

CHAPTER III THE FACTUAL BACKGROUND

19. This chapter sets out the background to the 1964 Stanfield proposal, the context in which it occurred and the subsequent history of discussions relating to the “Stanfield line.”
20. This factual background is based on information available to Newfoundland and Labrador from sources in the National Archives of Canada, from provincial archives and from other government sources. There has not been any general discovery of documents between the parties.
21. What was in issue at the time of the Stanfield proposal and later was not the division of resource revenues between Canada and the Atlantic Provinces, or even the management of exploration and development, but the right to full ownership and jurisdiction of the offshore and its mineral resources. It was in the context of attempts to have Canada recognize provincial ownership and jurisdiction of the offshore and its resources that interprovincial boundaries were discussed.

I. The Constitutional Framework

22. At Confederation in 1867, Nova Scotia, New Brunswick and the Province of Canada (consisting of Ontario and Quebec) joined to form the Dominion of Canada. Later, Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Alberta (1905) and Saskatchewan (1905) joined the Union. In 1949, Newfoundland and Labrador became the tenth province.
23. Under the *Constitution Act, 1867*, the federal government had a number of specific powers relating to the offshore: including the power to pass laws in relation to trade and commerce;

militia, military and naval service and defence; beacons, buoys, lighthouses and Sable Island; navigation and shipping; and sea coast and inland fisheries.⁹

24. Neither the territorial limits of the provinces in respect of the offshore nor interprovincial offshore boundaries were set out in the Constitution.
25. The *Constitution Act, 1867* did not provide for extending or changing provincial boundaries. This was corrected by section 3 of the *Constitution Act, 1871* under which Parliament could alter provincial boundaries with the consent of the legislatures of the provinces affected.

The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.¹⁰

II. Provincial Claims to Offshore Resources 1960 - 1964

26. Starting in the 1950s, the provinces became aware of the potential for oil and gas development in the offshore areas and began to address their claims to ownership of offshore resources.
27. In the early 1960s, the four Atlantic Provinces - New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador - began to work together to develop a

⁹ *Constitution Act, 1867*, s. 91, Statutes, # 8.

¹⁰ *Constitution Act, 1871*, s.3, Statutes, # 9.

common strategy.¹¹ Thus, in October 1960, the provincial Ministers of Mines, meeting in Quebec City, issued the following resolution:

The Mines Ministers unanimously agree and assert that offshore mineral rights within such distances offshore from provincial lands as seems reasonable and just and consistent with the terms of Union pursuant to the B.N.A. Act are the resources of the province and subject to provincial jurisdiction.¹²

28. On June 28, 1961, the Attorneys General of the Atlantic Provinces met in Halifax to discuss offshore mineral resources.¹³ At the meeting, Prince Edward Island presented a map outlining potential boundaries in Northumberland Strait. Newfoundland and Labrador advised the other provinces that it did not have an interest in this area, but rather in a division of the Strait of Belle Isle between Newfoundland and Labrador and Quebec.¹⁴ The Attorneys General agreed that Nova Scotia and Prince Edward Island would prepare a map extending the boundaries beyond Northumberland Strait up to the Strait of Belle Isle which would then be presented to the federal government in support of their demand for ownership of offshore resources.¹⁵
29. A contemporaneous memorandum, written by a Newfoundland and Labrador official, describes the work done on the boundaries:

¹¹ A draft memorandum to the federal Cabinet (February 3, 1964), Doc. # 6 provides a useful overview of the pre-1964 period.

¹² Letter from R.A. Donahoe, NS Attorney General, to Les Curtis, N&L Attorney General (June 9, 1961), Doc. # 1.

¹³ Minutes of Meeting of Attorneys General of Atlantic Provinces, Halifax, signed by B. G. Rogers, Prince Edward Island ("PEI") Director of Transportation (June 28, 1961), Doc. # 2.

¹⁴ Letter from B. G. Rogers, PEI to A. Farmer, PEI Attorney General (February 14, 1963), Doc. # 4.

¹⁵ N&L memorandum (June 29, 1961), Doc. # 3.

Nova Scotia and P.E.I. have done considerable work on this but their immediate object is to determine the interests of each on waters between their two Provinces, the idea being to draw a centre line between all the Provinces and that each Province should have mineral and oil rights to that line.

P.E.I. and Nova Scotia, who have already shown on a map a line between their two Provinces, have agreed to extend this line further, up to the Straits of Belle Isle and when completed they will distribute copies of this map which will define the off-shore mineral and oil rights of the several provinces. When we receive our copy 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.¹⁶

30. A second meeting was held in Halifax on October 7, 1961. At this meeting, the Nova Scotia Department of Mines presented Marine Chart 4490 with interprovincial boundaries thereon that went beyond Northumberland Strait.¹⁷ According to a memorandum, written by Graham Rogers of Prince Edward Island in 1963, the boundaries in the Northumberland Strait area were accepted by the Attorneys General of Nova Scotia, New Brunswick and Prince Edward Island.¹⁸ Newfoundland and Labrador did not attend these meetings.

31. In July 1964, Nova Scotia withdrew its acceptance of the Northumberland Strait boundaries. The Nova Scotia Solicitor wrote:

Until such time as there has been an agreement with the Federal Government and the Provinces concerned with reference to the

¹⁶ *Supra*, Note 15.

¹⁷ Memorandum from B.G. Rogers, PEI to Premier Shaw, PEI (June 13, 1963), Doc. # 5. See also letter from B.G. Rogers, PEI, to M. Jones, NS Legal Adviser (July 6, 1964), Doc. # 8.

¹⁸ Letter from B.G. Rogers, PEI to Premier Shaw, PEI (June 13, 1963), Doc. # 5.

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.¹⁹

III. The Stanfield Proposal (1964)

32. On September 23, 1964, a meeting was held between officials of New Brunswick, Nova Scotia and Prince Edward Island to discuss offshore resources in anticipation of the upcoming annual conference of the Atlantic Premiers. Newfoundland and Labrador was not represented at this meeting, but received a copy of the minutes.²⁰ The officials present appreciated that formal recognition by the federal government of the ownership rights of the Atlantic Provinces was essential to the “expeditious and economic and orderly development of offshore exploration” and undertook to make several recommendations to their respective Premiers with respect to boundaries:

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. In this respect, a plan was prepared by the Nova Scotia Department of Mines, setting forth graphically and by metes and bounds suggested boundary lines covering the Bay of Fundy, Northumberland Strait, the Gulf of St. Lawrence, including the Bay of Chaleur and the Strait of Belle Isle and Cabot Strait. These suggested boundaries have had the tentative approval of New Brunswick, Prince Edward Island, Newfoundland and Nova Scotia and, it is understood, are also acceptable to Quebec. 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

¹⁹ Letter from M. Jones, NS Solicitor, to B. G. Rogers, PEI (July 3, 1964), Doc. # 7. See also letter from B.G. Rogers, PEI, to M. Jones, NS (July 6, 1964), Doc. # 8.

²⁰ Letter from J. MacDonald, NS Deputy Attorney General, to A. Johnson, N&L Deputy Minister of Economic Development (September 23, 1964), Doc. # 10.

approved by the Provinces, under the provisions of Section 3 of the British North America Act, 1871.²¹

33. On September 30, 1964, at the annual conference of Atlantic Premiers in Halifax, the Premiers agreed to present a common position to the federal government consisting of:
- (1) a joint statement setting out the position of the Atlantic Provinces on offshore resources;
 - (2) a metes and bounds description of proposed marine boundaries (Schedule A to the statement); and
 - (3) a map showing graphically the proposed marine boundaries between the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland (Schedule B to the statement).²²

Premier Stanfield was asked to solicit Quebec's support and to prepare a presentation regarding the position of the provinces on offshore mineral resources to be made at the federal-provincial conference.²³

²¹ Minutes of officials meeting between NS, New Brunswick ("NB") and PEI (September 23, 1964), Doc. # 9.

²² Joint Statement of Atlantic Provinces (September 30, 1964), Doc. # 11.

²³ Letter from Premier Stanfield, NS, to Premier Lesage, QC (October 2, 1964), Doc. # 12; Memorandum entitled "Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action" (undated), Doc. # 13; Telegram from Premier Lesage, QC, to Premier Stanfield, NS (October 7, 1964), Doc. # 14.

34. In October 1964, at the federal-provincial conference in Ottawa, Premier Stanfield, on behalf of the Atlantic Provinces, presented a submission to Prime Minister Pearson claiming provincial ownership of offshore mineral resources in which he made the following points:
- (1) The only questions for discussion were the proprietary rights in submarine minerals and the boundary lines between provinces.
 - (2) The proprietary right in minerals contained in the submarine lands belonged to the provinces where the submarine lands were contiguous to a province.
 - (3) The orderly exploration and exploitation of submarine minerals was essential to the economic development of the provinces.
 - (4) The question of provincial boundaries need not be discussed at length or decided at the conference.
 - (5) Section 3 of the *British North America Act, 1871* provided the procedure for changing boundaries and in effect was a matter for agreement between the provinces concerned. Premier Stanfield said: "I can say, however, that the Atlantic Provinces have discussed this question among themselves and have agreed upon tentative boundaries of the marine areas adjoining those Provinces."
 - (6) The tentative boundaries were set out by metes and bounds and were graphically delineated on a map attached to the submission.
 - (7) The federal government was requested to give effect to "the boundaries thus agreed" through legislation pursuant to s. 3 of the *British North America Act, 1871*. Premier Stanfield said: "It may be that before actual legislation is prepared the description by metes and bounds should be reviewed and revised and the attached map, if necessary,

varied accordingly, but, for all practical purposes, the attached description of the boundaries and map represent the agreement of the Atlantic Provinces.”

- (8) Canada was also asked to continue to assert the status of the Gulf of St. Lawrence, Cabot Strait, Northumberland Strait and the Bay of Fundy as inland waters or territorial waters.²⁴
35. The metes and bounds description, attached to the submission as Schedule A, was entitled “Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries” (“Notes”). The Notes defined the boundaries between Newfoundland and Nova Scotia in the following way:

I - Boundary of Nova Scotia

From this mutual corner the boundary with Newfoundland runs southeasterly to the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland); thence to a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland); thence southeasterly to International waters.

....

VI - Boundary of Newfoundland

From the above common point southeasterly to the midpoint between St. Paul Island and Cape Ray; thence southeasterly to the midpoint between Flint Island and Grand Bruit; thence S.E. to International waters.

²⁴ Submission on Submarine Mineral Rights by Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, Federal-Provincial Conference (Oct. 14, 1964) (“Stanfield proposal”), Doc. # 15; Notes on federal-provincial Conference of Prime Minister and Premiers prepared by Privy Council Office (December 9, 1964), Doc. # 16.

The “mutual corner” referred to in the Nova Scotia description and the “common point” referred to in the Newfoundland description were references to the midpoint between East Point (Magdalen Islands) and Cape Anguille (Newfoundland).²⁵

36. The map attached to the submission as Schedule B was entitled “Chart Showing proposed boundaries of Maritime Provinces, Newfoundland and Quebec with primary regard to Mineral Rights.”²⁶ It depicted a line between Newfoundland and Nova Scotia which extended from the midpoint of a line drawn between East Point and Cape Anguille to the midpoint of a line drawn between St. Paul Island and Cape Ray to the midpoint of a line drawn between Flint Island and Grand Bruit. The line then proceeded about 85 nautical miles on an approximate azimuth of 125°.²⁷
37. On December 11, 1964, the Prime Minister rejected the Stanfield proposal. He advised the Atlantic Premiers that Canada considered that offshore resources fell under federal jurisdiction and that the question would be referred by the federal government to the Supreme Court of Canada.²⁸ Although efforts were made by the Atlantic Premiers to have the Prime Minister reconsider this decision, the die had been cast.²⁹
38. At a federal-provincial conference in July 1965, the Prime Minister stressed that Canada believed that the question of legal ownership should be settled by the Supreme Court before

²⁵ Stanfield proposal, Doc. # 15.

²⁶ See Figure 2. A true copy of the map attached as Schedule B of the Stanfield proposal is in a pocket at the end of this Memorial.

²⁷ See Figure 3.

²⁸ Letter from Prime Minister Pearson to Premier Smallwood, N&L (December 11, 1964), Doc. # 17.

²⁹ House of Commons Debates (February 22, 1965) at 11571, Doc. # 18. Letter from Premier Stanfield, NS, to Prime Minister Pearson (March 25, 1965), Doc. # 19; Letter from Prime Minister Pearson to Premier Stanfield, NS (April 27, 1965), Doc. # 20.

any arrangements could be negotiated between the federal government and the coastal provinces. The minutes record the following exchange between Prime Minister Pearson, Premier Shaw of Prince Edward Island and Premier Smallwood of Newfoundland and Labrador:

- 116. Mr. Shaw stated that the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St. Lawrence region, had subdivided the Gulf between themselves, and had advised the Federal Government accordingly. Thus there was no legal question involved.
- 117. The Prime Minister pointed out that adjustment of provincial boundaries without Federal participation would be an arbitrary action and he stressed that provinces do not have the constitutional authority to adjust provincial boundaries unilaterally.
- 118. Mr. Smallwood interjected that these interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law....³⁰

- 39. In 1967, federal officials proceeded on the assumption that there was no interprovincial agreement on offshore boundaries. An April 1967 federal memorandum entitled "Offshore Mineral Rights: Resolution of Federal-Provincial Conflict" reads in part:

Offshore lines of demarcation would be necessary not only to differentiate between federal and provincial areas of interest, but also to delimit the areas from which each individual province would obtain its share of offshore revenues. These offshore 'interprovincial' lines should be finalized at the time a federal-provincial agreement is made in order to forestall any disputes in this regard. The final determination of any offshore lines that would coincide or interfere with international boundaries could be left in abeyance with the

³⁰ Minutes of the Federal-Provincial Conference (July 21, 1965) at 27-28, Doc. # 21.

understanding that the federal government would negotiate the best terms possible with the countries involved.³¹

IV. The Work of the JMRC

40. In early 1968, Ministers of the Atlantic Provinces and Quebec met to reassess their options in the wake of the Supreme Court of Canada's decision in *Reference re: Offshore Mineral Rights of British Columbia*, which had been handed down on November 7, 1967.³² They decided to create a steering committee to promote "uniform legislation and regulation relative to the whole field of offshore minerals."³³ Following the meeting, the Joint Mineral Resources Committee ("JMRC"), made up of the Ministers of Mines of the Atlantic Provinces and Quebec, was formally established by agreement between the provinces.³⁴

The purpose of the Joint Mineral Resources Committee is to initiate and foster co-operation among the Provinces that are parties to the Agreement in the study of problems concerning the management of mineral resources in the submarine areas or lands within the Provinces and in their common terrestrial border zones and to make recommendations to the Governments of the Provinces for resolving the problems.³⁵

³¹ Memorandum of D.G. Crosby, Director of Resource Management and Conservation Branch, Federal Department of Energy, Mines and Resources ("EMR") (April 7, 1967) at 11, Doc. # 22.

³² [1967] S.C.R. 792 ("*British Columbia Offshore Reference*"), Authorities, # 17. The Court supported the ownership claim of the federal government with respect to the resources of all submerged lands lying seaward of the ordinary low water mark and outside of harbours, bays, estuaries and other similar inland waters.

³³ Letter from Premier Campbell, PEI, to D.W. Gallagher, Manager of PEI Economic Improvement Corporation (June 12, 1968). Doc. # 24.

³⁴ The agreement was based on a draft forwarded by D. Smith, NS Minister of Mines, to M. Lane, N&L Minister of Mines, Agriculture and Resources (June 7, 1968), Doc. # 23.

³⁵ Memorandum of Agreement between Governments of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland (July 16, 1968), Doc. # 25.

41. The JMRC established a committee of senior officials (called the Sub-Committee), and five technical committees. One of the technical committees was charged with “the delineation and description of the proposed boundaries of the participating provinces” in the submarine areas. The technical committee based its work on the Stanfield proposal, and the Notes and the map attached to the Stanfield proposal.³⁶
42. The technical committee prepared a list of coordinates defining the turning points in the Notes which each provincial member of the technical committee was asked to verify. F.J. Lukins, Newfoundland and Labrador Chief Engineer, who checked the list of coordinates, prepared a memorandum with his findings and attached a map he had received from the technical committee. The most seaward extension of the line shown on the map ended at Turning Point 2017 (the midpoint of a line drawn between Flint Island and Grand Bruit).³⁷
43. On January 16, 1969, the technical committee reported that it had determined and agreed upon the methodology for defining the turning points described in the Notes and that the final list of the coordinates would be forwarded to each participating province in the future.³⁸ The minutes record that the next steps would be a formal agreement followed by legislation in each province:

The meeting was in agreement that once this matter was finalized to its satisfaction then it would recommend to the Joint Mineral Resources Committee that an agreement be entered into by the

³⁶ Letter from P. Allard, Vice Chairman of JMRC, to P. Gaum, NS Minister of Mines (May 12, 1969), Doc.# 33.

³⁷ Memorandum from F.J. Lukins to N&L Deputy Minister of Mines (January 7, 1969), Doc. # 28.

³⁸ Report of the Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas prepared by J.C. Smith, Chairman (January 16, 1969), Doc. # 29.

provinces pertaining thereto and be confirmed by legislation by the participating provinces.³⁹

44. The JMRC met on January 17, 1969, and directed that the list of co-ordinates and the maps showing the turning points be forwarded to Graham Walker, Legal Adviser to the Nova Scotia Attorney General, who was to draft an interprovincial agreement and forward it to the Ministers of the participating provinces so that they could obtain the approval of their governments.⁴⁰ Apparently, no such agreement was drawn up.
45. The final list of co-ordinates was prepared by the technical committee between January 16, 1969 and May 12, 1969. The list also showed the most seaward extension of the line between Nova Scotia and Newfoundland as Turning Point 2017.⁴¹
46. On May 12, 1969, Paul Allard, Quebec Minister of Natural Resources and Vice-Chairman of the JMRC, wrote to the Ministers of Mines of the Atlantic Provinces and requested that the following action to be taken:
 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.

³⁹ Minutes of Meeting of Sub-committee of JMRC, Halifax (January 16, 1969), Doc. # 30.

⁴⁰ Minutes of Meeting of JMRC, Halifax (January 17, 1969), Doc. # 31.

⁴¹ List of Turning Points, Doc. # 32. See Figure 4.

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.⁴²

47. At the next meeting of the JMRC, on June 13, 1969, Minister Allard asked the Ministers to respond to his letter. The Nova Scotia Minister agreed with the contents of the letter and the six questions asked therein. The New Brunswick Minister was not prepared to give a “yes or no” answer to the six questions. The Prince Edward Island representative answered yes to four of the questions.⁴³ Frederick Gover, the Newfoundland and Labrador Deputy Minister of Mines, stated that he had no instructions concerning any of the six questions in Allard’s letter.⁴⁴ There was no follow-up and the agreement contemplated in the Allard letter was never concluded.

V. Federal Resource Administration Proposal

48. On November 29, 1968, the Prime Minister proposed to the Atlantic Provinces that Canada retain full responsibility for regulating offshore exploration and development, but that 50% of the revenues be placed in a common fund for distribution in accordance with mineral

⁴² Letter from P. Allard, Vice Chairman of JMRC to P. Gaum, NS Minister of MR (May 12, 1969), Doc. # 33.

⁴³ See letter from C.A. Miller, PEI Minister of Mines, to P. Allard, Vice Chairman of JMRC (May 22, 1969), Doc. # 34.

⁴⁴ Minutes of Meeting of JMRC, Quebec City (June 13, 1969), Doc. # 35.

resource administration lines.⁴⁵ The purpose of the mineral resource administration lines was to delimit areas of federal and provincial administration. Since all revenue seaward of the mineral resource administration lines was to be placed in a common fund for distribution, there would be no need to draw interprovincial boundaries. The Prime Minister's proposal was brought to the attention of the JMRC which decided that they should first agree among themselves as to the location of their interprovincial boundaries.⁴⁶

49. In June 1969, with no interprovincial agreement in sight, the JMRC, with the exception of New Brunswick, decided that a meeting with federal officials would be helpful, if only to obtain clarification of the Prime Minister's proposal on mineral resource administration.⁴⁷ A federal-provincial meeting was held in the summer of 1969, after which the JMRC reconvened in September to discuss the issues arising out of the meeting in greater detail.⁴⁸
50. From the federal government's perspective, little progress had occurred in 1969. In September 1969, the Prime Minister was advised by Otto Lang, Minister without Portfolio, that the JMRC was unlikely to reach a consensus. In his letter, Minister Lang referred to the Stanfield proposal as "an informal unapproved agreement."⁴⁹

⁴⁵Letter from Prime Minister Trudeau to Premier Robichaud (November 29, 1968), Doc.# 26; Statement by Prime Minister Trudeau in the House of Commons (December 2, 1968), Doc. # 27.

⁴⁶ Letter from P. Allard, Vice-Chairman of JMRC, to P. Gaum, NS Minister of Mines (May 12, 1969) at 3, Doc. # 33.

⁴⁷ Minutes of Meeting of JMRC (June 13, 1969), Doc. # 35.

⁴⁸ Report on Offshore Minerals Issue - Toronto Meeting of the JMRC (probably prepared by D. Darlington, Chief Economist, PEI Department of Mines following a September, 1969 meeting of the JMRC), Doc. # 36.

⁴⁹ Letter from O. Lang, federal Minister without Portfolio, to Prime Minister Trudeau (September 22, 1969) at 1, Doc. # 37.

51. In December 1969, the Prime Minister wrote to each of the Atlantic Premiers offering to conclude agreements with them on an individual basis.⁵⁰ This approach was rejected.⁵¹
52. After further federal-provincial meetings in 1970, it became evident to Ottawa that the Atlantic Provinces and Quebec had no uniform position, and to continue collective negotiations would not be fruitful.⁵² Accordingly, the federal Minister of Energy, Mines and Resources initiated bilateral discussions with each of the Atlantic Provinces. By June 1971, federal officials had determined that the Atlantic Provinces were unlikely to accept the concept of mineral resource administration lines and that the federal government would “have to chart a much more contentious and difficult course.”⁵³
53. In July 1971, the federal Minister of Energy, Mines and Resources presented a Memorandum to Cabinet outlining two revenue sharing formulas which might form the basis of a federal-provincial arrangement. Both formulas involved the division of the seabed off the Atlantic coast. S.S. Reisman, federal Deputy Minister of Finance, expressed the view that the Atlantic Provinces might not be in agreement on the division.

The memorandum does not state how this will be done, though E.M.R. officials have indicated that the divisions of sea bed agreed to several years ago by the provinces will be used. This may be a risky assumption to make, since only Newfoundland, of the five eastern provinces, has the same government that was in power when the sea bed was unilaterally divided by the provinces.⁵⁴

⁵⁰ Letter from Prime Minister Trudeau to Provincial Premiers (December 2, 1969) at 2, Doc. # 38.

⁵¹ Letter from Premier Smith to Prime Minister Trudeau (January 8, 1970), Doc. # 39; Letter from Premier Smallwood to Prime Minister Trudeau (January 29, 1970), Doc. # 40.

⁵² Memorandum to federal Cabinet (June 29, 1970) at 4-6, Doc. # 41.

⁵³ Letter from J. Austin to G. McNabb, Deputy Minister (Energy) of EMR (June 7, 1971) at 1, Doc. # 42.

⁵⁴ Memorandum from S.S. Reisman to the Minister (July 26, 1971) at 2, point 5, Doc. # 43.

54. In September 1971, the federal government submitted a new proposal to the JMRC⁵⁵ and in October 1971, John Turner, the federal Minister of Justice, wrote to the provinces to propose further consultations.⁵⁶ No discussions took place.

VI. The 1972 Provincial Proposal

55. In May 1972, the JMRC agreed that the five Premiers had to become actively involved in order to achieve an agreement. To this end, the JMRC formulated a number of principles for discussion by the Atlantic Premiers at a meeting in June 1972. The following principles are relevant:

(3) Ownership of the mineral resources in the submarine areas or lands within the provinces and in their common terrestrial border zones is in the provinces and not in the Government of Canada.

(4) The Governments of the four Atlantic Provinces and the Province of Quebec should confirm the delineation and description of the boundaries of the said five provinces in the submarine areas and the turning points in longitude and latitude relating thereto as was requested by the Honorable Paul E. Allard on May 12, 1969, then Vice-Chairman of the Joint Mineral Resources Committee.⁵⁷

56. A contemporaneous New Brunswick memorandum stated that “Interprovincial boundary lines in sub marine areas (e.g. the Gulf of St. Lawrence) must be confirmed and ratified at the earliest convenience.”⁵⁸

⁵⁵ Minutes of Joint Meeting of JMRC and Sub-committee, Halifax (September 14, 1971), Doc. # 44.

⁵⁶ Letter from J. Turner to W.R. Callahan, Chairman of JMRC (October 25, 1971), Doc. # 45.

⁵⁷ Minutes of Meeting of JMRC (May 24, 1972), Doc. # 46.

⁵⁸ Memorandum of May 24, 1972 Meeting of the JMRC prepared by H.W. van de Poll, NB Department of Natural Resources (May 25, 1972), Doc. # 47.

57. On June 18, 1972, after a meeting of the Atlantic Premiers and the Vice Premier of Quebec, Premier Regan wrote to Prime Minister Trudeau putting forward a common approach on offshore ownership by the “five eastern provinces as a united group.”⁵⁵ The communiqué issued at the same time described a provincial consensus on delineation and description of the offshore boundaries between the five provinces in the Gulf of St. Lawrence:

1. The proposal concerning offshore mineral resources made by the government of Canada on November 29, 1968, and as announced in the House of Commons on December 2, 1968, is not acceptable to the five eastern provinces.

2. The governments of the five eastern Provinces have agreed to the delineation and description of the offshore boundaries between each of these five provinces.

3. The five eastern Provinces assert 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.⁵⁶

58. On June 19, 1972, Premier Moores made a statement to the Newfoundland and Labrador House of Assembly in which he reported on the position taken by the Premiers. He informed the House that the Premiers had not attempted “to make concrete decisions on particular problems” and that the Halifax meetings served only “in creating a common philosophy on the question.”⁵⁷

59. Prime Minister Trudeau immediately advised Premier Regan that he was not prepared to debate the communiqué and that he took particular objection to “the assertion of ownership of the mineral resources of the seabed by the provinces and that the provincial boundaries

⁵⁵ Telegram from Premier Regan to Prime Minister Trudeau (June 18, 1972), Doc. # 49.

⁵⁶ Joint Communiqué (June 18, 1972), Doc. # 48.

⁵⁷ Statement by Premier Moores to the House of Assembly (June 19, 1972) at 2, Doc. # 50.

extend offshore in a manner to be delineated by provincial agreement.” The Prime Minister also stated that work on the Supreme Court reference would be started.⁵⁸

VII. Newfoundland and Labrador Goes its Own Way 1972 - 1977

60. In July 1972, Newfoundland and Labrador began to pursue a separate course from the other Atlantic Provinces. On July 28, 1972, Premier Moores announced a new policy on offshore mineral resources. The main feature was Newfoundland and Labrador’s claim to full ownership and jurisdictional rights over the resources of the continental shelf based on the province’s constitutional status at the time of Union in 1949.⁵⁹
61. In September 1972, William Doody, Newfoundland and Labrador Minister of Mines, Agriculture and Resources, advised petroleum companies that the province did not consider itself bound by any federal permit arrangements.⁶⁰ Minister Doody also wrote to the federal Minister of Mines, Energy and Resources and suggested that in order not to prejudice “a political settlement,” both governments should refrain from “all acts vis-à-vis the various [petroleum] companies ... which might tend to jeopardize the attainment of a political settlement.”⁶¹
62. In October 1972, Minister Doody also wrote Michael Kirby, Special Adviser to Premier Regan, about the need to have a precise determination of the line between Nova Scotia and

⁵⁸ Letter from Prime Minister Trudeau to Premier Regan (June 22, 1972) at 1, 3, Doc. # 51. See also memorandum to federal Cabinet (July 10, 1972), Doc. # 52. See also Record of Cabinet Decision (July 19, 1972), Doc.# 53.

⁵⁹ "Pledges with Ottawa on offshore resources not binding for the province says Moores," *Evening Telegram* (July 29, 1972), Doc. # 54.

⁶⁰ Letter from W. Doody, N&L Minister of Mines, Agriculture and Resources, to various petroleum companies (August 31, 1972), Doc. # 55.

⁶¹ Letter from W. Doody to D. MacDonald (September 22, 1972), Doc. # 56.

Newfoundland and Labrador. Minister Doody suggested that the line be established “according to scientific principles” to avoid confusion in the future.⁶² In his reply, Kirby agreed with Minister Doody 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. Kirby added:

As soon as this boundary has been drawn by our Mines Department, we can get together to discuss it. I am confident that any difficulty with regard to the boundary line can be resolved amicably.⁶³

On November 17, 1972, Cabot Martin, Newfoundland and Labrador Legal Adviser, wrote a reminder letter to Kirby.⁶⁴ There was no response and the issue remained unresolved.

63. On May 8, 1973, the federal government prepared a new proposal on offshore mineral resources for the Atlantic Provinces and Quebec.⁶⁵ The Premiers then met and drafted a response, dated June 19, 1973, which indicated they were prepared to discuss joint management and revenue sharing.⁶⁶ A week later, Premier Moores telephoned Premier Regan and informed him that his Cabinet would not support the response.⁶⁷ In September

⁶² Letter from W. Doody to M. Kirby (October 6, 1972), Doc. # 57.

⁶³ Letter from M. Kirby to W. Doody (October 17, 1972), Doc. # 58.

⁶⁴ Letter from C. Martin, N&L Legal Adviser, to W. Kirby (November 17, 1972), Doc. # 59.

⁶⁵ Memorandum to First Ministers re: Discussions by Officials on Atlantic Offshore Mineral Resources Administration Arrangements (May 8, 1973), Doc. # 60.

⁶⁶ Draft Proposal of Atlantic Provinces and Quebec (June 19, 1973), Doc. # 61.

⁶⁷ Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration (April 30, 1974) at 5, Doc. # 66.

1973, Newfoundland and Labrador dissociated itself from the other provinces and submitted its own proposal to the federal government.⁶⁸

64. The Newfoundland and Labrador proposal of September 1973 contained a draft federal-provincial agreement and draft legislation. The language of these drafts unambiguously referred to the fact that interprovincial boundaries remained unsettled.

(ii) in this Agreement

(a) “adjacent submarine area” means all that area seaward of the mean low water mark lying off the coast of Newfoundland as defined in term 2 of the Terms of Union between Newfoundland and Canada to which Canada as a sovereign state may claim exclusive rights for the purpose of exploring for and the exploitation of the mineral resources of the seabed and subsoil thereof 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 the other Provinces.⁶⁹

65. In January 1974, the Prime Minister rejected the Newfoundland and Labrador proposal, which he said was “diametrically opposed to the position which the Government of Canada has taken consistently” and was “at variance with the position taken by the other four Eastern Provinces, who are, I understand, prepared to negotiate with the Government of Canada....”⁷⁰
66. In November 1974, Newfoundland and Labrador advised the federal government that it was prepared to enter into “intensive bilateral discussions” subject to certain conditions, but at the same time it would continue with the preparation of its legal case.⁷¹ The federal

⁶⁸ Letter from Premier Hatfield to Premier Moores (September 27, 1973), Doc. # 63; letter from Premier Regan to Prime Minister Trudeau (September 28, 1973), Doc. # 64.

⁶⁹ N&L Proposal, September 1973, Doc. # 62.

⁷⁰ Letter from Prime Minister Trudeau to Premier Moores (January 28, 1974) at 2-3, Doc. # 65.

⁷¹ Letter from J. Crosbie to D. MacDonald (November 29, 1974), Doc. # 69.

government subsequently proposed that both governments join in making a reference to the Supreme Court of Canada. Newfoundland and Labrador agreed and in due course officials met to prepare a timetable for the reference.⁷²

VIII. Negotiations Between Canada and the Other Maritime Provinces 1974 - 1977

67. On April 30, 1974, the federal government met with Nova Scotia, Prince Edward Island and Quebec to resume discussions on the offshore.⁷³ At the meeting, Jack Austin, the federal Deputy Minister of Energy, Mines and Resources, reviewed recent developments. He explained that while federal officials had previously expected the five provinces to “come up with an agreed position,” Newfoundland and Labrador had submitted its own proposal. Deputy Minister Austin asked Michael Kirby, Special Adviser to Premier Regan, to secure confirmation in writing that Newfoundland and Labrador had “withdrawn from the “East Coast Provinces group” and had no further interest in the multilateral negotiations or their outcome. The minutes then record the following exchange:

Austin:[CAN] Queried whether any problems would stem from the withdrawal of Newfoundland, for example as regards inter-provincial boundaries.

Kirby: [NS] Indicated his understanding that there had been an agreement on boundaries among the Provinces some years ago but that Newfoundland claimed they had no written evidence of Newfoundland’s acceptance of these boundaries.

...

⁷² Memorandum to federal Cabinet (July 12, 1976) at 3, Doc. # 72.

⁷³ The designated official from New Brunswick was unable to attend.

Kirby [NS]: Indicated that Nova Scotia had no evidence of Newfoundland agreeing on the boundaries, but would search its files.

Austin:[CAN] Noted that absence of agreed interprovincial boundaries could raise the territorial problem and asked Mr. Smith what the legal consequences might be.

Smith: [CAN] Stated he was not sure of the significance of all this. Remarked that we were trying to develop an arrangement that would be legally enforceable. Suggested that even if Provinces had made an earlier political agreement on boundaries, this did not necessarily mean that they were locked into the arrangement.

...

Austin:[CAN] Stated that the Federal Government was not bound at all – what was involved was simply an arrangement amongst Provinces.⁷⁴

68. In May 16, 1974, Thor Thorgrimsson, Assistant Director of Resource Management and Conservation Branch, federal Department of Energy, Mines and Resources, prepared a memorandum for federal officials on the issues arising out of the April 1974 meeting. He stated that there could be no federal-provincial agreement on offshore mineral resources until several issues were settled, including boundaries:

(d) what 'territory' will the Agreement cover? The withdrawal of Newfoundland from the negotiations and the possible refusal of that Province to accept the interprovincial boundaries drawn up in 1964 has raised this problem, which is essentially a problem for the Provinces.⁷⁵

⁷⁴ Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration (April 30, 1974) at 4-7, Doc. # 66.

⁷⁵ Memorandum of T. Thorgrimsson (May 16, 1974) at 3, Doc. # 67.

69. On August 13, 1974, Michael Kirby prepared a similar report for Nova Scotia officials in which he acknowledged the need for an agreement about boundaries:

10 - There are a number of technical problems which have not yet been resolved but which officials believe can be resolved by further negotiations at the officials level. These include: -

a) An agreement indicating precisely where the boundaries lie between each of the five Eastern Provinces. This statement is required because the veto power over the issuance of an initial exploration permit will be held jointly by the Federal Government and the adjacent Province. Therefore, the territory over which the adjacent province has a veto must be clearly defined.⁷⁶

70. In late 1974, these federal-provincial discussions, which did not include Newfoundland and Labrador, came to a standstill.

71. On September 29, 1975, Premier Regan wrote to the Prime Minister to urge that negotiations be reopened to achieve a negotiated settlement.⁷⁷ Eventually the federal government agreed, but no substantive negotiations took place until May 1976.⁷⁸ At a meeting on May 12, 1976, between federal officials and representatives of New Brunswick, Nova Scotia and Prince Edward Island to discuss the proposed federal-provincial Memorandum of Understanding ("MOU"), Nova Scotia noted that there was a controversy between Newfoundland and Labrador and Nova Scotia about interprovincial boundaries. The minutes record the following exchange:

MacNabb:[CAN] Noted the Provinces would have to agree among themselves as to how they would share

⁷⁶ Memorandum of M. Kirby (August 7, 1974) at 5, Doc. # 68.

⁷⁷ Letter from Premier Regan to Prime Minister Trudeau (September 29, 1975), Doc. # 70.

⁷⁸ By 1976, Newfoundland and Labrador and Quebec had withdrawn from the negotiations.

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.
- MacNabb: [CAN] Remarked that it would be necessary to consult Quebec and Newfoundland with regard to the interprovincial lines of demarcation.
- MacLeod: [NS] Noted that Nova Scotia had on file a telegram from Premier Lesage accepting the interprovincial lines of demarcation agreed to in 1964.⁷⁹

72. In a July 12, 1976 Memorandum to Cabinet describing the proposed MOU, the federal Minister of Mines, Energy and Resources stated that “it was important to define with precision, probably by way of a map, the area covered by the arrangement, including the division between the three provinces themselves for the purposes of revenue sharing.” The memorandum specifically recognized the risks of proceeding without the consent of Newfoundland and Labrador.

As regards determination of the ‘territory’ to be covered by the proposed Agreement, the Federal Government could accept the so called “inter-provincial boundary lines” tabled on behalf of the four Atlantic Provinces by then Premier Stanfield of Nova Scotia at the Federal-Provincial Conference of October 1964 and later reportedly subscribed to by Quebec. However, it appears that at least certain representatives of Prince Edward Island and New Brunswick are not entirely satisfied with these lines, and that the Newfoundland Government does not accept them in their entirety; however federal representatives have not been made aware of any suggested alternatives in this context. It may, therefore, prove necessary to establish new provincial revenue-sharing lines for the Agreement

⁷⁹ Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resources (May 12, 1976), at 13, Doc.# 71.

area, if necessary without the consent of the Newfoundland and perhaps Quebec Governments, accepting the risk of a judicial challenge in this regard.⁸⁰

73. In the event, Newfoundland and Labrador never consented to the federal-provincial MOU.

IX. Memorandum of Understanding (1977)

74. On February 1, 1977, the federal government and Nova Scotia, New Brunswick and Prince Edward Island signed a Memorandum of Understanding which laid the groundwork for a detailed agreement on the sharing of offshore resource revenues and a joint oil and gas management board. Although neither Newfoundland and Labrador nor Quebec were parties, the MOU referred to “Interprovincial Lines of Demarcation” which had been “agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island.”

2. The Area to be covered by the Agreement will be the seabed and subsoil seaward from the ordinary low water mark on the coasts of Nova Scotia, New Brunswick, and Prince Edward Island to the continental margin, or to the limits of Canada’s jurisdiction to explore and exploit the seabed and subsoil off Canada’s coast, whichever may be farther, and where applicable, to the Interprovincial Lines of Demarcation agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island.⁸¹

75. The “Interprovincial Lines of Demarcation” were explained in a list of “Possible Questions and Suggested Answers,” prepared for Ministers by federal officials, as follows:

6. Q. What are the inter-provincial lines of demarcation referred to in the Memorandum of Understanding?

⁸⁰ Memorandum to federal Cabinet (July 12, 1976) at 12-13, Doc. # 72.

⁸¹ Memorandum of Understanding (February 1, 1977), Doc. # 74.

A. These are the lines agreed upon by the four Atlantic Provinces and Quebec which were presented on behalf of the five Provinces by the then Premier of Nova Scotia, Mr. Stanfield, to the Federal-Provincial Conference held in October 1964. In that Submission these lines were represented as inter-provincial jurisdictional boundaries. This is not the legal sense in which they are now being utilized. Under the Memorandum of Understanding, these lines are being used only for the purpose of indicating the offshore area in respect of which each Province will receive its share of mineral resource revenues.

7. Q. Why are there places where the interprovincial lines of demarcation are absent?

A. The lines as originally drawn by the five East Coast Provinces do not extend far enough in two places to fulfill the revenue-sharing purpose for which they will be used under this new federal-provincial arrangement: off the mouth of the Bay of Fundy; and southeasterly from Cabot Strait.⁸²

76. In May 1977, Newfoundland and Labrador published a White Paper which condemned the MOU as “unacceptable.”⁸³ Attached to the White Paper were proposed regulations governing offshore exploration. In October 1977, the Province issued the *Newfoundland and Labrador Petroleum Regulations, 1977*.⁸⁴

⁸² Possible Questions and Suggested Answers Concerning the MOU to be Signed on February 1, 1977, prepared by T. Thorgrimsson, Acting Director of Resource Management and Conservation Branch, EMR (January 28, 1977) at 3-4, Doc. # 73.

⁸³ White Paper (May 1977) at 12, Doc. # 75.

⁸⁴ 233/77 (October 24, 1977). The regulations were repealed on February 14, 1986 by the *Petroleum and Natural Gas Act Regulations Repeal Regulations 25/86*. See also Briefing for the Delegation of the Government of Canada: Federal - Provincial Conference of First Ministers on the Constitution: (February 5-6 1979) at B-4, Doc # 78.

77. Officials from Canada, New Brunswick, Nova Scotia and Prince Edward Island met throughout 1977 and 1978 to draw up a formal agreement in accordance with the MOU.⁸⁵ A meeting scheduled for September 1978 was cancelled as a result of the defeat of Premier Regan's government and the discussions ended.⁸⁶

X. Negotiations 1979 - 1982

78. In May 1979, there was a "gas show" in a well seven miles east of Sable Island and in August 1979, Mobil Oil Canada Ltd. announced an "oil find" at the Hibernia field approximately 175 miles east of St. John's. These discoveries moved the Atlantic coast to the forefront of oil and gas exploration in North America and brought into sharp focus the need to resolve the dispute between the federal government and provinces over ownership of the offshore.
79. In June 1979, the federal Conservative Party came to power. Prime Minister Clark's campaign promise had been that a Conservative government would transfer ownership of offshore mineral resources to the coastal provinces.⁸⁷ The Clark government moved quickly on this promise and, in the fall of 1979, consultations were held separately with Newfoundland and Labrador and with Nova Scotia.⁸⁸

⁸⁵ Memorandum from T. Thorgrimsson to D.G. Crosby, January 31, 1978, Doc.# 76; Memorandum from M.A. Cohen, Deputy Minister of EMR, to Minister, June 22, 1978, Doc. # 77.

⁸⁶ Briefing Note prepared by D.G. Crosby (March 13, 1979), Doc. # 79.

⁸⁷ This position was based on the September 16, 1977 "Kingston Communiqué", a series of policies formulated by the federal Conservative party in which provincial ownership of offshore mineral resources was recognized. See Doc. # 82.

⁸⁸ Letter from Prime Minister Clark to Premier Peckford (September 14, 1979), Doc. # 81; letter from Prime Minister Clark to Premier Buchanan (September 20, 1979), Doc. # 82.

80. In a letter to Premier Peckford dated September 14, 1979, Prime Minister Clark noted that it would be “necessary at some stage for representatives of adjoining provinces to get together with federal representatives to determine mineral resource delimitation lines between provinces in offshore areas.”⁸⁹
81. Federal officials recognized that, prior to any transfer of ownership, interprovincial boundaries would have to be established in the Gulf of St. Lawrence between Newfoundland, Quebec, Prince Edward Island, Nova Scotia and New Brunswick (if the Gulf was included in the transfer) and outside the Gulf of St. Lawrence between Newfoundland and Nova Scotia.⁹⁰ They also noted that Newfoundland and Labrador had proposed, as part of the provincial position on constitutional change, that interprovincial boundaries should be settled by arbitration.⁹¹
82. In March 1980, the Clark government was defeated and no further consultations took place.
83. In April 1980, Nova Scotia formally repudiated the 1977 Memorandum of Understanding and asserted jurisdiction over offshore oil resources to the limit of exploitability.⁹² In May 1980, the federal Minister of Mines, Energy and Resources told Premier Buchanan that Nova Scotia’s legislative initiatives were unconstitutional.⁹³

⁸⁹ Letter from Prime Minister Clark to Premier Peckford (September 14, 1979), Doc. # 81.

⁹⁰ Draft Discussion Paper (November, 29, 1979) at 6, Doc. # 83. See also Offshore Resources - Options prepared by the federal Department of Justice (July 9, 1979) at 9, Doc. # 80.

⁹¹ Draft Discussion Paper (November 29, 1979), Doc. # 83.

⁹² Memorandum to Minister of EMR (April 28, 1980), Doc. # 84; Memorandum of T.B. Smith, federal Assistant Deputy Attorney General (May 1, 1980), Doc. # 85; “N.S. bill isn’t laying claim to Hibernia find,” *Evening Telegram* (May 1, 1980), Doc. # 87.

⁹³ “Court battle threatened over N.S. petroleum resources act,” *Ottawa Citizen* (May 6, 1980), Doc. # 88.

84. In April, 1980, Newfoundland and Labrador announced that until the offshore dispute was resolved, the province was prepared to use its powers to “hold up commercial production of the Hibernia well.”⁹⁴
85. In July 1980, the federal-provincial Continuing Committee of Ministers on the Constitution and officials met to consider possible options to resolve the offshore resources issue. A report prepared by the Sub-Committee of Officials on Offshore Resources noted that there was a fundamental disagreement between the federal and provincial governments on the issue of ownership of offshore mineral resources. At this meeting, Newfoundland and Labrador proposed amendments to section 109 of the *Constitution Act, 1867* to the effect that the offshore area between provinces “be that area within lines drawn by agreement in accordance with principles of international law” and, failing agreement, by an arbitration process. The draft constitutional amendment read as follows:

109.2(1) The delimitation of the area adjacent or appurtenant to each Province shall as between adjacent or opposite Provinces, be that area within lines drawn by agreement in accordance with principles of international law.

109.2(2) If no agreement can be reached within a reasonable period of time, the Provinces concerned shall resort to arbitration, one member of the Arbitration Board being chosen by each Province, and one other or two others in the case of an even number either by agreement of the members of the Board or failing agreement by the Chief Justice of the Supreme Court of Canada.⁹⁵

86. In September 1980, at a subsequent constitutional conference, the Prime Minister presented a proposal for a joint management and revenue sharing arrangement in respect of offshore

⁹⁴ House of Commons Debates (May 1, 1980) at 604-605 (M. McGrath), Doc. # 86.

⁹⁵ Report to Ministers from the Sub-Committee of Officials on Offshore Resources (July 24, 1980) at 1-2 and Appendix I, Doc. # 89.

mineral resources. The Premiers of Newfoundland and Labrador and Nova Scotia publicly rejected the federal proposal.⁹⁶

87. However, during the constitutional conference in September 1980, Canada and Nova Scotia also met privately to work out a common position on offshore management and administration. Later, in September 1981, their officials began meeting to draft a bilateral agreement on joint management and revenue sharing of offshore mineral resources.⁹⁷

XI. Nova Scotia Agreement (1982)

88. The *Nova Scotia Agreement* was signed on March 2, 1982.⁹⁸ The *Agreement* represented a political settlement designed to avoid the necessity for a judicial determination regarding ownership of offshore resources. The federal government, through a cooperative management system, retained the ultimate power to control the development of the resources in the offshore area.
89. Schedule I of the *Nova Scotia Agreement* defined the “offshore region” covered by the *Agreement*. It contained a description of a line between Nova Scotia and Newfoundland and Labrador.

From this point [midpoint between Cape Anguille and East Point] the boundary runs southeasterly to the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland); thence to a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland); thence southeasterly to the outer edge of the continental margin....

⁹⁶ Minutes of Federal-Provincial Relations Meeting (September 19, 1980) at 2, Doc. # 90.

⁹⁷ Report by R.G. Blackburn, federal EMR (November 2, 1981), Doc. # 91.

⁹⁸ *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (March 2, 1982) ("*Nova Scotia Agreement*"), Doc. # 92.

Schedule I did not use the phrase "thence southeasterly to International waters" found in the 1964 Stanfield proposal. Unlike the 1969 list of Turning Points, which stopped at Turning Point 2017, the *Nova Scotia Agreement* described the line as extending "southeasterly to the outer edge of the continental margin."⁹⁹

90. The map attached to the *Nova Scotia Agreement*, which was meant to show "generally" the line described in the *Agreement*, was not precise. The map did not correspond with either the Stanfield map, the Turning Points map or even the description in the *Agreement* itself.¹⁰⁰
91. Schedule I also provided that if there was a dispute with any neighbouring jurisdiction the federal government could redraw the boundaries after consultation with the parties.

The outer limits of the offshore areas within which this agreement applies are as follows, provided that if there is a dispute as to these boundaries with any neighbouring jurisdiction, the federal government may redraw the boundaries after consultation with all parties concerned: ...¹⁰¹

92. In September 1982, Newfoundland and Labrador condemned the *Nova Scotia Agreement*, in particular, its management and revenue sharing aspects. The Province viewed these as tantamount to transferring complete control to the federal government which was "completely inappropriate and thus inadequate" for Newfoundland and Labrador.¹⁰² One of the problems with the *Agreement*, according to a Newfoundland and Labrador analysis, was that it left the boundary between provinces to be resolved by the federal government.¹⁰³

⁹⁹ See paragraphs 35 and 45 and Docs. # 15 and # 32.

¹⁰⁰ See Figure 5.

¹⁰¹ Schedule I, *Nova Scotia Agreement*, Doc. # 92.

¹⁰² Statement by W. Marshall, Minister Responsible for Energy (September 1, 1982) at 2, Doc. # 94.

¹⁰³ N&L Analysis of *Nova Scotia Agreement* (August 1982) at 43, Doc. # 93.

93. Prior to the enactment of legislation implementing the *Nova Scotia Agreement*, G. Booth of Canada Oil and Gas Lands Administration, the federal agency designated to administer offshore activities, asked W.V. Blackie, Surveyor General and Director of the Legal Surveys Division, Department of Energy Mines and Resources, to plot interprovincial boundary lines (and calculate grid areas) based on the description in the Stanfield submission.¹⁰⁴ Blackie responded in November 1983 that the description in some places was vague and that he had to make certain assumptions. In his report, Blackie made the assumption that the description of the southerly part of the line between Newfoundland and Labrador and Nova Scotia contained in the Stanfield submission was a line having an azimuth of 135°.

It should be noted that the descriptions of boundaries in the above document is subject to a certain amount of interpretation. For instance could the location of deflection point halfway between St. Paul Island (N.S.) and Cape Ray (Nfld.) vary by more than 1 km depending on whether the centre of the island or the most northerly point is used. This was discussed with you before calculations were commenced and the decision was that we would work from the deflection points previously plotted for you and shown on the NTS 1:250 000 mapping submitted with your request.

The coordinates which were more or less arbitrarily accepted as deflection points are:

47° 45' 56"	60° 23' 59"
47° 24' 41"	59° 43' 50"
46° 55' 28"	59° 01' 02"

As stated above, these coordinates are subject to interpretation and may vary as much as 30" in either direction.

The southerly part of the boundary between Nova Scotia and Newfoundland described as: thence south easterly to International waters (from a point midway between Flint Island (N.S.) and Grand Bruit (Newfoundland), was assumed to be a line having an azimuth

¹⁰⁴ W.V. Blackie to G. Booth (November 24, 1983), Doc. # 97.

of 135°00'00" from the point having the geographic coordinates 46°55'28", 59°01'02."

The lines between deflection points and the line having an azimuth of 135° 00' 00" were then intersected with the boundaries of grid areas and the areas of partial grid areas were calculated.¹⁰⁵

94. In April 1984, Blackie responded to a second request from Booth to calculate the line between Newfoundland and Labrador and Nova Scotia specifically as it was described in Schedule I of the *Nova Scotia Agreement*. Blackie recognized that the description was "vague" and required changes:

We have plotted the offshore boundaries from the description you supplied. However, we found the description in many places vague and have shown in red on a copy the changes that should improve it...¹⁰⁶

95. In June 1984, Canada and Nova Scotia both enacted legislation to implement the *Nova Scotia Agreement*.¹⁰⁷ Both statutes contained the following description of the outer limit of the offshore area between Newfoundland and Labrador and Nova Scotia:

[from the midpoint of a line drawn between East Point and Cape Anguille] thence southeasterly in a straight line to a point at latitude 47° 25' 28" and longitude 59° 43' 33", being approximately the midpoint between St. Paul Island (N.S.) and Cape Ray (Nfld.);

¹⁰⁵ *Ibid.*

¹⁰⁶ Letter from W.V. Blackie to G. Booth (April 16, 1984), Doc # 98.

¹⁰⁷ *An Act respecting the Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*, S.C. 1984, c.29, was passed by the House of Commons in June 1984. *An Act Respecting the Canada-Nova Scotia Offshore Agreement*, S.N.S. 1984, c.2 was also passed by the Nova Scotia House of Assembly in June 1984. See Statutes, # 2 and # 3.

thence southeasterly in a straight line to a point at latitude 46° 54' 50" and longitude 59° 00' 30", being approximately the midpoint between Flint Island (N.S.) and Grand Bruit (Nfld.);

thence southeasterly in a straight line and on an azimuth of 135° 00' 00" to the outer edge of the continental margin...

Inexplicably, the statutes omit any reference to a dispute resolution mechanism.¹⁰⁸

96. Neither Canada nor Nova Scotia sought the concurrence of Newfoundland and Labrador to the line set out in the *Nova Scotia Agreement* and in the implementing legislation.

XII. The Atlantic Accord (1985)

97. In the early 1980s, petroleum companies, anxious to avoid delays in offshore exploration, continued to press Canada and Newfoundland and Labrador to resolve their dispute over offshore jurisdiction. In the fall of 1981, bilateral negotiations were commenced and in January 1982, Newfoundland and Labrador presented a formal proposal to the federal government.¹⁰⁹ However, further discussions were inconclusive.
98. In April 1982, immediately after a provincial election, Newfoundland and Labrador referred the question of offshore ownership to the Newfoundland Court of Appeal. Canada responded by immediately referring a similar question directly to the Supreme Court of Canada.¹¹⁰

¹⁰⁸ *ibid.*

¹⁰⁹ Statement by W. Marshall, N&L Minister Responsible for Energy (September 1, 1982) at 2, Doc. # 94.

¹¹⁰ L. Barry, "Offshore Petroleum Agreements: An Analysis of the Nova Scotian and Newfoundland and Labrador Experience," in J. O. Saunders ed., *Managing Natural Resources in a Federal State* ed. (Carswell: Toronto, 1986) 177, Authorities, # 22.

99. In the fall of 1982, Ottawa tried to dissuade Newfoundland and Labrador from the court action by proposing a federal-provincial arrangement similar to the *Nova Scotia Agreement*, but this offer was rejected.¹¹¹
100. On February 17, 1983, the Newfoundland Court of Appeal held that the resources of the territorial sea belonged to Newfoundland and Labrador, while the resources of the continental shelf did not.¹¹² On March 8, 1984, the Supreme Court of Canada also recognized Canada's rights over the resources of the continental shelf.¹¹³
101. In September 1984, following the election of the federal Conservative government, negotiations with Newfoundland and Labrador on offshore issues began.¹¹⁴
102. On February 11, 1985, Canada and Newfoundland and Labrador signed the *Atlantic Accord*.¹¹⁵ The *Accord* did not address the issue of ownership, but instead outlined a comprehensive joint regime for the management of offshore petroleum resources and

¹¹¹ Counter-Proposal on Offshore Oil and Gas Resource Management and Revenue Sharing (September 2, 1982), Doc. # 95; Statement by Premier Peckford (October 6, 1982), Doc.# 96.

¹¹² *Reference re: Mineral and Other Natural Resources of the Continental Shelf* (1983), 41 Nfld. & P.E.I.R. and 119 A.P.R. 271 at 296, Authorities, # 6.

¹¹³ *Reference: re Mineral and Other Natural Resources of the Continental Shelf*, [1984] 1 S.C.R. 86, Authorities, # 8. The Supreme Court of Canada was not asked to express an opinion on the territorial sea.

¹¹⁴ In early 1984, Brian Mulroney, the Leader of the federal Opposition, promised Newfoundland and Labrador that, if the Conservative party was elected, ownership of the offshore mineral resources would be transferred to the Province. After the Supreme Court had rendered its opinion, but before the federal election was called, Mulroney advised Premier Peckford he was no longer able to fulfill his promise to transfer ownership, but he still recognized the right of Newfoundland and Labrador to be the "principal beneficiary" of its offshore mineral resources. See letter from B. Mulroney to Premier Peckford, June 14, 1984, Doc. # 99.

¹¹⁵ *Atlantic Accord* (February 11, 1985), Doc. # 100.

associated revenue sharing to be implemented by provincial and federal legislation. The key administrative agency was a joint regulatory board, the Canada-Newfoundland Offshore Petroleum Board.

103. The *Atlantic Accord* defined the offshore area as follows:

68. The area covered by this Accord is that area below the low water mark lying off the coast of Newfoundland and Labrador out to the outer edge of the continental margin, coming within Canada's jurisdiction being north and east and south of the appropriate lines of demarcation between Newfoundland, the adjacent provinces, and the Northwest Territories.¹¹⁶

104. Under the terms of the *Atlantic Accord*, the federal government and Newfoundland and Labrador agreed to introduce legislation to implement the *Accord* within one year.

105. By January 1986, draft legislation had been prepared. The Newfoundland and Labrador draft contained a tentative definition of the offshore area with an accompanying notation: "this definition needs to reviewed."¹¹⁷ In a memorandum to the President of the Council, Ronald Penney, a Newfoundland and Labrador legal adviser involved in the drafting, explained that the line between Newfoundland and Labrador and Nova Scotia had not yet been resolved. Thus, the Province wanted an arbitration process in the implementing legislation.

¹¹⁶ *Ibid.*

¹¹⁷ N&L Draft Atlantic Accord Bill, January 6, 1986, Doc. # 103. "Offshore area" was defined as :

those submarine areas lying seaward of the low water mark off the province and extending, at any point as far as (1) any line prescribed by the Governor General in Council with the consent of the Provincial Minister...or (2) where no line is prescribed at that point, the outer edge of the continental margin or a distance of two hundred nautical miles from the baseline from the whole breadth of the territorial sea of Canada as measured, whichever is the greater.

There is one further small point which is still at issue. The specific boundary lines between the offshore areas of the various provinces must be defined in the future. The federal government wishes to authorize a federal official, the Surveyor General of Canada, to make this determination in the absence of provincial agreement. We would prefer an arbitration process. However, there is a legitimate federal concern that an arbitration process might prejudice the St. Pierre negotiations.¹¹⁸

106. The federal legislation implementing the *Atlantic Accord* contains the following description of the “offshore area”:

"offshore area" means those submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as

(a) any prescribed line, or

(b) where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater.¹¹⁹

The implementing legislation for the *Atlantic Accord* also provided for an arbitration process as had been requested by Newfoundland and Labrador.¹²⁰

107. A “clause by clause” annotation of the federal implementing legislation, prepared by federal officials, provides an explanation of the drafters’ intent. It was noted that the “offshore area” could not be defined since Newfoundland and Labrador and Nova Scotia disagreed on the line. The annotation stated:

¹¹⁸ Memorandum from R. Penney to W. Marshall, President of the Council (January 6, 1986) at 3, Doc. # 102.

¹¹⁹ See Statutes, # 5, s.2. The provincial implementing legislation is essentially the same. See Statutes, # 4, s.2.

¹²⁰ See Statutes, # 4, s.6 and Statutes, #5, s.6.

“offshore area” The area is intended to be defined by way of regulations subsequent to the proclamation of legislation. The area could not be precisely defined in the legislation as there is, at present, a dispute between the provinces of Newfoundland and Nova Scotia in respect of the boundary line between the 2 provinces.¹²¹

XIII. The Nova Scotia Accord (1986)

108. Within a few months after the signing of the *Atlantic Accord*, Nova Scotia entered into negotiations with the federal government to change the *Nova Scotia Agreement* in light of the *Atlantic Accord*.
109. With respect to the offshore area to be covered, federal officials proposed a definition that mirrored Clause 68 of the *Atlantic Accord*:

The area covered by this Accord is that area below the low water mark lying off the coast of Nova Scotia out to the outer edge of the continental margin, coming within Canada’s jurisdiction being north and east and south of the appropriate lines of demarcation between Nova Scotia, and the adjacent provinces.¹²²

110. Nova Scotia officials, on the other hand, insisted on the definition of “offshore area” found in the *Nova Scotia Agreement* implementing legislation. Federal officials noted:

As Newfoundland disputes the seaward extension of the line indicated in the 1982 Canada/Nova Scotia Agreement, discussions

¹²¹ Federal Briefing Book, Canada-Newfoundland Atlantic Accord Implementation Act (Bill C-94) (June 16, 1986), Doc. # 107

¹²² Extract from federal Briefing Book Prepared for Federal-Provincial Meeting (October 15, 1985), Doc. # 101.

between Newfoundland and Nova Scotia may be required to resolve the inter-provincial boundary.¹²³

111. Successive federal drafts of the proposed *Nova Scotia Accord* included provisions whereby the line between Newfoundland and Labrador and Nova Scotia could be settled by an arbitration process. The Nova Scotia drafts were similarly worded, but did not specify the type of dispute resolution or the choice of law.¹²⁴
112. In May 1986, federal officials met with Nova Scotia officials to review the federal and provincial drafts. In a briefing note prepared by federal officials, the boundary dispute was described as follows:

Both the federal and provincial approaches to resolving a boundary dispute first involve the federal government attempting to bring about a reconciliation by negotiation. If this fails, at such time as deemed appropriate by the federal minister, the dispute will be referred to third-party settlement. The only substantive difference between the federal and provincial text is that Nova Scotia's approach would permit the parties jointly to settle on the procedure to resolve the dispute and the timing of invocation of the procedure. To allow this would be to permit Nova Scotia to tie up indefinitely a dispute involving another province.

The approach set out in legislation implementing the Atlantic Accord maintains for the federal minister both the ability to set the timing of the resolution of any dispute and the procedures for settlement. As the method by which any dispute is to be settled could have implications for Canada's international boundaries, it is

¹²³ Extract from federal Briefing Book Prepared for Federal-Provincial Meeting (October 15, 1985), Doc. # 101.

¹²⁴ Federal Briefing Book: Draft Canada-NS Offshore Petroleum Resources Accord (February 13, 1986), Doc. # 104; Federal Briefing Book: Draft Canada-NS Offshore Petroleum Resources Accord (April 10, 1986), Doc.# 105.

recommended that we hold to the approach set out in the Atlantic Accord legislation.¹²⁵

113. On August 26, 1986, Canada and Nova Scotia signed the *Nova Scotia Accord*, which was modelled on the *Atlantic Accord*.¹²⁶ The *Nova Scotia Accord* provided for the creation of the Canada-Nova Scotia Offshore Petroleum Board with powers similar to those of the Canada-Newfoundland Offshore Petroleum Board.
114. Article 43 of the *Nova Scotia Accord* contained the following description of the offshore area and the dispute resolution mechanism:

43.01 The Offshore Area described in the *Canada-Nova Scotia Oil and Gas Agreement Act* except for the portion thereof under United States jurisdiction in accordance with the decision of October 12, 1984 of the International Court of Justice in the *Gulf of Maine* case, shall constitute the Offshore Area for the purposes of this Accord.

43.02 Where a dispute arises with a neighbouring province as to the boundaries of the Offshore Area and the Government of Canada is unable, by means of negotiation, to bring about a resolution of the dispute within a reasonable time, the dispute shall, at such time as the Federal Minister deems appropriate, be referred to an impartial person or body for settlement, as determined in accordance with Article 43.03.

43.03 For the purposes of this Article, the person, tribunal or body to which a dispute is to be referred, the constitution and membership of any tribunal or body and the procedures for the settlement of a dispute shall be determined by the Federal Minister after consultation with the provinces concerned in the dispute.

43.04 Where the procedure for settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the

¹²⁵ Federal Briefing Book: "Meeting with Mr. Matheson" (May 28, 1986), Doc. # 106. Joel Matheson was the NS Minister of Mines and Energy.

¹²⁶ *Nova Scotia Accord* (August 26, 1986), Doc. # 108.

principles of international law governing maritime boundary delineation, with such modifications as the circumstances require.¹²⁷

115. Thus, the 1986 *Nova Scotia Accord* incorporated the line described in the implementing legislation for the 1982 *Nova Scotia Agreement*.¹²⁸ The *Accord* also provided for dispute settlement in the event of a dispute with a neighbouring province over a boundary in the offshore area.
116. At the time of the passage of the federal and provincial legislation implementing the *Nova Scotia Accord*, it was clear that the boundary in the offshore area between Newfoundland and Labrador and Nova Scotia had not been resolved.

XIV. Subsequent Events

117. From 1987 to 1992, there were no discussions between the federal government, Newfoundland and Labrador and Nova Scotia relating to the offshore boundary between the provinces. Ottawa's energies were focussed on resolving the Canada - France (St. Pierre and Miquelon) dispute. However, it was recognized that once this dispute was resolved, Newfoundland and Labrador and Nova Scotia would have to settle the offshore interprovincial boundary.
118. On March 27, 1992, federal officials met with officials from Newfoundland and Labrador and Nova Scotia. At this meeting, a Nova Scotia official stated that the offshore boundary with Newfoundland and Labrador was properly set out in the "Nova Scotia Accord

¹²⁷ Doc. # 108.

¹²⁸ See Figure 6.

legislation." Newfoundland and Labrador did not agree. Federal officials suggested that the three governments reconvene to discuss the matter as soon as possible.¹²⁹

119. On June 10, 1992, the Court of Arbitration rendered its decision in the dispute between Canada and France over the maritime boundary around St. Pierre and Miquelon.
120. In August 1992, the federal Minister of Energy, Mines and Resources, Jake Epp, wrote to three resource companies holding federal permits in the area offshore Newfoundland and Labrador to advise that the prohibition on drilling activity in the disputed waters south of Newfoundland and Labrador and St. Pierre and Miquelon, which had been in effect since 1967, had expired as a result of the recent decision of the Court of Arbitration. Minister Epp assured the companies that as soon as the interprovincial boundary between Nova Scotia and Newfoundland and Labrador had been agreed upon, the Canada-Nova Scotia Offshore Petroleum Board and the Canada-Newfoundland Offshore Petroleum Board would begin negotiations for the conversion of their exploration permits to exploration licences. Similar letters were written to both boards.¹³⁰
121. Minister Epp also wrote to John Leefe, Nova Scotia Minister of Mines and Resources, and Rex Gibbons, Newfoundland and Labrador Minister of Mines and Energy, to propose that officials be designated "to immediately begin discussions regarding the determination of the offshore boundary as provided for under the Accord Implementation Acts."¹³¹
122. In October 1992, provincial officials held a meeting to discuss the offshore boundary dispute. At the meeting, Newfoundland and Labrador officials asked Nova Scotia officials to provide them with background information relating to the line that Nova Scotia alleged had been

¹²⁹ Memorandum from P. Laracy, N&L to D. Hawkins, N&L (April 16, 1992), Doc. # 109.

¹³⁰ Letters from J. Epp to C.E. Schultz (August 6, 1992), Doc.# 110.

¹³¹ Letters from J. Epp to R. Gibbons and J. Leefe (August 6, 1992), Doc. # 111.

agreed to. In November 1992, Carey Ryan, Executive Director of the Nova Scotia Department of Mines and Resources, sent documentation on the Stanfield proposal to Martin Sheppard, Newfoundland and Labrador, Assistant Deputy Minister of Mines and Energy. Ryan advised Sheppard that these documents constituted the only information Nova Scotia was able to retrieve from its files.¹³² The following documentation was enclosed:

(1) A partial copy of the Stanfield proposal with a copy of the map (Schedule B). The Notes (Schedule A) were not attached.

(2) The September 30, 1964 statement issued by the Premiers.

(3) The October 2, 1964 letter from Premier Stanfield to Premier Lesage (without attachments); the October 7, 1964 telegram from Premier Lesage to Premier Stanfield; and the October 8, 1964 reply from Premier Stanfield to Premier Lesage.

(4) The Turning Points List prepared by the JMRC technical committee in 1969.

(5) The first two pages of an undated report prepared by Nova Scotia officials about the JMRC.

123. Although there was correspondence back and forth between the federal government and Newfoundland and Labrador and Nova Scotia about resolving the offshore boundary dispute, no progress was made between November 1992 and June 1998.

124. In June 1998, Ralph Goodale, federal Minister of Natural Resources, wrote to Premier Tobin of Newfoundland and Labrador and Premier MacLellan of Nova Scotia to advise that if the

¹³² Letter from P. Carey Ryan to M. Sheppard, November 3, 1992, Doc. # 112.

two provinces could not reach an agreement acceptable to the federal government by August 31, 1998, he would exercise his authority under the implementing legislation and refer the matter to arbitration.¹³³

125. In August 1998, Premiers Tobin and MacLellan announced they had agreed to resolve the issue by arbitration.¹³⁴

126. On May 31, 2000, Minister Goodale issued the Terms of Reference for the arbitration.¹³⁵

¹³³ Letter from R. Goodale, federal Minister of EMR, to Provincial Premiers (June 16, 1998), Doc. # 113.

¹³⁴ N&L and NS News Releases (August 6, 1998), Doc. # 114.

¹³⁵ Letter from R. Goodale, federal Minister of EMR, to Provincial Premiers (May 31, 2000), Doc. # 115.