CHAPTER VII THE POSITION OF NEWFOUNDLAND AND LABRADOR: A RECAPITULATION

283. The principal heads of argument as summarized in the Newfoundland and Labrador Memorial[311] are as follows:

a) There was no agreement between Newfoundland and Labrador and Nova Scotia dividing their respective offshore areas on the basis of the 1964 Stanfield line or on any other basis.

b) Under both Canadian law and international law, an agreement requires clear evidence of an intent to be legally bound.

c) The Stanfield line was nothing more than a common proposal by the Atlantic Provinces in a negotiation that failed.

d) The Stanfield line was put forward in negotiations about provincial ownership of the offshore, a matter that was not the subject of the subsequent Accords and implementing legislation.

e) The course of the Stanfield line, in an area identified by Nova Scotia as critical to this dispute, was left undefined.

f) For the Stanfield line to have become binding on Newfoundland and Labrador would have required legislative approval by the Province.

[311] N&L Memorial, paras. 148-155.

g) The Stanfield proposal was conditional on federal acceptance and subsequent constitutional implementation; without this, any agreement would have been *ultra vires*.

h) The federal-provincial Accords and implementing legislation on offshore resource management and revenue sharing are inconsistent with there being any agreement between Newfoundland and Labrador and Nova Scotia on the basis of the Stanfield line.

284. There is nothing in the Nova Scotia Memorial to prompt a reconsideration of any of these submissions, all of which are reconfirmed.

285. Several of these submissions are of a factual character, and can be briefly recapitulated. First, no intergovernmental agreement was ever drawn up and executed. Second, the constitutional legislation which was the object of the 1964 proposal was never passed. Third, the 1964 lines formed part of a proposal to the federal government predicated on federal acceptance of provincial ownership and jurisdiction, which proposal was rejected out of hand by the federal government. Fourth, the proposal was expressed throughout in terms of a request for constitutional legislation pursuant to the *Constitution Act, 1871*, to be enacted by the Parliament of Canada, which legislation was never prepared. Fifth, the proposal was ancillary to a broader objective of constitutionally recognized ownership and jurisdiction, which was never prepared or enacted.

286. The 1964 initiative was, therefore, a proposal made in the course of an unsuccessful negotiation, and it suffered the fate of any such proposal when negotiations produce no agreement. It was also a *conditional* proposal: conditional upon federal legislation under the *Constitution Act, 1871*, which would have implied federal recognition of the claim. The failure of that condition was equally decisive in depriving the initiative of any legal consequences whatsoever.

287. Without reciting the facts at length, a couple of instances may be cited to confirm this description. When Premier Stanfield made his presentation at the 1964 federal-provincial meeting he did not suggest that a binding agreement on boundaries was already in force. He said to the federal government, "[w]e are asking you to put in motion the steps necessary to define the marine boundaries between the several Atlantic Provinces..."[312] And the next year, Premier Smallwood confirmed to the Prime Minister, in a conference at which Nova Scotia was also present, but did not react, that the boundaries were "merely a proposal" and that the Provinces had not "attempted to make them law...."[313]

288. While the parties are agreed that intention is the litmus test of a binding agreement, Nova Scotia has ignored not only Canadian law but Canadian practice in determining whether such an intention can be established in this case. There is nothing more decisive than practice as an indicator of what types of instruments are intended by the parties to be legally binding. This is true even in an international context, as Reuter has observed.[314] It would, in fact, be difficult to see how one could assess whether the requisite intention exists in any given case *except* in relation to the normal practices of the parties in concluding binding legal agreements, taking into account the subject matter of the alleged agreement.

289. The Newfoundland and Labrador Memorial noted that intergovernmental agreements are a central feature of Canadian federalism, and that settled practices and customs have developed about how they are concluded and drawn up.[315] When they deal with matters of enduring importance, they are invariably set out in a written instrument that leaves no doubt that a legal obligation is intended. There would, as stated in the Memorial, be no precedent for an intergovernmental agreement constituted without formal documentation of any kind and yet

[312] Stanfield Submission (October 14, 1964), N&L Doc. # 15.

[313] Minutes of federal-provincial conference (July 21, 1965), N&L Doc. # 21.

[314] Reuter, *supra* note.

[315] N&L Memorial, para. 167.

intended to create significant legal obligations of an enduring character.[316] All of this is fully familiar to Nova Scotia and is reflected in its own practices.

290. The use of an instrument indicating an intention to be bound is not an end in itself, but it is of the highest relevance as an indicator of such an intention. That is why Canadian authorities have identified the degree of formality of an instrument, along with other factors such as its language and substance, as one of the leading "parameters" which determine the legal character of intergovernmental agreements in Canada. Kennett, in particular, notes that the "greater the formality of an agreement, the more likely it is to be characterized as having legal implications."[317] When the subject matter is permanent boundaries, or other matters of comparable gravity, it would be totally at odds with Canadian intergovernmental practice to suggest that an intention to be legally bound could be manifested by telegrams, speeches and communiqués, but with no formal documentation whatsoever.

291. It was clear from the outset, to all parties, that this was a constitutional matter and that one way or another constitutional legislation would be required. If the provinces enjoyed ownership and jurisdiction in relation to offshore resources, as they contended, they did so by virtue of the Constitution, and the *Constitution Act, 1871* was the logical vehicle for delimiting the areas in which these claimed constitutional rights applied. If on the other hand they did not possess the ownership and jurisdiction they claimed, it would be only by virtue of a constitutional amendment that such rights could be conferred upon them.

292. Given the position taken in the Supreme Court References, which recognized the federal government's rights over the resources of the continental shelf, it follows that any attempt to subdivide the area without federal concurrence and implementation would have been constitutionally *ultra vires*.

[316] N&L Memorial, para. 168.

[317] N&L Memorial, para. 164, quoting Kennett on *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, 1991) at 63-64.

293. Even beyond the intrinsically constitutional nature of the offshore issue, the idea implicit in the Nova Scotia position is that legally binding agreements committing a province irrevocably on matters of fundamental importance can be made without any reference to the legislature. This would be inconsistent with the principle of parliamentary sovereignty, which possesses a constitutional status by virtue of the preamble to the *Constitution Act, 1867*. There is no prerogative power to deal with provincial territorial rights, and such matters are clearly outside any inherent contractual power vested in the executive. Simply put, no politician or official has the authority to take or to give away provincial territory or natural resources without legislative authority or sanction.

294. This arbitration is being conducted under legislation that expressly contemplates the existence of disputes between provinces that are parties to Accords and provides for a procedure to resolve those disputes.[318] The Accords of 1985 and 1986 both made provision for the arbitration of such disputes on the basis of "principles of international law governing maritime boundary delimitation," which phrase eventually found its way into the legislation and the Terms of Reference.

295. The very existence of dispute settlement mechanisms leading to decisions that can be implemented without provincial consent demonstrates that none of the three parties believed that the line was already the object of a prior binding agreement. Not only does the provision for dispute settlement in itself cast doubt on the Nova Scotia thesis: the adoption of international maritime boundary delimitation law indicates that what all three parties contemplated was a situation where the line will have to be drawn on the basis of the only body of law which provides legal principles for continental shelf delimitation, which is international law.

[318] The Nova Scotia legislation also provides for the implementation of the resulting awards by the Government of Canada, even without provincial consent, and exception to the general rule that the approval of the provincial Minister is required for amendments. See N&L Memorial, para. 248.

296. All this is significant in itself. What makes it especially compelling is the fact that it stems ultimately from the 1982 Agreement between Nova Scotia and the federal government, a transaction in which Newfoundland and Labrador played no part whatsoever. Schedule I to that agreement refers to the possibility of disputes with other provinces, and provides that the Government of Canada may unilaterally redraw the lines after consultation with all parties. The provision for consultation was later transformed into a provision for arbitration on the basis of international maritime boundary delimitation law. The essential implications of this caveat nevertheless remain intact: that the Nova Scotia line was considered *even by Nova Scotia* as provisional; that the dispute with Newfoundland and Labrador anticipated; and that such disputes would be resolved, if necessary, without the concurrence of Nova Scotia through the alteration of the line provisionally referred to in the Nova Scotia Accords.

297. As Newfoundland and Labrador has already submitted, Nova Scotia would never have agreed to this language, which appears without any reservation of the Nova Scotia position and the federal government would not have sought the inclusion of this language if there had been the slightest notion that a prior binding agreement on the line was already in place.

298. Two other heads of argument appear in the list set out above. One is that the subject matter of the 1964 proposal was ownership and jurisdiction, not the very different legislative regime of the present Accords, and that an agreement made for a stated purpose could not be applied for other purposes without the express agreement of the parties. The other is that the course of the line throughout the most critical area in dispute was never defined in the proposal that Nova Scotia now seeks to characterize as a binding agreement. Both these considerations have been anticipated by Nova Scotia and discussed at length in its Memorial and they have been rebutted in this Counter Memorial.

299. There are two final considerations arising out of the Nova Scotia Memorial. They relate to the implications of Nova Scotia's arguments.

300. The first implication concerns the spurious theory, advanced by Nova Scotia in its Memorial, that the conclusion that the boundary in the offshore between Newfoundland and Labrador and Nova Scotia had not been "resolved by agreement" would "throw into disarray over 36 years of regional stability" because other provinces who have relied on the "1964 Agreement" would be adversely affected.[319]

301. This type of *in terrorem* argument barely deserves response. This arbitration is between two provinces only. It has no binding effect on other provinces. Moreover, Newfoundland and Labrador and Nova Scotia are the only two provinces that have agreements relating to the offshore with the federal government. The other provinces are simply not in the same position as Newfoundland and Labrador and Nova Scotia.

302. Moreover, the argument that there will be regional disarray is based on Nova Scotia's claims about the practice of the other provinces. But practice is just practice. Whether Newfoundland and Labrador and Nova Scotia have resolved their offshore boundary by agreement has no implications for what other provinces might do. And in any event, those provinces are concerned only with the area inside the Gulf. If they wish to issue permits respecting a particular line, they are free to so do. If they wish to agree on a line they are free to do so. Nothing in this arbitration can affect their freedom in this regard.

303. In short, Nova Scotia's argument about regional disarray is both legally irrelevant and factually incorrect.

[319] NS Memorial, page I-6, para. 17.

304. The second implication of Nova Scotia's claim concerns the basis on which the alleged "1964 Agreement" rests. In invoking the "1964 Agreement" Nova Scotia is seeking to have its boundary with Newfoundland and Labrador accord with a delimitation of boundaries prepared by provincial officials in the light of criteria believed to be relevant in 1964. The delimitation of maritime boundaries was hardly a matter of provincial expertise; the only expertise on that matter in 1964 rested with the federal government. Thus, even if the provincial officials involved believed that they were applying relevant principles of international maritime boundary law, there can be no confidence that they would have understood them properly or applied them accurately.

305. Furthermore, even if untrained provincial officials had been able to interpret with precision the relevant international law on the delimitation of maritime boundaries as it existed in 1964, the consequence of the Nova Scotia position is that it seeks to hold Newfoundland and Labrador to a view of the delimitation of maritime boundaries as it existed in 1964, not as it exists today.

306. The law of maritime boundaries has evolved since 1964. There has been the Third United Nations Conference on the Law of the Sea and the resulting 1982 Convention. There has been the considerable development of the law through the decisions of the International Court of Justice and decisions of international arbitral tribunals. There has been substantial state practice. There is a vast volume of scholarly opinion. But Nova Scotia's approach, relying on a proposal designed to assist the provinces in obtaining offshore ownership in1964, would fix the boundary at a time before any of this evolution occurred.

307. Nova Scotia's position is curious since, as a result of the *Gulf of Maine Case*, Nova Scotia itself became a substantial beneficiary of developments in the principles of international law governing maritime boundary delimitation.

308. The terms of the Accords and the implementing legislation do not contemplate any frozen-in-time delimitation between Newfoundland and Labrador and Nova Scotia. They require that the boundary be resolved by the principles of international law governing maritime boundary delimitation, and qualify that only by modifications where the circumstances so require. That is a mandate for a tribunal to apply the principles as they exist today, and not as they may have been imperfectly understood by those without expertise in 1964.