NEWFOUNDLAND AND LABRADOR – NOVA SCOTIA

Case Concerning The Line Dividing Their Respective Offshore Areas

THE CONCLUSION OF THE *1964 AGREEMENT*

Comprising a review of facts and events leading up to and surrounding the conclusion of the *1964 Agreement* and an analysis of the Agreement itself

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Submissions by

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12 March 2001

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INTRODUCTION

A) CONSIDERING THE FACTUAL RECORD

- Nova Scotia encourages the Tribunal to engage in a careful and full reading of the documents that make up the historical record.
  - A consideration of **the facts in their entirety**.
  - An appreciation of the full weight of the evidence, including accumulated weight of over 30 years of practice.
- The question to be determined by the Tribunal – whether the line has been resolved by Agreement – requires an appreciation of the big picture. **The whole picture**.
  - An examination of **specific elements** of the factual record and also a **broader perspective**.

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- The significance of particular facts considered as part of larger fact – "the whole truth" – "dots/strokes in a painting".

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* In these notes: "NS" refers to Nova Scotia; "N&L" refers to Newfoundland and Labrador; "NSM" refers to the Nova Scotia Memorial; "NSCM" refers to the Nova Scotia Counter-Memorial; "N&LM" refers to the Newfoundland and Labrador Memorial; and "N&LCM" refers to the Newfoundland and Labrador Counter-Memorial. "**Annex**" refers to the Annexes filed by Nova Scotia with its Memorial and Counter-Memorial. "**Doc.**" refers to the documents filed by Newfoundland and Labrador in support of its written submissions.

- Yes, there are gaps in the historical record.

  - The documents filed by the parties span over 30 years (specifically in regard to negotiations between the Provinces and Canada on ownership of offshore mineral rights).

  - Governments changed. Politicians and officials changed. Institutional memory over the years not always seamless, and the knowledge of particular events by particular individuals, years afterward the events, not always complete. The facts themselves, however, have not changed.

  - There are documents that refer to other material that has not been found. There are periods for which relatively little material has been filed by the parties. There is even evidence in the record that politicians and officials of the day themselves acknowledged that their files were not complete (and even newly-elected Premier Moores being reminded by Minister Doody that interprovincial offshore lines had been determined some time ago).

  - The fact is that there is no single source – whether in Halifax, St. John's or Ottawa – of documents that record the deliberations, negotiations, views of the governments concerned.

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- What the Tribunal has before it is **as complete a record as can be compiled**. When considering the record, focus not on the gaps, but on the composite picture that emerges:

  - As noted by ICJ in the *Fisheries Case* (UK v. Norway, ICJ Rep 1951 at p. 138):

    "... **it is impossible to rely upon a few words taken from a single note** to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.

    The Court considers that **too much importance need not be attached to the few uncertainties or contradictions, real or apparent,** which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the **variety of facts and conditions prevailing in the long period which has elapsed** since 1812 ..."

- As in that case, the Tribunal should not attach too much importance to "**the few uncertainties or contradictions, real or apparent**" in the record. "They may be easily understood in the light of the variety of facts and conditions prevailing in the long period which has elapsed," in the present case, between the 1950s and today.

- To this end, my colleagues and I, on behalf of Nova Scotia, encourage the members of the Tribunal to ask questions during our submissions. We welcome the opportunity to assist the Tribunal, wherever possible, to resolve any uncertainties regarding the factual record, in particular as regards the nature and significance of the events associated with the question that you have been mandated to resolve.

- Although questions of law are to be dealt with by V. Hughes, one issue is worth addressing now, as it applies to the use of the evidence.

  - N&L purports to distinguish evidentiary rules re. the manner in which the "**formation**" and the "**interpretation**" of agreements is proved. (N&LCM, paras 119-120)

  - N&L claims that it is "**self-evident**" that the evidentiary method used to **interpret** an agreement – including an examination of the plain words and the object and purpose of relevant documents, as well as subsequent conduct of parties – cannot also be used to assess the parties' **intent** at the time of formation.

  - **Must** be "self-evident", as N&L provides no evidence, no authority in support of its claim.

  - Where, as here, **all of the evidence is documentary**, how can the Tribunal determine the parties' intent at moment of formation of an agreement?

  - The answer, of course, is to consider the documents – to see what they can teach us as to the intentions of the parties. *I.e.*, to **interpret** them, in good faith. And interpretation includes, as N&L states, plain words, object and purpose and subsequent conduct.

B) NOVA SCOTIA'S ORAL SUBMISSIONS ON THE FACTS

- Evidence of the parties' boundary agreement will be assessed chronologically in NS' oral submissions – by S. Drymer, J. Bertrand; P. Saunders will address the matter of permit issuance as a particular example of the parties' conduct, separately.

- With rare exception – what might be called "uncertainties or contradictions, real or apparent" of no material importance to the central question to be determined by the Tribunal – all of the facts adduced by the parties, considered in their proper context and in relation to each other, point to one single conclusion:

  - **In 1964, Nova Scotia and N&L concluded a binding agreement regarding the line dividing their respective offshore areas.**

  - Yes, the parties discussed other matters too during the relevant period, as is described in Nova Scotia's written submissions and as will be discussed by my colleagues and me. But as to the question:

    Did Nova Scotia and Newfoundland conclude an Agreement resolving their offshore boundary? ...

    ... the answer must be: ***Yes***

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- Specifically, the facts reveal that, in agreeing on their mutual boundary, the parties:

  1. **Intended** to conclude, and did conclude, a binding agreement (an agreement; *not* a proposal);

  2. Delimited the **entirety of their mutual boundary**, out to the limits of the continental shelf subject to Canadian jurisdiction at international law (*not* just the Gulf of St. Lawrence);

  3. Described their boundary **accurately and completely** (*not* in a vague or indeterminate manner);

  4. Regarded the agreement between them as **of immediate effect** (*not* conditional on approval by the federal government);

  5. Considered their agreed boundaries applicable to **all forms** of rights, jurisdiction or administrative arrangements relating to the mineral resources of the continental shelf (*not* only in the context of "ownership") ...

  6. ... **and only** to rights, jurisdiction or administrative arrangements relating to the mineral resources of the shelf (just as in the **present-day** *Accords*)

- These six themes will be recalled throughout NS' review of facts.

C) SUBMISSIONS RE. THE CONCLUSION OF THE *1964 AGREEMENT*

- Four relevant periods / four main events will be considered:

  1. The Provinces' **initial discussions** of mineral rights and interprovincial offshore boundaries – **1958 to 1964**;

  2. The conclusion of the ***1964 Agreement*** – **September 30, 1964**;

  3. The accession of **Québec** – **October 7, 1964**; and

  4. The Provinces' submission presented to the federal-provincial Conference of **October 14-15, 1964** – the ***Joint Submission***.

     (The *Joint Submission* not part of the "conclusion" of *1964 Agreement*, but it is so close in time to the relevant events that it is useful to deal with it here, rather than as part of our later submissions re. events subsequent to 1964).

- Effort has been/will be made to meld the documents filed by each party, found in numerous archives, into a **single, coherent account** of the relevant facts surrounding the conclusion of the *1964 Agreement*.

  - Each party has filed documents not filed by the other ...

  - ... and each party paints a different picture of what actually happened on September 30, 1964.

  - Here, will bring together – unify – the divergent themes, the various strands of the story, to present a comprehensive, lucid and (we believe) convincing account of the seminal events of 1964.

  - What's more, as a good friend of mine is fond of saying, «*ç'à l'avantage d'être la vérité*» – this account of the facts **has the advantage of being the truth**.

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1. INITIAL DISCUSSIONS OF MINERAL RIGHTS AND INTERPROVINCIAL OFFSHORE BOUNDARIES – 1958 to 1964

(NSM, Part II, paras. 9-16)

- The issue of interprovincial boundaries in the offshore first arose in **1958**, and it remained on the common agenda of the Atlantic Provinces throughout the period leading up to the conclusion of the *1964 Agreement.*

- While the actual boundaries were fleshed out in meetings of senior Ministers and officials, the forum in which the issue **originated** and to which recommended boundaries were **submitted for agreement**, was the annual **Conference of Premiers of the Atlantic Provinces**.

A) EARLY EFFORTS TO DEVELOP BOUNDARIES

(NSM, Part II para 9)

- 1958 -

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- The matter seems to have been raised initially at the Conference of Atlantic Premiers, attended by **Premier Smallwood** on behalf of N&L, in **September 1958.**
(Annex 8)

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- Then, as now, the issue revolved around the **issuance of permits** to conduct mining operations and to explore for oil and gas.

  - In fact, the **earliest known reference** to the matter of interprovincial offshore boundaries is framed as:

"**the question of a boundary line between the Provinces as it related to authority to grant mining licenses and leases.**"
(Annex 8)

- 1959 -

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[SLIDE 11]

- The matter of boundaries was again raised the following year at the Conference of Atlantic Premiers, held in Fredericton, NB on **September 22, 1959,** again with N&L **Premier Smallwood** in attendance.
(Annex 9)

  - At that Conference, the Provinces considered legal advice provided to them, to the effect that they owned, or had grounds to **claim from the Government of Canada**, the subsoil extending from their shores to **up to two hundred miles into the Atlantic**.
(NSM Part II para 9) (Annex 10)

  - In an ideal world, of course, the Provinces' jurisdictional claims – based on legal, equitable and political grounds – would have been recognized by Canada; and their eventual request that this recognition be formalized under s. 3, *BNA Act, 1871* (discussed *infra*) would have been accepted by the federal government.

  - The Provinces had good arguments to make in this regard, and good reason to believe that those arguments would eventually prevail if they chose to make them. But whether this was the route taken, and where that route would lead, were, at the time, up in the air.

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[SLIDE 13]

  - It is interesting to note that, during this period, the provincial stand regarding "this whole question" of **federal *vs.* provincial jurisdiction** was recognized as distinct from "**the question of boundary divisions between the Provinces**".
(Annex 8, p. 2 para "1.")

- 1960 -

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[SLIDE 15]

- Boundaries were again briefly considered at the Atlantic Premiers' Conference (which **Premier Smallwood** attended) held in Halifax on **September 21, 1960** ...
(Annex 11; Annex 12)

- ... and at a meeting of the Ministers of Mines of all 10 Provinces, in Québec City in **October 1960**.
(N&L Doc. 1, para 1)

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- Here again, "**the relations between provinces**" was distinguished from relations "**between the provinces and the Federal Authority**" regarding "off-shore mineral rights".
(N&L Doc. 1, para 2; also para 1 "The Ministers of Mines ...")

- It was recognized that "[i]n the event that any **mineral find** took place ... it might be of the utmost importance that **the provinces concerned were in agreement on their respective rights** in advance of any discovery."
(N&L Doc. 1, para 2)

- Clearly, **permit issuance** relating to oil and gas remained a driving factor in 1960.
(N&L Doc. 5, para 2 "I contacted ...")

- 1961 -

- Work on interprovincial boundaries began in earnest in **1961**.

B) THE JUNE 28, 1961 MEETING OF THE ATLANTIC PROVINCES A-GS

(NSM, Part II, paras. 12-13)

- The matter was taken up at a **Meeting of the A-Gs of the Atlantic Provinces** held in Halifax on **June 28, 1961.** In attendance for N&L was its A-G, **Hon. Leslie Curtis**.
(Annex 16; Annex 17)

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[SLIDE 18]

- At the A-Gs' Meeting, it was agreed that the Provinces "**should first of all agree among ourselves upon inter-provincial boundaries** ..."
(Annex 16, p. 2 para 1)

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[SLIDE 20]

- Already, the Provinces were contemplating a "**presentation** [to the Government of Canada] **to be made by the four Premiers**".
(N&L Doc. 2, p. 2 para 1)

- The issue of the Provinces' jurisdictional claim to "ownership" was described as relating expressly to "**Oil, Gas and Mineral Rights**".
(N&L Doc. 2, p. 1 para 8)

- These rights were to be claimed "**along boundary lines to be decided upon between these Provinces.**"
(N&L Doc. 2, p. 1 para 8)

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- Those boundaries were regarded as necessary, in part, to manage "**exploration activities**".
(N&L Doc. 2, p. 1 para 5)

- And the question of mineral rights and, hence, the boundaries along which they would be claimed, covered "the **Continental Shelf** which

extends out in the Gulf of St. Lawrence **as well as out in the Atlantic Ocean.**"
(N&L Doc. 2, p. 1 para 4)

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- An internal N&L Memorandum, dated June 29, 1961, discloses the same.
(N&L Doc. 3)

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- The granting of "**off-shore mineral concessions**" ...
(N&L Doc. 3 para 1)

- ... drove discussions of the Provinces' rights over the "**Continental shelf**".
(N&L Doc. 3, para 1)

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- The Provinces' "**immediate object**" was to determine "**the interests of each** on waters between their two Provinces, the idea being to **draw a centre line**" ...
(N&L Doc. 3 para 2)

- ... in relation to "**mineral and oil rights**" ...
(N&L Doc. 3 para 2)

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- ... so that, eventually, that "line" could **also** be used in a request to the federal government "to have those areas declared to be **Provincial rights** ..."
(N&L Doc. 3 para 3; see also N&LCM para 129)

- Note: The A-Gs regarded that it was necessary for the Provinces to agree among themselves – "**first of all**" – on interprovincial offshore lines, both for the purpose of granting permits and so as to support an eventual submission

of the Provinces' jurisdictional claim to the federal government – **not** (as N&L now argues) **the reverse**.

- At their June 28, 1961 meeting, the A-Gs recommended:

  first, conclude an agreement on offshore lines, delimiting the Provinces' offshore mineral rights *inter se*;

  then, use that agreement in support of a jurisdictional claim to define the exact nature of those rights.

- This is **exactly what happened**.

- Further, as regards a potential request to the federal government to legislate boundaries agreed by the Provinces, it is interesting that, at the time, the Provinces clearly **misunderstood** the pertinent clause in the *BNA Act, 1871*.

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[SLIDE 27]

- Apparently, certain Provinces were operating under the false assumption that "**Ottawa would be bound to accept**" whatever boundary lines were agreed by the Provinces.
  (N&L Doc. 4, p. 2 para 1)

- Contrary to their stated understanding, however, agreement on a boundary by the Provinces concerned would *not* automatically "**be accepted by the Federal Government upon proper presentation.**"
  (N&L Doc. 5, p. 1 para 5)

- Their analysis of the role of the federal government, and their understanding of what it meant to request federal legislation to alter provincial boundaries was **in error**.

- Section 3 of the *BNA Act, 1871*, provides that Parliament "**may**" – not shall – "increase, diminish or otherwise alter the limits of [a] Province, upon such terms and conditions as may be agreed to by the ... Legislature [of such Province]."

- And history has shown that the federal government **did not** consider itself "bound to accept" the agreement on boundaries eventually concluded between the Provinces.

- More particularly, given that it did not accept the Provinces' **jurisdictional claims**, it did not consider itself bound to legislate the offshore lines agreed by the Provinces, which covered the entire offshore, in a manner to **recognize those claims.**

- Nonetheless, at the time, certain Provinces believed that presenting an interprovincial agreement to the Government of Canada would inevitably result in the "alteration" of the Provinces' boundaries under the Constitution.

  - Federal legislation was regarded as a near **certainty**.

  - Clearly, it was *not* seen as a **condition** to the Provinces' developing boundary agreement.

C) THE 1961 "PLAN AND DESCRIPTIONS" OF PROVINCIAL BOUNDARIES

(NSM, Part II paras. 12-13)

[SLIDE 28] **(on side screen)**

[SLIDE 29]
[SLIDE 30]

- As agreed at the June 28, 1961 meeting of A-Gs, Nova Scotia (the host of the meeting) had its Dept. of Mines prepare "**a plan and descriptions delineating the boundaries of the several Provinces of Quebec, Newfoundland, New Brunswick, Prince Edward Island and Nova Scotia.**"
(Annex 17, para 1)

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- These were transmitted to the A-Gs of those Provinces, for their consideration on **August 7, 1961** ...

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  - ... including to **Mr. Curtis of Newfoundland**,.
(Annex 17, para 2)

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- The understanding was that:

  - The boundaries "might be **agreed among the Provinces concerned** ..." (Annex 17, para 1)

  - "... and, **when agreement had been reached**, the several Provinces would approach the Federal Government ..." (Annex 17, para 1)

- The "plan and descriptions" enclosed were a document entitled "***Notes Re: Boundaries***" (describing the Provinces' boundaries by metes and bounds) and an accompanying **map** drawn on CHS Chart 4490. (Annex 18; Annexes 31 and 32)

  - These are **the same boundaries** that the Premiers of the five East Coast Provinces eventually "**unanimously agreed** ... [to] **be the marine boundaries of the Provinces**" in the *1964 Agreement* concluded on September 30, 1964 (discussed *infra*).

  - The **same boundaries** that are found, **today**, in legislation implementing the **Canada-Nova Scotia Accord**.

- (The ***Notes Re: Boundaries*** and **map** to be examined later, in the context of the Agreement concluded by the Premiers on **September 30, 1964** – the *1964 Agreement* – unless Tribunal wishes to do so here.)

D) THE MYSTERY OF "THE MISSING COMPASS ROSES"

- Before continuing, will address what N&L suggests to be (and old "Hardy Boys" fans might call) ***The Mystery of "the Missing Compass Roses"***. (N&LCM, paras. 59-60)

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- N&L accuses Nova Scotia of "**a significant omission**" in our Figure 4 (at NSM, Part II, p. 15), which is a scanned version of the map prepared in 1961 and later formally approved by the Premiers on September 30, 1964 (filed with NSM as Annex 32). (N&LCM, para 59)

- Specifically, Nova Scotia is accused of having "**failed to reproduce**" four *compass roses* (that appear on N&L's copy of the map), "while **at the same time preserving everything else** that is on the chart accompanying the Stanfield proposal."
(N&LCM, para 59)

- In fact, Figure 4 is an **accurate reproduction** of the map filed as Annex 32 to our Memorial, which in turn is a copy of the **only copy of the map in Nova Scotia's possession**.

- Apparently, our copy of the map was not as clear as the version provided to Newfoundland at the time, which it has filed with its Memorial (and misleadingly labelled, on the map itself, "Schedule B – Stanfield Proposal"; NSCM, Part III, paras. 45-47).

- And, contrary to Newfoundland's claim, **not only** the compass roses but also **other details** of the chart are missing (depth soundings; table comparing fathoms and feet to metres; much other detail).

- Further, N&L itself has **also** filed a copy of this map that is missing significant detail: Doc. 57, the map attached to a letter addressed to Nova Scotia by N&L Minister Doody (to be discussed by J. Bertrand).

- So: various copies of the **same map** seem to have been more or less refined. The copy in Nova Scotia's files was less clear than that in N&L's archives. Yet, even N&L's Minister of Mines could find no better copy when he needed one.

- Mystery solved.

- Of greater significance than the not-so-mysterious compass roses on Nova Scotia's Figure 4 is the fact that – as noted on Figure 4 itself – the 1961 map was prepared **prior to the identification of the geographic coordinates** of the boundary turning points.

  - The map was not intended to depict the boundaries with precision.

  - The **complete** and **accurate description** of the boundaries – including the Nova Scotia-Newfoundland line – was set out in the "description" contained in the *Notes Re: Boundaries*.

E) THE ATLANTIC PREMIERS' CONFERENCE OF AUGUST 1961

(NSM, Part II para 13)

- The boundary map transmitted to the Provinces on **August 7, 1961** was presented to and discussed by the Atlantic Premiers (including Premier **Smallwood**) at their annual **Conference, in Charlottetown**, a few days later.
(Annex 13, para 1)

F) THE A-GS' MEETING OF OCTOBER 7, 1961

- It appears that the boundary map was also presented to the A-Gs of the Atlantic Provinces at a meeting held in Halifax on **October 7, 1961**, at which "... **this boundary line was formerly (sic)** [formally] **accepted** ..."
(N&L Doc. 5, p. 1, last para)

  - (Perhaps N&L has a complete copy of p. 1 of this document – the version provided to Nova Scotia has most of last line cut off.)

- 1962 -

- In 1962, the Provinces were **still pondering** the "**question of policy**" regarding the Provinces' "**approach ... to the Federal authorities**" on the matter of provincial *vs.* federal rights to the offshore.
(Annex 16, p. 2 para 2)

  - This did not affect the separate initiative, recommended by the A-Gs in 1961, to "**first of all agree among ourselves on inter-provincial boundaries**."
(Annex 16, p. 2 para 1)

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- Several options were suggested, in 1962, as to the Provinces' "policy" or "approach" regarding their jurisdictional claims as against the Federal government:
(Annex 16, p. 2 para 2)

  - from:

    "**obtain agreement from the Federal authorities** that the Provinces should have the mineral rights in the submarine areas ..."

- to:

  "... let *'sleeping dogs lie"*

- Note: In 1962 it was suggested that ***if*** the Provinces chose to request federal recognition of their jurisdictional claims ... and ***if*** such recognition was granted (thereby solving the jurisdictional issue), then "***one way*** **of giving effect to this** would be a redelineation of the provincial boundaries ... under the [*BNA Act, 1871*]."

  - The question of **how to approach the federal government** was still very much **up in the air**.

  - Requesting federal "agreement" to the Provinces' jurisdictional claims was **one approach** considered – but such agreement was **far from certain**.

  - ***If*** the Provinces chose this route, and ***if*** the federal government accepted the Provinces' claims, then one – and only one – potential means of giving effect to that acceptance would be to "redelineate" the Provinces' boundaries to encompass the area claimed by them from Canada.

  - Meanwhile, an "agree[ment] among ourselves upon inter-provincial boundaries" continued to gain momentum.

  - Obviously, such an agreement was considered worthwhile **no matter** how – or even whether – it might ever be used in support of claims against the federal government.

- 1963 -

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- A **June 13, 1963** memorandum prepared for Premier Shaw of PEI stressed the need to resolve the boundary issue and also reflects the consistent view that this was a matter to be resolved **as between the Provinces**. (N&L Doc. 5)

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- The memorandum discloses that the file continued to be driven, in 1963, by the need to resolve **oil and gas exploration and permitting issues**:

> "The matter is becoming more important every day. **Two Oil Companies are doing extensive work this summer** on the Nova Scotia side of Northumberland Straits. This could be very important to us here on Prince Edward Island."
> (N&L Doc. 5, p. 2 para 5)

- And the **interprovincial ramifications** of settling the boundary issue – as opposed to federal-provincial concerns – remained clearly **front and centre**:

> "In the boundary line division it must be remembered that Prince Edward Island will be the gainer ... as **we will have All of one side of the Strait** whereas **Nova Scotia and New Brunswick will have** the portion that lies opposite each respective Province."
> (N&L Doc. 5, p. 1 para 1)

- 1964 -

G) QUÉBEC COMES ON BOARD

(NSM, Part II para 14)

- By **1964**, the boundaries as set out in the 1961 *Notes Re. Boundaries* and accompanying map had been transmitted to Québec.

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- On **July 2, 1964**, Québec's Deputy Minister of Natural Resources responded by declaring his Minister's **full support** for an agreement among the Provinces regarding their respective offshore boundaries:

  - "Dr. Jones informed me of the action taken between the Maritime Provinces in **order to agree on the location of the underwater boundaries** ..."
    (Annex 20, para 1)

- "My Minister is quite pleased with the idea of **fixing the boundary between our provinces** and **he agrees with your present plan.**" (Annex 20, para 3)

- The use of the word "*fixing*" – as in "**fixing the boundary**" – is significant.

  - It is of course proper English, properly used in this context; "**fix**" means "*to set or place definitively: establish; to make an accurate determination of*".
    (Webster's Collegiate Dictionary, 10th ed.)

  - But if the word appears to stand out in the Québec letter, it is perhaps because it is a literal translation from the French «***fixer***» – defined as «*régler d'une façon déterminée, définitive* [to settle in a determinative, definitive manner]. *Fixer une règle, un principe, des conditions.*»
    (Petit Robert, 11e éd.)

  - (Just as the word "project" which is used in several places in the letter may have been a literal translation from the French «*projet*», meaning "draft" or "preliminary work".)

  - Either way, whether expressed in French or English, there can be no question but that the intention was for the Provinces to **settle definitively** – *régler d'une façon definitive* – the matter of their mutual boundaries in the offshore.

- Moreover, it is evident that for Québec, in 1964, just **as for the other Provinces**, a potential request to, and the possible acceptance by, the federal government of a "**fix[ed] ... boundary between our provinces**" was **not essential** to the Provinces' agreement among themselves.

  - Rather, it was understood that such an agreement "should be accepted by the Federal Government so that so that the matter of **respective jurisdiction between the provinces and the central Government be finalized** once and for all."

- Correspondence between PEI and Nova Scotia officials during the same period illustrates a similar understanding.

  - In response to a letter from an official in the office of Nova Scotia's Attorney-General, Mr. Rogers of PEI, the senior official of the Province involved in the boundary negotiations, wrote:

    "... **it must be clearly understood** that each of the Provinces should have the right to **issue offshore licenses on their respective sides** of this accepted boundary line and then later **if we have to argue**

with Ottawa about it we will only have to do so."
(N&L Doc. 8, p. 1 para 3)

- At all times, an agreement **among the Provinces** and an agreement **between the Provinces and the Government of Canada** were regarded as distinct processes, both **temporally** and **conceptually**.

  - "First of all", the Provinces had to establish their boundaries, so as to settle definitively – **to delimit** – their **respective rights in the offshore**.

  - **Then**, it would be up to the federal government to accept (or not) those boundaries, so as to resolve – to delimit – the **rights of the Provinces** vis-à-vis the **rights of Canada**.

  - And as to the first of these questions – the delimitation of the rights of the Provinces *inter se* – the federal government had **no role to play**; in fact, the record demonstrates that it **had no interest** in determining how or where the Provinces delimited their rights **as between themselves**. (J. Bertrand to discuss this further.)

H) THE SEPTEMBER 23, 1964 MEETING OF A-GS

(NSM, Part II paras. 15-16)

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- On **September 23, 1964**, at a meeting of the A-Gs of the Maritime Provinces, what was to become (with few changes) the *1964 Agreement* was formally recommended to the various provincial governments.

  - N&L's Attorney-General was not present, though a memo prepared during the meeting was sent to the Province the same day by the Deputy A-G of Nova Scotia, Mr. MacDonald.
    (N&LCM, para 130 and Doc. 10; Annex 21)

- The Attorneys-General resolved that "the **boundaries as between the several Atlantic Coast Provinces** should be **agreed upon by the Provincial authorities** and the necessary steps taken to **give effect to that agreement**."
  (Annex 21, para "2.")

- The A-Gs declared: "**These suggested boundaries** [the 1961 *Notes Re: Boundaries* and map] have had the **tentative approval** of New Brunswick, Prince Edward Island, **Newfoundland and Nova Scotia**."
  (Annex 21, para "2.")

- Accordingly, they concluded: "It is recommended that **these boundaries should have the more formal approval of the several Governments concerned.**"
  (Annex 21, para "2.")

  - This is **exactly what happened** the following week, at the Atlantic Premiers Conference of **September 30, 1964**. (As will be seen.)

- As regards the role of the federal government in this interprovincial process, the A-Gs stated: "**It is further recommended** that Parliament be asked to define the **boundaries as so approved by the Provinces**, under the provisions of Section 3 of the *British North America Act, 1871*."
  (Annex 21, para "2.")

- At all times, an agreement **among the Provinces** and an agreement **between the Provinces and the Government of Canada** were regarded as distinct processes, both **temporally** and **conceptually**.

  - Here again, "**defining**" the boundaries by federal legislation – that is, "altering" the territory of the Provinces under the Constitution – was regarded as a measure **separate** from the Provinces' determination of their boundaries *inter se*.

  - Federal legislation would have constituted, in effect, an agreement **between the Provinces and the Government of Canada** delimiting the rights of the Provinces vis-à-vis those of Canada.

  - Federal approval was **not stated** to be – and **was not in fact** – relevant to the boundaries to be "fix[ed]" **as between the Provinces**, a process in which the federal government had no role.

  - Such approval was, rather, related to what the A-Gs on September 23, 1964 referred to as "**formal recognition of the rights of the Provinces to the submarine minerals ... from the Federal Government**".
    (Annex 21, para "4.")

- It is noteworthy that the A-Gs also recommended – this is **not referred to** in the N&L Memorial (para 32) or Counter-Memorial (para 130) – that their

several recommendations "**would, and should, extend to coastal waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia**."
(Annex 21, para "5.")

- This is an appropriate place to address what N&L alleges is yet another "**significant**" omission – this time, an omission it claims to have identified in the "contemporary documentation" comprising the historical record in this case.
(N&LM, para 211)

- Newfoundland claims that, because the documentation from 1964 "contains **not a single reference** to the **Laurentian Channel** or the **Laurentian Sub-Basin**", those areas were effectively excluded from the 1964 delimitation.

- Aside from fact that, as indicated (above), the "contemporary documentation" indeed refers to "**areas in the Banks of Newfoundland and Nova Scotia**" ...

- ... the **Laurentian Channel** is a **seabed** feature (while the names of the bays and straits mentioned in the documents referred to by N&L are **surface** features) ...

- ... and the Laurentian **Sub-basin** apparently was **not discovered until many years after 1964**; as set out in Nova Scotia's Counter-Memorial, the earliest reference to the Sub-basin in the scientific literature that we've found is on a map included with a 1986 publication – over 20 years after its supposed "omission" from the documentation evidencing the *1964 Agreement*.
(NSCM, Part IV para 80)

- (Another "mystery" solved.)

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2. THE CONCLUSION OF THE *1964 AGREEMENT* – SEPTEMBER 30, 1964

- After many years of discussion, the Premiers of the East Coast Provinces concluded an agreement establishing boundaries – including the line dividing the offshore areas of NS and N&L – for the purpose of delimiting their respective rights to minerals lying in the seabed of the offshore.

- This was the *1964 Agreement*, concluded at the Conference of Atlantic Premiers held in Halifax, NS on **September 30, 1964** ...

- ... to which Québec acceded exactly one week later.

- Before addressing the events of the **Conference**, and examining the nature and scope of the **Agreement** concluded by the Premiers, four observations of a general, or "**contextual**", nature may prove helpful as the evidence is considered.

i. The Currency of the Expression "1964 Agreement"

- First, Newfoundland derides Nova Scotia's use of the term "*1964 Agreement*" to describe the boundary delimitation concluded by the Premiers on September 30.

  - N&L **alleges** that "**no evidence** is produced to show **the currency of the expression** '*1964 Agreement.*"
    (N&LCM, para 51)

- **In fact**, the scholars whose work is cited in the N&L Counter-Memorial do use this very expression – and many similar terms, including:
(N&LCM, para 52 fn 58)

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- "**1964 Interprovincial Agreement**"
  (*J. I. Charney*, in N&L Doc. 23, pp. 330, 331, 332, 333 and 334; *Charney*, in N&L Doc. 24, pp. 397, 398 and 401)

- "**1964 Interprovincial Boundary Agreement**"
  (*Charney*, in N&L Doc. 24, pp. 397, 401; *J. J. Smith*, in N&L Doc. 25, pp. 125, 126 and 127)

  and

  "*1964 Agreement*"
  (*Charney*, in N&L Doc. 24, p. 398; *Smith*, in N&L Doc. 25, p. 126)

- Also note: The map attached to the October 6, 1972 letter from Newfoundland Minister Doody to Nova Scotia – this is the same N&L map that (as we earlier saw) "omits" certain compass roses – bears the handwritten caption:

"**1964 Interprovincial Premiers' Boundaries**".
(N&L Doc. 57; see also NSM Part IV, para 111 and accompanying fn.)

- Presumably, were he here to testify, the author of this caption might well have told the Tribunal that these "1964 Interprovincial Premiers' Boundaries" were derived from the "**1964 Interprovincial Premiers' Boundary Agreement**".

- All told, "***1964 Agreement***" seems the handiest of these expressions.

- Contrary to Newfoundland's overheated prose, the term "***1964 Agreement***" is neither "*myth*" nor "*mantra*", but very much in use.
(N&LCM paras. 51, 52, 55)

ii. A Deal is a Deal and an "Agreement" is an "Agreement"

- N&L also accuses Nova Scotia of "isolat[ing] the words **'agreed'** and **'agreement'** from **the context** that gives them meaning."
(N&LCM, para 123)

- In fact, the analysis of the factual record in which we are engaged (and which is set out at length in Nova Scotia's Memorial and Counter-Memorial) is precisely an analysis of **the numerous contexts** in which the words "**agreed**" and "**agreement**" were used by the parties – over and over again.

- The evidence demonstrates that when Premier Smallwood and Premier Stanfield, among others, used these words, they understood **full well** their meaning. The Premiers understood **then**, as they would **today**, that a deal is a deal – and an Agreement is an Agreement.

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- In an effort to neutralise the significance of this evidence, N&L claims that the parties' **intent** to conclude a binding "**agreement**" or to establish "**agreed**" boundaries must be sought "**separate and apart**" from those **plain words**.
(N&LCM, para 124)

  - N&L argues, in effect, that in considering the documents that evidence the *1964 Agreement*, **no importance whatsoever** should be attached to the Premiers' repeated references to:

    "the marine boundaries agreed upon by the Atlantic Provinces ..."

"**The Premiers agreed to present a common position to the federal government**")
(N&LM, para 33)

- NS says: **They agreed upon their boundaries.**

- Determining what, exactly, Nova Scotia and Newfoundland "**agreed upon**" on September 30, 1964 is the task of the Tribunal.

iv. What Was the Purpose of the Agreement?

- My last "contextual" observation, before turning to the events of the Premiers 1964 Conference itself, concerns **another** question regarding which the parties are closer together than appears at first glance – I refer to the issue of the underlying **purpose** for which the Provinces agreed upon their boundaries.

  - N&L claims: "**The very idea of delimiting boundaries was to assist in the provinces' claims to offshore ownership and jurisdiction.**"
    (N&LCM, para 128, referencing N&LM, para 28)

    (Similarly, N&L asserts that, at their meeting the week before, on September 23, 1964, the A-G's recommended that "...the Provinces should **agree on inter-provincial boundaries for the purpose of placing a negotiating proposal before the federal government.**"
    N&LCM, para 130)

  - NS says: "An agreement regarding boundaries as between the Provinces was considered **essential to any assertion by them of jurisdiction over submarine mineral resources** (or any political agreement) vis-à-vis the Government of Canada, **and to any granting of rights to industry.**"
    (NSM, Part II para 11)

- The formulations may differ slightly, but the parties are essentially in agreement:

  - The Provinces delimited their boundaries, ***inter alia***, so as (in N&L's words) "**to assist in the provinces' claims to offshore ownership and jurisdiction.**"

- Or that the delimitation "**ceased to have any relevance**" once the Provinces' ownership claims were, as Newfoundland argues, rejected by the federal government. (N&LCM, para. 125)

- "Delimiting boundaries" was, as N&L recognizes, regarded as necessary, *inter alia*, "**to assist in the provinces' claims to offshore ownership**" – ***not*** (as N&L argues) ***the reverse***.

- As at all times both prior to and after September 1964, an agreement **among the Provinces** and an agreement **between the Provinces and the Government of Canada** were regarded as distinct processes.

  - Defining the boundaries by federal legislation – that is, "altering" the territory of the Provinces so as to encompass the offshore – would have constituted, in effect, **recognition by the Government of Canada** of the Provinces' jurisdictional claims.

  - Federal legislation was conceived as a means of **formalizing** the federal government's "acceptance" or "approval" or "recognition" or "agreement" regarding the **rights of the Provinces** – as opposed to the rights of Canada – to the submarine minerals located within those boundaries.

  - This was a measure separate, both **conceptually and temporally**, from the Provinces' delimitation of their rights *inter se*.

- Established boundaries **as between the Provinces**, on the one hand, and the Provinces' claim to ownership of submarine minerals within those boundaries, as **addressed to the federal government**, on the other, were surely related. But certainly **not** in the manner suggested by Newfoundland.

- This becomes clear as the events of September and October 1964 are considered.

A) THE ATLANTIC PREMIERS CONFERENCE OF SEPTEMBER 30, 1964

(NSM, Part II paras. 18 *et seq.*)

- The proceedings of the Premiers' Conference of September 1964, and the record of the *1964 Agreement* concluded at the Conference, are found principally in the following documents:

  - The **statement** prepared in advance of Conference. (Annex 22)

- The **agenda** for the Conference.
  (Annex 23)

- The Premiers' ***Communiqué*** released at the conclusion of the Conference.
  (Annex 24; N&L Doc. 11)

- The follow-up "**Matters Discussed**" memorandum sent to the Premiers.
  (Annex 26; N&L Doc. 13)

- Attending the Conference were Premier Smallwood of Newfoundland, Premier Stanfield of Nova Scotia, Premier Robichaud of New Brunswick and Premier Shaw of Prince Edward Island.
  (Annex 22, para 1)

- The second item on the Premier's agenda was "**Submarine Mineral Rights** *and* **Provincial Boundaries**".
  (Annex 23)

  - The **title** alone is sufficiently clear as to the **distinction** between **federal-provincial questions** and **inter-provincial matters** ...

  - ... and the Agenda explicitly divides the subject along those lines, as follows:
    (Annex 23)

    "(a) **Constitutional questions**"

    and

    "(b) **Agreed boundaries**"

- Against this backdrop, turn now to the Premiers' declaration of the **Agreement reached by them** on September 30, 1964: the ***Communiqué*** issued at conclusion of Atlantic Premiers' Conference.
  (NSM, paras. 18-19) (Annex 24; N&L Doc. 11)

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- The Communiqué is quoted at length in Nova Scotia's Memorial, and is reproduced in full in its Counter-Memorial.
  (NSM, Part II para 19; NSCM, Part III para 14)

- Nowhere in the *Communiqué* is there the least evidence that the Provinces regarded their **boundary agreement** as subordinate or ancillary to, or an "integral part" of, a **package proposal** to the federal government regarding ownership of offshore rights.

- There is **not a single word** in the *Communiqué* that suggests, let alone states, that the boundaries agreed by the Provinces and the Provinces' claims to jurisdiction over the offshore were **inseparable**, or "**inextricably linked**", as N&L argues.
(N&LM, para 189)

- In fact, the text of the *Communiqué* is very clear on the distinction between matters **agreed as between the Provinces**, on the one hand, and matters **agreed to be proposed to the federal government**, on the other.

- Recall the agenda for the September 30 Conference: "constitutional questions", involving **federal-provincial** relations and rights, were distinguished from "agreed boundaries", referring to an agreement regarding the Provinces' rights ***inter se***.

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- Items 1 and 2 of the *Communiqué* deal with the issue of **provincial *vs.* federal control** of the offshore. They record the Premiers' agreement that:

  - the Provinces are "entitled to the **ownership and control** of submarine minerals underlying territorial waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia ..."; (**item 1**) and

  - "formal **recognition of** [these] **rights** ... should be obtained from the Government of Canada ..." (**item 2**).

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- Items 4 and 5 concern the Provinces' **agreement on boundaries**.

  - Item 4 states that "**it is desirable** that the marine boundaries as between the several Atlantic Coast Provinces should be **agreed upon by provincial authorities** and the necessary steps taken **to gove** (sic) **effect** to that agreement";

- Item 5 records that the Premiers "**unanimously agreed** ... that the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B **be the marine boundaries of the Provinces**".

  ("**the** marine boundaries" – *not* the "**proposed** marine boundaries", as Newfoundland suggests.)
  N&LM, para 33

- Item 6 records the Premiers' agreement that Parliament is to be asked "**to define the boundaries as approved by the Provinces** ... under the provisions of Section 3 of the *British North America Act, 1871*."

  - The agreement to request federal legislation regarding the boundaries, as recorded in **item 6** of the *Communiqué*, is **collateral** to the rights and obligations of the Provinces as between themselves, which the parties regarded as **grounded in their boundary agreement** declared in the preceding **item 5** ...

  - ... just as the agreement to request federal "recognition" of provincial rights to ownership and control of the offshore, recorded in **item 2**, is **collateral** to the Provinces' statement of their entitlement to those rights, which are described as **based on legal, equitable and political grounds**, in **item 1**.

  - In both cases, **federal recognition** is regarded **neither** as **the source** nor as **a condition** of the Provinces' rights and obligations.

  - Those rights are seen as grounded, in the case of **boundaries**, on the Provinces' agreement *inter se*; and in the case of **ownership** and jurisdiction over the offshore, on law, equity and political principles.

  - Federal recognition is seen as ... **just that** – acceptance by the federal government of ***its own* willingness to be bound**.

  - Although such a willingness (manifested in federal legislation or any other form) was obviously necessary to the Provinces' **jurisdictional claims** – i.e., *their claims against the federal government* ...

  - ... it was not at all necessary to their **boundary agreement** – an agreement among the Provinces regarding their rights ***inter se***.

  - Recall: "Delimiting boundaries" was (as N&L recognizes) regarded as necessary, among other things, "**to assist in the provinces' claims to offshore ownership**" – ***not* the reverse**.

- **Whether or not** Canada agreed to "vest" offshore rights in the Provinces (as was in fact requested in the October 14-15, 1964 *Joint Submission* – see *infra*), and whether such vesting were ultimately to relate to **complete or only partial** rights (as, indeed, eventually occurred), the parties nonetheless wished to **conclude an agreement** on boundaries because:

  - They recognized that their jurisdictional dispute with the federal government – as all constitutional battles – would be **long-term** (it took 20 years for Nova Scotia and N&L to conclude their Offshore Accords with Canada).

  - And they wished to get on with managing the growing **interest from industry** to explore in their respective areas.

- Again: federal "approval", manifested by legislation under the *BNA Act, 1871*, was regarded as a useful means of **sealing the deal** between the **Provinces and Canada** – not the Agreement between the Provinces themselves.

  - By altering the Provinces' boundaries so as to encompass the offshore, such legislation would presumably enshrine their "ownership" rights to the offshore.

- In sum, the *Communiqué* discloses that the Provinces regarded their offshore boundaries as a matter that **could** be agreed among themselves ... and that **was** in fact agreed among themselves at the Conference.

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- On **October 2, 1964**, two days after the September 30 Conference, Premier Stanfield of Nova Scotia wrote to the Atlantic Premiers, enclosing "a summary of matters discussed at the Atlantic Premiers Conference." (Annex 26; N&L Doc. 13)

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- The document, entitled "***Matters Discussed At The Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action***", records, under "Submarine Mineral Rights and Provincial Boundaries":

  > **"The Conference agreed on the marine boundary lines between each of the provinces."**
  > (Annex 26, p. 2 para 3)

- And under the heading "Action", the documents states:

> "Premier Stanfield of Nova Scotia **will prepare a presentation for the pending Federal/Provincial Conference** setting out the position of the four Atlantic Provinces with respect to submarine mineral rights and **the agreed marine boundaries.**"

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- In the ***Matters Discussed*** memorandum one has an explicit statement of the **agreement on boundaries concluded by the Premiers** on September 30 – ***not*** as a subsidiary component of a broader proposal, as alleged by Newfoundland, but as **a discrete agreement** that stands alone, separate from the Provinces' "**position ... with respect to submarine mineral rights**" and separate from the "**presentation**" to be prepared setting out that position.
  - The presentation (setting out the parties' position on jurisdiction) is a matter "**requiring further action**" – *to be done.*
  - The **boundaries** are declared to be "**agreed**" – a ***fait accompli.***
- Even the envisaged "presentation" was to distinguish between setting out:
  - "the **position** of the four Atlantic provinces with respect to **submarine mineral rights**" ...

    and
  - ... "**the agreed boundaries**".
- Lest there be any doubt that **the Premiers understood what they meant** when they referred to "***agreed*" boundaries** – as opposed to a simple political understanding or a negotiating proposal, or a "**common position**" to be presented to the federal government as N&L would have it (N&LM, para 33) – the **next item** in the memorandum records:

> "4. The Conferences discussed a **common approach** to economic development in the Atlantic Region."

  - The Premiers themselves understood the distinction between an agreement and a "common position".
  - They understood that an Agreement is an Agreement.

- Finally, Newfoundland attempts to *isolate* (as it might say) the word "**proposed**" used in the *Matters Discussed* document.

  - "*Why*," asks N&L, "*if a legally binding agreement had already been concluded, did Premier Stanfield characterize the boundaries in terms of a proposal requiring further action?*"
    (N&LCM, para 135)

- The answer is very simple – and is provided in Nova Scotia's Counter-Memorial.
  (NSCM, Part III paras 31-32)

  - As noted in the ***Matters Discussed*** memorandum, the Atlantic Premiers resolved that Premier Stanfield would:

    "... forward to the Minister of Resources in the Province of Québec a copy of the proposed marine boundaries and a copy of the map showing those boundaries. Premier Stanfield **will ask the Province of Quebec** to support the stand of the four Atlantic Provinces and **seek the approval of the Provinces of Quebec and British Columbia as to the proposed marine boundary lines.**"

  - **As of September 30, 1964**, the "marine boundary lines ... agreed on" by the Atlantic Premiers had yet to be approved by Québec ...

  - ... and before they could be "**approved**" by that Province, they first had to be "**proposed**" to it.

  - The next paragraph of the document, as noted, referring to the presentation to be prepared by the Atlantic Premiers for the upcoming federal-provincial Conference, correctly refers to "**the agreed marine boundaries**" ...

  - ... just as, at the outset, the document records that "**the Conference** [which did not include Québec] **agreed on the marine boundary lines between each of the provinces.**"

  - Premier Stanfield's October 2, 1964 letter to Premier Lesage, copied to the other Premiers, also makes this distinction – as will be seen.

B) THE BOUNDARIES AGREED BY THE PREMIERS

(NSM, Part II, paras. 32-37; Part IV, paras. 17 *et seq.*)

- Having examined the record of the September 30, 1964 Conference, we have now to consider **the actual boundaries** determined by the Premiers in the *1964 Agreement*.

- As declared in the Premiers' *Communiqué*, the boundaries "unanimously agreed" by them were set out in the *Notes Re: Boundaries* (**Schedule A** to the *Communiqué*) and depicted on the attached map (**Schedule B**).
(Annex 31 and Annex 32; N&L Doc. 15 and map)

- The first thing to note about the boundaries established in the *1964 Agreement*, as described in Schedule A to the Premiers' *Communiqué* (the *Notes Re: Boundaries*) is that they explicitly apply to only to **mineral rights, as between the Provinces**.
(Annex 31, p. 20)

- The Agreement goes on to describe each Province's boundaries, relative to every other Province with which it shares a boundary, by means of a series of **turning points** and **straight lines** joining those turning points – that is, by "metes and bounds".

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- Section I, entitled "**Boundary of Nova Scotia**", describes the boundary of Nova Scotia with New Brunswick, Prince Edward Island, Québec and Newfoundland respectively. Nova Scotia's "**boundary with Newfoundland**" is described as follows:

> "From this mutual corner [the 'tri-junction" point, or three-way boundary, between Québec, Nova Scotia and Newfoundland] 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**."
> (Annex 31, at p. 21)

- Section VI, "Boundary of Newfoundland", describes Newfoundland's boundary with Nova Scotia even more precisely:

> "From the above common point [the tri-junction point with Nova Scotia and Québec], 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.**"
> (Annex 31, at p. 25)

- From the last turning point, the agreed Nova Scotia-N&L boundary is stated to run "**southeasterly**"/"**S.E.**" to international waters.
  - As discussed in Nova Scotia's Memorial and Counter-Memorial, this description **clearly** and **accurately** describes a line covering the full extent of the **continental shelf** over which Canada could claim rights, running Southeast, or **135°**.

(NSM, Part IV paras 17 *et seq.*)
(NSCM Part IV, paras 85 *et seq.* and 141 *et seq.*)

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3. THE ACCESSION OF QUÉBEC TO THE *1964 AGREEMENT* – OCTOBER 7, 1964

(NSM, Part II paras. 21-25)

- As agreed at the September 30, 1964 Conference, on **October 2, 1964** Premier Stanfield sent a letter to Premier Lesage of Québec, on behalf of the four Atlantic Provinces (and copied to the Premiers of those Provinces), in which he stated:

> "The Conference agreed that I should advise the Government of the Province of Quebec of **our stand on the matter of submarine mineral rights** and of **the marine boundaries agreed upon by the Atlantic Provinces.**"
> (Annex 27; N&L Doc. 12)

- The issue of "**our stand on the matter of submarine mineral rights**" was, here too, distinguished from "**the marine boundaries agreed upon**".
  - The question of **rights** was to be the subject of the Provinces' joint submission to the upcoming federal-provincial conference. The matter of **boundaries** was – as stated – already agreed.

- As discussed earlier, the letter to Premier Lesage also made a point of noting that the boundaries "**agreed upon**" by Atlantic Provinces at their recent Conference were now being "**proposed**" to Québec.

- Enclosed with the letter to Premier Lesage were: the *Communiqué* from the September 30, 1964 Conference, setting out the points "**unanimously agreed**" by the Atlantic Premiers; the "**description by Metes and Bounds**" of the marine boundaries agreed by the Atlantic Provinces; and the "map" representing those boundaries.
(Annex 27)

  (The description of the agreed boundaries – the Notes Re: Boundaries document – originally enclosed with the letter to Premier Lesage, was missing from the copy of the letter, Annex 27, found in Nova Scotia's files.)

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- On October 7, 1964, Premier Lesage answered by telegram:

  "I am happy to let you know that the Province of Quebec is in agreement with the Atlantic Provinces on the matter of submarine mineral right **and** of the **marine boundaries agreed upon by the Atlantic Provinces**."
(Annex 28)

  - Again, "**the matter of submarine mineral rights**" and "**the marine boundaries agreed upon by the Atlantic Provinces**" are distinguished, this time by Premier Lesage.

- The following day, Premier Stanfield replied with "a note to acknowledge your telegram of October 7th expressing agreement with the Atlantic Provinces in the matter of submarine minerals and the marine boundaries agreed upon by the Atlantic Provinces."
(Annex 29)

- Last point re. Premier Stanfield's correspondence with Premier Lesage:

  - The letter states that "the **matter of submarine mineral rights** and [the assertion] that those rights should be vested in the provinces" – ***not*** **the matter of inter-provincial boundaries** – "is one of the **items on the agenda** for the next Federal / Provincial Conference."

  - This is important to bear in mind when considering the events of that Conference, specifically the nature and meaning of the "**Submission**

on Submarine Mineral Rights" presented to the Conference by the Atlantic Provinces.

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4. THE *JOINT SUBMISSION* PRESENTED TO THE FEDERAL-PROVINCIAL CONFERENCE OF PRIME MINISTERS – OCTOBER 14-15, 1964

(NSM, Part II paras. 26-31)

- On October 14-15, 1964, a Federal-Provincial Conference of Prime Ministers was convened, in Ottawa.
(Annex 30)

- As mentioned, among the items under discussion was the matter of submarine mineral rights.

- As agreed by the Atlantic Premiers on September 30, 1964, Premier Stanfield presented a "**Submission On Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland**" – the "***Joint Submission***"
(Annex 31)

  - The Submission was explicitly **attributed to** "the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland" ...
(Annex 31, p. 16)

  - ... and it was "**presented on behalf of the four Atlantic Provinces pursuant to agreement reached** at the Atlantic Premiers Conference held in Halifax on the 30th of September last".
(Annex 31, p. 19)

- This was, in fact, the first **practical application** by the Provinces of the *1964 Agreement*.

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- The *Joint Submission* distinguished "the questions with which we [the Atlantic Provinces] are concerned" as follows:

  "(a) **proprietary rights** in submarine minerals **as between Canada and the Provinces**, whatever the extent and nature of those rights may be"

  and

  "(b) **boundary lines between Provinces**".
  (Annex 31, p. 16)

  - Annexed to the *Joint Submission* were the Notes Re: Boundaries, containing the description of the boundaries established by the Premiers the week before, and the accompanying map.
    (Annex 31, p. 18)

- The *Joint Submission* provides additional evidence regarding the formation, nature and scope of the *1964 Agreement*.
  (NSM, Part II paras 24 and *passim*; NSCM, Part III paras 35 *et seq.*, Part IV, paras 7 *et seq.*, paras 86 *et seq.*, and *passim*)

  - Here, we have the **full text of the boundary descriptions** agreed by the Provinces (the *Notes Re: Boundaries*) and the map depicting those boundaries ...

  - ... annexed to a formal "**Submission ... by the Provinces**" to a "**Conference of Prime Ministers**" ...

  - ... relating to a claim for proprietary rights in submarine minerals "**whatever the extent and nature of those rights may be**".

- Yet, a reading of the *Submission* reveals that it is concerned principally ***not*** with how to determine **"boundary lines between Provinces"**, but (as its title and the federal-provincial nature of the Conference suggest), with the determination of "**proprietary rights in submarine minerals as between Canada and the Provinces**".

- The two matters – the two processes – were **distinct**.

  - Although the fact that the Provinces had agreed their boundaries for the purpose of **delimiting their respective rights** to offshore minerals is, of course, referred to in the *Joint Submission* ...
    (NSCM, Part III para 38)

- ... providing further proof that the **N&L theory** that the boundaries were merely a "proposal" is fundamentally incorrect ...

- ... **the focus** of the Provinces' presentation at the Ottawa Conference was exclusively their **jurisdictional claims against the federal government.**

- This was a matter **as between the Provinces and the federal government** – that is, a proper matter for a "Federal-Provincial Conference of Prime Ministers"

- In this context – that is, in the context of a submission concerned with "**proprietary rights in submarine minerals as between Canada and the Provinces**" – interprovincial boundaries were relevant insofar as they could serve as a means of **enshrining the Provinces' jurisdictional claims**..

  - A reading of the *Joint Submission* demonstrates that it was not at all concerned with the location of the Provinces' offshore boundaries – this had been determined as between the Provinces in the *1964 Agreement.*

  - The Joint Submission represents **the use of those boundaries** in support of the **Provinces' claims vis-à-vis Canada** – as had long been contemplated by the parties.

  - Specifically, the Provinces sought the incorporation of their agreed boundaries into legislation; the idea being that, by **altering the Provinces' territories to encompass the offshore**, such legislation would formalize the federal government's "acceptance" or "approval" or "recognition" of provincial rights – "**as between Canada and the Provinces**" – to mineral resources located within those boundaries.

- The *Joint Submission* is eloquent and telling proof of the principle that "delimiting boundaries" was (as N&L recognizes) regarded as necessary, *inter alia*, "**to assist in the provinces' claims to offshore ownership**" – it is, as mentioned, the **practical application of that principle**.

  - The *Joint Submission* was an example of precisely one of **the uses** to which the Provinces intended to put their Agreement ...

  - ... an example of one of the reasons for their deciding "**first of all to agree among ourselves**" on the delimitation of their respective rights to offshore minerals.

- As **at all times** both prior to and after September 1964, an agreement **among the Provinces** and an agreement **between the Provinces and the**

Government of Canada – the objective of the *Joint Submission* – were regarded as distinct processes, both temporally and conceptually.

- Defining the boundaries by federal legislation – that is, "altering" the territory of the Provinces under the Constitution so as to encompass the offshore area claimed by them – was regarded as a measure separate, both **conceptually and temporally**, from the Provinces' determination of their boundaries *inter se*.

- Federal legislation would have constituted, in effect, **agreement by the Government of Canada** to delimit **the rights of the Provinces vis-à-vis the rights of the federal government** in accordance with the Provinces' prior Agreement as to their rights *inter se*.

- Such legislation was nowhere stated – and was never in fact intended – to be determinative of the boundaries agreed as between the Provinces, a process in which the federal government had **no role** and **no interest**.

- Ultimately, the significance of the matter of "(b) boundary lines between Provinces" as discussed in the *Joint Submission* is the following:

  - They are **a matter for agreement between the Provinces** concerned.

  - They **have been agreed upon** the Provinces concerned.

  - And "to assure all of the Provinces that **the position of the Provinces in respect of their ownership of submarine mineral rights will be acknowledged and respected by Canada**" ... (Annex 31, p. 18 para 2)

  - ... they should be legislated under s. 3 *BNA Act, 1871* so as to determine, once and for all, the question of **proprietary rights in submarine minerals as between Canada and the Provinces.**

- There is certainly **nothing** in the *Joint Submission* to suggest that Provinces' boundary agreement was **conditional**, or in any way dependant, on federal approval or on recognition of the Provinces' jurisdictional claims.

  - To reiterate: "delimiting boundaries" was seen as necessary, among other things, "to assist in the *provinces' claims to offshore ownership*" – ***not* the reverse.** *The Joint* Submission provides compelling evidence of the Provinces' views in this regard.

- If anything, the Provinces' request that their agreed boundaries be constitutionalized, and their longstanding and frequently stated desire to have this done in aid of their jurisdictional claims, demonstrates convincingly **their intent to be bound by the offshore lines established the *1964 Agreement***.

- It is also significant that the *Joint Submission* ends as follows:

  "**In conclusion**, the Provinces ... assert that the Provinces are entitled to the ownership and control of submarine minerals **underlying territorial waters, including, subject to International Law, areas in the Banks off Newfoundland and Nova Scotia,** on legal and equitable grounds."

  - This summing-up of the Provinces' assertions constitutes further proof that the **focus** of the *Joint Submission* was "ownership and control of submarine minerals" – a delimitation ***not*** of lines between Provinces but of the limits of provincial, **as opposed to federal**, rights.

  - And it **also** reveals an important element of the Provinces' intentions regarding their mutually agreed boundaries.

  - The **geographical scope** of the rights asserted by the Provinces was defined so as to include **the full extent of the continental shelf subject to Canadian jurisdiction under international law**.

  - As noted, the Provinces requested the federal government to constitutionalize their agreed boundaries so as to encompass the offshore area claimed by them, as a means of delimiting **provincial *vs.* federal rights**.

  - Those **boundaries** must have extended **as far as the rights** that they were to delimit.

CONCLUSION

- The contemporaneous written evidence of the *1964 Agreement*, and specifically of the Provinces' intent to enter into a **binding agreement establishing their boundaries** is overwhelming, both in terms of the amount of such evidence and its consistency.

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- The evidence of this intent, from the period 1958 to 1964, includes:

  - The *Communiqué* released at the conclusion of the September 30, 1964 Atlantic Premiers Conference, recording that the Premiers had: "**unanimously agreed ... the marine boundaries of the provinces**"
    (Annex 24)

  - The memorandum entitled "*Matters Discussed on September 30, 1964* ...", which states unequivocally: "**The Conference agreed on the marine boundary lines between each of the provinces.**"
    (Annex 26)

  - Premier Stanfield's October 2,1964 letter to Premier Lesage of Québec, seeking Québec's concurrence with "**the marine boundaries agreed upon by the Atlantic Provinces.**"
    (Annex 27)

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  - Québec's accession to the *1964 Agreement*, evidenced in Premier Lesage's response to Premier Stanfield, dated October 7, 1964 in which he states: "**Quebec is in agreement** with the Atlantic provinces on the matter of submarine mineral rights and of **the marine boundaries agreed upon by the Atlantic provinces.**"
    (Annex 28)

- The evidence of events leading up to and surrounding the conclusion of the *1964 Agreement* also has much to disclose regarding the **nature** and **scope** of the *1964 Agreement* boundaries – in particular, the line dividing the offshore areas of Nova Scotia and Newfoundland and Labrador – as well as their applicability to the jurisdictional régime that currently exists.

  - Then, as now, the issue revolved around the **issuance of permits**.

  - The boundaries agreed by the Provinces in 1964 delimited the **entirety of the continental shelf** subject to Canadian jurisdiction at international law.

  - The Nova Scotia-N&L line delimited their respective offshore areas **accurately and completely** – to the edge of the continental margin along an azimuth (in the outer segment) running Southeast, or 135°.

- The boundaries established in the 1964 Agreement were **not dependant** on acceptance or approval by the federal government; "delimiting boundaries" was seen as necessary, inter alia, "to assist in the *provinces' claims to offshore ownership*" – ***not*** **the reverse**.

- The boundaries were nowhere stated, and never intended, to apply only in the context of provincial "**ownership**" of offshore mineral rights – they applied, as between the Provinces, to delimit their respective rights to the mineral resources of the continental shelf, **no matter the nature or degree of those provincial rights**.

- And they applied **only** to delimit the Provinces' respective rights regarding the **mineral resources of the shelf**.

- All of this will be demonstrated even more clearly by my colleagues, in the course of Nova Scotia's oral submissions during the hearing.