

## CHAPTER V THE ALLEGED "1964 AGREEMENT"

### I. Introduction

119. Nova Scotia claims that an agreement between Newfoundland and Labrador and Nova Scotia was concluded at the conference of September 30, 1964.<sup>126</sup> It correctly asserts that the test of whether an agreement exists is intent, but then wrongly assumes that, on the facts of this case, intent can be derived by looking at the plain words and the object and purpose of the alleged agreement, and the subsequent conduct of the parties. What Nova Scotia has done is confuse the rules relating to the formation of agreements, where intent is the primary consideration, with rules relating to the interpretation of agreements where plain words, object and purpose and subsequent conduct have roles to play.
120. That the rules relating to the interpretation of agreements do not apply to the question of the formation of an agreement is self-evident. How can the plain words and object and purpose of an agreement, both of which presuppose that the agreement exists, be taken into account when the very question is whether there is any agreement at all? Since Nova Scotia's legal argument about the existence of the so-called "1964 Agreement" is based on a faulty premise, its Memorial is fundamentally flawed.
121. Beyond Nova Scotia's misapplication of the principles of law, the claim that an agreement was concluded on September 30, 1964 is not supported by the facts. Moreover, even if subsequent practice is relevant to prove an antecedent intention, it is impossible to reconcile the historical record with the Nova Scotia contention that subsequent events reveal an intention to be bound. Time and time again, the historical record discloses statements and initiatives by key players that demonstrate that while there may have been interprovincial boundaries proposed in 1964, they had not resulted in a legally binding agreement.

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<sup>126</sup> NS Memorial, page IV-1, para. 1.

122. The practice since 1964 demonstrates precisely the opposite of Nova Scotia's contention. It shows that the two provinces could not have intended on September 30, 1964 to create a legally binding agreement, but simply agreed on a proposal to be put forward in negotiations.

## II. There Was no Intent to Enter into a Legally Binding Agreement on September 30, 1964

123. Nova Scotia's principal contention is that there was an intent to create a legally binding agreement on September 30, 1964 because documents prepared at that time use the words "agreed" or "agreement." Nova Scotia cites a communiqué issued on September 30, 1964 at the end of the Atlantic Premiers Conference, Premier Stanfield's summary of the meeting sent to Premier Robichaud on October 2, 1964 and Premier Stanfield's correspondence to Premier Lesage on October 2, 1964.<sup>127</sup>
124. However, in so doing, Nova Scotia isolates the words "agreed" and "agreement" from the context that gives them meaning. As pointed out in Chapter II, the word agreement can refer to political undertakings or policy agreements, provisional or *ad referendum* agreements, agreements subject to requirements of ratification or legislation, or agreed proposals made in the course of a multilateral negotiation. It is necessary, therefore, to identify an intent separate and apart from the use of the words "agreed" or "agreement" that will clarify whether the words are being used to denote a legally binding agreement.
125. As Newfoundland and Labrador made clear in its Memorial, a proper analysis of the context in which the alleged "1964 Agreement" was concluded shows that in 1964 the question of offshore boundaries was inextricably linked to ownership and jurisdiction over offshore mineral resources. At the Atlantic Premiers' Conference on September 30, 1964, the Premiers reached a political consensus. They agreed upon a joint negotiating proposal, their objective

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<sup>127</sup> NS Memorial, Page IV-7, para. 12(1)-(4).

being to obtain federal acceptance of provincial claims to ownership and jurisdiction over offshore mineral resources as a matter of constitutional right. Once this joint negotiating proposal was rejected by the federal government, it ceased to have any relevance.<sup>128</sup>

126. A review of the background, the September conference itself, and its outcome readily refute Nova Scotia's contention that a legally binding agreement was concluded at that time.
127. The historical record establishes that for the Atlantic provinces, the question of ownership and jurisdiction over offshore mineral resources was paramount. The question of interprovincial boundaries, while intertwined with this objective, was subsidiary. In an address to the Atlantic Premiers in 1959, Premier Stanfield articulated the thinking of provinces at the time. He said:

Who owns submarine minerals? There is, first of all, the constitutional question as to whether submarine minerals belong to the Government of Canada, or the Provinces. If it is conceded that these rights are vested in the Provinces, then the second question arises as to the rights of Provinces bordering on their common territorial waters .....<sup>129</sup>

128. The very idea of delimiting boundaries was to assist in the provinces' claim to offshore ownership and jurisdiction.<sup>130</sup> And contrary to Nova Scotia's assertion that "the provinces did not consider that the *1964 Agreement* was in any way dependent upon federal legislation"<sup>131</sup> the historical record demonstrates otherwise. Although the five East Coast provinces may have believed that, as a practical matter, the exercise of demarcating interprovincial

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<sup>128</sup> N&L Memorial, paras. 184 - 209.

<sup>129</sup> NS Memorial, Annex 9.

<sup>130</sup> N&L Memorial, para. 28.

<sup>131</sup> NS Memorial, page IV-5, para. 8.

boundaries was "primarily a matter for agreement between the Provinces concerned,"<sup>132</sup> they also recognized that to be legally binding an agreement on interprovincial boundaries required the concurrence of the federal government.

129. Both Newfoundland and Labrador and Nova Scotia made this point prior to the September 1964 Conference. In a memorandum dated June 29, 1961, Newfoundland and Labrador stated:

When we receive our copy [of Marine Chart #4490] it is agreed that the Province of Quebec will be consulted and asked to join in a request to the Federal Government to have these areas declared to be Provincial rights under the provisions of the *BNA Act, 1871* which authorized the Federal Parliament to define Provincial boundaries.<sup>133</sup>

In a letter from Nova Scotia to Prince Edward Island dated July 3, 1964, Nova Scotia stated:

Until such time as there has been an agreement with the Federal Government and the Provinces concerned with reference to the boundary question or a determination of the issue by the Courts, I do not think it is possible to finalize any agreement between the various provinces concerned with the Northumberland Strait area.<sup>134</sup>

Other provinces made statements to a similar effect.<sup>135</sup>

130. At the September 23, 1964 meeting of the Maritime Attorneys General, the participants affirmed that the provinces owned submarine mineral resources adjacent to their coasts and

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<sup>132</sup> Stanfield Submission (October 14, 1964), N&L Memorial, N&L Doc. # 15.

<sup>133</sup> N&L Memorial, para. 29; N&L Memorandum (June 29, 1961), N&L Doc # 3.

<sup>134</sup> N&L Memorial, para. 31; Letter from M. Jones to B.G. Rogers (July 3, 1964), N&L Doc. # 7.

<sup>135</sup> Letter from B.G. Rogers to A. Farmer (February 14, 1963), N&L Doc. # 4.

Memorandum from B.G. Rogers to Premier Shaw (June 13, 1963), N&L Doc. # 5.

Letter from Letter from P.E. Auger to J.P. Nowlan (July 2, 1964), NS Memorial, Annex 20.

with this in mind, that the provinces should agree on interprovincial boundaries for the purpose of placing a negotiating proposal before the federal government. A memorandum summarizing the meeting reads in part:

1. The Provincial Governments are entitled to ownership and control of submarine minerals underlying coastal waters on legal, equitable and political grounds ....
  2. The meeting felt that it was desirable that the boundaries as between the several Atlantic Coast Provinces should be agreed upon by the Provincial authorities and the necessary steps should be taken to give effect to that agreement .... It is recommended that these boundaries should have the more formal approval of the several Governments concerned. It is further recommended that Parliament be asked to define the boundaries as so approved by the Provinces, under the provisions of Section 3 of the British North America Act, 1871.
- ....
6. If agreement is reached by the Atlantic Provinces, an immediate approach should be made to the Province of Quebec, so that a united presentation might be made to the Federal authorities.<sup>136</sup>

A copy of this memorandum was provided to Newfoundland and Labrador (the province was not present at the September 23, 1964 meeting) prior to the Atlantic Premiers' Conference on September 30, 1964.<sup>137</sup>

131. Nova Scotia concedes that the conclusions reached at the Atlantic Premiers' Conference "essentially reiterate the recommendations of the Attorneys-General at their meeting of

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<sup>136</sup> N&L Memorial, para. 32, N&L Doc. # 9. See also NS Memorial, page II-pages 7-8, para. 15, Annex 21.

<sup>137</sup> N&L Doc. # 10.

September 23, 1964."<sup>138</sup> However, ignoring the plain words of the memorandum, which expressed the need for formal approval and parliamentary action to make the boundaries effective, Nova Scotia then purports to transform these conclusions into the "1964 Agreement."

132. Nova Scotia places great reliance on what it refers to as "the communiqué" issued after the September 30 Conference.<sup>139</sup> There are, however, two documents in the historical record which appear to have been issued as communiqués. But in each case, the words evidence the limited nature of the political consensus which was reached - exactly the opposite of what Nova Scotia submits.
133. The first communiqué, dated September 30, 1964, summarized the outcome of the discussion on submarine mineral rights as follows:

The Conference considered the matter of submarine mineral rights. The premiers were agreed that submarine mineral rights should be vested in the Provinces and considered the matter of provincial boundaries in relation to submarine mineral rights. The manner of presentation of the provinces case at the next Federal/Provincial Conference was agreed upon.<sup>140</sup>

Thus, provincial boundaries were just "considered" and they were referred to in the context of the provinces' case to be taken to the federal government.

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<sup>138</sup> NS Memorial, page II-11, FN 32.

<sup>139</sup> NS Memorial, page II-10, para. 19.

<sup>140</sup> NS Memorial, Annex 22. This communiqué is repeated almost verbatim in a newspaper article in the *Halifax Chronicle Herald* (October 1, 1964), Supplementary Doc. # 1.

134. The second communiqué, entitled: "Joint Statement of the Atlantic Provinces," explored in greater detail the issue of submarine mineral rights and stated that the Premiers unanimously agreed to the following:
- a) the provinces were entitled to ownership and jurisdiction over offshore mineral resources;
  - b) it was "desirable" that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by provincial governments;
  - c) the necessary steps should be taken to give effect to that agreement;
  - d) a united presentation should be made to the federal government; and
  - e) the federal government should be asked to define the boundaries as approved by the provinces.<sup>141</sup>
135. A memorandum sent by Premier Stanfield to Premier Robichaud of New Brunswick on October 2, 1964, entitled: "Matters discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action," further reinforces the view that the Premiers had no intention of entering into a binding agreement on September 30. The memorandum referred to "proposed marine boundaries."<sup>142</sup> Additionally, a letter sent by Premier Stanfield to Premier Lesage on October 2, 1964 described "proposed boundaries" and requested the concurrence of Quebec to the Atlantic Premiers' "course of action."<sup>143</sup> Why, if a legally

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<sup>141</sup> N&L Memorial, N&L Doc. # 11.

<sup>142</sup> N&L Memorial, N&L Doc. #13, page 2.

<sup>143</sup> N&L Doc. # 12.

binding agreement had already been concluded, did Premier Stanfield characterize the boundaries in terms of a proposal requiring further action?

136. Thus, there is nothing in the record to indicate that Newfoundland and Labrador or Nova Scotia had any intention, on September 30, 1964, to enter into a binding agreement on a boundary in their offshore. There is, at most, evidence of proposed boundaries that were to be put forward to the federal government as part of a negotiating proposal on offshore ownership, which if agreed to by the federal government and implemented by legislation, could have become a legally binding agreement. But nothing more.

### **III. The Events Subsequent to September 30, 1964 Do Not Establish Any Intent to Enter Into a Legally Binding Agreement**

137. Unable to prove that there was any intent to enter into a legally binding agreement on September 30, 1964, Nova Scotia seeks to bolster its arguments by relying on events that occurred after that date.<sup>144</sup>
138. Nova Scotia sees evidence of Newfoundland and Labrador's intention to conclude a binding agreement in the Stanfield Submission, in participation in the work of the JMRC and in participation in the meeting of the Premiers of the Atlantic provinces and the Vice-Premier of Quebec on June 17-18, 1972.
139. It also argues that Newfoundland and Labrador's own conduct in failing to raise objections at federal-provincial meetings, or to object to the 1977 MOU, or to the boundary in the 1982 *Nova Scotia Agreement*, or to the boundary set out in the 1986 *Nova Scotia Accord*, is all evidence of the province's intent to agree in 1964 to the so-called "1964 Agreement."

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<sup>144</sup> To the extent that Nova Scotia is arguing that the actions of Newfoundland and Labrador meet the requirements of acquiescence or estoppel, these assertions will be dealt with in Chapter VII.



140. Finally, Nova Scotia declares that Newfoundland and Labrador's conduct in issuing permits between 1965-1971, and the conduct of the Canada-Newfoundland Offshore Petroleum Board in issuing a Call for Bids in 2000, evidence an intent to agree to a boundary in 1964.
141. As pointed out earlier, there is no legal justification for gleanng a retrospective intent from events which occurred after that intent was meant to be formed.<sup>145</sup> But even if there were legal justification for Nova Scotia's approach, the facts simply do not bear out the Nova Scotia claim. Rather than showing that there had been the relevant intent in 1964, the historical record demonstrates that the provinces could not have had any intent in 1964 to enter into a legally binding agreement at that time.

**A. The Stanfield Submission**

142. The Stanfield Submission, drafted by Nova Scotia, and presented to the federal government in October 1964, described "boundary lines between the provinces" as "tentative," and pointed out that they could be "reviewed and revised" and "varied." Premier Stanfield also said that the question of boundaries did not have to be decided upon at the federal-provincial conference. Why, if a legally binding agreement had already been concluded, did Premier Stanfield say that boundaries could be "decided upon" at a later date?<sup>146</sup>
143. Nova Scotia suggests that Premier Stanfield qualified his remarks because the "technical exercise of plotting the precise latitude and longitude of the Turning Points remained to be done."<sup>147</sup> However, there is no suggestion in the Submission that Premier Stanfield was making a mere technical qualification. Rather, he was asserting what was understood by all of the Premiers, that this was a provisional understanding.

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<sup>145</sup> Paragraphs 31-38.

<sup>146</sup> Stanfield Submission (October 14, 1964), N&L Memorial, N&L Doc. # 15.

<sup>147</sup> NS Memorial, page II-16, para. 30.

144. Furthermore, the Stanfield Submission was rejected by the federal government in its totality.<sup>148</sup> The objectives of the Submission, to obtain (i) ownership and jurisdiction over offshore resources and (ii) federal approval and legislative implementation of the "proposed marine boundaries," were never attained.
145. Additionally, Nova Scotia's claims about Newfoundland and Labrador's subsequent failure to object stand in contrast to the clear and unequivocal statement about the boundaries in the Stanfield Submission made by Premier Smallwood at a federal-provincial conference on July 21, 1965.<sup>149</sup> The minutes record that in response to the statement of Premier Shaw of Prince Edward Island that "the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St. Lawrence region," Premier Smallwood interjected that "these interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law...."<sup>150</sup> The Minutes record no objection to this statement by Nova Scotia.

#### **B. The work of the JMRC 1969 - 1972**

146. Nova Scotia claims that the letter of May 12, 1969 sent by Paul Allard, the Vice-Chair of the Joint Mineral Resources Committee, to the Ministers of Mines of the Atlantic Provinces "put the intended scope of *"1964 Agreement"* squarely before the provinces.<sup>151</sup> But what the Allard letter made clear was that what had been achieved in 1964 was only a political consensus dependent on the provinces gaining ownership of the offshore, not a legally binding agreement. To quote Allard:

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<sup>148</sup> N&L Memorial, para. 37.

<sup>149</sup> NS Memorial, page IV-7, paras. 12(1) to 12(4).

<sup>150</sup> N&L Memorial, para. 38, N&L Doc. # 21.

<sup>151</sup> NS Memorial, page IV-27, para. 55.

The notes garnered from the Atlantic Premiers Conference state that the purpose for delineating the boundaries related expressly to the ownership of minerals in the submarine areas or lands within the Provinces and in their common terrestrial border zones.<sup>152</sup>

147. Furthermore, the letter emphasized that the Atlantic provinces and Quebec still had to agree on the location of interprovincial boundaries. Allard recommended that the provinces proceed to do so on the basis that they owned offshore mineral resources adjacent to their coasts. He said:

As you are well aware, the Joint Mineral Resources Committee has also been entrusted with the task of providing recommendations to the five above Governments concerning the proposal made by the Honourable Pierre E. Trudeau, Prime Minister of Canada, with respect to minerals in the offshore areas of the Atlantic Coast. Before the Committee can come up with any such recommendations, the five above Provinces must first agree among themselves to the location of their interprovincial boundaries. The approach in this connection must be that the submarine areas between the Provinces belong to the adjoining Provinces and the boundaries must be determined with that concept in mind. If, after the Provinces have so agreed, then it is quite in order if one Province wishes to take the approach that the land covered with water between the low water mark of the Province and the interprovincial boundary does not belong to it but the Government of Canada. I do not recommend this and personally do not agree with it, however the point I wish to get across is that before any discussion of Mr. Trudeau's proposals can be had the Provinces must agree where their boundaries would be if they were the only parties involved.<sup>153</sup>

148. Allard's statement makes clear that the boundaries were yet to be agreed. He went on to ask the Atlantic provinces to agree that the map produced by the JMRC accurately set forth

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<sup>152</sup> N&L Doc. # 33.

<sup>153</sup> N&L Doc. # 33.

interprovincial boundaries. He invited the Atlantic provinces to confirm that interprovincial boundaries would be effective for "all purposes". He also referred to the need for an agreement to be ratified by legislation by the five East Coast provinces and by Canada:

I would, therefore, request that you bring this matter to the attention of your Government at the earliest possible moment and report back to me:

1. That your Government agrees that the map enclosed herewith setting forth the Turning Points with the appropriate longitudes and latitudes delineates the boundaries between your Province and the other Provinces shown thereon.
2. That your Government agrees that the map enclosed herewith setting forth the Turning Points with the appropriate longitudes and latitudes delineates the boundaries between the other Provinces shown thereon.
3. That the boundaries are effective for all purposes, and in particular, mineral rights in the submarine areas are the property of the Province within whose boundaries the area is.
4. That your Government will confirm the map and the turning points for the purposes set out herein by agreement.
5. That your Government will confirm the agreement by legislation.
6. That your Government will join with the four Provinces herein in seeking legislation by the Government of Canada confirming the agreement if the Joint Mineral Resources Committee so recommends.

149. On June 13, 1969, the provinces reported back to Allard. Only Nova Scotia was prepared to confirm the boundaries without reservation.<sup>154</sup> Newfoundland and Labrador, New Brunswick, and Prince Edward Island did not provide such confirmation.<sup>155</sup> Prince Edward Island, in

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<sup>154</sup> Minutes of JMRC Meeting (June 13, 1969), N&L Doc. # 35.

<sup>155</sup> *Ibid.*

particular, told the other members of the JMRC that the phrase in the Allard letter that the proposed boundary was for "all purposes" was meaningless.<sup>156</sup> It could not have been clearer to Nova Scotia at that time that Newfoundland and Labrador had not confirmed its commitment to the proposed boundaries.

150. Nonetheless, Nova Scotia seeks to conclude, not just that there was an agreement already in existence, but that it was a legally binding agreement for "any and all purposes."<sup>157</sup> No source is given by Nova Scotia in its Memorial for the phrase "any and all purposes" and the only conclusion that can be reached is that it is an inadvertent corruption of the phrase "for all purposes" in the Allard letter. But even if it was, the Allard letter was talking about a claim to ownership of the offshore. The phrase "for all purposes" clearly applied to the purposes for which a boundary would be necessary when both parties had ownership over the relevant area. It was not contemplating circumstances where forms of rights, other than ownership, would be in existence. Thus, the attempt to use the Allard letter to show that the boundaries were to apply "regardless of the precise form of jurisdictional settlement"<sup>158</sup> simply does not withstand analysis.
151. There is no basis for concluding from the Allard letter, as Nova Scotia does, that a legally binding agreement had already been concluded. If it had been, there would have been no necessity for Allard to recommend that boundaries be given effect by way of (i) formal confirmation by government, (ii) intergovernmental agreement, and (iii) legislation.
152. Throughout this period, the unity of the East Coast provinces remained uncertain. Contrary to what Nova Scotia claims, there was no common position on boundaries. On September 28, 1971, the Director of Mineral Resources of New Brunswick advised the New Brunswick

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<sup>156</sup> Letter from C.A. Miller to P. Allard (May 22, 1969), N&L Doc. # 34.

<sup>157</sup> NS Memorial, page IV-1, para. 1; IV-26, para. 52.

<sup>158</sup> NS Memorial, page IV-27, para. 55.

Minister of Natural Resources that the boundaries between provinces was a problem still to be resolved.<sup>159</sup>

**C. The meeting of Premiers of the Atlantic Provinces and Vice-Premier of Quebec on June 17-18, 1972**

153. A careful examination of the historical record shows that neither the June 17-18, 1972 meeting, nor subsequent statements by Premier Moores, nor anything that occurred at the August 2, 1972 meeting, did anything more than renew and support the provinces' negotiating position with the federal government. No legally binding agreement on boundaries was concluded, nor can what occurred be construed as evidence of an intention in 1964 to establish a legally binding agreement at that time. The intention of the provinces was to put a common position before the federal government. And once that was rejected, nothing remained.
154. Nova Scotia argues that "Premier Moores agreed to the technical delineation and description of the boundary at a Conference of Premiers of the East Coast Provinces on June 17-18, 1972, and announced the agreement to the Newfoundland House of Assembly the following day."<sup>160</sup> It is clear from the historical record that Premier Moores' only intention in attending the meeting was to decide whether or not to remain part of "a common front" or to enter into bilateral negotiations with the federal government.
155. On May 9, 1972, Premier Moores met with Donald Smith, the federal Minister of Energy, Mines and Resources to discuss offshore mineral resources. Moores advised that the provinces would be meeting to consider the issue and although "he would like to proceed in concert with the other Atlantic Provinces so far as the proposed discussions in May and June

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<sup>159</sup> Memo from R.R. Potter to G. Bishop (September 28, 1971), Supplementary Doc. # 4.

<sup>160</sup> NS Memorial, page IV-48, para. 12(7).

were concerned he did not think that this would commit him to act only with the Atlantic Provinces."<sup>161</sup>

156. On June 6, 1972, Stu Peters, Executive Assistant to Premier Moores advised D.G. Crosby of the upcoming meeting as well as Newfoundland and Labrador's motivation for participating. He said: "it is hoped to decide on the basis of this meeting whether to try for a "common front" in dealing with the Federal Government on offshore mineral rights or to proceed to deal with ...[the federal government] ... instead on a bilateral basis."<sup>162</sup>
157. After the meeting on June 17-18, 1972, a communiqué was issued and a formal seven-point proposal was forwarded to Prime Minister Trudeau setting out the Premiers' demands for ownership of the "mineral resources in the seabed off the Atlantic coast and in the Gulf of St. Lawrence in accordance with the agreed boundaries."<sup>163</sup> There were no minutes of the meeting and no documentation of the "agreed boundaries."<sup>164</sup>
158. Premier Moores' statement to the Newfoundland and Labrador House of Assembly after the June 17-18, 1972 meeting, was far from being "dispositive" of the existence of a legally binding agreement.<sup>165</sup> It was simply a factual report on the political consensus reached on

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<sup>161</sup> NS Memorial Annex 47, page 2.

<sup>162</sup> NS Memorial, Annex 48.

<sup>163</sup> The decisions reached by the Premiers are set out in a communiqué issued following the meeting (N&L Doc. 48) and in the telegram from Premier Regan to Prime Minister Trudeau (N&L Doc. # 49).

<sup>164</sup> NS Memorial, page II-27, para. 51.

<sup>165</sup> NS Memorial, page II-30, para. 59. The full text of Premier Moore's statement to the House of Assembly is found in N&L Doc. # 50.

June 17-18, 1972.<sup>166</sup> In his statement, Premier Moores declared that "the result of the meeting was a seven-point agreement outlining the areas of co-operation between the provinces." He also said that aside from the agreement, the greatest benefit of the meeting was "the creation of a single strong opinion on the offshore question". Moores emphasized that the Premiers had not attempted to make concrete decisions on particular problems and that the meeting had served only "in creating a common philosophy on the question". Moores concluded: "I think if we work and produce on the base built in Halifax over the weekend, we can come up with some really worthwhile achievements."<sup>167</sup>

159. In short, Premier Moores' report on the June 17-18 meeting was meant to apprise the House of Assembly of on-going negotiations. He did not say it was a meeting at which final, binding decisions were taken. He did not say it was a meeting in which irrevocable commitments were made by the participants. All he said was that it was a continuation in the formulation of a position to put before the federal government. In any event, on June 22, 1972, Prime Minister Trudeau rejected the seven-point provincial proposal.<sup>168</sup>
160. Nova Scotia also argues that at the subsequent Premiers' meeting on August 2, 1972, Newfoundland and Labrador "made no objection to the resolution ... that confirmed the June 17-18, 1972 agreement."<sup>169</sup> Nova Scotia asserts that at the meeting the provinces opened the door to negotiations on other matters, such as revenue sharing, and further that "the East Coast Premiers, including Premier Moores of Newfoundland, considered that the *1964 Agreement*

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<sup>166</sup> The political consensus was also reported in the media. "Eastern Premiers Nix 50-50 deal on offshore minerals" *The Evening Telegram (St. John's)* (June 19, 1972), Supplementary Doc. # 6; "Five eastern provinces unite" *The Chronicle-Herald (Halifax)* (June 19, 1972), Supplementary Doc. # 7; Agreement on offshore rights outlined" *The Evening Telegram (St. John's)* (June 20, 1972), Supplementary Doc. # 8.

<sup>167</sup> N&L Memorial, para. 58, N&L Doc. # 50.

<sup>168</sup> N&L Memorial, para. 59, N&L Doc. # 51.

<sup>169</sup> NS Memorial, page IV-8, para. 12(8).



(and the 1972 technical delineation) applied to whatever forms of shared management control were henceforth to be the basis of discussion with the Government of Canada."<sup>170</sup> In fact, the opposite is true.

161. A contemporaneous Newfoundland and Labrador memorandum describing the August 2, 1972 meeting states that two of the five East Coast Premiers did not regard interprovincial boundaries as applying to any arrangements other than those arising in the context of ownership of offshore mineral resources.<sup>171</sup> The memorandum records that both Newfoundland and Labrador and Quebec took the position that "matters of jurisdiction were essential to the control of offshore activities." Newfoundland and Labrador also stated at the meeting that there was no constitutional mechanism by which the provinces could divide areas of jurisdiction for limited purposes and thus advised against approaching the federal government for approval of interprovincial boundaries on such a basis. The memorandum states that "because of the objections of the Newfoundland delegation, and the approval given its position by Quebec, the matter was dropped."<sup>172</sup> Finally, the minutes of the August 2 meeting record that no consensus was reached on the suggestion that the five East Coast Premiers request Canada to accept the delineation of their offshore boundaries.<sup>173</sup>
162. In the fall of 1972, there was correspondence back and forth between Newfoundland and Labrador and Nova Scotia regarding the question of an interprovincial boundary. Nova Scotia refers to a letter from Cabot Martin to Michael Kirby, Special Assistant to Premier Regan,

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<sup>170</sup> NS Memorial, page IV-29, para. 58. See also NS Memorial, page II-25, para. 49.

<sup>171</sup> Supplementary Doc # 10.

<sup>172</sup> *Ibid.*

<sup>173</sup> NS Memorial, Annex 56. See also "Eastern Premiers meeting to iron out settlement on offshore mineral rights" *The Evening Telegram (St. John's)* (August 2, 1972), Supplementary Doc. # 9; "Five eastern provinces set up strategy committee Offshore rights fight: Premiers plot tactics" *The Ottawa Journal* (August 2, 1972), Supplementary Doc. # 11; "East to forge united front on offshore rights" *The Evening Telegram (St. John's)*, Supplementary Doc. # 12.

regarding "the precise demarcation of our two respective shelf areas" and "the principles and methodology used to determine the points shown on the map...".<sup>174</sup> However, Nova Scotia fails to mention that this inquiry was a follow-up to a letter sent by William Doody, the Newfoundland and Labrador Minister of Mines, Agriculture and Resources on October 6, 1972, with respect to the need to have a precise determination of the boundary between Nova Scotia and Newfoundland and Labrador.<sup>175</sup> On October 17, 1972, Kirby replied to Minister Doody and agreed that "the boundaries should be established as accurately as possible" and advised that he intended to ask the Nova Scotia Department of Mines to draw a line.<sup>176</sup> Nothing further was heard from Nova Scotia despite the reminder sent by Cabot Martin on November 17, 1972. The complete correspondence available to Newfoundland and Labrador is reproduced in the Newfoundland and Labrador Memorial.<sup>177</sup>

**D. Newfoundland and Labrador's alleged failure to raise objections at federal-provincial meetings**

163. Nova Scotia asserts that in 1973, Newfoundland and Labrador "implicitly acknowledged the agreed boundaries, and failed to suggest in any way that Newfoundland no longer considered itself, or any of the other East Coast Provinces, bound by them."<sup>178</sup> In support of this proposition, Nova Scotia refers to a series of federal-provincial meetings on offshore mineral resources which were held in April and May 1973 and states that "had Newfoundland raised any objection to the agreed offshore boundaries, this would have come as a considerable

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<sup>174</sup> NS Memorial, page II, Para. 67. See also N&L Memorial, para. 62. Letter from C. Martin, N&L Legal Adviser, to W. Kirby (November 17, 1972), N&L Doc. # 59.

<sup>175</sup> N&L Memorial, para. 62. Letter from W. Doody to M. Kirby (October 6, 1972), N&L Doc. # 57.

<sup>176</sup> Letter from M. Kirby to W. Doody (October 17, 1972), N&L Doc. # 58.

<sup>177</sup> N&L Memorial, para. 62 and N&L Docs. #57, 58, 59.

<sup>178</sup> NS Memorial, page IV-8, para. 12(9).

surprise to the other participants in the light of Newfoundland's acceptance of the boundaries since their establishment in the *1964 Agreement*.<sup>179</sup>

164. Nova Scotia also says that Newfoundland "considered the boundaries to be applicable and that the reasons for its withdrawal from the provincial common front had nothing to do with those boundaries."<sup>180</sup> The September 1973 Newfoundland and Labrador proposal, according to Nova Scotia, "yet again confirms the binding and definitive nature of the boundary established in the *1964 Agreement* and belies Newfoundland's efforts to disavow that Agreement today."<sup>181</sup> Again, Nova Scotia has misinterpreted the historical record which it has submitted into evidence.
165. Senior officials of the federal government and the five East Coast provinces met three times, on April 25-26, May 3, and May 7, 1973, to discuss the possibility of a federal-provincial agreement on offshore mineral resources.<sup>182</sup>
166. At the federal-provincial meeting on May 3, 1973, to which the Nova Scotia Memorial refers, Newfoundland and Labrador officials arrived late.<sup>183</sup> In their absence, federal and provincial officials considered a federal discussion paper which had been prepared by T.B. Smith of the federal Department of Justice, and highlighted the need for agreement on interprovincial boundaries. Item F(2), Part II of the discussion paper, stated:

Area of Application

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<sup>179</sup> NS Memorial, page II, paras. 66, 68.

<sup>180</sup> NS Memorial, page II-36, para. 69.

<sup>181</sup> NS Memorial, page II-37, para. 71.

<sup>182</sup> NS Memorial, page II, para. 64.

<sup>183</sup> NS Memorial, page II-35, para. 68. See also Minutes of federal-provincial meeting (May 3, 1973), Supplementary Doc. # 13.

There will have to be a definition of the area in respect of which the legislation applies. This might be done by reference to the territorial sea, the continental shelf, internal waters of Canada and any provincial waters designated by the Governor in Council.

....

(2) Whether the area should be defined in the agreement should be a matter of policy although it may not be absolutely necessary or desirable if the operation of the arrangement in respect of all the parties depends on the satisfactory character of regulations made under the Act. However, the boundaries between adjacent provincial areas will have to be agreed on by the provinces.<sup>184</sup>

Thus, a federal official was asserting clearly that boundaries between the provinces still had to be agreed. There is no evidence of any objection being made to this by Nova Scotia. In fact, the minutes record that Michael Kirby, Principal Assistant to Premier Regan, advised the meeting that "the problem of provincial boundaries could be set aside for the time being."<sup>185</sup>

167. After the Newfoundland and Labrador officials arrived at the meeting they were asked by Kirby "whether Newfoundland accepted the provincial offshore boundaries." Leo Barry, the Newfoundland and Labrador Minister of Mines and Energy, replied that "Newfoundland had not decided on a final position."<sup>186</sup> The minutes record no objection by Nova Scotia to this statement.
168. Nova Scotia attaches importance to the absence of any mention of boundaries in a 12 - page memorandum dated May 8, 1973 prepared by federal official Austin and Nova Scotia adviser Kirby.<sup>187</sup> Both attended the May 3 meeting and thus were aware that Newfoundland and Labrador did not accept the interprovincial boundaries. Given that Kirby had suggested, at

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<sup>184</sup> Supplementary Doc. # 14.

<sup>185</sup> Minutes of federal-provincial meeting (May 3, 1973), Supplementary Doc. # 13.

<sup>186</sup> *Ibid.*

<sup>187</sup> NS Memorial, page II-34, para. 65.

the May 3 meeting that "the problem of provincial offshore boundaries could be set aside for the time being,"<sup>188</sup> it was not surprising that the memorandum did not address this question.

169. The September 1973 Newfoundland and Labrador proposal to the federal government, which stated that the offshore area covered by a bilateral federal-provincial agreement would be "subject to any lines of demarcation agreed to by the Province of Newfoundland with respect to the submarine areas within the sphere of interest of other Provinces,"<sup>189</sup> was an acknowledgement of the fact that the boundary between Newfoundland and Labrador and Nova Scotia had yet to be agreed.
170. On April 30, 1974, at a federal-provincial meeting to discuss offshore mineral resources (at which Newfoundland and Labrador was not present), when the question of interprovincial boundaries arose, Nova Scotia's representative Michael Kirby stated that Nova Scotia had no evidence of Newfoundland and Labrador agreeing to the boundaries.<sup>190</sup> Surely the Principal Assistant to Premier Regan would have been aware of any agreement. Furthermore, following that meeting, federal officials and Nova Scotia officials prepared memoranda indicating the need for "an agreement indicating precisely where the boundaries lie between each of the five Eastern Provinces."<sup>191</sup> In late 1974, federal-provincial discussions came to a standstill.
171. On May 12, 1976, when federal-provincial discussions on offshore mineral resources resumed (but without Newfoundland and Labrador and Quebec), the question of interprovincial boundaries was again on the agenda. Nova Scotia advised the other participants that there was an area of controversy between Newfoundland and Labrador and Nova Scotia. The

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<sup>188</sup> Minutes of federal-provincial meeting (May 3, 1973), Supplementary Doc. # 13.

<sup>189</sup> N&L Memorial, para. 64, N&L Doc. # 62.

<sup>190</sup> N&L Memorial, para. 67, N&L Doc. # 66.

<sup>191</sup> N&L Memorial, paras. 68-69.

minutes record the following exchange between Gordon MacNabb, the federal Deputy Minister of EMR and Graham Walker, Counsel for Nova Scotia :

MacNabb:[CAN]      Noted the Provinces would have to agree among themselves as to how they would share revenues. Raised the question of the territory to be covered by the Agreement.

Walker: [NS]        Commented that there would be only one area of controversy, that between Nova Scotia and Newfoundland.<sup>192</sup>

172. Thus, nothing in the series of federal-provincial meetings from 1973 to 1976 indicates that Newfoundland and Labrador had the intention in 1964 to enter into a legally binding agreement on offshore boundaries. Indeed, they serve to emphasize that Newfoundland and Labrador had not agreed and that Nova Scotia fully appreciated this fact. Thus, Nova Scotia's allegations about Newfoundland and Labrador's failure to object or to protest, even if relevant to the question of intention to enter into an agreement, are simply groundless.
173. Moreover, Nova Scotia's complaints about Newfoundland and Labrador's actions in federal-provincial meetings can be contrasted with its own actions in the later constitutional conferences of 1979 and 1980. At that time, Newfoundland and Labrador proposed that the *Constitution Act, 1867* be amended to include a new section 109, which would permit interprovincial boundaries to be settled by arbitration in accordance with the principles of international law.<sup>193</sup> The reports of these conferences state that the provinces agreed that if provincial ownership and jurisdiction over offshore resources was recognized by the federal government, the Newfoundland and Labrador proposal for a new section 109 was the

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<sup>192</sup> N&L Memorial, para. 71, N&L Doc. # 71. See also Memo from Innis McLeod to three Maritime Premiers (May 20, 1976), Supplementary Doc. # 18.

<sup>193</sup> R. Romanow et al., *Canada Notwithstanding* (Toronto, Carswell, 1984) at 74-75, Supplementary Authorities # 20.

preferred legal technique.<sup>194</sup> The proposal was apparently accepted by Nova Scotia, even though this was a clear and unequivocal indication that boundaries had yet to be agreed upon.

#### **E. Newfoundland and Labrador's response to the 1977 MOU**

174. Nova Scotia claims that "Newfoundland did not object to the explicit use of the Nova Scotia - Newfoundland boundary, as established in the *1964 Agreement*, in the *1977 Memorandum of Understanding* between the Maritime Provinces and the Government of Canada."<sup>195</sup>
175. However, the 1977 MOU was an understanding between the federal government and Nova Scotia and two other provinces. Newfoundland and Labrador was not a party. The 1977 MOU could thus apply only to the three provinces that had signed it and at most could affect only the boundaries between them. It could have no effect on Newfoundland and Labrador.<sup>196</sup>
176. Furthermore, Newfoundland and Labrador's ongoing opposition to the 1977 MOU was notorious. Brian Peckford, Newfoundland and Labrador Minister of Mines and Energy, was quoted in the press on January 12, 1977 as follows:

Provincial Mines and Energy Minister Brian Peckford said Newfoundland "didn't choose to go the same route" as the three coastal provinces, when asked about the impending agreement.

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<sup>194</sup> N&L Memorial, para. 85, N&L Doc. # 89. See also Report of Continuing Committee of Minister on the Constitution (February 5-6, 1979), Supplementary Doc. # 27 and Report of Continuing Committee of Minister on the Constitution (September 8-12, 1980), Supplementary Doc. # 32

<sup>195</sup> NS Memorial, page IV-9, para. 12(10).

<sup>196</sup> "Ottawa offers Maritime provinces new proposal on offshore dispute" *The Evening Telegram (St. John's)*, (July 23, 1976), Supplementary Doc. # 19; "Newfoundland not included in offshore reset proposal" *The Evening Telegram* (August 11, 1976), Supplementary Doc. # 20; "Maritimes make deal" *The Evening Telegram (St. John's)* (September 6, 1976), Supplementary Doc. # 21.

"We're not in the same ball game at all," he added, pointing to Newfoundland's claim of jurisdiction over the continental shelf.<sup>197</sup>

177. Shortly after it had been signed, the MOU was described by Newfoundland and Labrador Member of Parliament, John Crosbie, as "a sick joke."<sup>198</sup>
178. And, in 1977, Newfoundland and Labrador issued a White Paper on the administration and disposition of petroleum belonging to the province which marked out a position fundamentally different from the MOU. The White Paper used the MOU as a point of comparison to "show why a political settlement along the lines of the recent Maritime Agreement would not protect ... [the] province's interests".<sup>199</sup>
179. Not only does Nova Scotia ignore this, it seeks to gloss over its own record in respect of the MOU. Thus, Nova Scotia claims that the MOU "was eventually superseded, as regards Nova Scotia, on March 2, 1982" when the *Nova Scotia Agreement* was signed. But this completely ignores the fact that the 1977 MOU was repudiated in its entirety by Nova Scotia Premier Buchanan in 1980, when he reversed the policy of the previous government.<sup>200</sup>
180. Moreover, in 1980, Nova Scotia passed four pieces of legislation relating to offshore mineral resources: the *Petroleum Resources Act*, the *Pipeline Act*, the *Gas Utilities Act* and the *Energy*

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<sup>197</sup> "Ottawa, Maritimes near agreement" *The Evening Telegram* (January 12, 1977), Supplementary Doc. # 22.

<sup>198</sup> "Off-shore agreement sick joke - Crosbie" *The Evening Telegram (St. John's)* (March 14, 1977), Supplementary Doc. # 23. See also Statement by Newfoundland and Labrador Member of Parliament J. McGrath (May 1, 1980), N&L Doc. # 86.

<sup>199</sup> White Paper (May 1977), N&L Doc. #75. "White paper would give Newfoundland best deal" *St. John's Evening Telegram* (May 26, 1977), Supplementary Doc. # 24.

<sup>200</sup> NS Memorial, page IV, para. 61. See Statement by Premier Buchanan, NS Hansard (May 6, 1980), p.1940, Supplementary Doc. # 31 and Transcript of Federal-Provincial Conference, September 8 - 12, 1980, Supplementary Doc. # 33.



*and Mineral Resources Conservation Act*.<sup>201</sup> None of the four Acts, which contained an expansive definition of Nova Scotia's offshore area, made reference to interprovincial lines of demarcation agreed upon in 1964.

181. During second reading of Bill C-61 ( the *Petroleum Resources Act*) in the Nova Scotia House of Assembly, Arthur Donahoe, on behalf of the government, discussed the section of the proposed legislation which asserted Nova Scotia's jurisdiction: "As I have said, limits will be set by international law or treaty, and by federal-provincial and intra-provincial agreements," clearly indicating that boundaries had yet to be agreed.<sup>202</sup>
182. Thus, Newfoundland and Labrador is called to account by Nova Scotia for allegedly failing to object to line in an MOU to which it was not a party and the provisions of which do not have any implications for it, and which Nova Scotia itself repudiated and ignored in drafting its own offshore resource legislation three years later.

**F. Newfoundland and Labrador's response to the 1982 Nova Scotia Agreement**

183. Nova Scotia argues that "Newfoundland did not object to the use of its *1964 Agreement* boundary with Nova Scotia in the *1982 Canada - Nova Scotia Agreement*, nor to the inclusion of that boundary in the 1984 provincial and federal implementing legislation." In particular, Nova Scotia says, "An analysis of the *1982 Agreement* published by the Government of Newfoundland at the time made no mention of the boundary as a contentious issue."<sup>203</sup>

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<sup>201</sup> *Petroleum Resources Act*, S.N.S. 1980, c.12, Supplementary Statutes # 9. See also *Pipeline Act*, S.N.S. 1980, c.13, *Gas Utilities Act Energy*, S.N.S. 1980, c.7 and *Mineral Resources Conservation Act*, S.N.S. 1980, c.5. (not included in Supplementary Statutes).

<sup>202</sup> Arthur Donahoe, NS Hansard (May 5, 1980), p. 1813, Supplementary Doc. # 30.

<sup>203</sup> NS Memorial, page IV-9, para. 12(12).

184. As noted in the Newfoundland and Labrador Memorial (and omitted in the Nova Scotia Memorial), the *Nova Scotia Agreement* contained a caveat which provided that if there was a dispute with any neighbouring jurisdiction, the federal government could re-draw boundaries after consultation with the parties.
185. In September 1982, William Marshall, the Newfoundland and Labrador Minister of Energy, made a public statement condemning the *Nova Scotia Agreement*. Referring to the Newfoundland and Labrador analysis of the *Nova Scotia Agreement*, and in particular, the outstanding question of interprovincial boundaries, Marshall said:

The Nova-Scotia type agreement would give Ottawa the right to unilaterally finalize our offshore boundaries with Quebec and Nova Scotia after the Agreement has been signed. (Analysis page 42; Agreement schedule 1, 1<sup>st</sup> paragraph).

....

In conclusion, the Nova Scotia-type Agreement is flawed in countless ways and is fundamentally inappropriate to resolving the two conflicting claims to ownership of the offshore.<sup>204</sup>

#### **G. The language of the *Atlantic Accord***

186. Nova Scotia also argues that Newfoundland and Labrador "intended the [1964] Agreement to be binding" because the *1985 Canada-Newfoundland Atlantic Accord* offered no objection to the agreed boundaries, and merely referred to limits based on "appropriate" lines of demarcation with the other Provinces.<sup>205</sup>
187. The historical record makes clear that the use of this language was deliberate. The federal officials who drafted the "clause by clause" annotation of the federal implementing legislation for the *Atlantic Accord* stated that interprovincial boundaries could not be defined because

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<sup>204</sup> N&L Memorial, para. 92, N&L Doc. # 94 .

<sup>205</sup> NS Memorial, page IV-2, para. 12(13).

"there is, at present, a dispute between the provinces of Newfoundland and Nova Scotia in respect of the boundary line between the 2 provinces."<sup>206</sup>

#### **H. The position of the federal government**

188. Throughout its Memorial, Nova Scotia seeks to leave the impression that the issue of a boundary in the offshore area with Newfoundland and Labrador was an issue between the two provinces and that the federal government played only a marginal role. In this way it seeks to ignore the fact that any agreement on boundaries would have required federal concurrence and federal legislative implementation. It ignores the fact that the boundary issue was part, and only a secondary part, of a much bigger issue between the provinces and the federal government - ownership and jurisdiction in respect of offshore areas.
189. Moreover, the consequence of the Nova Scotia argument that an agreement existed between Newfoundland and Labrador and Nova Scotia is that the federal government must have been completely unaware of its existence. The "1964 Agreement" was apparently "known to all" except the Government of Canada.
190. If the federal government knew of the existence of "1964 Agreement", why then were consistent doubts expressed by federal officials over whether there was any such agreement? In 1972, Donald Macdonald, the federal Minister of Energy Mines and Resources, did not believe there was any binding agreement on boundaries. In a letter to Minister Alan MacEachen, he said: "the Federal Government has never, of course, recognized these purported offshore boundaries."<sup>207</sup>

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<sup>206</sup> N&L Memorial, N&L Doc. # 107.

<sup>207</sup> Letter from D. Macdonald to A. MacEachen (April 27, 1972), Supplementary Doc. # 5.

191. Prime Minister Trudeau, according to Nova Scotia, must also have been ill-informed when he wrote to the provinces on June 22, 1972 stating that "it might become necessary to have a resolution of the points of law at issue." Included amongst those "points of law" was "the location of provincial boundaries."<sup>208</sup> It is revealing that the Nova Scotia Memorial discloses no objection by Nova Scotia to this official statement by the Government of Canada - well after the "1964 Agreement"- that no boundaries existed.
192. There are many more illustrations of the federal government's view that there had been no legally binding resolution of the boundaries in the offshore between Newfoundland and Labrador and Nova Scotia. In 1973, T.B. Smith of the federal Department of Justice wrote that "the boundaries between the adjacent provincial areas will have to be agreed to by the provinces."<sup>209</sup> The following year Smith referred to what occurred in 1964 as a "political agreement" only.<sup>210</sup> Subsequent discussions involving federal officials referred to the boundary issue as a matter yet to be resolved, possibly through arbitration.<sup>211</sup>
193. By 1979 the federal government had still not heard of the "1964 Agreement". Prime Minister Clark wrote to Premier Peckford on September 14, 1979 that "It will be necessary at some stage for representatives of adjoining provinces to get together with federal representatives to determine mineral resources delimitation lines between provinces in offshore areas."<sup>212</sup> On September 20, 1979, the same letter was sent to Premier Buchanan of Nova Scotia.<sup>213</sup> In

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<sup>208</sup> Letter from Prime Minister Trudeau to Premier Regan (June 22, 1972), N&L Doc. # 51.

<sup>209</sup> Federal Discussion Paper (May 3, 1973), Supplementary Doc. # 14.

<sup>210</sup> Minutes of meeting of federal and provincial officials (April 30, 1974), N&L Doc. 66.

<sup>211</sup> N&L Docs. # 80 & 83.

<sup>212</sup> N&L Doc. # 81.

<sup>213</sup> N&L Doc. # 82.

October 1979, the correspondence was made public.<sup>214</sup> There is no record indicating that Premier Buchanan responded asserting the existence of any agreement.

194. Beyond all of these statements is the fact that neither the federal-provincial Accords relating to the offshore, nor their implementing legislation, make any reference to any agreement between Newfoundland and Labrador and Nova Scotia on a boundary in respect of their offshore areas. They provide for the boundary to be settled through negotiations, and if these negotiations are unsuccessful then through arbitration in accordance with the principles of international law governing maritime boundary delimitation unless the circumstances otherwise require.<sup>215</sup>
195. Moreover, the line designated in the 1986 *Nova Scotia Accord* and its implementing legislation is nowhere described as a line agreed with Newfoundland and Labrador. To have done so would have contradicted the arbitration provision, and have been inconsistent with the 1985 *Atlantic Accord* already reached by the federal government with Newfoundland and Labrador and its implementing legislation.<sup>216</sup>
196. After the conclusion of the Accords and the implementing legislation, the federal government still acted on the basis that no agreement between Newfoundland and Labrador and Nova Scotia existed. Jake Epp, the federal Minister of Energy Mines and Resources, wrote to the Ministers of Mines of Newfoundland and Labrador and Nova Scotia on August 6, 1992 informing them that the moratorium on drilling in the St. Pierre et Miquelon area would expire on July 26, 1992 once the Canada-France boundary took effect, and said:

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<sup>214</sup> Possible Questions and Suggested Answers on Offshore Mineral Resources prepared by federal officials (October 2, 1979), Supplementary Doc. # 29.

<sup>215</sup> N&L Statutes # 3, 4, 5, 6.

<sup>216</sup> N&L Memorial, para. 112.

Given that we now have certainty on the international boundary, the federal government and the provincial governments of Newfoundland and Labrador and Nova Scotia must proceed to address the issue of the determination of the offshore inter-provincial boundary between Nova Scotia and Newfoundland.<sup>217</sup>

Like Prime Ministers Trudeau and Clark, Minister Epp had apparently not heard of the "1964 Agreement."

197. The statement of Minister Epp is important in a further respect. As Prime Minister Clark had said in 1979, Epp noted that the issue of a boundary in the offshore was a matter to be resolved by federal and provincial representatives. It was not a matter for the provinces alone. Any binding arrangement had to have the concurrence of the federal government. An arrangement between Newfoundland and Labrador and Nova Scotia by themselves simply would not do.
198. Thus, the Nova Scotia argument that there was a "1964 Agreement" binding on Newfoundland and Labrador can exist only on the basis of two alternative assumptions. The first is that the federal government did not know about the agreement and it proceeded after 1964 in total ignorance that the boundary in the offshore between Newfoundland and Labrador and Nova Scotia had already been resolved by agreement. But, as has been pointed out already, this is simply not plausible.
199. The second, alternative assumption is that the federal government knew about the agreement all the time. If that was so, the public statements of federal officials, including successive Prime Ministers, indicating that an agreement was yet to be concluded, were knowingly false. Of course, such an assumption is preposterous.

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<sup>217</sup> N&L Doc. # 111.

#### **IV. Newfoundland and Labrador's Practice in Issuing Permits Discloses No Intent to Enter Into a Legally Binding Agreement**

200. Nova Scotia claims that Newfoundland and Labrador's practice in issuing permits from 1965 shows that it regarded the "outer segment of the line dividing its offshore area from that of Nova Scotia to be a constant azimuth of 135 degrees."<sup>218</sup> It also claims that failure by Newfoundland and Labrador to protest Nova Scotia's issuance of permits out to a 135° line also is evidence of Newfoundland's intent to treat the 135° line as a boundary.
201. However, the conduct of Newfoundland and Labrador in issuing permits neither demonstrates the existence of the "1964 Agreement" nor does it indicate any agreement to an offshore boundary on the 135° line. Moreover, Nova Scotia's own practice, which does not in fact show any firm commitment to the 135° line, is simply irrelevant.

##### **A. The 135° line has no basis as an agreed line**

202. It is important to note here that Nova Scotia consistently equates the "1964 Agreement boundary" with an azimuth of 135° running from Turning Point 2017. However, as argued in Chapter II, the 135° line has no basis in the documents and other material on which Nova Scotia relies in order to establish the existence of an agreement.
203. The course of the proposed boundary throughout the Gulf of St. Lawrence was plotted with reasonable accuracy in the Notes accompanying the Stanfield Submission, which Nova Scotia characterizes as part and parcel of the "1964 Agreement", and it was plotted with precision by the JMRC in 1969. But, beyond Turning Point 2017 in the entrance to Cabot Strait there is nothing more than the vague reference in the "Notes re: Boundaries" to describe the *general direction* of a boundary in a "southeasterly" direction.

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<sup>218</sup> NS Memorial, page IV-22, para. 42.

204. The word "southeasterly" cannot, as a matter of language, be equated with due southeast or  $135^{\circ}$ . It is consistent with a range of bearings. This is evident not only in ordinary usage but also in the terms of the "Notes re: Boundaries" themselves, where expressions such as "southeast", "easterly" "northeast" and "northeasterly" are used throughout - when plotted, they do not necessarily represent a direction determined by a principal compass point.
205. Moreover, the map produced by the JMRC as the most definitive expression of the 1964 boundary proposal depicts no boundary at all in the outer area, but stops abruptly at Turning Point 2017.<sup>219</sup> It was Surveyor-General W.V. Blackie who, some twenty years later, suggested a line of  $135^{\circ}$  as a way to give meaning to the general description in the Stanfield Submission.<sup>220</sup> His work was in relation to the 1982 *Nova Scotia Agreement* and did not involve Newfoundland and Labrador.
206. The key documents surrounding the 1964 proposal demonstrate that the exclusive focus of attention, so far as the boundary lines were concerned, was the Gulf of St. Lawrence. In particular, the memorandum of the September 23, 1964 meeting immediately before the Premiers' meeting of September 30, 1964 refers in detail to the boundaries in the Gulf, all the adjacent Straits and Bays including the Bay of Fundy, and makes no mention whatever of the outer area.<sup>221</sup> The map submitted by Premier Stanfield, and presumably prepared by Nova Scotia, is not consistent with the  $135^{\circ}$  line. Notwithstanding the courageous efforts of the Nova Scotia Memorial to explain the discrepancy away, a divergence of ten degrees cannot have been a "drafting error", especially when the original map has compass roses clearly indicating azimuths conveniently near the line.<sup>222</sup>

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<sup>219</sup> See N&L Memorial, Figure 4 and NS Memorial, Figure 7.

<sup>220</sup> N&L Memorial, para. 93, N&L Doc. # 97.

<sup>221</sup> N&L Doc. # 9.

<sup>222</sup> See N&L CM Figure 1.



207. Furthermore, the 135° line is inconsistent with points 2, 3 and 4 of the "Notes re: Boundaries," which Nova Scotia holds to form part of the "agreement", and which contemplate the use of equidistance in a context of opposite coasts.<sup>223</sup> It is equally inconsistent with the statement in the "Notes re: Boundaries" that the line extend southeasterly to "international waters,"<sup>224</sup> not to the edge of the continental margin.
208. Moreover, in seeking to argue that the Stanfield Submission sought to delimit out to the edge of the continental margin on the basis of the 135° line, Nova Scotia conflates the general claim to ownership and jurisdiction with the delimitation issue. The implication is that if the Premiers claimed the entire continental shelf they must have delimited it as well - notwithstanding the contrary terms of the maps of 1964 and 1972 as well as the documents. But a claim does not imply a delimitation. In international law, by way of illustration, the existence of an undelimited frontier zone does not call into question the territorial sovereignty of the neighbouring states. So far as the continental shelf is concerned, moreover, the same point is central to the reasoning of the *North Sea Cases*: an undelimited area is none the less under the *ipso facto* and *ab initio* jurisdiction of the adjacent coastal state.<sup>225</sup> Consequently, contrary to the Nova Scotia argument, the existence of a claim to the outer continental shelf does not in any way prove the existence of a legally operative delimitation.
209. This conflation of a claim to ownership with delimitation is evident in the misleading Figures in the Nova Scotia Memorial, referred to in Chapter III, which purport to show the "1964 Agreement boundary" extending on an azimuth of 135°.<sup>226</sup>

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<sup>223</sup> N&L Doc. # 15.

<sup>224</sup> *Ibid.*

<sup>225</sup> *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3 at paras. 19, 39, Supplementary Authorities # 10.

<sup>226</sup> See CM Figures 2 and 3.

210. Even if there was a legally binding agreement in 1964, a boundary between the offshore areas of Newfoundland and Labrador and Nova Scotia along the 135° line would not have been a part of that agreement. Thus, Nova Scotia's attempt to treat the 135° line as an agreed boundary line and to consider that it has some significance in the practice of Newfoundland and Labrador lacks foundation.

**B. Newfoundland and Labrador's practice in issuing permits does not respect an agreed line**

**i) Background to Newfoundland and Labrador's permitting practice**

211. From 1964 until 1984, the issuance of permits by Newfoundland and Labrador was part of the province's strategy to assert exclusive jurisdiction over all of the offshore resources adjacent to its coasts. Federal regulation of offshore exploration had begun in earnest in 1960, when the federal government issued regulations to govern offshore exploration pursuant to the *Territorial Lands Act* which required companies desiring to engage in offshore exploration activities to apply for federal permits.<sup>227</sup> By the mid-1960s, the federal government had issued a number of permits which covered large tracts of the offshore area off the coasts of Newfoundland and Labrador.

212. Thus, before the enactment in 1987 of federal and provincial legislation implementing the *Atlantic Accord*, offshore permits were issued by both the federal government and the Newfoundland and Labrador in respect of Newfoundland's offshore area. The *Atlantic Accord* implementing legislation established the Canada-Newfoundland Offshore Petroleum Board with jurisdiction, subject to ministerial approval, to issue licences for exploration, production and development in the Newfoundland and Labrador offshore area.

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<sup>227</sup> *Canada Oil and Gas Land Regulations*, P.C. 1960 - 474. In 1961, these regulations were repealed and replaced by SOR 61-253.

ii) **Newfoundland and Labrador's issuance of permits from 1964 to 1971**

213. Prior to April 15, 1965 when legislation was enacted, Newfoundland and Labrador gave approval in principle for the granting of permits to several companies to explore for natural gas and oil in offshore areas adjacent to the province. However, no permits were actually issued.
214. The *Petroleum and Natural Gas Act* came into force on April 15, 1965 and "applied to all petroleum on land and under the seabed within the jurisdiction of the Province."<sup>228</sup> The Act provided that companies could obtain offshore permits pursuant to regulations.<sup>229</sup> However, no regulations were enacted. On October 27, 1965 the province issued one offshore "Interim Petroleum Permit" to British Newfoundland Exploration Limited (BRJNEX) to explore for, drill and produce petroleum for test purposes. However, no other permits for offshore areas were issued in 1965.
215. In 1966, the Act was amended to provide that until regulations were issued, the Minister of Mines, Agriculture and Resources could issue permits at his or her discretion.<sup>230</sup> A number of Interim Permits were subsequently issued.

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<sup>228</sup> S.N. 1965, No. 56, Supplementary Statutes # 5.

<sup>229</sup> Section 8 provided that a person could not drill or operate a well except in accordance with a tenure instrument issued under the Act or regulations. Section 9 authorized the Lieutenant Governor in Council to make regulations regarding tenure instruments.

<sup>230</sup> *Petroleum and Natural Gas (Amendment) Act* S.N. 1966, No.2, Supplementary Statutes # 6.

216. By 1972, according to Newfoundland and Labrador's records, the following Interim Permits had been issued and were in force:<sup>231</sup>

1.	BRJNEX	October 27, 1965
2.	Pan American Petroleum Corporation (Amoco)	January 31, 1966
3.	Pan American Petroleum Corporation (Amoco)	January 5, 1967
4.	Shaheen Natural Resources Company	February 20, 1967
5.	Alberta Export Refining Company Limited	February 20, 1967
6.	Canadian Homestead Oil Limited	May 3, 1967
7.	Mobil Oil Canada Limited	September 15, 1967
8.	Katy Industries Inc.	May 19, 1971
9.	Cathedral Corporation	October 7, 1971

217. The offshore area covered by these pre-1972 Interim Permits is reproduced at **CM Figure 10**. It can be seen that the only permits in the vicinity of the 135° line are the Interim Permits issued to Katy and to Mobil.<sup>232</sup>

218. The Nova Scotia Memorial devotes considerable attention to the Katy permit seeking to argue that the western limit of the permit accords with the 135° line. As pointed out in Chapter III above, this conclusion is based on a fictional reconstruction of the intent of the drafter of the Katy permit.

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<sup>231</sup> Copies of these Interim Permits are found in the Supplementary Docs. # 36 to # 44.

<sup>232</sup> Supplementary Docs. # 42 and # 43.

219. The facts relating to the Katy permit are quite simple. On September 15, 1967, an Interim Permit was issued to Mobil by Newfoundland and Labrador. The western boundary of the permit, Nova Scotia says is "in conformity with the 1964 Agreement boundary", which for Nova Scotia is the 135° line. (See **CM Figure 11.**)<sup>233</sup>
220. Four years later, on May 19, 1971 an Interim Permit was issued to Katy by Newfoundland and Labrador. For the most part, the Katy permit surrounds the Mobil permit. The western limit of the Katy permit, as shown on the map attached to the permit, extends significantly to the west of the Mobil permit. Thus, if the western limit of the Mobil permit conforms with the 135° line, the western limit of the Katy Industries permit cannot be in conformity with it. (See **CM Figure 12.**)<sup>234</sup>
221. Thus, Nova Scotia cannot claim that the western boundary of the Mobil permit and the westward boundary of the Katy permit both run along the 135° line. Clearly, the Katy permit extends significantly to the west of the 135° line and does not conform with Nova Scotia's theory that Newfoundland and Labrador were seeking to follow a boundary that Nova Scotia claims was established in the "1964 Agreement."
222. Furthermore, as pointed out in Chapter III, Nova Scotia's attempt to explain this away by imagining the intent of the drafter of the Katy permit is simply not credible. The Katy permit undermines the Nova Scotia theory that in issuing permits Newfoundland and Labrador was seeking to follow the 135° line.

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<sup>233</sup> See Chapter III, Part VII.

<sup>234</sup> *Ibid.*

iii) **Newfoundland and Labrador's issuance of permits from 1972 to 1976**

223. In 1972, following a change in the provincial government, Newfoundland and Labrador announced its intention to review the status of the Interim Permits issued by the previous administration. Following this review, Newfoundland and Labrador recognized that certain interim rights had in fact been granted.<sup>235</sup> These rights were divided into two categories: Class "A" Interim Permits and Class "B" Interim Permits.<sup>236</sup>
224. Between 1973 and 1976, Newfoundland issued a number of Class "B" Interim Permits which entitled holders to "prospect and explore for petroleum." Production rights were not granted.<sup>237</sup>
225. From the documentation available to Newfoundland and Labrador, the Interim Permits issued in 1973 to 1976 period in the offshore areas to the west and to the south of Newfoundland and Labrador were:<sup>238</sup>

1.	Elf Oil Exploration and Production	November 21, 1973
2.	Chevron Standard Limited	June 14, 1974
3.	Amoco Canada Petroleum	June 14, 1974
4.	Hudson's Bay Oil and Gas Co. Limited	July 3, 1974

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<sup>235</sup> N&L Budget Supplement Number Three (Spring 1973), Supplementary Doc. # 15.

<sup>236</sup> Class "A" Interim Permits consisted of those permits which had been issued to companies who also held federal permits for the same areas. These Interim Permits allowed holders to explore for and to produce offshore petroleum under certain conditions. Class "B" Interim Permits consisted of those permits which had been issued to companies who did not hold federal permits for the same areas. These Interim Permits did not allow holders to produce offshore petroleum.

<sup>237</sup> White Paper (May 1977), N&L Doc. # 75.

<sup>238</sup> Copies of these Interim Permits are found in the Supplementary Docs. # 45 to # 51.

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|----|-----------------------------------|--------------------|
| 5. | Texaco Exploration Canada Limited | September 20, 1974 |
| 6. | Texaco Exploration Canada Limited | December 12, 1974  |
| 7. | Pacific Petroleum Limited         | May 12, 1975       |

226. A number of these Interim Permits extend to the west of the 135° line which Nova Scotia claims was a boundary being respected by Newfoundland and Labrador. (See **CM Figure 13.**) In particular, the permits issued by to Hudson's Bay Oil and Gas Co. Limited on July 3, 1974 and to Texaco Exploration Canada Limited on December 12, 1974 completely overlap Nova's Scotia's claimed boundary.<sup>239</sup> However, Nova Scotia never protested. (See **CM Figure 14.**)

**iv) Newfoundland and Labrador's issuance of permits from 1977 to 1985**

227. By the spring of 1976, it had become apparent that a settlement between Canada and Newfoundland and Labrador in respect of the offshore was highly unlikely and the province decided that comprehensive regulation was required. The result was the *Newfoundland and Labrador Petroleum Regulations, 1977*,<sup>240</sup> published in the Newfoundland Gazette on October 24, 1977.<sup>241</sup>

228. Starting in 1978, Newfoundland and Labrador began issuing a series of exploratory permits pursuant to the 1977 Regulations. None of the exploratory permits issued by Newfoundland

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<sup>239</sup> Supplementary Docs. # 48 and # 50.

<sup>240</sup> *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 233/77, Supplementary Statutes # 7.

<sup>241</sup> The regulations were amended in 1978 and republished in the Newfoundland and Labrador Gazette. See *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 139/78, Supplementary Statutes # 8. Nova Scotia states in error that the regulations were first published in 1978.

and Labrador after 1977 was in the vicinity of the 135° line that Nova Scotia claims Newfoundland and Labrador was respecting.<sup>242</sup>

**v) Summary**

229. Contrary to the claim of Nova Scotia, the practice of Newfoundland and Labrador in issuing permits during the period 1965 to 1985 does not demonstrate any intent to conform with "the boundaries established in the 1964 Agreement" or to extend to the west of the 135° line. Nova Scotia's attempt to refashion the permit issued to Katy so that it is seen to conform with the 135° line is simply unsuccessful. The Katy permit is to the west of the 135° line.
230. Furthermore, the permits issued in the 1972 to 1976 period clearly overlap the 135° line. These permits alone contradict any claim that Newfoundland and Labrador was seeking to conform with boundaries set out in the so-called "1964 Agreement", or to conform with the 135° line.

**vi) The 2000 Call for Bids**

231. Nova Scotia argues that Parcel 14, located offshore western Newfoundland, in a "Call for Bids" issued in 2000 by the Canada Newfoundland Offshore Petroleum Board (CNOBPB) constitutes "strong evidence" of a "continuing recognition of the boundaries established in the 1964 Agreement."<sup>243</sup>

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<sup>242</sup> An exploratory permit issued to Texaco Exploration Canada Limited on November 20, 1978 is in the permit grid to the east of the 135° line. A copy of the exploratory permit is found at Supplementary Doc. # 52.

<sup>243</sup> NS Memorial, page II-48, para. 95.



232. Under the implementing legislation for the Accords, it is the CNOBP's mandate to administer rights issuance. Parcels are awarded to successful bidders following a competitive call for bids. As a preliminary step, industry is invited to nominate lands for potential inclusion in a call. The nomination process and the making of a Call for Bids plan is solely a CNOBP responsibility. Once made, however, the plan is submitted to the provincial and federal governments for approval.
233. Since 1990, seventeen parcels, including Parcel 14, have been approved and awarded from Calls for Bids in offshore western Newfoundland. The fact that in 2000, federal and provincial governments approved a parcel that was to the east of the lines drawn up in the Stanfield Submission simply has no relevance to the question of the conclusion of an agreement in 1964.
234. Furthermore, the Call for Bids was well after the date at which the issue before the Tribunal became an active dispute between the parties. In August 1998, the Premiers of Newfoundland and Labrador and Nova Scotia announced that the issue of the boundary in their offshore areas was to be referred to arbitration. Events subsequent to that date are simply not relevant to the resolution of this dispute.

**V. Nova Scotia's Permitting Practice Is Irrelevant**

235. Nova Scotia invokes its own practice in issuing permits in order to show an intent to conform with "the boundaries established in the 1964 Agreement" or to show acceptance of a boundary. But Nova Scotia's permitting practice is not relevant. Nova Scotia's intent alone is nothing more than wishful thinking. What has to be shown in order to establish an agreement is a common intent of the parties, and this Nova Scotia has failed to do.
236. However, even if Nova Scotia's practice was relevant, that practice in fact does not provide the support that Nova Scotia claims.<sup>244</sup> The permits reveal that Nova Scotia followed one practice for permits issued inside the Gulf of St. Lawrence and the Cabot Strait area and its approaches, and a different practice for permits issued in the outer area. The permits issued to Texaco in the inner area are limited by reference to "a common boundary" with an adjacent province. However, the permits issued to Hudson's Bay Oil and Gas Company and to Mobil Oil Canada in the outer area contain no such reference.<sup>245</sup>
237. Thus, if Nova Scotia's practice involves any recognition of a boundary at all, it is a boundary only in the inner area. Nova Scotia did not limit permits in the outer area by reference to any boundary.

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<sup>244</sup> NS Memorial, Appendix A, para. 7.

<sup>245</sup> NS Annex 76 and N&L Supplementary Docs. # 53 and # 54.

**VI. The Alleged Practice of New Brunswick, Prince Edward Island and Quebec is Irrelevant**

238. Nova Scotia argues that the practice of New Brunswick, Prince Edward Island and Quebec confirms that a legally binding agreement was entered into by the Eastern Provinces in 1964.<sup>246</sup> These other provinces are not parties to the arbitration and the fragmentary evidence as to their past practice put forward by Nova Scotia should be disregarded by the Tribunal.
239. The practice of New Brunswick, Prince Edward Island and Quebec in issuing exploration permits in respect of their offshore areas in no way "confirms" that the so-called "1964 Agreement" was legally binding as between Newfoundland and Labrador and Nova Scotia.
240. The 1977 MOU which involved New Brunswick, Nova Scotia and Prince Edward Island (but not Newfoundland and Labrador or Quebec) was based on the assumption that federal legislation would be enacted. However, no such legislation was enacted and the MOU was repudiated by Premier Buchanan of Nova Scotia in 1980.<sup>247</sup>
241. At present, there is no federal legislation applicable to resource revenue sharing and administration in relation to the offshore with New Brunswick or Prince Edward Island or Quebec. There is no evidence in the record as to any arrangements which are in place between any of these provinces and the federal government in relation to resource revenue sharing and joint administration.

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<sup>246</sup> NS Memorial, pages II- 42 to II- 44, paras. 80-83; page IV-11, para. 16.

<sup>247</sup> See para. 179.

242. Insofar as Prince Edward Island is concerned, its oil and gas legislation references the fact that the limits of its offshore jurisdiction must be established by a future federal-provincial agreement. The Prince Edward Island *Oil and Natural Gas Act* contains a verbal definition of the offshore area within the province's jurisdiction which does not correspond to the Stanfield line. Section 2(p) of the Act defines "provincial lands" as follows:

(p) "provincial lands" means the land mass of Prince Edward Island and includes the seabed and subsoil off the shore of the land mass to the limits of Prince Edward Island sovereignty and to such limits as may be set by federal-provincial agreement; (emphasis added)<sup>248</sup>

243. Thus, the practice of other provinces, which in any event does not support Nova Scotia's contentions, is irrelevant.

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<sup>248</sup> *Oil and Natural Gas Act* R.S.P.E.I. 1988, c.O-5, Supplementary Statutes # 10.