

CHAPTER III RHETORIC AND REALITY IN THE NOVA SCOTIA MEMORIAL

I. Introduction

50. The Nova Scotia Memorial is characterized by unsubstantiated assertions, excessive rhetoric and misleading illustrations. Many of these will be referred to throughout this Counter Memorial. In this section, a selection of the most egregious examples will be mentioned. These examples illustrate that the factual allegations made by Nova Scotia, as well as its arguments, must be viewed with extreme caution, and in important instances simply cannot be relied upon.

II. The Mythical "1964 Agreement"

51. Throughout its Memorial, Nova Scotia asserts as fact precisely what it has to prove - that there was a legally binding agreement entered into by Newfoundland and Labrador. The expression "1964 Agreement" is repeated incessantly and is claimed to be "known to all," even though no document evidencing such an agreement is produced and no evidence is produced to show the currency of the expression "1964 Agreement." Nor, as will be pointed out in Chapter V, was the "1964 Agreement" known to the federal government. Indeed, it seems that the principal use of the expression "1964 Agreement" is to be found in the Nova Scotia Memorial.
52. Revealingly, Nova Scotia does not mention scholarly writers, who would presumably be part of the "all" to whom the "1964 Agreement" was "known." Because if they did, they would have to admit, that far from any scholar knowing the "1964 Agreement," scholars that have dealt with the issue have taken the view that no legally binding agreement was concluded in 1964.⁵⁸

⁵⁸ I. Townsend-Gault, "Petroleum Operations on the Canadian Continental Margin" (1983) *Canadian Institute of Resources Law* at 62; J. Charney, "The Offshore Jurisdiction of the States

53. The assumption that continued repetition of the word “agreement” will take the place of proof is manifested in a variety of ways. Thus, it is alleged that the Terms of Reference require the Tribunal “first to adjudicate on the validity of the boundary established by the parties’ Agreement.”⁵⁹ But the Terms of Reference require no such thing. They require proof that such an agreement exists,⁶⁰ not an adjudication of the “validity of the boundary” established in an agreement that already exists.
54. Similarly, Nova Scotia alleges that Newfoundland and Labrador “never sought to disavow the *1964 Agreement*”⁶¹ as if the existence of the agreement was a fact and not something to be proved. Of course, by expressing the issue this way, Nova Scotia can ignore the numerous occasions where officials of Newfoundland and Labrador have denied that any such agreement exists.⁶²
55. The Nova Scotia Memorial is replete with similar examples. But mantra is no substitute for proof, and expostulation cannot replace analysis. The onus is on Nova Scotia to prove the existence of a legally binding agreement and it has failed to do so.

of the United States and the Provinces of Canada - A Comparison" (1983) 12 *Ocean Development and International Law Journal* at 307, 329-335; J. Charney, "Maritime Jurisdiction and the Secession of States: The Case of Quebec" (1992) 25 *Vanderbilt J. of Intl. Law* at 397-399; J. Smith, "Notre Mer: An Independent Québec's Maritime Claims in the Gulf of St. Lawrence and Beyond" (1997) 35 *C.Y.B. Intl. Law* 124- 127, Supplementary Authorities # 23, 24, 25, 26.

⁵⁹ NS Memorial, page I-11, para. 25.

⁶⁰ Terms of Reference, Article 3.2(i).

⁶¹ NS Memorial, page II-2, para.5.

⁶² N&L Memorial, paras. 38, 62, 64, 67, 71, 76, 85, 92, 105, 107, 118.

III. The "Slight, though Very Definite, Turn toward the East" in the Stanfield Line, and the Missing Compass Roses

56. In describing the line in the "1964 Agreement" Nova Scotia states that "it is apparent from the map depicting the boundaries agreed by the Provinces (see Figure 4) that, from the last defined turning point along the Nova Scotia-Newfoundland boundary, the line makes a slight, though very definite, turn toward the East and runs in a straight line to an undefined terminus."⁶³ Nova Scotia claims that "This depiction is entirely consistent with the metes and bounds description of the boundary."⁶⁴ A footnote to these statements provides, "The map is not sufficiently precise to have allowed for an accurate determination of the azimuth (especially given that, at the time the map was prepared, the coordinates for the turning points had not yet been plotted)."⁶⁵ The footnote goes on to identify the azimuth running from the midpoint between Flint Island and Grand Bruit (Turning Point 2017 as later plotted by the JMRC) as "an azimuth running southeast, or 135 degrees...".⁶⁶
57. Closer analysis, however, shows that there is much that is misleading in these statements. First, Nova Scotia Figure 4, an illustration depicting the map accompanying the Stanfield proposal ("Stanfield map"), does not in fact show a line that runs at 135°. ⁶⁷ The line on Nova Scotia Figure 4, running from the midpoint between Flint Island and Grand Bruit, can be readily determined to be a line that runs approximately at 125° – not 135°. ⁶⁸

⁶³ NS Memorial, page IV-17, para. 29.

⁶⁴ *Ibid.*

⁶⁵ NS Memorial, page IV-17, FN 56.

⁶⁶ *Ibid.*

⁶⁷ NS Figure 4 is located between pages II-15 and II-16 of the NS Memorial.

⁶⁸ N&L Memorial, para. 36. See also N&L Memorial Figure 3.

58. Second, the claim that the Stanfield map was not sufficiently precise to have allowed for an accurate determination of the azimuth is simply not credible. The map that Nova Scotia Figure 4 depicts is Canadian Hydrographic Chart 4490, a chart which is sufficiently precise to depict any line. A copy of the chart, says Nova Scotia, is found in Annex 32.⁶⁹ And of course, Annex 32 also has a line on it, the line that runs from the midpoint between Flint Island and Grand Bruit at approximately 125°.
59. There is a significant omission in Nova Scotia Figure 4 and in Annex 32. The Stanfield map has four compass roses displayed on it, one very close to the 125° line. The copy of the Stanfield map provided in the pocket of the Newfoundland and Labrador Memorial shows those compass roses quite prominently. (See CM Figure 1.) It is curious that a reproduction process, which throughout the Nova Scotia Memorial is uniformly of high quality, should have failed to reproduce the compass roses in Nova Scotia Figure 4 and in Annex 32 while at the same time preserving everything else that is on the chart accompanying the Stanfield proposal.
60. A glance at Figure 4 of the Nova Scotia Memorial would tend to confirm that the line in the “1964 Agreement” made a slight turn to the east, and on the face of it there is no basis for questioning the assertion in footnote 56 that this is a line of 135°.⁷⁰ But, if the compass roses had been on the chart in Annex 32 and on Figure 4, it would have been readily apparent that the line was not a 135° line. In fact, it would have been relatively easy to determine that it was a line of approximately 125°. And, by any definition, a difference of 10° is much more than a “slight, though very definite, turn toward the East.”⁷¹

⁶⁹ NS Memorial, page II-15, para. 28 and FN 44.

⁷⁰ NS Memorial, page IV-17, FN 56.

⁷¹ NS Memorial, page IV-17, para. 29.

IV. The Graphic Representations of the Line in the “1964 Agreement”

61. Throughout its Memorial, Nova Scotia provides illustrations of the line which it claims was the line provided for in the “1964 Agreement.” Invariably that line extends out From Turning Point 2017 on an azimuth of 135°. Yet, the only map accompanying the Stanfield proposal, which according to Nova Scotia embodies the “1964 Agreement,” does not show such a line. Thus, Figure 5 of the Nova Scotia Memorial,⁷² which is titled “The 1964 Agreement Boundaries,” includes a line said to represent the “Boundary between Nova Scotia and Newfoundland and Labrador Established in the 1964 Agreement” that bears little relationship to the line on the map accompanying the 1964 Stanfield proposal (see **CM Figure 2.**) In short, the title to Nova Scotia’s Figure 5 map is simply misleading.
62. Similarly, Figure 8 of the Nova Scotia Memorial purports to depict “The 1964 Agreement with Defined Turning Points Approved in 1972.”⁷³ However, Figure 8 contains a line extending beyond Turning Point 2017 which simply does not appear on the map that was produced by the JMRC to describe the turning points. (See **CM Figure 3.**) Again, the title to the Figure 8 map is misleading.
63. Repetition of something that is inaccurate does not make it accurate. Misleading illustrations do not create an agreement, and continually showing a line that did not exist in 1964 or in 1972 and saying that it did, does not retrospectively create any agreement on such a line.

⁷² NS Figure 5 is located between pages II-19 and II-20 of the NS Memorial.

⁷³ NS Figure 8 is located between pages II-23 and II-24 of the NS Memorial.

V. The Map "Presented to the East Coast Premiers in 1972"

64. Nova Scotia states that at the conference of June 17-18, 1972, the Premiers had before them a map entitled "Provincial Offshore Areas Accruing to the Provinces."⁷⁴ This map is identified as Nova Scotia Figure 9. (See CM Figure 4.) The map, it is claimed by Nova Scotia in the title to Figure 9, was "presented to the Premiers in 1972."⁷⁵ On what evidence is such a claim based?
65. It appears that the confident assertion that the map was "before" the Premiers in 1972 is no more than speculation, and the statement that it was "presented to the Premiers in 1972" is just plain wrong. Footnote 73 to the Nova Scotia Memorial claims that Nova Scotia had the map as early as April 1971 and that Premier Regan was aware of it in May of 1971.⁷⁶ How, then, could it have been "presented" to him in 1972?
66. The evidence shows that two maps were provided to Nova Scotia in 1971. One map showed revenues being divided among the provinces "on the basis of each having a delineated geographical area," and this is the map represented in Nova Scotia Figure 9, and another map which depicted revenues being divided on the basis of a common fund.⁷⁷ Further, the federal official who provided the maps to Nova Scotia in 1971 informed Nova Scotia officials that, pursuant to a federal-Nova Scotia strategy, these maps were being provided to Nova Scotia in confidence and were being kept from Newfoundland and Labrador.⁷⁸

⁷⁴ NS Memorial, pages II-26 and II-27, para. 50. See also NS Memorial, page II-27, FN 74.

⁷⁵ NS Figure 9 is located between pages II-27 and II-28 of the NS Memorial.

⁷⁶ NS Memorial, page II-27, FN 73.

⁷⁷ NS Memorial, Annex 50, pages 1-2, 4.

⁷⁸ Note to file of D.G. Crosby (May 6, 1971) and Letter from D.G. Crosby to I. McLeod (May 6, 1971), N&L Supplementary Docs. # 2 and 3.

67. The claim that the map was “presented” to Premier Moores in 1972 is based on the statement, again in footnote 73 of the Nova Scotia Memorial, that a “version of this map was also provided to the Government of Newfoundland by a federal official, D.G. Crosby, during his briefing of Premier Moores on June 6, 1972.”⁷⁹ But this is an assertion only, and no evidence is proffered that the map in question was “presented” by Crosby to Premier Moores. Indeed, Crosby’s notes suggest that it was not Figure 9, but rather the map which depicted revenues being divided on the basis of a common fund, that was provided to Newfoundland and Labrador officials at that time.⁸⁰
68. In respect of the other East Coast Premiers, to whom the map was allegedly “presented,” Nova Scotia does not even try to provide any evidence of this occurring. Assertion remains the method of proof.
69. This idea of a map being “presented” to the Premiers, and being “before” them in 1972, which is based totally on speculation that appears contrary to the available evidence, then becomes treated by Nova Scotia as hard fact. The “figures” on the map, Nova Scotia claims, were “subsequently used, *inter alia*, in discussions at the Premiers’ meeting of August 2, 1972.”⁸¹ Again, this is no more than conjecture, because the proof offered that they were “used” in discussions is none other than a repetition of the discredited speculation about maps being “presented” or provided to the East Coast Premiers in 1972.
70. The myth of the map being presented to the East Coast Premiers in 1972 becomes central to Nova Scotia’s claim that Newfoundland and Labrador is bound because it failed to object to

⁷⁹ NS Memorial, page II-27, FN 73.

⁸⁰ Compare D.G. Crosby’s description of the map which depicted revenues being divided on the basis of a common fund (in NS Annex 50) to his description of the map he intended to use for his briefing session with Premier Moores (in NS Annex 52). The description of the two maps are virtually identical.

⁸¹ NS Memorial, page IV-22, para. 44. See also page II-27, FN 74.

this map. Images are conjured up of “assembled premiers” finding the “visual impact” of a map “striking”,⁸² where there is simply no evidence that the map was before them, or that any federal official was in attendance to “present” it to them.

71. Even if the map was before the Premiers in 1972, it strains credulity to believe that Premiers who were assembled to formulate a strategy against the federal government would find “striking” a map provided to them by the federal government. The Premiers, one would assume, would be more impressed with the map illustrating the Turning Points produced by the JMRC – a body that the Premiers themselves had constituted. The federal map that appears to have captivated Nova Scotia represented nothing more than a proposal from the federal government to illustrate resource revenue sharing.⁸³
72. Moreover, the legal significance of all of this is completely unclear. Nova Scotia’s argument is that Premier Moores apparently failed to object to a line on a map which it has never been established that he ever saw. But, even if a federal official had provided a map to Premier Moores, how could any legal consequence flow in respect of any relations between Newfoundland and Labrador and Nova Scotia from comment on, or failure to comment on, a representation on a map of a federal proposal on revenue sharing?
73. In the end, therefore, Nova Scotia’s treatment of the facts on the issue of the “map presented to the East Coast Premiers in 1972” is little more than historical fiction combined with wishful thinking. And, in any event, it is legally irrelevant.

⁸² NS Memorial, page IV-23, para. 45.

⁸³ It should also be noted that D.G. Crosby did not become aware of the Turning Points until July 1977 so that any maps provided by him in 1971 or 1972 to the provinces could not have been based on the Turning Points. See letter from D.G. Crosby to J. Godsoe (July 21, 1977), Supplementary Doc. # 25.

VI. The “official, published Nova Scotia map”

74. Figure 16 of the Nova Scotia Memorial, entitled “Implementation of the 1964 Agreement by Nova Scotia: Offshore Exploration Permits 1965-1971” is described as “a reproduction of the official, published Nova Scotia map that establishes the petroleum licence ‘grid’ system.”⁸⁴ The footnote to this statement states “By 1971, the grid system maps included the turning points as numbers by the JMRC in 1969, and later agreed by the Premiers in 1972. A copy of the original map is found in Annex 77.”⁸⁵
75. On its face, all of this is simple and straightforward. Yet, in the space of these two statements, there are two errors and one unproven assertion.
76. The first error is that despite the assertion that by 1971 grid system maps contained the JMRC turning points, the map in Nova Scotia Figure 16, purportedly “as of 1971,” does not contain those turning points. The second error is that although the Figure 16 map is claimed to be a 1971 map, it could not have been issued in 1971. The names in the top left hand corner indicate that the Nova Scotia Minister of Mines was Leonard L. Pace. But, Leonard Pace did not take office as Minister of Mines until 1973.⁸⁶ Thus, the map could not have been issued before then. (See CM Figure 5.)
77. Although Nova Scotia claims the map was “published,” it does not cite any information to support that claim. A map similar to Annex 77 was published in the 1974 publication entitled “Petroleum Exploration in Nova Scotia.”⁸⁷ Leonard Pace also appears on this map as Nova

⁸⁴ NS Memorial, page II-45, para. 88. NS Figure 16 is located between pages II-45 and II-46 of the NS Memorial.

⁸⁵ NS Memorial, page II-45, footnote 121.

⁸⁶ *Who's Who in Canada* (1975-1976), Supplementary Doc. # 17.

⁸⁷ W. Potter and T. Dexter, NS Department of Mines (January 1974), Supplementary Doc. # 16.

Scotia Minister of Mines. Thus, it seems that the most likely date of publication of a map containing the information found on Annex 77, claimed by Nova Scotia to be published in 1971, would be 1974.

78. It also appears that it was in 1974 that the federal government became aware of this map. In a memorandum to the Acting Deputy Minister of the federal Department of Energy Mines and Resources, W.H. Hopper, the Assistant Deputy Minister wrote:

Attached is a copy of the publication prepared by the Nova Scotia Department of Mines, entitled 'Petroleum Exploration in Nova Scotia' which we received recently. It is difficult to understand why this publication was prepared unless its main purpose is to foster the illusion that the province really administers the area off its coasts and supervises oil and gas activities thereon.⁸⁸

79. Ultimately, the map in Annex 77 is of no significance. As the memorandum from W.H. Hopper indicates, it illustrated Nova Scotia's desire for authority, not actual authority in Nova Scotia. It was treated with derision by federal officials, and there is no reason why Newfoundland and Labrador should have taken it more seriously. Its new found status in the Nova Scotia Memorial is characteristic of Nova Scotia's willingness to make unsupported or incorrect assertions and then treat them as if they were fact.

VII. Imagining the Intent of the Drafter of the Katy Permit

80. One of the most remarkable parts of the Nova Scotia Memorial is Appendix A where Nova Scotia seeks to demonstrate that the drafter of the permit granted to Katy Industries Inc. (Katy) on May 19, 1971 followed the 135° line.⁸⁹ Presuming an intent on the part of the drafter to follow the 135° line, Nova Scotia seeks to show that the presumed intent was the

⁸⁸ *Ibid.*

⁸⁹ NS Memorial, Appendix A, paras. 24-35.

real intent. However, the analysis shows no more than that while drafting is recognized as an accurate science, crystal ball gazing is not.

81. The essence of the Nova Scotia argument is that two things that are different are in fact the same. Nova Scotia's Figure A-5 depicts the permit granted to Mobil Oil Canada Ltd. (Mobil) on September 15, 1967, which according to Nova Scotia "traces the 1964 Agreement boundary."⁹⁰ For Nova Scotia, the "1964 Agreement boundary" means the 135° line.⁹¹ Nova Scotia's Figure A-7 depicts the permit granted to Katy on May 19, 1971,⁹² which Nova Scotia says, in the light of its own re-engineering of what the drafter intended and did, "virtually corresponds" to the 135° line.⁹³
82. Nova Scotia cannot have it both ways. Either the western limit of the Mobil permit follows the 135° line, or that of the Katy permit follows the 135° line. For, as **CM Figure 6** demonstrates, there is a substantial difference between the western limit of the Mobil permit and the western limit of the Katy permit. The Katy permit extends significantly westward beyond the Mobil permit.
83. Nova Scotia attempts to get around this by conjecturing that the pen of the drafter did not follow his intent. Nova Scotia's explanation is that if the lines representing the westward limits of the Mobil and Katy permits are extended northwards towards Cabot Strait, outside the permit area, they are close to intersecting the 135° line beyond Turning Point 2017.⁹⁴

⁹⁰ NS Figure A-5 is located between pages 10 and 11 of Appendix A.

⁹¹ NS Memorial, Appendix A, para. 21.

⁹² NS Figure A-7 is located between pages 13 and 14 of Appendix A.

⁹³ NS Memorial, Appendix A, para. 32.

⁹⁴ NS Memorial, Appendix A, para. 28.

Nova Scotia then concludes that the drafter must have intended to draw the westward boundary of the Katy permit along the 135° line.⁹⁵

84. Thus, according to Nova Scotia, the intent of the drafter is divined from looking, not at the lines the drafter drew, but at what the drafter would have been thinking if he had notionally extended the permit lines northwards, back towards Cabot Strait. But this explanation faces a problem. As mentioned earlier, the plan accompanying the Katy permit (**CM Figure 6**) shows that it is west of the Mobil permit, which Nova Scotia insists generally follows the 135° line.
85. The problem is solved, Nova Scotia claims, by assuming a drafting error. The Katy permit was not drawn on a Mercator projection. If the line that Nova Scotia thinks the drafter intended is drawn on a Mercator projection, then, Nova Scotia claims, its point is proved.⁹⁶ And it illustrates this with Figures A-4 and A-8.⁹⁷
86. Creative as the explanation may be, there is nothing to support it, even though Nova Scotia has represented the line in Figures A-4 and A-8 in a manner designed to clothe its theory with plausibility.
87. Nova Scotia Figures A-4 and A-8 are intended to show that the real difference between the Katy permit line and the 135° line is "minuscule."⁹⁸ The problem is that the line said to represent the westward limit of the Katy permit is a line of Nova Scotia's construction, conveniently drawn in Figures A-4 and A-8 on maps without the Newfoundland and Labrador

⁹⁵ NS Memorial, Appendix A, para. 30.

⁹⁶ NS Memorial, Appendix A, paras. 26 and 27.

⁹⁷ NS Figure A-4 is located between pages 10 and 11 of Appendix A. NS Figure A-8 is located between pages 15 and 16 of Appendix A.

⁹⁸ NS Memorial, Appendix A, para. 33.

permit grid. The result is a depiction that does not correspond with the permit plan on which the Katy line was drawn. What Nova Scotia has done is draw a line that it wants to believe was intended to be drawn, even though there is absolutely no evidence that this was in fact the drafter's intent.

88. Nova Scotia produces all kinds of reasons for ignoring what the drafter did and focussing on what it believes to be the intent of the drafter. The Appendix to the Memorial refers to such things as lack of coordinates, lack of projection and scale, and even seeks to blame folds in the map and the way it has been copied.⁹⁹ Even pencil thickness plays a role in Nova Scotia's desperate attempt to explain away what is simple, straightforward and obvious.¹⁰⁰
89. What Nova Scotia cannot ignore is that in fact it is a rather trivial task to replicate the Katy permit line on a Mercator projection. Nova Scotia's contrived focussing of attention to the north of the permit area is designed to divert attention from the permit itself. Because if one focuses on the actual permit, it is quite clear that it was drawn according to the Newfoundland and Labrador permit grid.¹⁰¹ Thus, every intersection of the line with the permit grid can be transposed onto a chart showing the Newfoundland and Labrador permit grid.
90. **CM Figure 7** shows the Mobil permit as drafted and as plotted on a Mercator projection. **CM Figure 8** shows the Katy permit as drafted and as plotted on a Mercator projection. The result shows that a line properly plotted on a Mercator projection accords with the actual Katy permit plan, and differs markedly from the fictional line drawn by Nova Scotia in Figures A-4 and A-8. It becomes clear, therefore, why Figures A-4 and A-8 do not include permit grids. If they had done so, it would have been obvious that the fictional Nova Scotia representations of the Katy permit do not correspond to the actual permit issued.

⁹⁹ NS Memorial, Appendix A, para. 24.

¹⁰⁰ NS Memorial, Appendix A, paras. 29, 34.

¹⁰¹ The Katy permit plan is located in NS Annex 80.

91. The representation of the Katy permit in **CM Figure 9** accords with the obvious intent of the drafter. The drafter was well aware of the Mobil permit. He marked it on the plan. He clearly intended to extend the Katy permit to the west of the Mobil permit, and that was what was done. Thus, Nova Scotia's attempt to reconstruct the Katy permit so that it runs along a line of 135° , notwithstanding its veneer of scientific verisimilitude, ultimately collapses.
92. Why does Nova Scotia engage in such transparent revisionism? Why did it devote practically a whole Appendix to developing its theory of the Katy drafter's intent? On its face, this was to try and demonstrate Newfoundland and Labrador's commitment to a 135° line, which obviously fails. But there is a more important point. If Nova Scotia has to admit that the Katy permit extended to the west of the 135° line, then Nova Scotia would be in the embarrassing position of having to explain why it did not object to the issuance of the permit. Because under Nova Scotia's theory, in order to be consistent with the standard it seeks to apply to Newfoundland and Labrador, such failure to object would mean acquiescence by Nova Scotia in Newfoundland and Labrador's position that there was no such agreed line.
93. Thus, for Nova Scotia, the Katy permit has the potential for undermining both its arguments on Newfoundland and Labrador's practice and its arguments on acquiescence and estoppel. Hence, Nova Scotia had to embark on a tortuous explanation of an intent that it wishes the drafter of the Katy permit had.