CHAPTER VI ACQUIESCENCE AND ESTOPPEL

I. Introduction

244. The essence of the Nova Scotia argument on acquiescence and estoppel is that through a failure to object to the alleged use of a boundary since 1964, Newfoundland and Labrador has somehow become bound by it. Nova Scotia maintains that since Newfoundland and Labrador "raised no objection to the agreed boundaries,"[249] "never disavowed its agreed boundary with Nova Scotia until it initiated the present dispute"[250] and "was silent,"[251] it has "acquiesced in the boundaries ... including its agreed boundary with Nova Scotia."[252] Nova Scotia further submits that it "relied"[253] on such purported acquiescence in combination with alleged "numerous representations regarding [Newfoundland and Labrador's] acceptance of the boundaries."[254] From this, Nova Scotia concludes that Newfoundland and Labrador "is estopped from denying the existence of the *1964 Agreement* and the boundaries established therein."[255] In other words, having failed to establish Newfoundland and Labrador's intent to conclude a binding agreement, Nova Scotia seeks to bind Newfoundland and Labrador to a line through the international law doctrines of acquiescence and estoppel.

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[249] NS Memorial, page IV-31, para. 65.

[250] *Ibid.* at para. 66.

[251] *Ibid.* at para. 70.

[252] *Ibid.*

[253] *Ibid.* at para. 69.

[254] *Ibid.* at para. 67.

[255] *Ibid.* at para. 71.

245. This argument is fundamentally misconceived in several respects:

a) legal obligations arising by operation of acquiescence or estoppel have nothing to do with the conclusion of binding agreements, and this argument therefore has no place in Phase One of these proceedings;

b) Nova Scotia mistakenly seeks to establish the existence of a boundary rather than, as required by the Terms of Reference, an agreement; and

c) in any event, the facts simply do not establish the elements of either acquiescence or estoppel.

II. Acquiescence

A. Acquiescence plays no role in the formation of a binding agreement

246. Acquiescence, as the leading authority on the topic MacGibbon has said, is "essentially a negative concept used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights."[256] The significance of an assertion of rights by one state and of failure to respond by another in circumstances where it should do so was made clear by Professor Ian Brownlie in the course of oral pleadings in the *Gulf of Maine Case*:

> The essence of the principle [of acquiescence] is that one government's knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute, and the failure to protest in the face of that conduct or assertion of rights, involves a tacit acceptance of the legal position

[256] I.C. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 B.Y.I.L. 143 at 143, Supplementary Authorities # 16.

represented by the other party's conduct or assertion of rights.[257]

247. At its most basic, then, acquiescence is silence, inaction or failure to protest that may in appropriate circumstances give rise to a rebuttable presumption of acceptance or recognition of a legal right or position claimed by another state.[258] A conclusion that there has been acquiescence requires actual or constructive knowledge of a notorious claim;[259] sufficient duration of the acquiescence;[260] and circumstances rendering the alleged acquiescence legally significant.[261] Moreover, these elements must be established strictly:

> [T]he safeguard most necessary to a realistic and acceptable application of the doctrine of acquiescence lies in the demand that it be interpreted strictly.[262]

248. Acquiescence is relevant, then, where a claim is made and a party fails to act in a way that would indicate a denial of that claim in circumstances where disapprobation or disavowal is required. In that sense, acquiescence can be understood as tacit or deemed consent to a

[257] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Oral Pleadings, Verbatim Record, Argument of Canada, April 4, 1984, Doc. C 1/CR 84/4 at 65-66, Supplementary Authorities # 2.

[258] MacGibbon, *supra* note 256 at 183; H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989" (1989) 60 B.Y.I.L. 1 at 45-46, Supplementary Authorities #22.

[259] MacGibbon, *supra* note 256 at 173, 178, 180, 183; *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116 at 138-39, Supplementary Authorities # 8; see also on this requirement the dissenting opinions of McNair J. at 176-180 and of Read J. at 194 and 200-205; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, [1984] I.C.J. Rep. 246 at para. 144, Supplementary Authorities # 1.

[260] *Fisheries Case*, *supra* note 259 at 138-39; MacGibbon, *supra* note 256 at 165; *Gulf of Maine Case*, *supra* note 259 at para. 144.

[261] MacGibbon, *supra* note 256 at 143, 170; H. Lauterpacht, "Sovereignty Over Submarine Areas" (1950) 27 B.Y.I.L. 376 at 395-96, Supplementary Authorities # 15.

[262] MacGibbon, *supra* note 256 at 168-69.

claim or asserted position.[263] However, the notion of tacit or deemed "consent" applicable in the context of acquiescence is not a substitute for the express consent required for the formation of a binding agreement.[264] There can be acquiescence in response to an adverse claim, such as a claim of entitlement to territory,[265] but there can be no acquiescence in response to an offer to enter into an agreement.

249. The distinction between acquiescence and consent to be bound by agreement can be illustrated by the fact that treaty-making by a state requires specific authority, whereas acquiescence does not. This distinction was made clear by Professor Brownlie in oral argument in the *Gulf of Maine Case* in considering the relevance of the authority of officials to bind the state through acquiescence:

> There is no question of transaction and consequently there is no

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[263] *Gulf of Maine Case, supra* note 259 at para. 130; MacGibbon, *supra* note 256 at 145, 182; Thirlway, *supra* note 258 at 45.

[264] See P. Reuter, *Introduction to the Law of Treaties*, 2nd ed. (London & New York: Keegan Paul International, 1995) at 55, defining an international agreement as "an expression of concurring wills, Supplementary Authorities # 19;" J.E.S. Fawcett, "The Legal Character of International Agreements" (1953) 30 B.Y.I.L. 381 at 385, observing that intent to create legal relations "must be clearly manifested before a legal character is attributed to [an international] agreement, Supplementary Authorities # 13;" article 38(1)(a) of the Statute of the International Court of Justice which describes treaties as "establishing rules *expressly* recognized by the contesting States, Supplementary Statutes # 11;" and the *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3 at paras. 28, 32, where the Court repudiated the relevance of "negative" elements in establishing whether a state was bound by an agreement, insisting rather on "conduct" which would have to be "very definite" and "very consistent," Supplementary Authorities # 10. Nova Scotia has not cited any case or authority in which it has been held that mere silence or inaction by a state can constitute that state a party to an agreement. The *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, [1962] I.C.J. Rep. 6, is of no assistance to the Nova Scotia argument, as in that case it was common ground that a treaty establishing a boundary between the parties already existed - the only issue was its interpretation, Supplementary Authorities # 6.

[265] See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press) at 157, Supplementary Authorities # 12.

> question of authority on the part of officials to bind the State as in the context of treaty-making.[266]

250. Thus, by implying that an agreement resolving the line dividing the parties' offshore areas was constituted by acquiescence, Nova Scotia has hopelessly confused the distinct legal concepts of agreement and acquiescence.

B. Nova Scotia's arguments on acquiescence do not relate to any agreement

251. Nova Scotia's argument further confuses the question of the existence of an *agreement* with the issue of whether conduct by one of the parties evidences or supports a particular *boundary*.[267] Such practice could only be relevant in determining where the boundary should be, not whether an agreement has been concluded.

252. Thus, even if it were theoretically possible to constitute a binding agreement through the silence of one of the parties, the argument advanced by Nova Scotia fails to address such a possibility in this case. The only agreement alleged by Nova Scotia is the so-called "1964 Agreement." However, Nova Scotia does not establish at all, as the heading to section IV - E of its Memorial implies, that Newfoundland and Labrador acquiesced in the "1964

[266] Brownlie, *supra* note 265 at 66. See also Professor Bowett in oral reply in the same case: " the issue [of acquiescence] is not one of treaty-making or of unilateral declarations, but of knowledge, or the means of knowledge, on the part of the officials concerned": *Gulf of Maine Case,* Reply of Canada, Doc. C 1/CR 84/21 at 7, Supplementary Authorities # 3. Professor Reuter has also emphasized the distinction between agreements and other, non-consensual bases of obligation: "While the possibility of purely verbal agreements is hardly challenged in itself, construing an essentially passive conduct as an expression of will certainly is. In any event, in order to establish an obligation of this kind, it is possible to resort to other technical explanations such as unilateral acts, acquiescence, estoppel, forclusion, or even custom or consolidation by time": Reuter, *supra* note 262 at 30-31.

[267] In the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at paras. 72-73, the Court emphasized the distinction between the existence of a boundary and of a boundary agreement, Supplementary Authorities # 7.

Agreement." Rather, Nova Scotia claims that *subsequent* to 1964, Newfoundland and Labrador "raised no objection to the Newfoundland-Nova Scotia *boundary*."[268]

253. This is an entirely different argument, based not on acquiescence in the Stanfield proposal or the "1964 Agreement" at all, but rather on supposed acquiescence *in a boundary*. Whether or not there has been acquiescence in a boundary says nothing about the existence of an agreement.

254. Moreover, the alleged acquiescence relied upon by Nova Scotia arises *after* the date at which Nova Scotia says the "1964 Agreement" - the only agreement it alleges - came into being. To assert that conduct (let alone an absence of conduct) arising *after* the alleged creation of a binding agreement can itself be constitutive of such an agreement is a manifest nonsense.

C. No acquiescence by Newfoundland and Labrador has been demonstrated in this case

255. Even if acquiescence were relevant to the agreement issue, Nova Scotia would still have to establish that:

a) it had notoriously asserted that Newfoundland and Labrador had agreed, with bilateral binding effect, to a line in the "1964 Agreement;"

b) Newfoundland and Labrador had failed to protest Nova Scotia's assertion of the existence of such a binding agreement; and

c) circumstances existed that would make such protest necessary in order to avoid legal effects.

[268] NS Memorial, page IV-31, para. 65 [emphasis added].

256. Nova Scotia has not advanced, much less demonstrated, any of these propositions. Nor could it have, given the stringent requirements of acquiescence and the facts of this case.

257. Acquiescence can only arise in the presence of a notorious claim coming within the actual or constructive knowledge of the allegedly acquiescent state.[269] MacGibbon emphasizes the significance of this requirement: "T]he effect of acquiescence is in every case confined strictly within the limits of the claim asserted and does not embrace other similar or wider claims."[270]

258. At no place in the record or in its Memorial does Nova Scotia identify an occasion when it clearly, unambiguously and publicly claimed that Newfoundland and Labrador had become a party, on September 30, 1964, to a binding agreement with it. Nor does Nova Scotia point to any fact or circumstance that would justify the conclusion that Newfoundland and Labrador was ever aware of such a claim by Nova Scotia.

259. The joint negotiating position adopted by the Atlantic Premiers on September 30, 1964 and presented to the federal government on October 14, 1964 was simply that - a proposal. Nova Scotia at no time suggested that it considered such joint negotiating position to constitute a bilaterally binding agreement between itself and Newfoundland and Labrador which finally determined, regardless of the outcome of the negotiations with the federal government, their maritime boundary.[271] There was thus, quite simply, never anything for Newfoundland and

[269] MacGibbon, *supra* note 256 at 173, 178, 180, 183; *Fisheries Case (United Kingdom v. Norway), supra* note 259at 138-39; see also on this requirement the dissenting opinions of McNair J. at 176-180 and of Read J. at 194 and 200-205; *Gulf of Maine Case*, *supra* note 259 at para. 144.

[270] MacGibbon, *supra* note 256 at 183.

[271] In fact, in correspondence dated October 2, 1964, Premier Stanfield of Nova Scotia himself characterized the boundaries discussed on September 30, 1964 as "proposed" boundaries, a matter "Requiring Further Action." Further, in the course of presenting the Stanfield proposal on October 14, 1964, Premier Stanfield referred to "tentative boundaries" that could be "reviewed and revised," "varied" and "decided upon" at a later date: see *supra*, paras. 135,142 and N&L Docs. #12, 15 & 16.

Labrador to protest.

260. The second requirement of acquiescence is a failure to protest over an extended period of time.[272] As MacGibbon puts it, "acquiescence is primarily dependent for its legal effect upon the fact that it is necessarily conjoined with the passage of time...."[273]

261. Nova Scotia again fails to satisfy any such requirement. The historical record shows that Newfoundland and Labrador's conduct *never* evidenced tacit acceptance of any claim that it had concluded a binding agreement with Nova Scotia. Rather, Newfoundland and Labrador *consistently* took positions and made assertions that were clearly irreconcilable with any such claim. Moreover, Nova Scotia consistently failed to object to or protest such assertions or positions. By way of illustration:[274]

a) During the July 21, 1965 federal-provincial conference at which Nova Scotia was present, Premier Smallwood of Newfoundland and Labrador clearly took the position that "interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law...."[275] Nova Scotia did not react.

[272] See, *e.g., Fisheries Case*, *supra* note 259 at 138-39.

[273] MacGibbon, *supra* note 256 at 165. The Chamber in the *Gulf of Maine Case* held that the passage of a significant period of time is crucial before failure to protest can have any legal effects. In that case, the passage of a period of six or seven years without protest was dismissed by the Chamber as a "brief silence" that could not give rise to legal consequences: *Gulf of Maine Case*, *supra* note 259 at para. 140.

[274] See also the many instances described in Chapter V.

[275] See para. 145; N&L Doc.# 21 at 27-28.

b) During the June 13, 1969 meeting of the JMRC, also attended by Nova Scotia, Newfoundland and Labrador further indicated that it was not prepared to confirm the interprovincial boundaries set out in a map accompanying the Allard letter of May 12, 1969.[276] Again, Nova Scotia did not react.

c) In October 1972, the Newfoundland and Labrador Minister of Mines, Agriculture and Resources wrote to Michael Kirby, Special Adviser to Premier Regan of Nova Scotia, about the need for the determination of the line between Nova Scotia and Newfoundland and Labrador. Far from proclaiming the prior existence of a binding agreement establishing such a line, Kirby agreed that "the boundaries should be established as accurately as possible," advised that he would ask the Nova Scotia Department of Mines to draw a line for discussion purposes, and added that he was "confident that any difficulty with regard to the boundary line can be resolved amicably."[277]

d) In May 1977, Newfoundland and Labrador issued a White Paper which criticized the 1977 MOU as a political settlement that "would not protect [the] province's interests" and as "unacceptable." Yet again, Nova Scotia remained silent.[278]

e) During the federal-provincial constitutional conferences of 1979-1980, Newfoundland and Labrador proposed that provincial maritime boundaries be settled

[276] See paras. 146 - 149; N&L Docs.# 33, 35, 43.

[277] See para. 162; N&L Memorial, para. 62; N&L Docs.# 57, 58, 59.

[278] See paras.176-178; N&L Memorial, para. 76; N&L Doc.# 75; N&L Supplementary Docs. # 22, 24.

by arbitration in accordance with principles of international law. Still, Nova Scotia did not object.[279]

f) The 1985 Atlantic Accord between Canada and Newfoundland and Labrador did not refer to any agreed lines but rather to "appropriate lines," as required by Newfoundland and Labrador. The reason for this, as stated in the federal annotation to the federal implementing legislation was that there was a "dispute between the provinces of Newfoundland and Nova Scotia in respect of the boundary line between the 2 provinces."[280] Nova Scotia did not deny the existence of any such dispute.

262. The third and most crucial element of acquiescence - circumstances that would require a reaction or justify an inference that silence was tantamount to acceptance[281] - is entirely ignored by Nova Scotia in its Memorial. First, the 1964 joint proposal was "tentative" and "proposed".[282] Second, both provinces were operating within a constitutional and legal context in which the conclusion of such a binding agreement even by express consent - let alone by acquiescence - would have been a legal impossibility in any event.[283] There was

[279] See para.173; N&L Memorial, paras. 81, 85; N&L Docs.# 83, 89; N&L Supplementary Docs. # 27, 32.

[280] See paras. 187-188; N&L Memorial, paras 103-107; N&L Docs.# 100, 102, 107.

[281] *Temple Case, supra*, note 264 at 30. See also H. Lauterpacht, *supra* note 261 at 395-96, Supplementary Authorities # 15. MacGibbon emphasizes that silence or absence of protest does not in itself amount to acquiescence: "Whether silence is to be interpreted as amounting to acquiescence depends primarily on the circumstances in which the silence is observed. Thus ... silence maintained by a State after a situation had been notified or had become generally known could fairly be interpreted as acquiescence and as the abandonment of claims to the contrary *if, by virtue of either special agreements or general practice, the occasion was one on which the State could, or ought to, have protested*": MacGibbon, *supra* note 256 at 170 [emphasis added].

[282] *Supra*, note 271.

[283] N&L Memorial, paras. 224-230.

therefore nothing in the circumstances to suggest that passivity on the part of Newfoundland and Labrador - of which there was none in any event - constituted acceptance of a binding obligation.

263. In any event, the law is clear that certain circumstances will defeat any alleged acquiescence. MacGibbon, in reviewing the practice of the International Court of Justice in this regard, referred to the *U.S. Nationals in Morocco Case* where:

> ...the Court acknowledged that absence of protest in relation to a situation which it described as provisional did not affect the respective rights of the parties since the question was kept open by the continuance of the negotiations.[284]

264. This is exactly the situation that existed before, on and following September 30, 1964. The so-called "1964 Agreement" was nothing more than a provisional, common understanding of what was being proposed to the federal government. The Premiers themselves recognized the need to preserve a degree of solidarity in their interactions with the federal government. Restraint in publicly disputing the nature or extent of their understanding was necessary to preserve the greater goal of achieving recognition of provincial ownership of the offshore. No acquiescence could possibly arise in such circumstances.

D. The effect of any alleged acquiescence would in any event be presumptive only

265. Finally, even if acquiescence were relevant and Nova Scotia had established its elements, Nova Scotia's Memorial omits any discussion of its true legal effects. Rather, Nova Scotia appears simply to assume that establishing acquiescence is tantamount to establishing a binding legal obligation, or perhaps even a binding agreement.

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[284] MacGibbon, *supra* note 256 at 173, referring to the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.)*, [1952] I.C.J. Rep. 176 at 200-201, Supplementary Authorities # 5; see also the dissenting opinion of Read J. in the *Fisheries Case*, *supra* note 259 at 203.

266. In fact, "the primary purpose of acquiescence is evidential."[285] Whatever the evidential or presumptive value of acquiescence, it always yields to a demonstration of the actual intent of the allegedly acquiescent state.[286] Acquiescence without more simply cannot produce the result wished for by Nova Scotia. Thus, the acquiescence that Nova Scotia claims existed is controverted by the clear and unambiguous facts establishing that Newfoundland and Labrador did not conclude a binding agreement on September 30, 1964 establishing a maritime boundary with Nova Scotia.

III. Estoppel

A. Estoppel, like acquiescence, plays no role in the formation of a binding agreement

267. Estoppel is even further removed than acquiescence from any concept of agreement. The essence of estoppel is that it:

> ... operates to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to its detriment or the party making the statement has secured some benefit.[287]

[285] MacGibbon, *supra* note 256 at 145.

[286] "[A]cquiescence presumes a consent to have existed, on the basis of the factual circumstances, but the presumption may be overturned by proof of the contrary": Thirlway, *supra* note 258 at 45-46, reviewing the practice of the International Court of Justice on this issue in the period 1960-1989. See also MacGibbon, *supra* note 256 at 183.

[287] D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 33 B.Y.I.L. 176 at 176-77, Supplementary Authorities # 11.

268. Thus, "agreement ... has nothing to do with estoppel."[288] Indeed, as observed by Thirlway and confirmed by Fitzmaurice,[289] the concept of estoppel is essentially antithetical to the concept of agreement, in that the former attaches no significance to actual or even presumed consent of the parties. Nova Scotia has failed to acknowledge the fundamental difference between agreement, which depends for its binding effect on consent, and estoppel, which depends for its binding effect on considerations of good faith and equity.

269. McNair states the distinction between estoppel and agreement with clarity:

> The obligations created by a treaty rest upon contract. What binds a party to carry out his promise is the efficacy derived from his consent; it would be both false and absurd to say that a party must perform his obligations because he is 'estopped' from repudiating them.[290]

270. As observed above, the only issue to be determined by the Tribunal in Phase One is whether the line has been resolved "by agreement". The Terms of Reference do not ask the Tribunal to decide whether the line has been resolved by estoppel, or by considerations of good faith, or indeed by reference to any other source of legal obligation. In raising estoppel in Phase One, Nova Scotia is in effect attempting unilaterally to amend the Terms of Reference so as to permit a *determination* of the line in the *absence* of any actual agreement between the parties.[291]

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[288] Bowett, *supra* note 287 at 177, n3. See also Reuter distinguishing between agreement and obligations flowing from "other technical explanations such as... estoppel:" *supra* note 264 at 31.

[289] Thirlway, *supra* note 258 at 29-30; separate opinion of Fitzmaurice J. in the *Temple Case, supra* note 264 at 63.

[290] A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 486, Supplementary Authorities # 18.

[291] Nova Scotia has failed to cite any case where estoppel has been used to find an agreement establishing a maritime boundary. Those maritime boundary cases which have considered estoppel do so in determining the nature and existence of equitable considerations to be applied in establishing the boundary not in establishing the existence of a prior boundary agreement itself:

B. Nova Scotia's arguments on estoppel do not relate to any agreement

271. Even if estoppel could properly be considered in these proceedings, Nova Scotia has in any event misapplied the concept. Nova Scotia refers to Newfoundland and Labrador's "numerous representations regarding its acceptance of the boundaries established in the 1964 Agreement, which includes its boundary with Nova Scotia."[292] Indeed, the heading to this portion of Nova Scotia's argument proclaims that Newfoundland and Labrador "is estopped from denying its agreed boundary with Nova Scotia."

272. Thus, Nova Scotia does not allege, much less establish, that Newfoundland and Labrador represented that it concluded a binding agreement, or that Nova Scotia relied on such a representation; rather it claims that it relied on Newfoundland and Labrador's purported recognition of a boundary. In short, Nova Scotia has simply failed to address the only question of relevance in Phase One, that of the existence of an agreement.

C. No estoppel can be raised in this case

273. Even if estoppel were relevant, Nova Scotia still fails to establish the requirements for an estoppel in this case. First, there must be authorized conduct amounting to an unconditional, unambiguous, and convincing representation directed at the state relying on estoppel. Second, there must be reasonable reliance by the state alleging estoppel which has caused it to suffer some prejudice.[293]

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see, e.g., *Gulf of Maine Case*, *supra* note 259.

[292] NS Memorial, page IV-31, para. 67.

[293] *North Sea Continental Shelf Cases*, *supra* note 263 at para. 30; *Gulf of Maine Case*, *supra* note 258 at paras. 130, 133, 139, 145; *Temple Case*, *supra* note 263, separate opinion of Fitzmaurice J. at 60-65; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Judgment, Application to Intervene)*, [1990] I.C.J. Rep. 118 at para. 63, Supplementary Authorities # 11; *Case Concerning the Land and Maritime Boundary (Cameroon v. Nigeria) (Preliminary Objections)*, 11 June 1998, I.C.J. General List No. 94 at para. 57, Supplementary Authorities # 5; Thirlway, *supra*

A mere change in position is insufficient.[294] What must be shown is that reliance on the representation has "... brought about a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both."[295]

274. However, Nova Scotia does not even attempt to discharge its burden in proving an estoppel. First, with respect to the requirement of representation, Nova Scotia baldly asserts that Newfoundland and Labrador has made "numerous representations" but does not trouble itself to identify even one concrete instance of such a representation, word or deed, let alone one that is *shown* (rather than simply asserted) to have been unconditional, unambiguous, convincing and directed at Nova Scotia.

275. Moreover Nova Scotia conveniently omits any reference to the numerous occasions on which officials of Newfoundland and Labrador made clear to Nova Scotia and to the federal government that the Stanfield proposal was a proposal only, or that the lines in that proposal were tentative only, or that agreement had yet to be reached on offshore boundaries.[296] In fact, the historical record is the direct opposite of that suggested by Nova Scotia.

276. The closest Nova Scotia comes to identifying specific conduct is its reference (albeit without citing any particulars) to the "issuance of oil and gas permits whose limits coincide with the

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note 257 at 36-43; Bowett, *supra* note 286 at 178, 184-186, 188-94; A. Martin, *L'Estoppel en droit international public* (Paris: Pedone, 1979) at 293, 322-23, Supplementary Authorities # 17.

[294] H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) at 170, note 39: "...from the point of view of estoppel, the conduct of one party can be invoked in favour of the other only when, as the result of such conduct, the position of the latter has altered for the worse a factor which is of the essence of the doctrine of estoppel in its primary connotation," Supplementary Authorities # 14. See also Thirlway, *supra* note 258 at 44; Bowett, *supra* note 287 at 191, 193.

[295] *Temple Case, supra* note 264, separate opinion of Fizmaurice J. at 63.

[296] See examples cited in para. 261.

agreed boundaries" and Newfoundland and Labrador's failure to protest Nova Scotia's issuance of permits "along" the same alleged boundary.[297] In fact, as demonstrated above,[298] no such consistent practice occurred at all. Rather, as demonstrated above,[299] Newfoundland and Labrador frequently issued permits that crossed the purported boundary, a practice that significantly drew no protest or response whatever from Nova Scotia.

277. In any event, the Chamber in the *Gulf of Maine Case* dealt with virtually identical arguments concerning the effect of the permitting practice of the parties in that case.[300] Canada had argued that the practice of the United States in issuing permits apparently respecting a median line in the period 1964 to 1970 gave rise to an estoppel. Canada also relied, as Nova Scotia now does, on its own extensive permitting practice respecting the alleged boundary during the same period, coupled with the failure of the United States to protest such practice. The Chamber rejected these arguments as being wholly insufficient to establish an estoppel:

> [T]he facts advanced by Canada do not warrant the conclusion that the United States Government thereby recognized the median line once and for all as a boundary between the respective jurisdictions over the continental shelf; nor do they warrant the conclusion that mere failure to react to the issue of Canadian exploration permits ... legally debarred the United States from continuing to claim a boundary following the Northeast Channel ...
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> ...
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> [A]ny attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.[301]

[297] NS Memorial, page IV-31-32, paras. 67, 70.

[298] See paras. 200-242.

[299] See paras.211-226.

[300] Although, significantly, not in connection with the alleged existence of a delimitation agreement but rather in connection with how such delimitation should be carried out.

[301] *Gulf of Maine Case*, *supra* note 259 at paras. 138, 140.

278. Thus, even under considerably more compelling factual circumstances, the very sort of practice upon which Nova Scotia now relies did not disclose the required clarity to set up an estoppel. Nova Scotia's case is no stronger.

279. In any event, the facts show conclusively that Nova Scotia knew full well and at all times that Newfoundland and Labrador did not consider itself bound by any purported "1964 Agreement." Given the factual record,[302] it is simply disingenuous of Nova Scotia to assert that it made a "reasonable assumption"[303] to the contrary. Among the more prominent of its own contemporaneous assertions disproving any such "reasonable assumption" are the following:

a) During the federal-provincial meeting of May 3, 1973, Michael Kirby, principal assistant to the Premier of Nova Scotia clearly acknowledged that Newfoundland and Labrador did not agree on boundaries and that the "problem of provincial offshore boundaries could be set aside for the time being."[304] At the same meeting Kirby directly asked the Newfoundland and Labrador representatives whether they accepted provincial offshore boundaries, to which the response was that Newfoundland and Labrador "had not decided on a final position."[305]

b) At the federal-provincial meeting of April 30, 1974, Kirby himself acknowledged that Newfoundland and Labrador did not accept the boundaries, stating that "Nova Scotia had no evidence of Newfoundland agreeing on the boundaries."[306]

[302] See Chapter V. See also N&L Memorial, Chapter III.

[303] Nova Scotia Memorial, page IV-32, para. 69.

[304] See para. 166; N&L Supplementary Doc.# 13 at 7-8.

[305] See para.167; N&L Supplementary Doc.# 13 at 12.

[306] See para. 170; N&L Memorial, para. 67; N&L Doc.# 66.

c) An August 7, 1974 memorandum prepared by Kirby indicated a number of matters requiring "further negotiations at the officials level," including an "agreement indicating precisely where the boundaries lie between each of the five Eastern Provinces."[307]

d) During the federal-provincial discussions on May 12, 1976, Graham Walker, Counsel for Nova Scotia indicated, in response to a federal query as to the territory to be covered by the proposed federal-provincial agreement, that there was "one area of controversy, that between Nova Scotia and Newfoundland."[308]

280. Finally, Nova Scotia has not demonstrated the keystone of any estoppel argument - that it has suffered prejudice through reliance on the alleged representations of Newfoundland and Labrador. It mentions only two ways in which it "relied" upon the alleged representations: in issuing oil and gas permits, and in "limiting its offshore claims to its offshore area as established by the *1964 Agreement*."[309] Neither have any bearing on the concept of detrimental reliance in estoppel.

[307] N&L Memorial, para. 69; N&L Doc.# 68.

[308] See para. 173; N&L Doc.# 71.

[309] NS Memorial, page IV-32, para. 69.

281. If through Newfoundland and Labrador's forbearance Nova Scotia has for a period enjoyed the benefit of greater resource administration revenues, it can hardly now be heard to complain that this has been to its prejudice. To the contrary, Nova Scotia has enjoyed a windfall while Newfoundland and Labrador, if anyone, would have lost to the extent of Nova Scotia's gain.[310]

282. In any event, Nova Scotia is not in the position of a state which, through reasonable reliance in good faith on clear representations of another state, has suffered demonstrable prejudice. If anything, the conduct of Newfoundland and Labrador was throughout plainly inconsistent with any hope Nova Scotia might have harboured that the 1964 proposal would eventually form the basis of binding legal obligations. Such a result could certainly not flow from Nova Scotia's own contemporaneous conduct, which was plainly inconsistent with its current allegations. Indeed, were the law of acquiescence and estoppel to be applied to Nova Scotia, as it seeks to have it applied to Newfoundland and Labrador, good faith would preclude Nova Scotia, having failed in any forum, at any relevant time or by any means to state clearly its belief in a binding agreement resolving the line between the parties, to assert that effect must now be given to such a fiction.

[310] Bowett, *supra* note 287 at 200-201 recognizes the fact that it is usually the allegedly acquiescent state, and not the state seeking to apply estoppel at all, which has suffered prejudice through a failure to assert its legal rights: In such circumstances, "there has been no deception and nothing which good faith, operating through the doctrine of estoppel, requires to be put right."