ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 20th day of March, A.D., 2001, at the Wu Conference Centre, Fredericton, New Brunswick, commencing at 9:30 a.m.

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

Professor Donald M. McRae

Brian A. Crane, Q.C.

L. Alan Willis, Q.C.

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CHAIRMAN: Mr. McRae?

PROFESSOR MCRAE: Thank you, Mr. Chairman. Mr. Chairman, members of the Tribunal. It is my privilege to open the second round of this arbitration for Newfoundland and Labrador. Let me start by saying that you will be perhaps

relieved to note that we do not have a box of -- or a book of documents for you, or even a box of documents, for that matter, and we do have one document that has been passed -- an extract from an article that has been passed to the Tribunal and to Nova Scotia.

We did receive shortly before the start of this hearing a further written submission of material by Nova Scotia. Obviously, we will try during the course of this hearing to look at it, and if possible, if we have any response we would try to do so by the end of the day. I cannot, however, in the circumstances, guarantee that, and with your permission, I would ask the Tribunal that if we're unable to provide you with any comments we have on that by the end of the day, we would do so by the end of tomorrow in writing.

Mr. Chairman, members of the Tribunal. In this second round of oral argument, Newfoundland and Labrador would like to take the opportunity to clarify the issues in dispute, to correct the factual errors that have emerged in the Nova Scotia argument, and to provide for the Tribunal a summary of the key elements of the Newfoundland and Labrador case. We would, at the same time, welcome the opportunity to clarify any issues on which the Tribunal might wish to have assistance.

However, Mr. Chairman, after two full days of argument

for each party and over four hours of rebuttal by Nova Scotia yesterday, pretty well everything that can be said in this case probably has been said at least twice. As a result, we shall try as far as possible to avoid repeating our arguments and simply focus on what is necessary for the purposes of rebuttal.

Now I shall be providing the Tribunal with an overview of our case and then deal with issues arising out of the Terms of Reference and the applicable law. Mr. Crane will deal with some factual issues. Mr. Willis will return to the question of the alleged existence of an Agreement in 1964, and I shall then consider some issues in relation to the subsequent conduct of the parties and then conclude our presentation.

Yesterday, Mr. Chairman, you heard essentially a further reiteration of Nova Scotia's position presented with a vigour and enthusiasm that tended to mask the fundamental implausibility of the core elements of the Nova Scotia case. There were a couple of new elements that came to light yesterday, and I'll refer to them shortly, but essentially, the issues between the parties are now fully joined.

And although I indicated in my opening statement last week that the factual issues are not really in dispute, in fact, the Tribunal is really faced with two theories of

the factual record. One proffered by Nova Scotia is based on the theory that in the late 1950's and early 1960's the provinces embarked on a process to delimit their maritime boundaries. This was a project undertaken by the provinces themselves for its own sake, as it were. Although it is related to offshore ownership claims, it was, Nova Scotia contends, separate. Thus, there was no need to have the agreement of the federal government or any kind of legislative implementation. It was an agreement amongst the provinces inter se, as Nova Scotia said.

Now the other theory is that as part of their campaign to get recognition from the federal government or provincial ownership of the offshore, the East Coast provinces agreed on a proposal to the federal government that included boundaries between the provinces in the offshore. The proposal contemplated federal and provincial legislation to give effect to the boundaries. The boundaries set out in the initial proposal of 1964 were defined with more precision in 1968 and then proposed again with a renewed bid for ownership of the offshore in 1972. But both in 1964 and 1972, the proposals of the provinces were rejected, and so no binding agreement on boundaries was ever concluded.

How, then, does the Tribunal choose between these

theories? It must review the facts as placed on the record and determine for itself what occurred. The factual base for these two theories is the same. It is not in dispute that there is no formally concluded agreement. Nova Scotia relies on a Joint Statement of Premiers on September 30th, 1964, and then seeks to bolster its argument by reference to events, documents and records of meetings spanning many years into the future.

It has the burden of proving that there is an agreement, and we submit it has not discharged this burden. The refrain repeated yesterday by Mr. Fortier that it is up to Newfoundland and Labrador to prove a negative to prove that there is no agreement is simply wrong in law and need not be given any attention by the Tribunal.

Mr. Chairman, in substance, the Newfoundland and Labrador case is very simple. The line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has not been resolved by agreement. Nova Scotia has the burden of proof to show that an attempt to enter into the alleged 1964 Agreement exists. It has to substantiate its claims that boundaries and ownership were separate and the federal government is irrelevant. It has to show how the law of treaties applies, and we submit it has not done so.

Now Nova Scotia has asserted that a binding Agreement was concluded between the Premiers on September 30th, 1964. But despite all of the "a deal is a deal" hoopla, ultimately, their claim rests on the results of a conference of East Coast Premiers where the Premiers unanimously agreed that it was desirable to conclude an agreement on certain defined boundaries at some time in the future.

And, as a result, Nova Scotia was forced to hunt here and there for tidbits from subsequent years to try and show that the Premiers did intend to conclude an agreement on September 30th, 1964, even though the Premiers themselves said in that September 30th statement they did not intend to conclude an agreement at that time.

And the eclectic way in which Nova Scotia goes about patching together an agreement is illustrated, I suggest, by the role played by D.G. Crosby. Although it is essential for the operation of its theory for Nova Scotia to banish the federal government from any role in respect to the alleged 1964 Agreement --

CHAIRMAN: May I just make a commentary? It's a little -- a little behind. I very often am. It has to do with the question of what the expression of demarcation of -- or delimitation of the boundary, whatever, means. It does seem to me that the law -- the international law on

delimitation of boundaries is very much impregnated with a notion of agreements, and they can only be pre-existing agreements before there is a dispute. And in that sense, you could say that the law of treaties does become relevant because, of course, you make an agreement in international law by way of treaties.

PROFESSOR MCRAE: Yes, Mr. Chairman. The question is at what point is a treaty concluded, and where there is a process that is recognized by the parties before the agreement is concluded and that process has not been completed, then no one can turn around and say later that an agreement was concluded. There are many agreements where they are signed off by the negotiators but never, in fact, enter into any force because the governments decide not to go ahead with them. So we're suggesting here there is a process that was contemplated, anticipated, never concluded, and so, therefore, there was no agreement that was ever concluded.

To return to the role played by Crosby, although, as I mentioned, the federal government has been banished from any central role, it is D.G. Crosby who ultimately is the hero of the piece. Crosby not only produces a federal map some eight years after the 1964 meeting, on which there is apparently a 135 degree line, it is his memorandum of discussions with provincial officials on which Mr. Fortier

relied so heavily yesterday as evidence of a provincial intent.

In fact, it is surprising that Nova Scotia does not label the 1964 Agreement as the "1964 Crosby Agreement".

But Mr. Chairman, this smorgasbord approach to the construction of an agreement between the provinces on offshore boundaries again casts great doubt on the Nova Scotia claim. Equally --

PROFESSOR CRAWFORD: I think that -- with respect, Professor McRae, it's just slightly unfair. Having spent the entire morning reading pleadings, I have -- I'm strongly attuned to accuracy in what someone said because I had a morning of being misrepresented myself.

As I understand it, the role that those documents of Mr. Crosby's is supposed to play is to have brought to the attention of Nova Scotia and Newfoundland prior to 1972 that what they were doing then, was part of the '64 process so that the outer line, if we may call it that, of '64, was as it were incorporated into the '72 process by reference to the map in those discussions. So I don't think -- if I'm getting it right, I don't think Nova Scotia is saying that Crosby, in effect, made the agreement. What he did was to draw to the attention of the Premiers before 1972 that what they were about to do was still implicated with the '64 process and the outer

line.

PROFESSOR MCRAE: Thank you, Professor Crawford. I don't believe that I suggested that he made the agreement, although it does seem to me that the Nova Scotia argument relies very heavily on showing that there was a 135 degree line that appeared, from their point of view, much earlier than the suggestion in the implementation of the 1982 agreement. Therefore, Crosby's role, in their point of view, is extraordinarily significant. In the absence of that, they don't have a 135 degree line until much later.

PROFESSOR CRAWFORD: Absolutely. I mean there's a distinction between an agreement which might, perhaps, have related to the Gulf and an agreement which related to the outer line, and without the Crosby map, as it were, then you're struggling to say that that existed in 1972. Obviously, 1972 was, in some sense, a continuation of 1964, but it -- the interpolation of the Crosby map provides an explicit link which is otherwise missing. I think that's its function.

PROFESSOR MCRAE: Yes, Professor Crawford, and I think that the distinction between a line inside the Gulf and a line outside the Gulf, for the purposes of the Terms of Reference, as I'll go on to point out, really doesn't matter. Has the line dividing the offshore areas of Newfoundland and Labrador and Nova Scotia been resolved by

agreement? It's not sufficient to show that part of it has been resolved by agreement, so it comes back. From our point of view, Crosby, from their -- within their argument, plays quite a pivotal role. We don't think it's so important, quite frankly, but I was simply trying to characterize how they regard Crosby's importance.

Equally, how can one have a boundary if one looks -- suggested that this pulling bits and pieces together to constitute an agreement casts great doubt on the Nova Scotia claim, and equally, I would argue, how can one have a boundary established under a 1964 Agreement when there are at least three different depictions of the so-called boundary, all different?

There is the Stanfield boundary, there's the JMRC boundary, and then the 1986 Accord boundary. So which is the 1964 Agreement boundary? The answer, Mr. Chairman, in our view, is none of the above. There is no 1964 Agreement, so there is no 1964 boundary.

So faced with the record before it in this case, the Tribunal has to ask itself whether it is plausible that there could be a legally binding agreement between provinces based on such fragmentary evidence. Records of meetings, a submission to the federal government, ambiguous statements by officials in a meeting, a political statement by a Premier to the legislature, to

mention just a few of the sources which have been referred to.

When an agreement on such an important issue has to be assembled in this way, then there must be serious doubt as to whether there was any agreement at all.

Is this really how Canadian provinces and Premiers conduct their business? Did they really do so in 1964? And of course, it is not the way they conduct their business. They know how to enter into an agreement, and they knew so as well 36 years ago.

But Nova Scotia would have us believe that while the provinces had the wisdom to enter into an agreement quite formally in setting up the JMRC, they did not do so in respect to the much more important issue of boundary delimitation some four years earlier. Surely not.

Much of Nova Scotia's argument, Mr. Chairman, is based on a play on the word "agreement". For Nova Scotia, if the word "agreement" is used, then it must mean that a legally binding agreement was intended. And we heard this from Mr. Fortier yesterday. He pounced on every use of the word "agree" as proof of the existence of a binding agreement. And he painted the issue in stark terms, because the premiers had used the word -- the term "unanimously agreed", either there was a binding agreement or the premiers were morons. He mentioned that at page 56

of the transcript.

Now, while there's a great deal of drama in the creation of such an opposition, it's hardly conducive to serious analysis.

Mr. Fortier passed quickly by paragraph four of the Joint Statement on which Nova Scotia bases the 1964 Agreement. Paragraph four, of course, states that the premiers unanimously agreed that it was desirable to agree on boundaries.

Thus Mr. Fortier failed to address the Newfoundland and Labrador argument that paragraph four, I'm sorry, paragraph five, where unanimous agreement on the description of the boundaries is set out, has to be read in the light of paragraph four, which indicates that an agreement on boundaries is something for the future.

So that it is only possible to say, as Mr. Fortier does, there is not any ambiguity, and I quote, "There is not any ambiguity whatsoever in the wording of that agreement", that is found at page 773 of the transcript, if you refuse, as Nova Scotia does, to address the relationship between paragraph four and paragraph five. In short, Nova Scotia's interpretation of paragraph five creates a conflict with paragraph -- between paragraphs four and five. And then Nova Scotia refuses to discuss that conflict.

Mr. Chairman, Newfoundland and Labrador does not deny that in 1964 there was a description of boundaries in the Gulf, and an indication of a general direction that the boundaries would take outside.

That was all set out by the Premiers in 1964. And there was a refinement of that description inside the Gulf later on through the JMRC process.

But putting all of this in an agreement, in a way that would be binding on the provinces, as the Premiers had talked about on September 30th, 1964, that simply never happened.

And why not? Because, as we have pointed out, the issue has to be understood in its proper context. Boundary delimitation was a means to the end of offshore ownership. The Premiers agreed on a negotiating position with the federal government. They agreed on a common united front amongst the provinces. A joint position which included boundaries.

If the federal government had accepted the provinces' proposal in 1964, or if they had accepted a renewed proposal in 1972, then the agreement that had been contemplated on September 30th, 1964 probably would have been concluded.

The preconditions of federal government approval, and the passage of the necessary legislation in all

probability would have happened.

But of course, the federal government rejected the proposals of the provinces, and that was the end of the matter. There was no agreement on boundaries.

Now Nova Scotia may well have decided thereafter that it was in its interests to use those lines proposed in 1964 for its own purposes. And other provinces may well have seen it in their interest to do so, but there was no agreement. There were no agreed boundaries.

Mr. Chairman, because it is unable to establish any intent to enter into a legally binding agreement on the basis of the alleged 1964 Agreement, and because the 1964 boundary description and depiction does not do all Nova Scotia wants it do, Nova Scotia is forced to go shopping into the future to find the necessary intent to enter into an agreement, as well as to find the missing elements of the alleged agreement.

But both factually and legally, this is problematic. And even after two rounds of oral pleading, Nova Scotia has still managed to leave ambiguity in respect of its claim. In our view, Nova Scotia is asserting that an agreement was concluded on September 30th, 1964. And that what happened after that was simply confirming that agreement.

Professor Crawford expressed the view in our first

round that perhaps Nova Scotia had taken the position that the agreement might have been concluded after that date, although we were not clear that they had done so.

However, yesterday Nova Scotia did not take the opportunity to clarify its position, although the tenor of its statements seem to be that the case was still based on an agreement allegedly concluded on September 30th, 1964. And that, in our view, is the basis on which their case has to be tested.

In this regard, in reliance on subsequent conduct, Nova Scotia seeks to draw too much from it. That subsequent conduct -- that subsequent conduct can be evidenced confirming a contemporaneous expression of intent, but it cannot be the expression of intent on which the claim that an agreement exists is based. And it cannot retrospectively create an intent that did not exist at the time the agreement was allegedly entered into.

PROFESSOR CRAWFORD: Professor McRae, if you had -- let's just take the example of an unratified treaty. Let's assume that there is agreement between two states as to the content of a treaty. In this case the description of a boundary. The treaty is never ratified for some reason, but the parties subsequently act as if it had been. In other words, they behave as if that was the boundary, and they do so for a sufficient period of time, and they know

that each other is doing so.

In that situation would we say that there was a boundary by agreement?

PROFESSOR MCRAE: With respect, the agreement would have to arise afterwards rather than agreement based on the prior unratified treaty. That of itself would be insignificant and gone. One would have to look for unilateral statements, acquiescence in estoppel and things of that kind, after the event.

PROFESSOR CRAWFORD: Well I agree. By definition you wouldn't have a treaty on day one. But you might say after the event that you had -- well you probably wouldn't say you had a treaty, but you might say you had an agreement?

PROFESSOR MCRAE: Well the point, Professor Crawford, is that we get back into the slipperiness of this word "agreement". You'd have to find whether or not there was something that was legally binding. And legally binding may arise acquiescence in estoppel after that event, but you could not say there was a legal binding agreement in the nature of a treaty just by the subsequent conduct.

You'd have to look for some other source for finding the -- finding the legal obligation. Particularly where the parties had the opportunity to formalize their agreement, and for whatever reason have not done so.

Moreover, Nova Scotia's use of subsequent conduct in our view, cannot be legally justified. Much emphasis has been placed by Nova Scotia on what it regards as a failure by Newfoundland and Labrador to protest positions taken by Nova Scotia. And sometimes even positions not taken by Nova Scotia.

But failure to protest is not conduct that can be used to create an agreement. It may be relevant to an argument relating to acquiescence or estoppel, but this is not how failure to protest is always used in Nova Scotia's pleadings. And of course, arguments relating to acquiescence in estoppel, although formally adhered to by Nova Scotia in this oral phase, were treated in such a marginal and tangential way that it does not appear to be taken particularly seriously, even by Nova Scotia. And I will refer -- I'll come later when I deal with subsequent conduct to say a few more words there.

Mr. Chairman, although this case depends very much on an appreciation of the factual record, the way in which in those facts are viewed is affected significantly by an appreciation of the particular mandate of the Tribunal, as set out in the Terms of Reference. This, of course, has provoked much discussion in the first round, but with one exception, it was glossed over by Nova Scotians -- Nova Scotia yesterday.

The exception was, what seemed to us, a fairly startling revelation by Professor Saunders, that Nova Scotia took the view that Canadian domestic law was relevant to the determination of the intent of the parties.

That appeared to us to contradict what had been said in Nova Scotia's written pleadings. However, as I will go on to say later in this presentation, when one looks more closely, I think one sees that this apparent concession is more apparent than real, and I'll deal with that shortly.

But before turning to consider further the Terms of Reference, and the applicable law, Mr. Chairman, there's a further observation I wish to make in these opening remarks.

In considering the central issue in this case, it is important that only factors relevant to the determination of whether the line has been resolved by agreement are taken into account. Nova Scotia has sought, throughout this case, to raise the spectre of regional disorder and disarray if the Tribunal were to conclude, as we suggest that it must, that there was no legally binding agreement resolving the line dividing the respective offshore areas in Newfoundland and Labrador and Nova Scotia. And we heard it from Nova Scotia again yesterday.

Let us look at the image of boundaries that Nova

Scotia likes to show. It consists of lines in the Gulf, together with lines joining the turning points, the 2015, 2017, and the 135 degree azimuth. Now, inflammatory language such as the wrecking ball image, of which Nova Scotia seems so fond, designed it would appear, to influence those outside the hearing room rather than those inside, simply do not contribute anything to the analysis of this issue.

And such statements do not contribute anything, because they are nothing more than a simplistic and disingenuous characterization of the issue. They're simplistic because they ignore the fact that this is a case between Newfoundland and Labrador, and Nova Scotia, and not a case with the other provinces.

And they're disingenuous because as Nova Scotia knows, there's only one and one alone consequence of a decision by the Tribunal that the line dividing the respective offshore areas between Newfoundland and Labrador, and Nova Scotia, has not been resolved by agreement.

That is that the Tribunal will simply proceed to the second phase and determine a line for Newfoundland and Labrador and Nova Scotia in accordance with the principles of international law governing the delimitation of maritime boundaries, nothing more. Such a process promotes stability, it does not destroy it. If other

provinces think --

PROFESSOR CRAWFORD: Professor McRae, is that consistent with your answer to the last question I asked in the first round, which is are there any turning points in the Gulf? You asked me what I meant and then you gave the unequivocal answer no. Now, of course, as you say, the result of this process one way or another will be that there will be a line between Nova Scotia and Newfoundland. But if you are right -- I mean, if Newfoundland -- if the boundary between Newfoundland and Nova Scotia has not been determined by agreement, it's very -- it would be very hard to say that the boundary between Newfoundland and Quebec had been determined by agreement.

PROFESSOR MCRAE: Well, Mr. Crawford, let me address that because I think that if the other provinces -- let's assume that the Tribunal was to conclude that the line dividing the areas between Newfoundland and Labrador and Nova Scotia was not resolved by agreement. If other provinces think that they have an agreed boundary, and actually we don't have any evidence of this, we have supposition, then they will assess whether the reasoning of the Tribunal is applicable to them.

If they conclude that it is, then they can simply go through the process necessary to turn what they thought was an agreement into an agreement. There is no disorder

or disarray in provinces sitting down and putting into legal form what they thought was an agreement.

And if they did not think they had an agreement, then they will not be concerned by a decision by the Tribunal that there is no agreement between Newfoundland and Labrador and Nova Scotia. And again, there is no disorder, no disarray, no wrecking ball as a result of that.

As I mentioned, Mr. Crawford, the other day from the point of view of Newfoundland and Labrador, we did not agree to an agreement in 1964, therefore we did not agree to turning points.

PROFESSOR CRAWFORD: I'm just wondering whether Article 59 of the Statue of International Court has been incorporated into Canadian law?

PROFESSOR MCRAE: I doubt that it has been, Professor Crawford. And of course, Nova Scotia glosses over the most obvious and fundamental point. And that is apart from Newfoundland and Labrador and Nova Scotia, no provinces have negotiated an accord with the federal government, so until Accords have been entered into, the issue of boundaries is purely hypothetical.

So we would suggest, Mr. Chairman, that Nova Scotia's claims about regional disorder are exaggerated, misleading and ultimately irrelevant to the issue before the

Tribunal.

Mr. Chairman, members of the Tribunal, let me turn now to the question of the Terms of Reference and the applicable law.

There has, I would suggest, been much confusion in this case over the meaning of the Terms of Reference and the applicable law. Plus at this final stage of our argument, I would like to refer to the relevant provisions and explain where there is agreement, where there is disagreement and what it is in our view that the Tribunal must do.

I must say, Mr. Chairman, that in view of the confusion arising out of the first round position of Nova Scotia and the Terms of Reference and the applicable law, we had hoped that Nova Scotia might take the opportunity in the second round to clarify its position. However, apart from some comments of Professor Saunders, which may in fact have made the situation even less clear, Nova Scotia preferred to make its arguments solely on the facts.

Now it is without dispute that the Tribunal must decide whether the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has been resolved by agreement. It is without dispute that such an agreement has to be a legally binding agreement.

And it is without dispute that whether a legally binding agreement has been concluded is determined by reference to the intent of the parties.

CHAIRMAN: I must say that that problem -- there are things lurking in saying "legally binding". It sounds as if the parties are agreed that that is so. The difficulty is that one is speaking -- one party is speaking from the perspective of international law, the other party from -- is speaking from the perspective of national law. I wouldn't have thought it's impossible because we are only interpreting a statute here to make an agreement that is a real agreement intended by the parties to be binding about which they have no legal sanction within the national system. And given the nature of the statute that tells us to apply cy pres, if I can put it that way, public international law, then it is quite conceivable that some actions, and I'm not saying these are those actions, could be seen as being an agreement, but not subject to any enforceable mechanism in the court.

PROFESSOR MCRAE: There may well be agreements, Mr. Chairman, that are not subject to any kind of enforceable mechanism in the courts on particular occasions. And I agree with you that fundamentally the difference comes down to whether or not international law or domestic law is applicable or even that is a much narrower question in

fact. I think that to some extent the issue has been characterized rather misleadingly in terms of whether international law or domestic law applies. And as we have argued, it doesn't really matter which route you take as long as you, when you get to the question of looking at the actual intent of the parties, you do that in a real way. And so therefore, the dichotomy between international law and domestic law does not seem to us to matter at the end of the day, whether this is a kind of an agreement that you could go to the domestic courts and bring an action on or not.

We don't think, Mr. Chairman, that the Tribunal has to make a choice between the polar opposites of domestic and international law, it simply has to apply the Terms of Reference, as you are suggesting, that it has to do on the applicable law. And I think when that is done properly there is no dichotomy and you do not have to make an artificial determination of intent. Of course, the starting point is Article 3 --

PROFESSOR CRAWFORD: Artificial determination of intent, Professor McRae. And it's partly a question of how international law operates in relation to agreements. I mean, the court will not listen to Foreign Ministers or Attorney Generals standing up after and saying I didn't intend to make an agreement. That will regarded as

irrelevant. The question is whether what they did was intended to give rise to I think -- the phrase I think was used in the Aegean Sea was immediate commitments. But what that means is that -- immediate means not subject to ratification or to some other process of confirmation before it was binding. And commitments means things intended to be taken seriously, if I can use layman's language. So that seems a reasonable test.

If we can ask of the Premiers at a particular time were these immediate commitments. Now okay, but it's quite obvious that the Premiers could not have had the intent to bind themselves under international law in '64 or '72. But on a certain view of the Terms of Reference that's not the question we are asked.

PROFESSOR MCRAE: But, Professor Crawford, the question is what do you have to take into account in determining what they understood a commitment to mean. And it gets back to the point I was making earlier, where they understand that a process is required in order to get -- enter into a commitment that would be a commitment that is binding on them, then that has to be taken into account in determining their intent. If they use the words agree, knowing that this is something that is part of a process that will end up ultimately in legislation, then their intent is quite different if they use the words agree

knowing that's the end of the matter and no possibility of legislative effect will come into question.

As I mentioned earlier, obviously the starting point is Article 3, which directs the Tribunal to apply principles of international law.

Now we have pointed out -- I don't want to pursue this here, but I still want to refer back to our arguments. We have pointed out in the Memorial the difficulties inherent in simply applying the law of maritime boundary delimitation to the question of whether an agreement has been concluded by provinces. And this led us to suggest that the Tribunal should determine the matter under the law of Canada whether there was an agreement on boundaries, and we develop those arguments in our Memorial and Counter Memorial. I am not going to return to them today.

We have also argued that the reference to principles of international law governing the delimitation of maritime boundaries is a reference to a specific body of law and is not an incorporation of the whole corpus of international law. And that as I pointed out, in my statement in the first round, remains that position, I won't repeat it.

But we do not -- and we do not believe that Nova Scotia has really made a credible case to counter that

argument. But the ultimate consequence, as we were just discussing, the ultimate consequence of the difference between the parties in the applicable law really relates to this question of intent. The initial point is that regardless of whether one proceeds under the law of Canada or under the principles of international law relating to treaties, the central question in determining the existence of agreement is whether the parties intended to enter into an agreement that would bind them. And that is where the parties, in fact, diverge.

So the crux of the issue is whether one looks at the intent the parties actually had in 1964 or whether one retroactively looks at their intent and attaches to their actions a different intent from what they might well have had at that particular time.

Now in his presentation yesterday, Professor Saunders rejected -- at least he seemed to reject our characterization of Nova Scotia's position. The issue of fictional intent he said was a red herring. Indeed he said, and I quote it from page 838 of the transcript, "The domestic context, including the domestic legal context and what the Premiers would have known of it, is relevant to determining that intent."

Now, Mr. Chairman, if that is indeed the position of Nova Scotia, then it appears to us that they have moved

considerably from the position they were taking earlier. But the questions is what did Professor Saunders mean by that concession? He went on to say that "The fact that the Premiers had asked for binding legislation was an indication of an intent to be bound." They tried to be bound, they intended to be bound, he said.

In a response to a question from the Chairman who asked whether a political agreement is sufficient, that is would it be sufficient to constitute the intent necessary to bind the Premiers if they had done everything they could, Professor Saunders agreed.

But we would suggest that in fact Professor Saunders has reintroduced the notion of fictional intent. If a political agreement, that is an agrement that by definition is not binding, can evidence the intent necessary for a conclusion that there is an agreement within the meaning of the Terms of Reference, then it is pure fiction to suggest that the parties to the agreement have an intent to enter into a legally binding arrangement. So that the Nova Scotia position appears to be that although they don't like to have their position characterized as one of searching for a fictional intent, they do accept that something that was not intended to be legally binding under the law of Canada can still evidence an intent for the purposes of finding an agreement within

the meaning of the Terms of Reference. And whether one calls that semi-fictional or fictional intent, Mr. Chairman, in our view that is still a question of fiction.

Now, Professor Saunders did try to cast his argument in more moderate hue.

He argued that if the Premiers had done everything they could, this could be sufficient to evidence an intent.

But that also raises the difficulty, both in principle and on the facts of the case. Because to say that the Premiers had done everything they could, and thus they had the necessary intent, ignores the fact that the Premiers know that if certain requirements are not fulfilled then there will be no legally binding agreement.

Thus it is their knowledge of the factors that condition the creation of legal obligation that is being ignored under the Nova Scotia position. So that there is still not a real intent that is being sought.

And from a practical point of view on the facts of this case, it cannot be said that by asking for constitutional legislation, the Premiers were evidencing an intent to be bound. Because the Premiers knew that if the legislation was not passed, they would not be bound. Ignoring this also means that there is a fictional intent that is being established.

So, Mr. Chairman notwithstanding Professor Saunders' attempts to rehabilitate the Nova Scotia position, it still appears to be that an intent to be legally bound can be found even though there is no intent to be legally bound.

PROFESSOR CRAWFORD: Professor McRae, after -- well in the discussions leading up to 1972, there was some consideration of whether Section 3 was the appropriate mechanism in any event. I mean even assuming that the provincial claims were upheld. And we discussed yesterday the August meeting in 1972, where I think it was Newfoundland that took the position that Section 3 was not appropriate. I think by this stage Newfoundland had some expertise on board and realized that you couldn't treat the continental shelf as part of the limits of the province on any view of things. And for whatever reason, in any event, it was clear by 1972 that Section 3 was not going to be the mechanism. And there is a clear difference between '64 and '72. '64 refers to Section 3 and 72 does not.

PROFESSOR MCRAE: Professor Crawford, I don't want to infringe on the province of one of my colleagues, but I understand that Mr. Willis is planning to address that point.

So, gentlemen, if international law is to be applied

to the question of whether the necessary intention exists to conclusion of a legally binding agreement, it will involve a factual inquiry into whether the parties had the intent to enter into a legally binding agreement. And that can only be done if the actual circumstances are considered. That is the question of intent must be determined in this case in the light of the actual knowledge and expectations of the officials whose intent is being assessed.

And those expectations can be determined only by considering the legal framework in which the officials operated. That framework determines what constitutes an intent to be legally bound and what does not.

Officials whose intentions are being assessed must be taken to have understood when they were doing something that had legal consequences and when they were doing something that did not have legal consequences.

Indeed, Mr. Chairman it's almost self-evident that this is the inquiry that must be undertaken to establish -- to ascertain intent.

International law in these matters treats domestic law as a matter of fact. It provides the necessary context within which the actions of the parties are to be assessed.

We suggested that this result to be reached by analogy

with the doctrine of intertemporal law, in our view, the simplest and clearest approach for the indication of domestic law in considering whether an agreement has been concluded is that domestic law is simply the proper law of the agreement.

Now how then does Nova Scotia differ? Nova Scotia, as we understand it, derives its position from the words at the end of Article 3.1. The well-known words, "as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times."

And according to Nova Scotia, these words constitute a direction to the Tribunal to treat the parties as states, even back in 1964 when the alleged agreement was concluded.

Now such a position, Mr. Chairman, simply cannot be right. Retroactivity is generally frowned on in law. And retroactivity on such a massive scale, which would have the effect of requiring the Tribunal to ignore reality would be unprecedented. But the wording of Section 3.1 does not do this.

The interpretation proposed by Nova Scotia results in contradictions within Article 3.1 itself and would place the Tribunal in the position of creating a conflict between the Terms of Reference and the enabling statutes.

Now first the conflict within Article 3.1 itself. In arguing that the "as if the parties were states" provision prevents the Tribunal from looking at the actual intent of the parties in determining whether an agreement exists, Nova Scotia is really claiming that the Tribunal should not apply the principles of international law governing delimitation of Maritime boundaries.

Now accepting for a moment for the purposes of argument, the Nova Scotia claim that international Maritime boundary law includes the law relating to the conclusion of agreements, which is the only way Nova Scotia incorporates the law of treaties into this case, the effect of the Nova Scotia claim, we would suggest, would be to misapply the principles of international law relating to the conclusion of agreements.

As I pointed out, international law requires the determination of whether there was an intent to enter an agreement based on actual intent.

But really Nova Scotia is claiming that the "as if the parties were states" provision overrides that requirement. It imposes an obligation for the Tribunal to ignore actuality and treat the provinces as if they were acting as states in 1964.

So Nova Scotia has in effect created a conflict between separate parts of Article 3.

Second, the conflict between the Terms of Reference and the enabling statutes, the conflict within a provision like Article 3.1 is potentially managed through interpretation, although there is an assumption against such conflicts being found.

But I would suggest that conflicts between the Terms of Reference and the statutory provisions granting authority for the Terms of Reference are of much greater significance. Yet this, we would suggest, is what Nova Scotia has created.

As I pointed out last Thursday, the "as if the parties were states provision" is not found in the enabling statute. By contrast, the reference to the principles of international Maritime boundary law come directly from the enabling statute.

So again Nova Scotia is claiming that the Minister inserted into the Terms of Reference a provision that contradicts the mandate under the statute from which the Minister gained his authority.

In effect, Nova Scotia was saying the Minister may have exceeded his authority, but ignore that, go ahead and apply the provisions in a way that's contrary to the statute. In effect inviting you to exceed your authority.

But don't worry, says Nova Scotia, any problem created by you or exceeding your authority is not a matter

for you, it's a matter for the Federal Court of Canada.

Now an argument that encourages litigation, Mr. Chairman, is inherently suspect. And this argument is at least that. But of course, it is more than that. It's just plain wrong.

So as I said on Thursday, the Tribunal must interpret its Terms of Reference if it can properly do so in a manner that avoids any conflict between the Terms of Reference and the enabling statute. And this involves rejecting the Nova Scotia theory that the "as if the parties were states" provisions overrides other provisions of the Terms of Reference. That provision, as I suggested last week, can fulfil a confirmatory role that helps clarify the other provisions of Article 3.1, but it cannot and does not contradict or override them.

Mr. Chairman I was going to make some remarks about the other provision with such modification as circumstances require, but since we are submitting something in writing in response to a question, I will not deal with that at the present time.

The final issue that arises in respect to the Terms of Reference and the applicable law, relates to the meaning of the phrase, "resolved by agreement". Having the Memorial, both parties took the view that in order for the line to be resolved by an agreement, an agreement must be

found that is legally binding.

However, in the course of the first round, the idea of something less than a legally binding agreement has been referred to from time to time. And Nova Scotia appeared to be suggesting in its first oral round presentations that the idea of an incomplete agreement might be sufficient for the Tribunal to reach the conclusion the line has been resolved by agreement.

In other words, the Tribunal could fix up an agreement that is not sufficiently precise.

Mr. Chairman, in our view the Terms of Reference are clear. The question asked of the Tribunal in phase one is whether the line has been resolved by agreement?

Now although the word, "agreement" can be used in a binding or a nonbinding sense, the word, "resolved" is much more fixed in meaning. It means to deal with something successfully or to clear it up.

But something has not been resolved if either party can still walk away without legal consequences. And either party can walk away unless the boundary has been set under an agreement that is legally binding. And it is for this reason that it is important to distinguish between political agreements that the Premiers might enter into knowing that there were many steps that would have to be taken before the province had entered into a legally

binding commitment and agreements that commit the province irrevocably.

Understandings between officials or working arrangements will not meet the requirement that the line be resolved by agreement. Agreements have to be entered into. They cannot be the result of inaction or inadvertence. And that is why it is inconceivable that the provinces could have entered into legally binding commitments on the basis of what Nova Scotia offers as evidence of a commitment.

Nothing short of a formal agreement fully implemented by legislation would have done it. And even if the matter were viewed from the perspective of international law, it would not be sufficient for the Terms of Reference that something less than a binding agreement exists. There can be no approximations.

Now, of course, we do not deny that under international law agreements can take a variety of forms. But the informality of the means of conclusion, whether by joint communique or exchange of notes or otherwise, must not be allowed to cloud the need for formality and reality in the obligation that is being assumed.

Either the agreement resolves the line or it does not. A consensus or an understanding is simply not good enough. There has to be an agreement with legal consequences.

There has to be, as we have said, a binding agreement.

PROFESSOR CRAWFORD: You say either there is an agreement or there is not. Obviously at one level that's right. But it is at least theoretically possible that the Tribunal might conclude that there was agreement on the turning points, but not on the southeasterly line.

In that situation, you can't say either that the boundary is or that it is not resolved by agreement. It's partially resolved by agreement.

In your view, what is the right answer for the Tribunal to give if that was hypothetically its conclusion?

PROFESSOR MCRAE: Professor Crawford, if you come to the conclusion that part of the line was agreed upon, but the rest is not, then in our view, you are unable to conclude that the line has been resolved by agreement. You have not been asked whether part of the line has been resolved by agreement, you have been asked whether the line between dividing respective offshore areas. And the question is not has or has it not or has it partially, the question is has it been resolved.

So in our view, and I was about to mention this, but I think you have saved me dealing with the next part of my presentation, because we felt that in the last few days perhaps Nova Scotia was suggesting that you did have

authority to sort of fill in the gaps if you were to come to that conclusion. We do not agree with that. We think the Terms of Reference are very clear in this regard.

And equally it's not the task of the Tribunal to draw a line. That is a task for phase two of this arbitration.

Now clearly the Tribunal has to interpret. There's no question about that. It has to interpret the events on which an agreement is alleged to have been based in order to establish its existence, in order to establish its terms.

But that does not include filling in the gaps as it may find, as was suggested -- we think was suggested yesterday.

PROFESSOR CRAWFORD: I think that's a separate question. Obviously if the Tribunal as succinct from interpreting agreement had to fill in gaps, then there wouldn't have been anything that was resolved, and certainly whatever it means, who had resolved must lead to a situation where you can say well that is -- that is the line now, as it were.

I was really -- I was really asking whether the Tribunal couldn't, as it were, say "yes, the line has been resolved as to one part of it, but not as to another"? I mean, it's slightly odd the Terms of Reference given to a Tribunal to say -- you know, you can answer yes, no, but you can't answer anything else. And one would normally

construe Terms of Reference as giving a Tribunal slightly more flexibility than that.

PROFESSOR MCRAE: Professor Crawford, there are many aspects of these Terms of Reference that one might regard as slightly odd, so as to suggest that perhaps is a normality rather than oddity, but in any event, on both of those issues we are -- we are quite clear that the Tribunal has to determine whether the line has been resolved. If you consider part of it has been resolved, then the line has not -- has not been resolved, and we must go to phase two, where that might well be a factor that will be taken into account in phase two.

PROFESSOR CRAWFORD: Well quite obviously in that -- in that hypothesis there would have to a phase two, so I suppose it's a purely formal difference. The Tribunal might say no, but indicate in its reasoning that -- that certain points were in fact resolved, and phase two would proceed on that basis. So I suppose it doesn't really matter.

PROFESSOR MCRAE: It doesn't really matter, Professor Crawford, except in this sense, we would discourage you from doing anything in phase one that might appear to pre-judge what would be argued or considered or determined in phase two. But we recognize you do have that ability to -- to interpret your Terms of Reference.

PROFESSOR CRAWFORD: So we have article 59(a), which says

that anything the Tribunal does in the first phase is not binding in the second phase.

PROFESSOR MCRAE: Perhaps my friend Mr. Fortier would want to argue that, since they're wishing to apply international law. But we think we're still governed by Canadian law in terms of the way this proceeding is to operate, and the Terms of Reference that are to be interpreted.

That concludes, Mr. Chairman, my submissions on the Terms of Reference and the applicable law, and with your permission I would ask you to call upon Mr. Brian Crane to deal with some factual aspects of this case.

Thank you, Mr. Chairman.

MR. CRANE: Mr. Chairman, members of the Tribunal, I'm going to take just a few minutes this afternoon to touch on some of the documents that Mr. Fortier filed yesterday, and I'll be referring to the small book of documents, and also to the earlier compendium, which was filed on the end of last week.

there's very little dispute, really, about the documentary record. The book I'm referring to will be -- is called Nova Scotia's Compliment Oral Argument Book. Not so many -- not so many compliments yesterday. However, I've had a night's sleep.

Now the first document I would like refer to is

document 4(a), and that is a Prince Edward Island report written in 1963. It's a useful document in that it summarizes a bit of the history that has taken place up to that date, and there are two points in that document that I would mention.

One is that in the middle of the first page there is reference to a meeting on June 28th 1961. And that was a meeting where in the next paragraph shows that an agreement was reached that a proper boundary line in Northumberland Strait be drawn up and submitted. And that was a special item which was decided and agreed to at a later meeting, and that appears at the bottom of the page. A later meeting on October 7th 1961.

And that was a meeting where the three provinces, Nova Scotia, New Brunswick and PEI, had before them a map having to do with Northumberland Strait. I just want to point that out as a completely separate issue.

And the other thing that I wanted to refer to is the next document over, is document 5(a), and this is a note showing minutes of a meeting of June 28, 1961. And there are two points in that document. The first is that it does confirm, as was mentioned in the previous one, of the understanding that was reached with respect to Northumberland Strait. And it also refers to a -- Mr. LaForest's view expressed in the minutes there, that the

clause for the settling of boundaries under the Constitution, the British North America Act, and says "Apparently requests for such settlements must come from the legislatures of the provinces concerned." And that is, of course, a theme that appears later in the correspondence, especially as we get closer to 1964.

PROFESSOR CRAWFORD: But Mr. Crane, they're talking here about waters that would be either internal waters or territorial waters.

MR. CRANE: Yes.

PROFESSOR CRAWFORD: They are not talking about the continental shelf. So that there doesn't seem to be any difficulty with the proposition that Section 3 could be used to -- to specify the limits of the province, at least so far as internal waters or territorial waters --

MR. CRANE: That's very -- very correct. Yes.

The -- if one turns over the page to the next page, there is a reference there to the next steps which are contemplated, and it says "after a new complete grid map is prepared based on the PEI map and some other data, there is to be a meeting in Mr. Donahue's office in Halifax of the small committee set up to do the work in preparation for the final presentation to be made by the four Premiers."

So that there is -- in there there is a sense that

there will be a presentation made by the four Premiers. And that, I would assume, would be a presentation to the federal government in line with the fact that there had to be an amendment of the boundaries.

Now the next document I would refer to is 6(a), which is the next one over. And just to mention that there is a -- this is a memorandum, a 1962 memorandum, to the Nova Scotia Attorney General. And there is reference at the bottom of that memorandum to Professor LaForest's views and opinion. And there is a distinction there between the claim to the territorial waters, and the claim to the ownership of lands, submarine lands off the continental shelf.

And there is in the last sentence on that page, there is the phrase there that "There is a fairly strong argument as to provincial rights in the portions of Northumberland Strait and the Bay of Fundy, which are more than three miles from the coastline, and that there is some argument as to ownership by the provinces of submarine land extending the width of the continental shelf."

Now the next reference that I would give to the Tribunal, I should say that the next documents all confirm that there was a -- further discussion with the provinces affecting Northumberland Strait, and the -- there is

nothing in the documents that we have that establishes for sure the provenance of the document of the Stanfield map. And I should mention that both copies of the Stanfield map that are in the Tribunal -- before the Tribunal are -- don't have a date on them, although it's interesting that the copy of the -- the Newfoundland copy of the map, which is the better copy, if one looks at it, it's quite clear that that is -- that was a revision of the chart in 1963. So that the actual document that's in the record, we can say for sure dates from after 1963, when the chart was reprinted. I'm not saying that that turns on it, but just wanted to mention that is clear from the -- from the charts that are in the record.

Now, there was some discussion yesterday by Mr. Fortier about the minutes of the meeting of September 23, 1964, and he put in his book of documents, tab number 9(a), which shows that those minutes were forwarded to Newfoundland, although Newfoundland was not present at that meeting.

I just want to put on the record quite clearly, we have never said anything different. This is in our Memorial at page 10, para 32. We've never said that there's an inference that Newfoundland never got it, or the fact that they weren't there means anything.

Now in terms of the key documents, and we tried in our

book to put in those documents we felt were central to the issue, it is -- has been and is our position that the September 30th document -- September 30, 1964 does represent a statement of a position and that it is a position to be taken with the federal government. That, in our view, is the most logical inference as to the meaning of that document.

It's very enlightening, in our submission, what was said about that document in the letter to Premier Lesage of Quebec because that specifically says that this is the position to be taken. That was agreed by the provinces. This is our position, and we're taking that in the conference with the federal government. That, in our submission, is very clear. It's not an agreement with immediate effect. It's an agreement between them to take a political position in negotiations with the federal government.

And even Mr. Allard, who does a very detailed, almost legal, analysis of the position in his letter way back -- or later on, in 1969, he says on the first page that it is clear that the purpose of those boundaries was to achieve ownership. He says that quite specifically, and that's at the bottom of page 1 of his letter. That is at tab 22 of our book of documents. That was the purpose.

Now to proceed to the JMRC period, there is a very

important reference that I want to give to the Tribunal. In the minutes of the JMRC in 1969, you will recall that the JMRC Technical Committee by this time had prepared the turning points document and had drawn up a map. What was the process that the JMRC thought that would then be in place?

If one looks at tab 24(a) in Mr. Fortier's book, there is a reference on the second page and that reference is to future action. There was a discussion -- at the second paragraph on page 2 there's a discussion at the JMRC of the report from the technical committee, and then it says, "The meeting directed the coordinates in the maps showing the turning points were to be forwarded to the Secretary, who, in turn, was to draft an agreement between the participating provinces, who were, in turn, to obtain approval of their governments as to its contents."

This is before Mr. Allard writes his letter setting out the process. In his letter, of course, he says precisely the same thing. "After the turning points have been settled, they should be approved and there should be an agreement entered into by the participating provinces, and then there should be provincial legislation and then there should be federal legislation." He sets it out in a very orderly fashion, that that was -- this reference shows that the thought in the JMRC itself after discussion

was exactly the same -- that there should be the draft of an agreement and then it would be followed by legislation. So it's all consistent at this point in time.

PROFESSOR CRAWFORD: Well, in fact, it doesn't talk about legislation here, does it? It says --

MR. CRANE: Not at this point.

PROFESSOR CRAWFORD: -- "who, in turn, were to obtain approval of their governments to its contents", and it appears that -- well, I mean this may be pure inference, but I got the impression that Mr. Allard wrote his letter as were himself. This was, as you say, an analysis of the situation which went beyond anything that had been carried out by the JMRC, or is that not a justified --

MR. CRANE: I think it's a reasonable inference that he wrote the letter as the Quebec member of the JMRC, but he wasn't intending to represent the corporate view. In fact, he asks everybody for their reactions --

PROFESSOR CRAWFORD: Yes.

MR. CRANE: -- and there's a variety of reactions coming back, which, in itself, is somewhat instructive that they're not exactly ad idem by any means, and that he has a much more stricter view, stricter perception about what should be done.

CHAIRMAN: But if there was a written agreement following that, it would, nonetheless, be a political matter. I

don't see how you could easily enforce that kind of agreement. You can't tell the -- so that if I follow Mr. McRae's argument, that wouldn't matter at all because under Canadian law, it is not binding. You just wonder what the Premiers could have done to achieve an agreement, and consequently, why in the Terms of Reference the agreements prior to the -- at that time could not be considered.

MR. CRANE: Certainly, the agreement that would be reached of the participating provinces was at a political level. Once it had reached the stage of having to go to provincial legislation, it would be another matter. But at that stage, the purpose of having the agreement was to put -- make sure everybody was committed to something, and that then they would proceed to legislation. But that is a political commitment at that point in time. And one of the problems is the shifting positions of the provinces on a variety of matters, including boundaries, and that it was of very great importance to Mr. Allard when he wrote his letter to make sure people were pinned down. They weren't pinned down, and, in our view, they never were pinned down in that binding sense.

PROFESSOR CRAWFORD: Yes. Of course, there's no indication in the record that I can recall from '64 up to '72 that there was any divergence between the provinces -- well,

there may have been one or two points to be sorted out, but there was no overt disagreement. The first signs of overt disagreement are the Doody letter of '72 where there's a clear disagreement on the location of the southeasterly line.

MR. LEGAULT: I will answer that question for you, Mr. Crane. There is the interjection by Premier Smallwood in the exchange with Prime Minister Pearson in 1965, July, 1965.

PROFESSOR CRAWFORD: Yes, a memorable exchange, but, of course, he wasn't saying that they didn't have an agreement on what the boundaries were. He was saying that there was only a proposal.

MR. CRANE: Yes, and that we never attempted to make it law, as I recall the phrase. Yes. And then the next reference I would go to is that after the process is referred to in the 24(a) as to what was the process, Allard writes his letter and this continued to be recognized. The Allard letter continues to be recognized by the JMRC as a guide. And it's referred to when they finally get to the -- right before the meeting of the Premiers, it's referred to in that final minute. And there's one other minute that is of importance, and that's at tab 26, which I referred to on Friday, because it does indicate that there was a gap here of two or three years, or two years, anyway --

'69, '70, '71 -- there's a gap in which there's a lot of discussion with the federal government going on, and -- but in the fall of 1971, they sort of reach the conclusion in the JMRC that this has got to be -- there's got to be a common front and that Premiers have got to be brought back into the picture.

And then they have a meeting that was in September, 1971, and that's at tab 26, and that's the reference where, after they discuss the importance of the issue, the minutes record that the JMRC is to be asked -- the technical committee is to be asked whether there are any boundary problems. In other words, they go back fresh to the JMRC, not to upset what is being done, but to say, "Are there any boundary problems?" In other words, "Is it complete and is there anything else?"

And there is no -- nothing in the record of a response from the JMRC except we find in the spring of the following year, in May, that they go to the -- they go to the Premiers on the basis of the report, which is the turning points and the map.

PROFESSOR CRAWFORD: So the inference to be drawn from that, presumably, is that the -- that all the remaining questions about exactly where the line was to be drawn -- I'm leaving aside the southeasterly line, but all the other remaining questions were actually resolved and that

the JMRC had reached agreement -- I'm not saying it was an agreement, but agreement on what the boundaries would be.

MR. CRANE: I would make the further inference that there is -- they did not intend that the line go further; that they did not intend to go beyond turning point 2017; that there is nothing in the record that says that that was a piece of unfinished business. And that that was -- what was agreed to in the meeting of the Premiers was a confirmation of the report from the JMRC, which was specifically the turning points and the map with the turning points on them.

So that was the raw material, if you like, that went to that meeting of the Premiers, and the -- turn up that, that's found at 28(a) in Mr. Fortier's book. This is -- in our submission, this is a pretty important document. Because this represents, in effect, the report or recommendation from the JMRC to the Premiers, bearing in mind that the JMRC itself is a political committee. And at page 2 of that document, you will see the -- in the bottom of the long paragraph after "Previous history is discussed", you will see the phrase "The meeting concluded that it should set forth certain principles and refer these principles to the respective provincial Premiers for consideration at a forthcoming meeting of the four Atlantic provinces and the province of Quebec."

And then Premier Regan comes into the meeting and makes a short presentation and withdraws. And then after the Premier withdrew, the meeting considered the principles and then -- and the -- after that the JMRC recommends the following principles.

And here we have a -- again a statement of position reminiscent of the September 30, '64 statements. The same type of presentation. This is the principles that should be adopted by the Premiers. And the -- it sets out all of these principles, and one can anticipate that the Premiers, if they approve those principles, that that would be transmitted to the federal government. And principle number 4, that the government should confirm the delineation and description of the boundaries. And then the reference as requested by the Honourable Paul Allard on May 12, 1969. Again, a reference to the Allard process and what they anticipated, and attached the map and so on.

And then at the bottom of that page after number 8, the above principles should be conveyed by each member of the committee to his respective Premier.

And then we have the letter which is the next tab over, 30(a), which is a letter to Premier Moores from Secretary of the Committee, Mr. Walker. And he repeats that -- what I have just mentioned, that there were certain principles recommended, repeats item number 4 and

at the last part, which is interesting because it -- the last paragraph in the letter, this foreshadows what was the negotiating stance, if you like, that the Premiers might adopt. This is page 3.

And he is talking about a change in the minutes. And then he says in the last sentence -- or second to last. "The reason for this deletion is the committee felt that the initial position, namely that the ownership is in the provinces concerned and that, as a first position, this should not be a negotiable item." So they are all talking here in terms of a negotiation with the federal government. And that this, when it comes out of the Premiers it -- the only record we have of the Premiers is the -- in effect, the adoption of the principles, because the statement which is -- which takes two forms, the communique and also a statement by -- a letter to -- from Premier Regan to the Prime Minister. The statement takes the form of an adoption of those specific principles, a statement of position leading to the negotiation.

And it -- at this point the Premiers have moved back solidly together and are advancing the ownership strategy, so that they are saying we want ownership and we have agreed on the boundaries.

Now that was, in our view, a political stance and this was a endorsement of the principles set forth by the JMRC,

and the Premiers in that context can't have had the intention that this would be a form of binding agreement. It was a statement of their position at that time.

So the -- what happens -- I should perhaps just put a footnote in here that my friend, Mr. Fortier, talked about Mr. Doody from Newfoundland being the Chair of the JMRC, that is not so. As far as we can see from all the records, he was never Chair of the JMRC. In fact, he had just taken office as Minister. There had been an election the previous year, in 1971 in Newfoundland. And that's why Premier Moores was fresh on the scene and Mr. Doody was fresh on the scene.

Now --

PROFESSOR CRAWFORD: Just looking at it, of course, the fact that it was politically useful to have a common front at a particular time is really -- it doesn't determine the question one way or another. It may be a reason for an agreement or it may be that it was a political arrangement either way. It seems from the record, however, that it was Newfoundland that tried to get the provinces back in line, as it were.

MR. CRANE: Yes. They played a role in that Mr. Doody sort of asked for a meeting. And it may be anticipated that the Premiers' meeting, the Atlantic Premiers, so on, was planned and that he wanted to be briefed, have the

opportunity to meet his colleagues and -- because he was new on the job and that as a result he asked that -- let's see if we are still together. That was one of the reasons that is expressed in the minutes that -- whether there was still a united front. And I think that that's sort of part of the dynamic of what was taking place at that time.

PROFESSOR CRAWFORD: So the JMRC was rumbling along in the background, but at the level of the First Ministers, as it were, there had been considerable dis-unity in the years preceding 1972?

MR. CRANE: They had certainly been an off and on relationship, according to the documents. I mean, I don't think it's -- one would say that it didn't reach the -- it didn't escalate to the point that it did in '73 when Newfoundland went its own way, but there had been quite a bit of different perceptions, different points of view, some advocated by lateral negotiations with the federal government, others said let's keep a united front and so forth.

PROFESSOR CRAWFORD: The federal government, in its '69 offer, was really saying to the provinces well let's do deals on a one to one basis. And if we do a better deal with another one later on, we will give you the benefit of it, sort of a most favorite province clause?

MR. CRANE: Yes. There is a little bit of divide and

conquer work.

PROFESSOR CRAWFORD: I'm not suggesting, Professor McRae, that it was a binding most favorite province clause.

But the point I'm making is this, if that's true that isn't that -- that it was circumstantial evidence for the fact that the First Ministers in 1972 might have wanted to reach an immediate commitment?

MR. CRANE: It's -- what it seems to be from the wording of the communique that the -- they considered coming together with Quebec an important event. This was -- the communique were first -- the fact -- the first time that this has been a joint meeting with Quebec. And so that it became a bit of a political event.

But that's very far from reaching an agreement that's binding on all the parties, whether one talks about legally or not, binding in a real sense. They were saying that we are together, and we are going forward. And this is what Moores says when he reports to the legislature, we have a new spirit of cooperation here. And that's what -- it's very difficult to take from this, in the absence of any formal document, that there was an intention to create legal obligations.

Now that pretty well completes what I was going to say in terms of the meeting of the Premiers. The -- what -- the briefing that took place of the -- Premier Moores, on

the 6th of June, doesn't seem to have been reflected in any way, in any of the documents that we have related to the June 22 meeting of the -- or June 18 meeting of the Premiers. There is nothing there, there is no suggestion that there was anything from that meeting that was before them.

The only decisions that were taken were with respect to the proposal from the JMRC. That's the hard evidence. And there is certainly no evidence of a federal map being before the Premiers.

And my friend, Mr. Bertrand, said in answer to a question from Professor Crawford that the evidence was unclear. And I say it's not only unclear, it's nonexistent. There is no evidence of any map being -- any map before them addressing the 135 line being before them in any way.

Now the -- there was a subsequent meeting on -- in August. There was a difference of view. And the difference of view in the August Premiers' meeting appears to be with a matter of how the federal government was going to be approached. The -- and the minutes and also Cabot Martin's memo show that there was a different -- different opinions and that it was -- they decided not to forward -- not to formally request an amendment from the federal government. That's all we can take from that.

And it was the beginning of a process that led to the dissolution of the united front, as it were.

PROFESSOR CRAWFORD: I'm just looking at the events of August and that lack of consensus on that point. I mean, the minute is quite interesting and it's elaborated on in the other document to which we referred yesterday.

They say in two sentences, there was no consensus on asking the federal government's approval and therefore they didn't. But they affirmed -- they said this doesn't alter our position on the boundary.

Now might you not say that that is evidence that they have actually agreed as were -- as between themselves in an agreement to be taken seriously that this is the boundary?

MR. CRANE: I don't think that they were even addressing the concept of agreement on the boundary. I think what they were doing at that meeting was to say what are we -- what is the best strategy in relation to dealing with Ottawa? Are we going to go and have a formal approach and look -- ask them for the -- to change the boundaries? And there are a lot of -- you have got to remember that really what they were concerned about was Trudeau.

Prime Minister Trudeau had written three days after the Regan letter -- he wrote a four page letter to Premier Regan, saying this is not on. And that was a blunt turn

down. And I think at this point there was a certain amount of internal considerations, which way are we going to go on this? Is it even worthwhile hitting Ottawa?

CHAIRMAN: Are you suggesting that Mr. Trudeau could be blunt?

MR. CRANE: I misspoke. So that that -- and really the question is -- it wasn't that the -- they were saying we don't want to have the boundaries changed, they were saying this is not the best strategy right now. We will -- and Newfoundland was in favor at that -- if one believes the Cabot Martin minute, of an approach that would wait till the end.

You know, let's get -- let's complete the negotiations and then let's deal with this changing the boundaries issue.

There's still -- ownership was still there, and Newfoundland maintained that itself throughout the period.

Now the -- there's just a couple of other -- the boundary remains an outstanding issue throughout the period, outstanding issue as between Newfoundland and Labrador, and Nova Scotia. We had reference to the -- some of the documents. There was a -- there was a -- if I can find my note on this. There was in the book of documents yesterday, there was reference to -- it's the last document, 36(b), and this was a 1973 meeting of

officials, and I don't think you need to turn it up particularly, but it -- that was in May -- in April, 1973. That has to be read in conjunction with the other document that I referred to on Friday, which was the May, 1973 meeting of officials. So that it's just -- this is just a part of a sequence of several situations where officials have recognized that there is a dispute, most of them are Nova Scotia officials, have recognized that there is a dispute.

And this dispute continued throughout 19 -- the 1970's. It was right up to the period of the 1977 MOU, and the new -- the reaction of Newfoundland to that 1977 MOU in the White Paper.

Now, Mr. Bertrand yesterday said that the argument that we had presented on the constitutional documents had no merit. Or did not merit any reply. Those were his words. The significance of the constitutional documents is really two fold. First of all, there were specific discussions going on at the time of the constitutional conferences about the offshore. This was an item, they had set up a committee on the offshore. And so that this is a relevant part of the history.

The second issue is that Newfoundland was the province that advanced the proposed text calling for arbitration. And calling for the application of international law to

determine boundary disputes. That is the first mention in the documentation of what came to be a process in the Accords, and then in the legislation.

The papers show a commitment by Newfoundland and Labrador to arbitration, as a means of settling its offshore dispute with Nova Scotia.

The -- now I'm coming to the last comments that I would make, and these have to do with the 1980's. And I have a couple of points to make with respect to the period of when the Accords were being negotiated, and the implementing legislation was being drawn up.

The first is with respect to the 1982 Canada-Nova Scotia Agreement. This was really the first of the Accords. And that had a unique provision in it that the boundary could be redrawn by Canada itself, unilaterally, after consultation with the parties. This was objected to by Newfoundland and Labrador, and the references to that objection are found in three documents, document 93, these are in the original record. Document 94, and document 102.

And as a result of this objection, the -- there was an arbitration scheme put in, rather than this idea that Canada unilaterally could redraw the boundaries.

And finally, there are in the period after 1982 there are a number of documents which show that there was

unfinished business with respect to the boundary between Nova Scotia and Newfoundland and Labrador.

Those documents are document 101, and that's in a briefing -- a federal briefing book involved in the Canada-Nova Scotia Accord. That's a 1985 document at page 131.

Document 102, and that's a memorandum to Minister Marshall at page two, that's 1986. A briefing book is document 107. Briefing book under the Canada-Newfoundland Act, June 1986. And they -- there's -- that's a little hard to work through that document, if you could note it's page two and page five. There -- it's a commentary on the legislation, and the way it's put together it's hard to figure out what page you're at.

And then finally, of course, in 1992, there is Minister Epp's letter after St. Pierre and Miquelon has been resolved. There is the -- the letter to the provinces from Minister Epp, and that's at document 111.

Now the final point that I would make on the Accords is that on the first day, on March 12 at page 39, Mr. Fortier submitted that the provinces have expressly consented that international law be the governing law of the arbitration. And in my submission, there was no such consent, and it had nothing -- and it is completely wrong to talk about this as the governing law of the

arbitration.

The arbitration is set up under a federal statute, the Terms of Reference are provided by a federal Minister, and the interpretation of those documents is clearly a question of Canadian law. In other words, if you are to interpret the meaning of the statute, or the meaning of the Terms of Reference, that exercise is an exercise under Canadian law. It's wrong to -- wrong to characterize this as sort of governing law is the -- of the arbitration is international law.

PROFESSOR CRAWFORD: Mr. Crane, we need to get our terms clear. Clearly the -- the law of the arbitration is Canadian law. It's an arbitration carried out under the Accord Legislation. And the applicable law, in accordance with the governing law, the applicable law is international law.

MR. CRANE: Yes.

PROFESSOR CRAWFORD: Now there's been a third question, whether -- what the effect is of the applicable law in terms of the way you look at any agreements. The proper law of which might not have been international law. And indeed, was not international law. So there are three -- three levels.

I take it you're not contradicting that?

MR. CRANE: I quite agree with your -- your

characterization, Professor Crawford. It is -- I'm just addressing the sweep of Mr. Fortier's submission was that the governing law of the arbitration was international law, and I just wanted to make the point that the interpretation of those Terms of Reference, the interpretation of the federal statutes, is a matter of Canadian law.

PROFESSOR CRAWFORD: Yes, but of course, if -- if we decided, you know, to hell with international law, we're going to apply English law, or Australian law, we -- we'd be in jurisdictional problem -- trouble under Canadian law. I mean the legislation does provide that we are to apply international law, although there is a question of interpretation as to what means.

MR. CRANE: Yes. I don't think there's any difference between us on that.

The -- I think that completes the round-up. And I'm grateful for your consideration of those facts.

CHAIRMAN: This might be a convenient time for a short break?

PROFESSOR MCRAE: Yes, Mr. Chairman. I don't know how long you had in mind?

CHAIRMAN: Well, I think I would have a look at your time. I would like the suggestion to be from you, because I don't want to impinge on your time unduly. As far as I'm

concerned, it could be five minutes.

PROFESSOR MCRAE: Well, I was going to suggest that if we took a 10 minute break that would be fine. We would like to finish, because we have people who want to catch planes this afternoon.

CHAIRMAN: Yes. Well would you prefer the five, or are you happy with 10? You know how long you're going to talk.

PROFESSOR MCRAE: I think maybe 10 is more appropriate. Thank you.

(Brief recess)

MR. WILLIS: Mr. Chairman and members of the Tribunal. My topic today, once again, will be the existence of the alleged agreement concluded on September 30, 1964, according to Nova Scotia, and the claim by Nova Scotia that it resolves the line. And, as well, I will discuss the geographical coverage of that alleged agreement. I will begin by summarizing the issues as they now appear to stand, and in so doing, provide a road map of the main submissions --

CHAIRMAN: Just a moment, Mr. Willis. I didn't look to my left. I just looked to my right.

MR. WILLIS: Forgive us.

CHAIRMAN: Yes. No, no, not at all, but perhaps you might, for the benefit of counsel on the other side, and we won't listen to the first part --

MR. WILLIS: I will just begin once again. I'm sorry. My topic, as I've mentioned once again, will be the existence of an alleged agreement concluded on September 30, 1964, that, according to the claims of Nova Scotia, resolves the line, and the related issue of the geographical coverage of that alleged agreement.

I will begin by summarizing the issues as they now appear to stand, and in so doing, provide a road map of the main submissions I intend to make.

There are two major questions. The main issue, of course, is whether there is a binding agreement at all, and by that I mean an agreement that resolves the line for the purposes of the two Accords. And the second issue which arises only if the first one is answered in favour of Nova Scotia, is does the agreement, if it exists, extend beyond the Cabot Strait at a bearing of 135 degrees to the outer limit of the continental shelf?

I will spend most of my time on the first question. Nova Scotia has claimed that a legally binding agreement was concluded with immediate effect on September 30, 1964, and that is the case we have to meet.

Our position is simple and straightforward. There is no evidence that the parties intended any such binding agreement for the following reasons: First, the conspicuous absence of any instrument evidencing such an

intention, taking into account the profound importance and permanence of boundaries, as well as Canadian practices on the manner in which legally binding intergovernmental agreements are customarily concluded.

Second, the absence of legislation. In particular, the fact that the parties specified their intended means of bringing the lines into legal force, the BNA Act 1871, which was never done.

Third, the fact that the terms of the proposal assumed the adherence of the federal government and implementation by the federal government, which never happened.

And fourth, the fact that the proposal was part and parcel of a negotiating proposal related to the ownership of offshore resources, which negotiation ended without success.

I will deal first with the manifest insufficiency of the documentation supporting the alleged agreement. The basic proposition of the Nova Scotia case strains credulity. They ask us and you to accept that a binding and irrevocable boundary agreement of unprecedented importance was brought into force by an oral agreement at a political meeting without the signature of any instrument at all; that it was never reduced to writing, except in the form of an unsigned political statement.

Now this, Mr. Chairman, and members of the Tribunal,

is so remote from normal practice in Canada that it is impossible to accept. The Nova Scotia case is both counter-intuitive and unsupported by precedent.

The intention to create a legally binding agreement cannot be presumed. It has to be proved. A document evidencing such an intention would indeed shift the burden of proof, but the utter absence of anything of the kind leaves it squarely in the Nova Scotia court.

So far as intention is concerned, there is nothing more probative than practice, the normal practice of the parties in assessing whether a binding intent really exists. And this is so whether you look at it from an international or a domestic perspective.

I would like to refer to a citation from Reuter on the Introduction to the Law of Treaties, a classic text, where he says at page 90 -- at page 59, rather, in the English translation in discussing the conclusion of treaties, "Practice thus appears as the supreme and ultimate guide in the interpretation of their intentions."

We finally had a reaction yesterday to some of the domestic law materials which we filed with our Memorial. Professor Saunders drew attention to the cautious manner in which the conclusions of the Kennett study were expressed. That's Kennett on Managing Interjurisdictional Waters in Canada, a Constitutional Analysis. But

Professor Saunders had nothing to say about the substance of those conclusions. There was no critique of the various criteria that Kennett suggested to determine the legal character of intergovernmental agreements that have not been constitutionalized. And he mentioned in the study the degree of formality, the substance, the subject matter, the language and other factors. The study, in fact, is a careful analysis of Canadian practice, and what he concludes is, and I quote -- "The greater the formality of an agreement, the more likely it is to be characterized as having legal implications."

Common sense, no doubt, but there's nothing wrong with that, and clearly, the documentation in the present case is at the extreme end of any conceivable spectrum from the formal to the informal.

In considering whether the documents provide evidence of a binding intention, the context and the subject matter is important. We have to assess the binding intent issue in the context of what the Premiers were talking about in 1964, matters of the greatest possible constitutional importance, boundaries that would last forever. Given that context, that factual context, the question almost answers itself.

A debate about the adequacy of the documents would have an air of reality if we were talking about matters

such as that dealt with in the JMRC Agreement of 1968, which did nothing more in the end than set up a committee, or even the MOU of 1977, both of which are evidenced by far more convincing documentation. But in the case of an alleged boundary agreement, the absence of a signed instrument is almost conclusive in the light of modern Canadian practice.

Professor Saunders disparaged the material we appended as examples of how interprovincial agreements or intergovernmental agreements in Canada on matters of high importance are drawn up. There was, however, no suggestion that these examples were unrepresentative. Nova Scotia has offered no examples or precedents of its own, and that not notwithstanding that the practice of the parties would be relevant, even in an international context.

We have not seen a single example that would give some plausibility to the Nova Scotia thesis that vast tracts of territory can be exchanged by Premiers in this slap dash manner. Though, of course, it's only slap dash if, in fact, you assume they really intended to enter into immediate commitments, into a binding agreement.

There is not a single precedent in Canadian practice of a legally binding agreement on territory or anything remotely approaching the importance of territory concluded

on the basis of this type of documentation.

It doesn't happen because both politically and legally, it couldn't happen. Legally, even apart from the 1871 Act, because some form of legislative authority would have been needed, since this wasn't an ordinary contractual matter and it wasn't a matter of prerogative.

I don't need to belabour the political point, because it's obvious.

PROFESSOR CRAWFORD: You say it wasn't -- so you say it wasn't a matter of prerogative, and just looking at the Crown and United Kingdom at present, there's authority for the proposition that the Crown could claim the continental shelf by an act of the prerogative without legislation. Although, in fact, many common law countries have passed legislation, nonetheless, the Crown could simply proclaim that it has the continental shelf.

MR. WILLIS: Well there would be, in the federal government -- at the federal government level, as an aspect, I think of the foreign affairs prerogative, a power to deal with boundaries that would probably include offshore boundaries and the continental shelf. But as far as the provinces are concerned, that would not -- that would not accrue to them. And as far as boundaries generally are concerned, if there ever was a prerogative, (a), it wasn't vested in the provinces; and (b), it's been

displaced by legislation, namely the -- the BNA Act 1871.

PROFESSOR CRAWFORD: Yes, but I think -- I think we've been working on the assumption that -- at least at the level of intent, one might well have formed the view, certainly after -- after 1967, one might have formed a view that what the provinces wanted to do didn't require any action under Section 3. I -- I agree, obviously, that as a matter of Canadian law, Section 3 displaces whatever prerogative might have -- might conceivably have existed.

But we're talking about intent, and we're talking about the continental shelf. And we're talking about Terms of Reference, which if they're intra vires directs us to treat the provinces as if they were states. So do we -- do we deem them to have the federal prerogative to claim the continental shelf?

MR. WILLIS: No. Any prerogative power to claim a continental shelf would attach to the federal government, as an aspect of the foreign affairs aspect of the prerogative, and not to the provinces.

PROFESSOR CRAWFORD: But Canada could reach an agreement with the United States on the delimitation of the continental shelf without resort to parliament.

MR. WILLIS: Yes, that would be within the foreign affairs prerogative.

It was argued yesterday, and I'm turning back once

again to Professor Saunders' presentation, that we are trying to have this Tribunal make Canadian law, and make it retroactively. And the argument leaves us perplexed.

The literature we cited is based on an analysis of Canadian practice over time. If what we produced does not reflect what we call settled practices in Canada we have not heard why. And of course, while the cases we cited, or some of them, may be post 1964, the cases do not purport to make new law, they state the law as it exists.

Now, I would like to turn to an issue that was raised by Professor Saunders as well, and that also formed the subject of some of the questions during Professor McRae's presentation. And that was the question about enforceability, because Professor Saunders framed this issue in terms of enforceability.

But from the Newfoundland and Labrador perspective, we haven't seen it in those terms at all. We see it, partly because if you look at this historically, I mean the obligations of the Crown may exist in law, but are very often not enforceable. And that's especially true if we roll back the clock to the days when we dealt with petitions of right, and we had no Section 19 of the Federal Court Act, and Crown immunities were much broader than they are today.

So I think one can well talk about Crown obligations,

including provincial government obligations, that exists and are perceived as truly legal obligations, and yet are not enforceable in the customary normal manner.

We see it, therefore, and we frame the issue throughout in terms of intention to create binding legal obligations quite independent of enforceability. We concede that enforceability could not be the test in a matter of this kind.

That leads to the next of the main reasons why in the submission of Newfoundland and Labrador, there was no binding agreement in this case with immediate effect in 1964.

And that's because there was no legislation. And specifically, there was no constitutional legislation under the BNA Act 1871 to implement the agreement in the manner that was specified and intended.

Professor Saunders said yesterday that by 1972, the Premiers were no longer talking about constitutional legislation, they were talking about just plain federal legislation, and he said if I understood him, that's what we got.

And we've had some references this morning to the statement at the August meeting in 1972 that there was -- that Newfoundland had now taken the position that the 1871 Act was not the right procedure.

But I think, as Mr. Crane explained, what really drove the reluctance of the parties, and particularly Newfoundland and Labrador to make an approach to the federal government in 1972, was not the legal concern about whether the BNA Act 1871 could be applied or not. There would have been, one way or another -- that was a question of legal technique. I think what drove that decision was the clear political perception that it was a non-starter. Mr. Trudeau had just refused the whole -- turned the whole thing down flat.

And whether it was to be the BNA Act 1871, or whether it was to be some other mechanism, I don't think it would have been just plain provincial legislation or just plain federal legislation. I think if these rights as the provinces were claiming, attached to them as a matter of constitutional right, it had to be something either on the pattern of the constitution of the BNA Act 1871, or failing that, imperial legislation. Perhaps the BNA Act 1973, if the -- if the existing mechanism whereby it could be done domestically in Canada did not apply. We've had a number of BNA Acts over the years, up to the patriation of the Constitution in 1982.

So that was a question of legal technique. I think what has to be emphasized, it wasn't a reversal of philosophy, and it wasn't a reversal of strategy. And the

intervention, it was tactical.

Certainly I see, in the record of 1972, no evidence that would change the basic approach in the 1964 Agreement, and the basic approach suggested by Minister Allard on behalf of the JMRC, which was to get the thing entrenched in the constitution with federal recognition, and in conjunction with ownership.

The Premiers had decided in 1964, in the plainest terms, that they intended to use the BNA Act 1871 to define, and those were the words, to define and to give effect to the boundaries, the question of legal technique would be secondary. I think that was still their intention in substance.

But even supposing this could have been done by just plain legislation of any kind, can one imagine how different a set of statutes implementing a true boundary agreement would have been from the federal legislation that was passed to implement the Accords.

The Newfoundland and Labrador legislation would have set out a line, what Nova Scotia calls "the line". And of course, what it sets out is an arbitration procedure.

And the Nova Scotia legislation would not have made an agreed boundary subject to arbitration, and to federally imposed changes that do not require the consent of the province as an exception to the general rule in that

statute, that such consent is required.

Now, this absence of boundary legislation, or of any legislation at all, is something that would provide a complete answer to the Nova Scotia case, in any event. But all the moreso, I suggest, were all the 1964 documents and many of those from before, state over and over again exactly how the proposal was to be implemented.

And it never happened. So the absence of this constitutional legislation is decisive from two separate points of view.

Legislative implementation would have been necessary, even if the parties had not referred to it. But it was an integral part of their intentions that this is how it would be done in this way or no other.

At the end of the day it makes no difference, as I said, whether the BNA Act 1871 was the only way to do it, or whether it would be applicable to the outer continental shelf. I think there was an arguable case either way.

But what counts is the intentions of the parties and those could not have been made more clear.

Whatever Nova Scotia says now, the use of the BNA Act 1871 or of a similar constitutional procedure was not redundant window dressing in the minds of the actors in 1964, because they stressed its use at every opportunity. And as I said, it was the 1871 legislation that was not

merely to approve or ratify the boundaries according to the documents, it was to define them.

Mr. Fortier said that the 1964 Agreement was the culmination of a process. It was, I suggest, anything but, even by its own terms.

Those terms provided for additional and essential legal steps before the proposal could become law. It was the start of a legal process that was never completed.

I turn to the next point, Mr. Chairman. The proposal was about ownership. And as such, it was a negotiating proposal and not a stand alone agreement. It was a proposal, as well, aimed at the federal government, which was treated throughout the record from beginning to end as an essential party to the proposed transaction.

Mr. Fortier, yesterday, devoted a good part of his documentary analysis to proving the contrary. He made two general submissions on this point. A first that ownership and boundaries were separate problems. And second that the boundaries came first. We take issue with both.

How could the boundary aspect really be separate? These are two sides of the same coin. Boundaries cannot exist in a vacuum, because they have to have an object. There has to be something to divide up.

Mr. Fortier pointed to some of the earlier documents from the 1960s. And he said what was driving the exercise

-- the motor he said was mining leases and licenses.

Well in a way that seems to confirm our point of view. Permits, leases and licenses have no function unless the ownership rights are there. They can't give rights and they can't even generate royalties, which are based on ownership. They can't exist in any meaningful way in a proprietary vacuum.

PROFESSOR CRAWFORD: But Mr. Willis, you have granted permits. You have granted permits. I mean Newfoundland. Not you personally. Are you revoking them?

MR. WILLIS: The point is that those permits were granted with the objective of obtaining ownership and in anticipation of ownership.

PROFESSOR CRAWFORD: Yes, but then why can't you have an agreement with the objective of and in the anticipation of --

MR. WILLIS: Yes, but my point now is, Mr. Crawford, that the boundary issue can't be treated as something unlinked and separate and distinct.

PROFESSOR CRAWFORD: No, I entirely agree. But I mean if you had a situation in which two states -- let's assume two states relating to a third, and they have a claim against the third, one might think of the Gulf of Fonseca situation, where two states are claiming adversely to a third. And they say we are going to proceed on the basis

that we have the territory and they don't, or one might think of Western Sahara in another context, and we are going to reach a proleptic or prospective agreement on what our boundary is going to be. I mean you can act on that basis. And it turns out they win, or at least they win up to a point. There is an agreement in which they get 50 percent of the benefit of these areas.

Now wouldn't you say after the event that they have actually agreed on their boundary?

MR. WILLIS: I would say that -- I might want to qualify that. I would say it was a contingent and anticipatory agreement in anticipation of sovereignty in that case, in this case, in anticipation of ownership. Certainly not separately, separate and distinct. And not even prior in the sense that the -- the tentative agreement on boundaries would be something that really takes effect only upon the acquisition of ownership.

PROFESSOR CRAWFORD: To take another example of a proleptic agreement before they got the mandate for Nauru, the three governments that were going to benefit from the phosphate industry agreed on the carve up. They did that by the Phosphate Island Agreement of 1919.

They didn't even have any rights to Naru at that stage. They were granted when the mandate was granted in -- from recollection, 1921. So two years later, they

got the mandate.

I don't think either of them would have been particularly happy about one of them saying, oh, well we have got the thing now, we will renegotiate. It was a proleptic agreement. And the suggestion is that at least after '67, when it became clear that it was extremely doubtful that the provinces had any rights that they could agree executively and proleptically to a carve-up in the event that they got the rights. And that that agreement could be intended to be effective even though it wasn't immediately effective because they didn't have the rights till later on.

MR. WILLIS: And although I am not very familiar with the Nauru case, I guess it could also be called a conditional agreement. I mean it would not really take effect unless certain conditions were --

PROFESSOR CRAWFORD: Of course, on this hypothesis nothing would have happened unless the Accords had been passed. But I mean we are in a situation where we know they have been passed. They were part of a long-term policy of the governments concerned to get benefits from the offshore. The government succeeded. I can assure you the provinces did better than the Australian States.

So they got something and now we are being asked to say well have they agreed, as it were proleptically, on

what the carve-up should be as between them? I don't see any reason in principle, apart from questions of separation of powers, apart from questions of intent why they couldn't actually have done so.

MR. WILLIS: But, of course, another branch of our case is that the Accords are one thing and the ownership objective, the subject matter of the original tentative understanding, was quite different. And too different really to be -- to allow the 1964 proposal to be treated as something that anticipated and would automatically without further agreement become applicable to the Accords regime.

PROFESSOR CRAWFORD: To sort of cy pres too far, you would say.

CHAIRMAN: I can't help this sort of thing. But it sounds to me that is anticipatory agreement anticipating an anticipatory breach.

MR. WILLIS: I hope it wasn't a question. The documents certainly don't support either the theory that ownership and boundaries were separate and distinct, or for the reasons I have given, that boundaries were to come first and ownership after.

The main points I made last week in our submission still stand, that the two were always associated, directly linked. They were dealt with together in all of the

documents.

Mr. Fortier referred yesterday to a memorandum from Graham Rogers of the PEI government that was item 6(a) in the compendium he submitted. In fact, here the linkage to ownership could not really have been more clear. Mr. Rogers refers in the last paragraph, I believe it is, to the aim of obtaining agreement from the federal government that the provinces should have. In other words, ownership should have the mineral rights in the submarine areas. And then he outlines a number of ways of achieving this objective, including the BNA Act 1871. Ownership and jurisdiction and boundaries, rather, were linked because the linkage, as we have said before, was inherent and because they were always dealt with in association, the one with the other.

It follows that they were both part of a single package, a single negotiating proposal which was clearly aimed at the federal government.

And finally, precisely because ownership was the issue, the federal government was an essential party to the transaction. It was seen as such by all the parties.

That's why the Stanfield submissions important. It's an eloquent plea to the federal government, addressed to the federal government to accept the ownership claim either on legal grounds or on equitable grounds and then

to implement it through legislation, including the 1871 Legislation.

The federal-provincial negotiating context is plain for all to see. And of course, the federal government never came on board in terms of anything remotely resembling what was being proposed in 1964.

The federal government was essential and recognized as such to both aspects of the transaction. A recognition of ownership on the one hand and boundaries as such. And as I mentioned last week, the use of the BNA Act 1871 would have put both items, both aspects beyond any doubt or possibility of challenge, so none of this was secondary or incidental, it was at the heart of the whole proposal.

Mr. Fortier referred to a letter from Graham Rogers of PEI, and it's the same letter I referred to a minute ago, responding to a letter from the senior solicitor of Nova Scotia, Mr. Malachi Jones. The letter which is item 7 in the Crane compendium, is of some interest. It was dated July 3, 1964 a few months before the September meetings. And in that letter Mr. Jones wrote, "Until such time as there has" --

PROFESSOR CRAWFORD: I'm sorry, where was that?

MR. WILLIS: That was item 7 in the Crane compendium.

PROFESSOR CRAWFORD: Sorry. Yes. Fine.

MR. WILLIS: Mr. Jones wrote that, "Until such time as there

has been an agreement with the federal government and the provinces concerned, with reference to the boundary question or a determination by the courts, I do not think it is possible to finalize any agreement between the various provinces concerned with the Northumberland Strait area."

And that was the legal perception from Nova Scotia only a few months before the conclusion of the purported September 30th Agreement.

PROFESSOR CRAWFORD: Just the sort of thing a senior solicitor would say, isn't it?

MR. WILLIS: Yes. Which doesn't mean it's wrong. Having restated the essentials of the Newfoundland and Labrador case, I will return now to some of the points that Nova Scotia made yesterday in its own restatement.

And as Professor McRae pointed out -- and there will be some repetition here, but perhaps it's warranted -- a lot of this boils down to this simple proposition from Nova Scotia, that any appearance of the word "agreement" or "agreed" in a record that goes back over three decades, demonstrates the Nova Scotia case. But it does nothing of the kind.

An agreement can be a legally binding agreement or it can be something else. It could be a political agrement or a political undertaking. What we have to find out is

not whether the Premiers reached quote "agreement" on some point at some time, but what kind of an agreement it was intended to be.

And I emphasise, because Nova Scotia often forgets it, that Nova Scotia has itself stressed the point that a binding agreement is one that is intended by the parties to be legally binding, as evidenced by the circumstances and the documents.

The use of the word "agreed" in a document can never be anything more than the first stage of an inquiry. The word by itself, as I said lase week, is neutral in terms of this essential distinction.

Let me address the question in terms of international law. International law does not say that any document or statement that uses the word "agreed" is an expression of a legally binding agreement. The Nova Scotia Memorial recognized that this is not the issue. It said in its Memorial at page 45, paragraph 10, that international law recognizes that there may be instruments characterized by the parties as agreements that are not in fact intended to be binding and which are really statements of policy or common purpose. To which I would only add that they can also be statements of a joint negotiating policy or an agreed proposal in a multilateral context.

This is why the Moores' statement that has come to

occupy centre stage in the Nova Scotia argument lacks the significance that Nova Scotia attributes to it. There are some new developments that came out of the June 1972 meeting, but nothing, I submit, to transform the political undertaking of 1964 into something fundamentally different.

It's exactly the same kind of document as emerged in the 1964 Statement. We should assess the significance of the June 1972 Statement in terms of the multiple steps that Minister Allard referred to. It might at best have been the very first of those steps, the confirmation of the delineation and description of the boundaries, but it was only the very first step.

What happened to the agreement he called for? Because it was clearly a formal agreement the had in mind. And what happened above all to the provincial and federal legislation that he called for justice had been done in 1964?

What happened in 1972 was the political reaffirmation of an earlier political understanding, nothing more. The form, the context, the nature of the meeting, the nature of the understandings, such as a further study of financial arrangements, are all political in character and they point to a political and not a legal document.

Let me turn back once again to 1964. Mr. Fortier said

we were treating the Premiers as morons. But I suggest it treats them as morons to suggest that they would think of fixing provincial boundaries, not only without legislation but without a signed agreement, or that they would call for constitutional legislation by the federal government, but assume that it was legally superfluous.

I will not say much on the wording of the 1964 Statement. That ground has been plowed well enough. But I do note that Mr. Fortier had nothing to say about the word desirable in paragraph 4. And on the curious wording of paragraph 5, I would observe that be is not are and it's not shall be and it's not will be. It seems to be a kind of tentative subjunctive referring to something yet to come into existence.

Little was said either about the very tentative language of the 1964 documents. Mr. Stanfield's use of that word was not restricted to the federal-provincial aspect of the line. Little was said either about the very frequent use of the word "proposed" in all these contemporary documents, such as the transcript of the 1965 conference, I'm referring to Mr. Smallwood's intervention, which was made without any reaction from Nova Scotia.

And when the same word "proposed" was used in the follow-up action document, that is document 13 in the Newfoundland and Labrador case, it was clearly not just in

relation to Quebec that the boundaries are described as proposed. It says Premier Stanfield will forward to the Minister of Resources in the Province of Quebec -- and I quote -- "A copy of the proposed marine boundaries and a copy of the map." The words are unqualified and unrestricted.

Now Nova Scotia has to show that there is not only a binding agreement, but that it is an applicable agreement. In other words, that it applies for the purposes of the present Accords and the implementing legislation, which, in our submission, are quite different in character from the original proposal -- that one is more limited and at the same time more complex.

I will not go over the arguments from last week about why this move is illegitimate, but I will just add one word about the all purposes references in the Allard letter, which is the only basis for the argument that Nova Scotia has suggested. The key point -- and I apologize for the repetition -- is that only Nova Scotia confirmed the six points in the Allard letter at the meeting of the JMRC on June 13 at 1969, and at that meeting, Minister Callaghan of Newfoundland and Labrador reported that he had no instructions on any of the six points, and there the matter was left.

PROFESSOR CRAWFORD: Sorry -- Nova Scotia and Quebec.

Quebec affirmed them, as well.

MR. WILLIS: Thank you. It is not enough -- it is not enough to say that in 1964 the provinces wanted to be bound through the enactment of legislation that never came, and it would not be enough to say they did everything they could to become bound. The only real issue, in our submission, is whether they did become bound, and in any event, they did not do everything they could to become bound. They never signed an agreement and they never introduced or passed the legislation that would have been required under the 1964 proposal or the JMRC Allard plan of action.

So the lines did not become the object of a binding agreement in 1964 or thereafter, and they died once and for all with the breakup of the multilateral negotiating process and the end of the so-called united front in 1973.

There's no divergence of views on what happened in 1973 and how definitive, how final that rupture was, but its significance has not been recognized by Nova Scotia because their case is based essentially on the idea that one element from the multilateral process was somehow kept alive as a stand-alone agreement long after that process had collapsed once and for all.

We have already discussed the reasons why this is incorrect, but it's worth looking at the record once again

just to see how final the breakdown of the multilateral negotiating process was in 1973. It was a clean break and as such, it wiped the slate clean. We can see the rift developing in 1973 -- early in 1973 in the report of a meeting of officials from all six jurisdictions following a first Ministers' meeting in April. That's Nova Scotia Annex A61. There were major differences of policy and approach, and it led to Newfoundland going its own way and submitting its own proposal in September of that year.

The extent of the divergence between Newfoundland's approach and that of the other provinces is apparent from Prime Minister Trudeau's lengthy reply of January 28, 1974, which is document 65 in the Newfoundland and Labrador case. In that letter, he describes the Newfoundland and Labrador proposal as a claim for unilateral provincial authority that would fragment the management system, and as a renewed claim for federal recognition of ownership rights.

Now the reaction of the other provinces to this initiative of Newfoundland and Labrador was swift, and it announced the end of the multilateral process in no uncertain terms.

Premier Hatfield wrote to Premier Moores on September 27, in his capacity of Chair of the Council of Maritime Premiers, stating his conclusion that, and I quote -- "You

are proposing to withdraw support of the cooperative effort of the five provinces." He noted the rather wide divergence in views between Newfoundland and the others and that there would be little point in an officials' meeting. And Premier Regan also wrote to Prime Minister Trudeau on September 28th, stating that, in his view, Newfoundland and Labrador was divorcing itself from the work being carried on by the Committee of Officials.

So there could be no doubt about the finality of this break, and the multilateral approach involving a united front was never revived.

When a negotiation breaks down completely and irrevocably like this one, the consequences are clear -- so clear they do not have to be spelled out. It means that all the proposals that were on the table in the context of that negotiation lapse. They lapse whether they were controversial or not. There's no need to take them off the table one by one because there's nothing to keep them alive. The breakdown, as I said, creates a tabularasa, and when the matter is opened again, it's opened on that basis.

As we stated in our Counter Memorial, when a negotiation fails, it's not just the deal breaker that fails to enter into force, but every single element of the package, even those that might have been perfectly

acceptable to all the parties if only the other conditions could have been met.

Nova Scotia has suggested that there's a pattern of reliance on these lines in the years after 1973, but that really does not correspond to the facts. The permits it relies upon, quite apart from all the other factual points we've made, all date from before the breakup of these negotiations.

And the theory of a continuing reliance after 1973 is contradicted by the caveat in the boundary schedule to the 1982 Nova Scotia Agreement. The clearest signal one could imagine, that there was no agreement at all, and everyone knew it, including Nova Scotia, which, nevertheless, signed off on this language with no reservation.

Now that caveat, as you will recall, anticipates the contingency of disputes with other jurisdictions, and that means provinces, but if the Nova Scotia theory that the Stanfield lines of 1964 were binding, then there could have been no such dispute -- not only with Newfoundland and Labrador, but with any of the other East Coast provinces.

The 1982 Agreement was also close in time to the constitutional negotiations of 1980 where Newfoundland and Labrador pressed its claim to ownership and submitted, as well, a provision for the arbitration of boundaries. That

provision would not have been meaningful if the Stanfield lines had already acquired legal force and effect because that would mean that there could never have been an interprovincial dispute on offshore boundaries in Canada, and there's no evidence that Nova Scotia ever queried or objected to the obvious assumptions of the Newfoundland constitutional proposal.

So Nova Scotia's theory of a continuing application or a continuing reliance on the lines after the breakup of the multilateral front in 1973 does not, we submit, stand up to scrutiny.

So far as the principal issue is concerned, Mr. Chairman, I rest my case that there is no binding agreement in this case that resolves either the whole or any portion of the line at issue.

And I will turn now to the Nova Scotia claim outside the Gulf, the 135 degree line. This question is relevant only if the first question is answered in favour of Nova Scotia, but its importance is obvious.

First, it's not only by far the most extensive portion of the line, it's also the critical area in dispute. It's the most important area.

And second, the Terms of Reference asks whether the line, the whole line in other words, the line as a single entity, has been resolved by agreement. The Tribunal has

not been asked about portions of the line.

Third, if the alleged Agreement was supposed to cover the whole area, but in fact did not do so, then an essential term was missing, and nothing entered into force at all.

The basic facts are clear, but the explanations are not. The line outside the Gulf on the Stanfield map is not based on the methodological principles in the Notes re Boundaries, the metes and bounds. It is not the Nova Scotia line, and in fact, it doesn't appear to be based on any principle of delimitation that can be discerned at all.

The imprecision of the term southeasterly is patent, especially in this document, where as we saw last week similar terms can accommodate an extremely wide range of possible azimuths.

And of course, there's as well the ambiguity of the term international waters.

The questions are so fundamental that the area outside the Gulf should have been the top priority of the JMRC. The first priority of the JMRC Technical Committee to clear it up.

Why the boundary outside the Gulf was never addressed is not apparent from the record. It may be that the original indications from 1964 were considered too sketchy

to give the Technical Committee a basis on which to proceed.

It may be this was considered primarily a bilateral question of no interest to the majority of the JMRC. And it may be, as I suggested the other day, that the provinces did not want the matter to get tangled up with the St. Pierre and Miquelon dispute. We will never know the answers to those questions.

But we do know what we have to know, which is that when the JMRC approved the delineation and description of the boundaries in submarine areas, the line stopped at turning point 2017.

There is no indication on the map that the boundaries were to be extended beyond that point. The map they produced shows boundaries ending at point 2017. At no point was the map described merely as an illustration of turning points.

Throughout the documentation it's referred to as a map that shows the boundaries. This is in the minutes of January 17, 1969, document 32 in our book of authorities. It's in the Allard letter, which refers to the map delimit -- delineates the boundaries between your provinces and the other provinces shown thereon. It's in the minutes of the JMRC Committee -- subcommittee rather, of May 24, 1972, the document Annex 46 in the Nova Scotia Annexes.

The letter from the Secretary of the JMRC on June 16, 1972, and so on. And the map itself is entitled "Boundaries of Mineral Rights".

It is common ground that this and only this is the map which the premiers approved on June 18 of that year.

And I refer in that respect to Figure 7 from the Nova Scotia Memorial, and the accompanying notes. And it's described throughout, not as a map illustrating merely turning points, it's described as a depiction of the boundaries, with no indication that the lines went any further than what you see, and what the ministers saw on that map.

Mr. Fortier said nothing could be clearer in the course of the boundary outside turning point 2017. But that raises the obvious question: if nothing could be clearer, why was it not simply put on the map?

The premiers certainly gave no blessing to Figure 9, which is being used in our submission, as a diversionary tactic to distract attention from the real map they approved. This is the only way Nova Scotia has found to get the 135 degree line, or anything at all, outside turning point 2017 back into the picture at the relevant times.

This, of course, Mr. Chairman, and Members of the Tribunal, was a map that did not originate with the

parties. It had no official status even in the federal government. And above all, there's not a shred of evidence that it was even on the table at the meeting of June 18, 1972.

Nova Scotia is asking this Tribunal to attach momentous legal consequences to a map that may have been shown to Premier Moores in a briefing, but on which he made no recorded comment one way or the other.

Nova Scotia has not --

PROFESSOR CRAWFORD: Mr. Willis, you say "may", I mean, there's Mr. Crosby's document, which I think indicates that it was shown to him. I mean, I'm not detracting from the argument.

MR. WILLIS: No. There's -- the evidence is not clear that Figure 9 was shown to Premier Moores. The -- the figures which appear in Dr. Crosby's note about the map he presented to Premier Moores contain a whole list of figures -- well I believe they contain 12 figures, and only two of them actually appear on this map. That raises questions about whether it was the same map.

We also know, if we go back further in the record, that originally there were two maps in play from Dr. Crosby. And one was a map showing pools, and one was a map showing an approach that would be based on a strict geographical delineation.

Now which of those two maps might have been presented to Premier -- Premier Moores? We don't know.

It's true that the figures in Dr. Crosby's memorandum that item 30(c) of the book submitted yesterday implies an area of division. But whether it actually showed a 135 degree line, and whether it was the same as Figure 9 is not -- is not clear from the evidence. There is some doubt about that question in our review.

Nova Scotia has not shown why Figure 9 should be considered relevant at all. Taking account -- into account its provenance, its origin, and the fact that it was no more than a backgrounder developed by a federal official for a meeting.

It would not have been normal or appropriate for the premier to have objected to it in the middle of the federal briefing.

What the premiers actually agreed to was a different map, at a different meeting, between different parties, and a meeting, in addition, at which the federal position was rejected, which tends to detract from the status or authority any federal map might have had in the context of that meeting.

And certainly what they agreed to shows no 135 degree line.

One or two final points before I conclude about the

area outside turning point 2017.

As was noted yesterday, there was never any reply to Cabot Martin's follow-up letter to Mr. Kirby on November 17, 1972. It is improbable that Mr. Kirby simply forgot about the matter. But when he intervened on the boundary issue in -- on April 30, 1974, at a federal-provincial meeting of officials, he recognized, in his interventions, that these matters were not really settled, because he said that Nova Scotia had no evidence of Newfoundland agreeing on the boundaries.

And then Mr. Smith with the federal government says we are trying to develop an arrangement that would be legally enforceable, and an earlier political agreement between the provinces would not necessarily mean they were locked in. And at that point, Nova Scotia says nothing at all.

I will wrap up my presentation, Mr. Chairman, Members of the Tribunal, with two general conclusions. The first is there was never a legally binding agreement of any kind because the documents do not disclose an intention to enter into such an agreement with immediate effect, as our friends have claimed. The steps that all the parties agreed upon as necessary to bring the lines into effect were never taken. It would be unfaithful to the intentions of the parties, even in a framework of international law, to say that the lines had acquired

legal force and effect when those stipulated conditions were unfulfilled.

And the second general conclusion is that even as a political document, there is absolutely nothing at the end of this process that resolves the critical area of this dispute outside the Cabot Strait.

I rest my case, and I thank the Tribunal for its attention and I would ask you, Mr. Chairman, to call upon my colleague, Professor McRae, to conclude our afternoon.

CHAIRMAN: Thank you very much, Mr. Willis. Mr. McRae?

PROFESSOR MCRAE: Thank you, Mr. Chairman. Before turning to my concluding remarks, I would like to say a few words on the issue of the subsequent conduct of the parties, an area that has played a substantial role in the -- Nova Scotia's argument about the intent of the parties in 1964 to conclude a legally binding agreement. And as you know, Mr. Chairman, we have taken the position that the subsequent conduct of the parties in this case is, putting it at its highest, inconclusive, and it therefore does not emirate the intention that actually has been lavished on it in these proceedings. And of course, one area that has been quite laboriously picked over is the issue of permitting. Mr. Chairman, the very fact that the parties cannot agree as to the facts on permitting is reason enough to set it aside as unhelpful. If the parties with

all of the clarity of hindsight and bringing to bear all of the expert resources that they have cannot produce an uncontroversial picture of what was happening in terms of permitting in the 1960's and 1970's, then I suggest that it tells us nothing -- that nothing useful or reliable exists there and it should be set aside, but as our friends from Nova Scotia have belaboured the point, there are two matters that I wish to refer to. It will require very little time.

The first has to do with the famous or infamous Katy permit. Obviously, I couldn't resist not saying something about the Katy permit at this stage. As stated in the Newfoundland and Labrador Counter Memorial, the western limit of the Katy permit as shown on the permit plan extends significantly to the west of the Mobil permit so that if the western limit of the Mobil permit conforms to the 135 degree line, as maintained by Nova Scotia, the Katy permit cannot be in conformity with it also. The point, it seems to us, is obvious.

Now Professor Saunders tried to explain away the obvious last week by suggesting, as they did in their written pleadings, that the depiction of the Katy permit was all in error owing to the use of different projections and that the drafter of the Katy permit essentially did not know what he or she was doing.

Nova Scotia, apparently, does know what the drafter was doing, or rather, what the drafter ought to have done, and Nova Scotia's argument is based on the supposition that the drafter intended to do something different from what he or she did.

And rather than trying to go into this in some detail, I think simply what we would like to do is to take you to Professor Saunders' response yesterday to Mr. Legault's query about the Katy permit. Mr. Legault asked -- and this is at page 828 of the transcript -- "Is the Katy permit west of the Mobile permit on a Mercator?" Professor Saunders' response was, "Fractionally. Only fractionally."

But the permit plan shows clearly that the Katy permit is significantly to the west of the Mobil permit, and it is only that depiction, the depiction on the plan, that is significant, not a reconstruction of it some 35 years later by Nova Scotia based on some presumed intent or incompetence of the original drafter.

What Nova Scotia attempts to do to the Katy permit is the equivalent of trying to amend the terms of the document. And even when our experts transfer the original depiction from a permit plan to a Mercator projection, it is still significantly and not fractionally to the west of the Mobil permit.

Now there is no need for the Tribunal to choose between the views of two law professors as to which is the appropriate depiction of the Katy permit because we are quite happy to defer to the court appointed expert, who, we suggest, will confirm that our Mercator depiction of the Katy permit which shows that the Katy permit is sufficiently to the west of the Mobil permit, is, in fact, accurate.

And, Mr. Chairman, in the brief review we have made of materials supplied to the Tribunal today by Nova Scotia, where there is some distances given in respect of the depiction of the Katy permit, we just want to note -- and we will be following this up with a letter -- we just want to note that the transposition of the Katy permit to the Mercator projection, which is the basis of the figures that are given by Nova Scotia, is, of course, the Nova Scotia transposition of the Katy permit. And again, we would invite you -- we will supply you the figures based on our depiction of the Katy permit and we will simply invite you to speak to the court expert as to whether or not our Mercator depiction is, in fact, accurate.

Second, with respect to the 1973 to '75 interim permits. Professor Saunders correctly last week referred to introduction of an amendment to the Petroleum and Natural Gas Act requiring permits for pre-drilling and

seismic and geophysical surveys. But then he went on to say that because seismic and similar surveys were generally seen as lower order activities, they were in most jurisdictions, unregulated and would not entitle the operator to any claim over a specified area of lands. Somehow, he concluded from that, they were insignificant.

Now Mr. Chairman, those interim permits were not fly by night permits. They were subject to statutory requirements, they were subject to approval by Cabinet, and as demonstrated in the application submitted by companies -- and you will find examples of this in our oral argument book, tabs 58 and 59 -- the companies were required to provide significant information, type of work, geographical area, date of commencement, type of equipment, cost breakdown of the program, how many persons employed. Those permits, Mr. Chairman, were just as serious an exercise of jurisdiction by Newfoundland and Labrador on the issuance of permits as other permits would be. Newfoundland and Labrador would simply not have stood by and waved as a seismic boat sailed by, as Professor Saunders said people in Nova Scotia do.

Mr. Chairman, the other --

PROFESSOR CRAWFORD: As I understand it, those seismic permits were subject to a qualification in relation to the jurisdiction of Newfoundland and Labrador, so you are not

actually asserting by issuing that permit jurisdiction over, let us say, the area marked by the "T" in Texaco?

PROFESSOR MCRAE: The question of where the boundary, being undetermined, a qualification of that kind indicates as far as Newfoundland and Labrador's jurisdiction, in fact, extends.

PROFESSOR CRAWFORD: No, I understand that. I'm not suggesting that the -- that a permit of that size respects the 135 line. I'm simply making the point that because you have the qualification, the actual exercise of jurisdiction extends as far -- up to whatever the boundary might be. You accept that?

PROFESSOR MCRAE: That's right. It goes to wherever the boundary would be. The point of those permits, of course, is they do not reflect -- as Nova Scotia alleged our permitting practice did -- do not reflect the 135 degree line. That is the point. We are not claiming that they reflect a line that we are adhering to. We are simply saying they do not respect the 135 degree line.

Mr. Chairman, members of the Tribunal, I also would like to return briefly on the matter of subsequent conduct to a matter that we had assumed until yesterday was no longer in issue between the parties, and I refer to Nova Scotia's somewhat ambiguous attempt to resuscitate yesterday its argument on acquiesence and estoppel. We

had assumed that perhaps they had abandoned that argument, because, obviously, it does have no role to play in this case.

But yesterday Mr. Fortier insisted that Nova Scotia had not abandoned its acquiesence and estoppel argument. But he did argue that Nova Scotia -- or he did add that Nova Scotia did not argue that the 1964 Agreement was established by subsequent conduct. Rather, he said that Nova Scotia uses subsequent conduct to confirm the existence of a binding intent in 1964.

Now, Mr. Chairman, I don't know whether that constitutes wiggling or whether it is simply blowing hot and cold. But it seems to us that if Nova Scotia's point is that it relies on subsequent conduct only as evidence of a prior intent, it is simply applying subsequent conduct as an evidentiary tool, and that does seem to us to be an abandonment of acquiesence and estoppel in any true sense as an alternative argument.

But nevertheless, if, in fact, Nova Scotia does, in fact, insist that acquiesence and estoppel should be part of the phase one of these proceedings, we would argue that that attempt has to be rejected. I will simply give you the three reasons, which we have already outlined in our written pleadings. First, acquiesence and estoppel have nothing to do with binding agreements and therefore they

are not material here.

Second, because Nova Scotia confuses both the elements and the effects of acquiesence and estoppel. And third, because there are no -- there is no factual basis at all for applying either concept in any event.

Now we have dealt with these matters in our written pleadings and we do not intend to take the Tribunal's time to continue with that issue here.

PROFESSOR CRAWFORD: When you say there is no factual basis, what you say is there is no factual basis for the assertion that there was an estoppel as to the existence of a boundary by agreement?

PROFESSOR MCRAE: That is correct.

PROFESSOR CRAWFORD: Yes.

PROFESSOR MCRAE: Mr. Chairman, Members of the Tribunal, let me turn to some closing remarks. Yesterday in his closing statement Mr. Fortier spent some time trying to show that Newfoundland and Labrador had failed to prove the case that there was no 1964 Agreement, but, of course, that is not the question before the Tribunal.

The true issue is whether Nova Scotia has established the existence of the Agreement that was alleged to have been entered in to on September 30th 1964. And to do this they have to show an intention to enter into a legally binding agreement on terms that are clear and apparent.

There can be no agreement if there is uncertainty, vagueness, ambiguity and contradiction.

Well, how has Nova Scotia fared? I would like to return to the framework we set out last week for assessing the Nova Scotia claim. They claim the 1964 Agreement described the boundaries; that it was an Agreement for all purposes; that the boundary in the outer area was defined by an azimuth of 135 degrees, and that it went to the outer edge of the continental margin. In order to make this claim, Nova Scotia has relied on the assumptions that there was a legally binding agreement; that the issue of boundaries was distinct from the issue of ownership; that the federal government was irrelevant to the process, and that the law that governed the conclusion of Agreement by the provinces in 1964 was the international law of treaties.

Now at the end of the last round, I pointed out that there were fundamental problems with establishing that claim. I referred to the fact that although it is central to Nova Scotia's position, that there has been a consistent application of and respect for the so-called 1964 Agreement. In fact, the record showed inconsistency and contradiction, and let me highlight that again.

In its now well known figure 29, Nova Scotia alleges that the 1964 Agreement boundary line has been

consistently applied and respected by Newfoundland and Labrador. But in 1964 the Stanfield map showed a line that is different from that claimed by Nova Scotia to have been agreed in 1964.

In 1969, the JMRC map showed a line different from that claimed by Nova Scotia to have been agreed in 1964. In 1971 to 1974, Newfoundland and Labrador issued permits that did not conform with the line Nova Scotia claims was agreed to in 1964.

In 1972, Minister Doody suggested to Nova Scotia discussions on the basis of a line that is different from the line that Nova Scotia claims was agreed to in 1964. And in 1977, petroleum regulations issued by Newfoundland and Labrador showed a line that is different from the line claimed by Nova Scotia to have been agreed to in 1964.

An important part of Nova Scotia's claim has been that Newfoundland and Labrador's conduct has consistently shown respect for this line. But faced with the fact that this is not so, Nova Scotia resorts to such theories as the drafter with a disjunct between his mind and his pen and seeks to make other inconvenient permits vanish because they relate to an activity for which Nova Scotia does not require permits.

Mr. Chairman, these points alone show that Nova Scotia has failed to prove the matters that it has set out to

show, and which were key to the Nova Scotia case, but let us look more closely at all of the elements of the Nova Scotia claim. Such a close look shows that there is no and there was no 1964 Agreement. Nova Scotia, as we have said, has patched together elements spanning over a period of 21 years in order to try and establish a 1964 Agreement. Now for the sake of simplicity, I will divide the time since 1964 into three periods, 1964 to 1969, 1970 to 1975 and 1976 to the present day.

First the description of the boundaries. In one sense, this is the most, or I should say only, successful part of the Nova Scotia position. In 1964 there was a description of boundaries, but it was a description of boundaries on which it was desirable to enter into an agreement, and that agreement was going to take place after ownership was secured, and it was an incomplete description. It had to be perfected in 1972, but again, only in part. And Nova Scotia has to borrow for it again, for what is in fact the whole point of its claim, the 135 degree line.

But of course, the proposal of the provinces was rejected in 1964 and again in 1972. And then in the third period, the 1964 description, fixed up to include the 135 degree line is resurrected in the 1982 Agreement and the 1986 Accord. But, of course, it is resurrected and

modified unilaterally by Nova Scotia.

The second key element, the any and all purposes provision, introduced, as Mr. Willis pointed out, in the 1969 Allard letter, but the conditions of Allard were not fulfilled either in 1969 or later when the proposal made to the federal government in 1972 or subsequently.

The third element, the 135 degree azimuth. The terms set out in 1964 said "southeasterly", but that was not 135 degrees on the Stanfield map. It did not even get on the map of the JMRC that finished at turning point 2017.

Newfoundland and Labrador's conduct in the 1970's did not show adherence to a 135 degree line. Minister Doody did not use it on his map. His line was closer to 145 degrees. All that Nova Scotia can rely on is a federal map, which they assert, but never prove, was seen by Premier Moores in the 1970's.

In 1977 Newfoundland Oil and Gas Regulations did not respect 135 degrees.

The fourth element, to the edge of the continental margin. Well of course, that was not what was said in 1964. It was southeasterly to international waters. It did not feature on the JMRC map. It appears only when Nova Scotia resurrects the 1964 line for the purposes of the 1982 Canada-Nova Scotia Agreement.

Thus, Mr. Chairman, the evidence clearly shows that

the elements that Nova Scotia claims were part of a 1964 Agreement were in fact pieced together from a variety of sources spanning over a period of 21 years.

Let us look at the key Nova Scotia assumptions, again within the three period -- three period timeframe.

The first assumption, intention to create a legally binding agreement. In 1964 it was agreed that it was desirable to enter into an agreement at some time in the future, if certain conditions relating to ownership and federal legislation were met. That does not meet the test of intent.

The intent sought in the Allard letter fails because the Allard conditions were never met. The search for intention in the conduct of Newfoundland and Labrador equally fails. The permits do not respect the line.

Minister Doody writes to Nova Scotia with the major problem of what has been done in 1964. That is the rejection of any intent to agree to a line.

And Premier Moores, who came to play such a pivotal position in the Nova Scotia case, almost rivalling D.G. Crosby, simply expressed to the house exactly what had happened in terms of the process of preparing a proposal to the federal government.

And in the third period there was no change. The Allard conditions were never fulfilled and Newfoundland

and Labrador's conduct does not conform to Nova Scotia's claim of an expressed intent.

Nova Scotia was left to try and piece intent together from isolated statements of officials often taken out of context.

The second assumption, that boundaries and ownership were separate. But in 1964, the joint statement clearly linked them. And in 1969, the Allard letter clearly linked them.

They may have become delinked for Nova Scotia, when in the 1970's it abandoned the idea of ownership, but for Newfoundland -- but Newfoundland and Labrador continued to pursue an ownership claim through negotiations and through litigation.

Of course, by the third period, boundaries and ownership were delinked because ownership was off the table.

But what happened in the 1982 Agreement and in the 1986 -- '85 and '86 Accords, shows that at the end of the day, rights did precede boundaries, and not vice-versa, which is the theme of the Nova Scotia case.

The third assumption, the irrelevance of the federal government. This, of course, as Mr. Willis has just shown, has little plausibility.

The so-called 1964 Agreement arose out of a

development of a negotiating strategy with the federal government over ownership. The failure to take the steps necessary to have an agreement on boundaries arose out of the federal rejection of the provinces ownership claims. And at the end of the day, the rights that were accorded and the need to have boundaries that has given rise to this arbitration, is the result of agreements with the federal government.

The federal government was, and is, front and centre in the whole issue of provincial offshore boundaries.

The fourth assumption, the application of the international law of treaties. In 1964, no one dreamed of applying international law to the actions of the premiers in putting forward their proposals to the federal government on ownership and boundaries. They operated in a domestic legal framework. And it was under a domestic legal framework that the issue was dealt with. Rejection of the proposal by the federal government, acting as the federal government, not as a state, and rejection by the Supreme Court of Canada, acting as the Supreme Court of Canada, and not as the International Court of Justice.

The idea of the application of international law comes in much later and is given formal expression in the Accords. It becomes the mechanism for settling a line between the parties. It is only under these Terms of

Reference, and not under the terms of the implementing legislation, that an argument is now made, that the relations of the provinces in 1964 should be considered as if they were states. But as we have shown, the Terms of Reference require determination of real intent as a factual matter, not a fictional intent.

Again, at the end of the day, the assumptions on which Nova Scotia rests its claim of a 1964 Agreement cannot be sustained. And Mr. Chairman, when the assumptions of a claim do not stand up, and when the elements of the claim that there was an agreement on September 30th, 1964 cannot be established, then we would suggest respectfully that the burden of proof on Nova Scotia has not been discharged. They have failed to establish that there was any legally binding agreement entered into on September 30th, 1964.

Mr. Chairman, it is useful to recall, as I showed you earlier, the lines that are in issue here. There are in fact two parts, the two sections of the line from the tri-point or turning point 2015 to 2017, and from turning point 2017 beyond. The former was discussed in 1964, but the latter did not come into discussion until much later. And you cannot segment the question before you. If you find that the 135 degree line was not established by agreement in 1964, then you must answer the question

before you, that the line between Newfoundland and Nova Scotia -- Newfoundland and Labrador, and Nova Scotia has not been resolved by agreement.

There can be no partial finding, and you cannot create a line, as our friends have implied that you could. Failure to find that any part of the line was not resolved by agreement puts this case into phase two.

And by mentioning phase two, Mr. Chairman, I think a comment is deserved.

The result of a two phase arbitration is that the issue of where the line should be drawn, in accordance with the principles of international law governing maritime boundary delimitation, is divorced from the question of agreement. This, of course, has the advantage that Nova Scotia does not have to justify the line that it is claiming in the light of principles of international maritime boundary law. It is avoided in phase one, the embarrassment of having to defend a line, that a 135 degree line, that in fact, as Mr. Willis said, accords with no principle of international maritime boundary law.

And a final comment on phase two, Mr. Chairman. One of the most impressive aspects of the Nova Scotia Memorial was the list of Canadian and international counsel and experts that Nova Scotia had assembled. But the thing that was most remarkable, was that although there are many

on that list who are experts, indeed leading experts, on maritime boundary law, not one was an expert on the law of international treaties. That is an indication of how seriously Nova Scotia believed in its claim of an agreement. Nova Scotia knew from the outset that the real issue was maritime boundary delimitation, and they organized their team accordingly.

It's thus time, Mr. Chairman, to bring this phase to a close, so that Nova Scotia's experts on maritime boundary delimitation can get to work.

In the light of the above, Mr. Chairman, Members of the Tribunal, Nova Scotia has failed to establish that the line dividing their respective offshore areas of Newfoundland and Labrador, and Nova Scotia, has been resolved by agreement. Accordingly, we respectfully request this Tribunal to so hold, in accordance with article 3, the Terms of Reference, that the line dividing the respective offshore areas of Newfoundland and Labrador, and Nova Scotia, has not been resolved by agreement.

That concludes, Mr. Chairman, the second round presentation of Newfoundland and Labrador. On behalf of the Newfoundland and Labrador, I would like to thank the Tribunal for the attention and consideration that you have given me and my colleagues throughout this hearing.

Thank you, Mr. Chairman.

PROFESSOR CRAWFORD: I just wanted an indication as to when we can expect the replies in writing to the two Tribunal questions?

MR. FORTIER: I was going to ask, Mr. Chairman, Professor Crawford, when you wanted them? We're prepared to submit our written replies within --

PROFESSOR CRAWFORD: Well we should fix a precise time so that there's no disadvantage. I mean, settle on the time zone, and so on.

MR. FORTIER: We intend to be bound by the time that you will determine. Would -- would a week from today be acceptable, or would you --

PROFESSOR MCRAE: We were under the impression, Mr. Chairman, that we would provide this by the end of the hearing.

CHAIRMAN: That is my impression.

PROFESSOR CRAWFORD: Could we -- could we suggest the end of this week? Is that --

MR. FORTIER: The end of this week is fine.

PROFESSOR MCRAE: If that's your pleasure. Although, if we had known that, I think we would have spent much more time on our preparation than we had.

PROFESSOR CRAWFORD: Well you still have time to do it.

PROFESSOR MCRAE: Yes, that's true. We will -- at the end

of the week is fine with us.

MR. FORTIER: Thank you.

CHAIRMAN: I'd like to take this opportunity on behalf of the Tribunal to thank counsel on both sides for the -- and congratulate them for the quality of the arguments that have been put to us. In my last incarnation, I often went home and said to my wife, this has been a good day, a day when you hear counsel's ability focus in on a difficult issue is always a pleasant one. And we have had more than a week of happy days in that sense.

I would like also to join you, Mr. Fortier. You mentioned it in thanking the Registrar and those who assisted us, including the personnel at the Wu Centre for assisting us in many ways.

We will do our level best to -- to come up with a decision within the timeframe contemplated by the Terms of Reference, and I'm confident that we'll get at least close to them. But I -- we are certainly going to try.

Thank you very much.

MR. FORTIER: Would it be possible for the parties to have, given the fact that they are to be treated as if they were states, to have prior notice of the date when your Tribunal will hand down its decision? I'm sure that both in St. John's and in Halifax, this would be appreciated. Twenty-four hours, two days?

CHAIRMAN: Yes, I would think so.

MR. FORTIER: Thank you very much.

(Adjourned)

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

Reporter