitment, as such. You weren't enforcing a contract. You were enforcing a legal relation entered into on the basis of reliance. And the potato case, if I can so call it, is consistent with that analysis.

PROFESSOR SAUNDERS: It is consistent, and I will come back to that with a slightly different twist, if I may. I would very quickly like to address the academic sources of which Newfoundland makes a great deal. In fact, it's still international law, using publicists. If I could briefly have slide 27?

The primary source for the actual criteria that Newfoundland applies, not just refers to but applies as law, are drawn entirely from a study from Mr. Kennett, who they say identifies the factors that determine whether the requisite intention exists. Those factors focus on formality, substance, language, formal rather than good faith obligations, intent of the parties.

Now, Mr. Kennett saw it differently. Mr. Kennett, although they say he identifies these factors, in fact says they are parameters that can be suggested, with might be used by the courts to determine the legal character of these agreements.

And finally, he says the courts have not confronted this issue directly, and the characterization of these agreements is difficult.

I will refer to one other source before concluding. This is the other -- the other Mr. Saunders, if I may, cited by Newfoundland. It says, although not quoted, interestingly enough, neither of these questions, the enforceability or the legal characterization, has received a great deal of attention to date, in the legal literature or in case law. That's in 1988.

So far from having drafters of the legislation who must have known that these formal criteria were at the heart of intergovernmental agreements, or that it was a well developed body of law, if any one of them had read one of Newfoundland's main sources, they would have discovered the exact opposite.

Now, Newfoundland essentially has asked the Tribunal to apply Canadian law, in flat defiance of the Terms of Reference, in our view. But beyond that, based on the scanty authority they have submitted, they are also asking the Tribunal to make Canadian law, and to do it retroactively.

Newfoundland claims there's a full body of law that would justify this. There is not. So both Nova Scotia and Newfoundland ask for the retroactive application of a

system of law that did not apply at the time. For Nova Scotia it's the rules that did exist at the time in international law, and can be identified, and have the immense advantage of having been chosen by the parties in their statutes, and mandated by the Minister in the Terms of Reference.

Newfoundland asked for the application of rules that it cannot show existed at the time, that will have to be developed from scratch, and that the parties have not agreed to apply, and that are not in the Terms of Reference. The choice is clear.

On the final point, which Professor Crawford referred to, Canadian courts have recognized that there may be rights without remedies for a period of time, as in the South Australia case. Mr. Justice LeDain, which we have referred to the quote, and I won't go into it now, pointed this out in the PEI case, but in a slightly different context. What he said was that a right that existed through that period acquires force, acquires enforceability, at the time it achieves a forum for its enforcement, as it did through the Federal Court Act.

We are in a parallel situation, though obviously different. We had these rights, the agreement existed, but it may not have been enforceable under domestic law. By the agreement of the parties, which is key as it was in

the Federal Court Act legislation, that -- those rights have acquired a new status, because they have acquired a forum, this Tribunal that can enforce them.

PROFESSOR CRAWFORD: The problem is whether they are rights ex-contract to --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- or whether they're rights that arise from performance and reliance, because I know -- I know you've submitted otherwise, but I mean it is at least arguable, the rights arising from reliance are related to the question of delimitation, not to the question of agreement.

PROFESSOR SAUNDERS: It's possible, although we would submit it got pretty concrete by 1972, I would also submit that the position -- the approach in the PEI case was to treat it with the body of law that now applied. And that in this case would mean to apply international law standards to the formation of the agreement, and on that basis, we submit, Nova Scotia clearly wins.

If I may, however, return to the -- the comment, it's a last point before Mr. Fortier kills me, the South Australian case that you -- Justice Windeyer did not -- was not just saying what Newfoundland quoted him for, and he did cite, and say the following as well: "To say that the standardization agreement is not a legally enforceable

contract does not mean that it is merely a scrap of paper. For English law has never taken the view that undertakings to which it cannot give its aid lack all weight or meaning." Thank you.

MR. FORTIER: Mr. Chairman, Members of the Tribunal, I will now close the Nova Scotia oral submission.

As you hear Professor Saunders say, the parties agree that the litmus test of a binding agreement is intention. The 1964 Agreement by which the parties delimited their respective rights to offshore mineral resources passes the test with flying colours.

In its written submissions, as in its oral pleadings last week and today, Nova Scotia has provided overwhelming proof of the parties' real intent to conclude a binding agreement. Newfoundland's thesis that the provinces did not intend the boundaries established in the 1964 Agreement to be binding on them simply does not stand up. It is belied by the contemporaneous written evidence of the '64 Agreement, by the express intent of the provinces when they concluded the Agreement, and by the ordinary meaning of the terms of the documents evidencing the Agreement, as well as the object and purpose of the Agreement.

It is contradicted by the work of the JMRC. It is in stark contrast of the declaration of Newfoundland Premier

Moore in 1972. It is incompatible with a consistent conduct of the provinces subsequent to the conclusion of the Agreement. It is completely at odds with the incorporation of the agreed Nova Scotia-Newfoundland boundary in the '77 MOU, in the 1982 Canada-Nova Scotia Agreement. In the 1984 implementing legislation, as well as in the Canada-Nova Scotia Accord, and the 1986 Federal and Provincial implementing Legislation.

As we saw last week, pleader after pleader on behalf of Newfoundland addressed the same facts, the same issues. Four times, Mr. Chairman, we heard counsel describe the evidence in a manner so as to obscure what really occurred during the relevant period.

Four times the Tribunal listened to an explanation of what the Premiers really intended when they repeatedly referred to their own accomplishments as an agreement on their respective boundaries or as quote "agreed". Or what various academics really meant when they coined such expressions as the 1964 Interprovincial Agreement, the 1964 Interprovincial Boundary Agreement, the 1964 Agreement to refer to what occurred at the conference of Premiers in September 1964.

And through it all what was perhaps most surprising was Newfoundland's steadfast refusal to confront head-on the obvious problems with its theory or to respond to the

evidence and submissions tendered by Nova Scotia.

Its Premier with the other Atlantic Premiers declares having unanimously agreed their respective maritime boundaries. What does Newfoundland say? Argue that the plain words agreed or agreement do not say anything about the parties' intent.

A later Premier announces to his legislature that several years of work -- after several years of work, the provinces have agreed on the technical delineation, a description of those boundaries. What has Nova Scotia said -- say? Well they minimize the statement by agreeing that it doesn't really reflect concrete decision and anyway, they had some wiggle room.

Newfoundland's permit activity is demonstrated by Nova Scotia to be other than what it claims. What does Newfoundland say? It accuses Nova Scotia of crystal ball gazing. And above all, it avoids any effort to rebut Nova Scotia proof.

One of those permits appears to claim St. Paul Island as part of Newfoundland's territory. What does Newfoundland say? It ignores the issue and it puts the same map up on the screen the following day.

Its permitting practice generally is questioned. How and where does it engage in permit issuance if, as it claims, there are no boundaries defining its offshore

areas? What does Newfoundland say? It avoids giving any answer.

And what of the Agreement itself by which, in Nova Scotia's submission, the parties delimited their offshore areas. By way of evidence regarding the circumstances immediately surrounding the conclusion of the '64 Agreement, the Tribunal has seen the repeated declaration by the provinces contemporaneous with the Agreement that they had agreed their offshore boundaries. The communique, the summary of the conference. The correspondence between Premier Stanfield and Premier Lesage. For its part Newfoundland initially claimed in its written submissions that the 1964 Agreement was not an agreement at all, but a proposal.

Last week it rechristened the 1964 Agreement as a present indication of what those boundaries are going to be, page 394, an agreement on what they will conclude in a future agreement. An agreement to agree in the future setting out the terms on which when they do enter into an agreement, they will use these terms. What the boundaries will be when an agreement is entered into. A description and definition of the boundaries. The defined element of an agreement. An agreement on the lines that it was desirable to agree formally on as boundaries at some stage in the future. The identification of the boundary lines.

Everything. Anything but an agreement.

The plain words of the document that comprised the historical record speak for themselves, Mr. Chairman. No matter how many times Newfoundland says so, its repeated assertions cannot convert the provinces' agreement into anything else, into something less.

The evidence demonstrates that when they used the words the premiers understood full well its meaning and the intention that it connotes. It's only Newfoundland today in 2001 which fails to do so.

A review of the plain words of these documents reveals no hint that the 1964 boundaries were merely a loose or a temporary arrangement, a common position, a political commitment or any of the other monikers employed by Newfoundland to avoid using the word agreement. This is not surprising considering that the boundaries had been in development, as we saw this morning, for a number of years by the time they were agreed and announced by the Premiers in September '64.

And please remember, I say that very respectfully, Newfoundland itself recognizes that the evidence in any event demonstrates clearly that the parties were determined to fix their boundaries inter alia so to assist their jurisdictional claims vis-a-vis Canada, not the reverse. Boundaries and ownership, yes, they were

related, but certainly not in the manner suggested by Newfoundland.

The documents contain no reservations regarding the boundary. They contain no sunset clause. There is nothing to suggest that the provinces regarded their agreement as a pact that either could or would be abandoned at will, given the purpose to which the Premiers agree their boundaries so as to issue permits and secure the benefits of oil and gas exploration in the offshore permanence was of the essence of the agreement. Stability was key. Stability remains key. Your decision will ensure stability.

The subsequent conduct of the party further confirms their intention to be bound. Nova Scotia -- as Nova Scotia stated clearly at the outset of these proceedings, and as the members of the Tribunal have discovered for themselves, there are gaps in the historical record. This is not a cause for alarm. It's not the result of any conspiracy. It is simply the inevitable result of the fact that over 40 years have elapsed since the conclusion of the 1964 Agreement.

Newfoundland would exploit these gaps. Say we haven't heard of any smoking gun. Exaggerate their significance in an effort to ram through its theory regarding the nature of the agreement reached by the Premiers in '64.

As we have seen a theory according to which the Premiers agreed on the boundaries that were to apply, but they failed only to agree to be bound by those lines. And it does so by means of a new -- today a completely unsustainable twist of its argument.

As I said earlier today, originally in its Memorial Newfoundland asserted that it would establish that there was no Agreement between Newfoundland and Labrador and Nova Scotia on the line dividing their respective offshore areas. Newfoundland's theory was that the provinces agreed not on a line but on a negotiating position regarding offshore jurisdiction vis-a-vis Canada. Yet, one could sense a palpable tension in its submissions, and these were highlighted again by Professor McRae last week.

On the one hand Newfoundland continues to claim that because of the requirement that the parties file their briefs simultaneously it did not know the case that it had to refute. On the other hand, Newfoundland set out in its Memorial and Counter Memorial very detailed submissions on what it says really happened in 1964. Under the first approach, Newfoundland might have said little in its Memorial, in fact it indicated as much when we met with the Tribunal on -- in September. And then in its Counter Memorial it could merely have denied Nova Scotia's claim. Instead what Newfoundland has done is propose an

alternative interpretation of events in 1964.

But last week Newfoundland added a new element to its argument conceding -- and this is a very crucial concession -- conceding that the parties did indeed agree on boundaries in 1964, but they stop short of agreeing to apply those boundaries until some unspecified time in the future when their ownership of the offshore would be recognized.

More significantly, Newfoundland also decided that to protect its fragile case a further strategic retreat was called for, as asserted, surprisingly, by Professor McRae just prior to the end of the first round of the hearing, page 693, and I quote, "All Newfoundland and Labrador must demonstrate in order to prevail in this phase of the proceedings is that the contemporaneous and subsequent record is ambiguous."

And while Newfoundland sought to diminish its own threshold, its own task in this arbitration, it purported to raise the bar for Nova Scotia, the same page, page 693. "Nova Scotia has to show that there is one and only one possible explanation for the evidence. And if it fails to do so, then it fails to show the existence of an agreement."

This, Mr. Chairman, Members of the Tribunal, is a novel proposition. The Tribunal's mandate is very clear.

As Professor Crawford stated earlier, in this arbitration the duty of this Tribunal is to determine whether the line dividing the respective offshore areas of the two provinces has been resolved by agreement, not whether the line legislated as schedule 1 to the Canada-Nova Scotia Accord Act has been resolved by Agreement, but whether the line has been resolved by Agreement.

It is not bound to consider only the parties respective positions, but to consider the evidence and determine whether the line has been resolved by agreement.

And what is Newfoundland's response to this most important question? What have we learned about its claims during the hearing? Simple: in the words of its counsel, Newfoundland's case rests on the fact that it's left itself "wiggle room". That Premier Moores used "weasel words", as Mr. Willis stated on the 16th of March. That Nova Scotia has produced no "smoking gun". All of which, of course, is claimed almost forty years after the fact. That is the basis of the Newfoundland case. But I ask you, on behalf of the Province of Nova Scotia, is this to be the basis of your decision? Is this to be sanctioned as the basis on which the parties are to be allowed to conduct themselves in their relations with each other, and with other governmental entities?

Newfoundland has chose to play a very, very risky

strategic game in this arbitration, by calling onto question the validity of offshore lines set out in an Agreement on which all regional parties rely. It has, it wagers, nothing to lose. At the worse, if its gambit fails, it will find itself bound by the very Agreement that it negotiated and entered into in 1964, and that it has respected ever since, to its tremendous benefit. At best, it will have the opportunity to play for an even greater share of the wealth believed to be buried in the continental shelf. But at what cost?

Its tactics before this Tribunal are no less keen. By denying utterly that the parties intended to establish a binding boundary delimiting their respective offshore areas, Newfoundland leaves the Tribunal potentially facing the daunting prospect of finding that an Agreement was concluded, but that an interpretation of that Agreement, other than that proposed by Nova Scotia is called for. That is a finding that the line has been resolved by Agreement, but that there is some uncertainty as to its precise course in certain areas.

The Tribunal, your Tribunal, Mr. Chairman, Gentlemen, should not fall for it. Nova Scotia could claim, if you find intent, but you have no choice but to agree with our interpretation, since no other has been offered by Newfoundland. But we don't take that position. Rather,

we claim that if you find intent, as I submit you must, the facts compel you to arrive at the conclusion that our interpretation is correct, that the line agreed to by the parties is in fact the line that is currently enshrined in law. However, should you not agree with that interpretation of the '64 Agreement, we submit that you are nonetheless required to interpret the Parties Agreement, so as to enable it to be implemented correctly, that is, to give effect to the parties' intention to establish a complete boundary over the continental shelf to the limits of the Canadian jurisdiction.

And here they, because of the time, I will refer the Tribunal to the Temple Preah Vihear case and the Botswana Namibia case, where it's normal to have boundaries that are not completely precise. It is normal, especially when the -- the knowledge of the areas is not fully available.

As stated in Nova Scotia's Memorial, and to answer the question posed by Professor Crawford during the hearing last week, there is simply no need to proceed to a second phase of the arbitration to determine the issue. The Tribunal has before it all of the evidence required to make the determination, you have all of the evidence available.

It is now incumbent upon your Tribunal, Mr. Chairman, Gentlemen, to consider that evidence and to arrive at your

own conclusion. To determine whether the Nova Scotia-Newfoundland line has been resolved by agreement; and if so, to identify, and if necessary, interpret that agreement.

So as agent on behalf of Nova Scotia, I request that the Tribunal declare, and I don't think you require me to read the paragraphs in -- in our Memorial and our Counter-Memorial, but principally that the line dividing the respective offshore areas of the Provinces of Newfoundland and Labrador, and the Province of Nova Scotia has been resolved by Agreement.

On my own behalf, and on behalf of members of my team and all of the many men and women who supported those who addressed you in the course of the last two weeks, Mr. Chairman, Members of the Tribunal, I would like to thank you very much for your patience. I'd like to thank you very much for your very incisive questions, it's been intellectually very stimulating, and we're very grateful to you for your extreme patience, and -- and careful listening of the Nova Scotia arguments.

Thank you, Mr. Chairman, Gentlemen.

CHAIRMAN: Thank you very much, Mr. Fortier. We will resume tomorrow to hear the -- I'm sorry -- yes, would you be in a position to let us know or when you can, whether you will be on at 12:00 or 12:30?

PROFESSOR MCRAE: Mr. Chairman, we will advise you by the end of the day whether it will be 12:30 or 12:00, and we will advise Nova Scotia, as well.

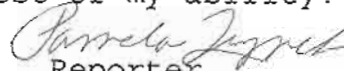
CHAIRMAN: Thank you very much.

MR. FORTIER: I would be remiss, Mr. Chairman, in not thanking the stenographer also, and the registrar, for their contribution to the orderly process of the last eight days.

CHAIRMAN: Thank you very much. I think the panel can agree that part of it -- with you.

(Adjourned)

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


Reporter