CHAPTER IV THE CONDUCT OF THE PARTIES

I. Introduction

82 Newfoundland and Labrador had assumed that with the rendering of the Award of the Tribunal on May 17, 2001, Phase One was over. Yet, it discovered that much of Nova Scotia's Memorial in Phase Two consists of an attempt to reargue the claims it made about the conduct of the parties in Phase One, even asserting as fact matters on which the Tribunal has already ruled otherwise.

83. Nova Scotia takes the position that regardless of the Tribunal's ruling, the conduct of the parties indicates that they had agreed on a line. As it did in Phase One, Nova Scotia seeks to rely on both the conduct of officials of the two provinces and the administrative practice of the provinces in issuing permits.

84. Since most of the claims about conduct made by Nova Scotia in its Memorial were advanced in Phase One, Newfoundland and Labrador will not rehearse what has already been dealt with in detail in the first phase. Instead, in this Chapter, Newfoundland and Labrador will rebut the allegations made by Nova Scotia in its Phase Two Memorial concerning the conduct of the parties and respond to any new claims made by Nova Scotia.

II. The Political Relations of the Parties

A. The Alleged 1964 Agreement

85. In its Award, the Tribunal noted that its concern in Phase One was only with conduct showing that the boundary had been resolved by agreement. However, it added that conduct "may be relevant to delimitation in a variety of ways, while stopping short of a dispositive

agreement."[66] Hence, it said "conduct ... remains relevant for the process of delimitation in the second phase of this arbitration."[67]

86. Nova Scotia, however, takes from this recognition of the uncontroversial proposition that conduct may be a relevant circumstance in maritime boundary delimitation a license to make conduct the dominant and overriding circumstance in this delimitation. It seeks to construct a case that, in effect, overturns the Award of the Tribunal in Phase One.

87. Nova Scotia claims that, notwithstanding the conclusion of the Tribunal in Phase One, a boundary was indeed agreed to in 1964. "Agreement on the boundary was reached in 1964 and reaffirmed in 1972,"[68] Nova Scotia asserts in its Memorial. And, taking its lead from its Phase One Memorial, Nova Scotia has peppered its Memorial in Phase Two with references to the "1964 Agreement," and the term "existing boundary" is used to describe the Nova Scotia claim.[69] Even the language of "deal," so soundly debunked in Phase One, has re-emerged.[70] In short, the Nova Scotia Memorial simply treats the decision of the Tribunal in Phase One as if it had never occurred.

88. In its Award the Tribunal found that there was no legally binding agreement concluded in 1964. It said:

> But the reason why the *1964 Joint Statement* did not amount to a definitive agreement was not only its lack of precision. It was also its

---

[66] Phase One Award, p. 80, para. 7.8.

[67] Phase One Award, p 80, para. 7 8.

[68] Nova Scotia Memorial, Phase Two, II-2, para. 5.

[69] See, for example, Nova Scotia Memorial, Phase Two, Figure 48 (after IV-70).

[70] Nova Scotia Memorial, Phase Two, VI-13, para. 24.

> conditional character and its linkage to a provincial claim to existing legal rights to the offshore.[71]

89. Nor was any legally binding agreement concluded in 1972. There had been no agreement in 1964, and thus there was nothing to "reaffirm" in 1972. Nova Scotia pays lip service to this conclusion, but asserts that the parties "agreed on something in 1964 and 1972."[72] What Nova Scotia does not go on to say is that the "something" agreed to in 1964 and 1972 was, as the Tribunal pointed out, imprecise, conditional, and linked to a provincial claim to the offshore.[73] And that provincial claim was rejected by the federal government.

90. Nevertheless, Nova Scotia insists on repeating throughout its pleadings the allegation that there really was an agreement and indeed makes it a foundation for much of its case. But once the "1964 Agreement" is seen for what it is, much of the edifice built by Nova Scotia about the conduct of the parties, falls to the ground.

91. Nor can this edifice be reconstructed in the form of a claim that even if there was no agreement on a line, there was an agreement on a methodology. The Nova Scotia Memorial states:

> The parties also expressly agreed on the methods by which their boundaries were drawn, which methods were applied in the boundaries described in 1964 and demarcated in 1972.[74]

92. This, in fact, is no more than a restatement of the claim that the parties had reached an agreement on the boundary in 1964 and 1972. For if the alleged agreement in which the "methodology" was used turns out not to be an agreement – as the Tribunal has now ruled – then there is no basis for claiming that part of this alleged agreement survived. The so-called

---

[71] Phase One Award, p 78, para 7.5(1).

[72] Nova Scotia Memorial, Phase Two, II-4, para. 7.

[73] Phase One Award, p 78, para 7.5; pp. 81-82, para. 7.10.

[74] Nova Scotia Memorial, Phase Two, II-5, para 8

agreement on "methodology" is just as conditional and linked to the provincial claim to the offshore as the Tribunal found the "1964 Agreement" to be.

93. Nova Scotia invokes in aid of its alleged agreement on methodology the statement in Minister Doody's letter of October 6, 1972 that he was "not questioning the general principles which form the basis of the present demarcation."[75] This was a statement of fact about general principles on the basis of which certain lines had been drawn and nothing more. Moreover, even if the Tribunal had concluded that there was a "1964 Agreement," it made clear that such an agreement would extend no further than Turning Point 2017. In respect of the line beyond that point, the Tribunal said: "neither the *Joint Statement* nor the *Notes re: Boundaries* provided any rationale for the direction or length of the line."[76] That is a clear rejection of any argument that there was an agreed methodology in respect of the line beyond 2017.

94. Thus, the alleged agreement on methodology is, like Nova Scotia's effort to resuscitate the "1964 Agreement," little more than a flight of imagination.

B. Nova Scotia's Misuse of the Doody Letter

95. Nova Scotia lets it imagination run loose as well by attempting to imagine what was in the mind of Minister Doody when he sent his letter of October 6, 1972. The Doody letter, according to Nova Scotia, turns out to be a rejection of the 125 degree line in the map attached to the Stanfield Submission, and not an objection to the 135 degree line. Nova Scotia refers to a "partially erased" line on the map half-way between Doody's "tentatively suggested line" and the 125 degree line on the Stanfield map.[77] But, there is no mystery about the "partially erased line" on the Doody map. The line is simply the western limit of the

---

[75] Memorial of Newfoundland and Labrador, Phase One, Doc. # 57.

[76] Phase One Award, p 81, para. 7.10.

[77] Nova Scotia Memorial, Phase Two, IV-39, para 84

Mobil permit, and parts of the Katy permit are also visible on the map. Minister Doody was using a map showing existing Newfoundland and Labrador permits. He was not erasing a line that reflected "the permit practice of the parties."[78] There is no permit practice of Nova Scotia shown on the map.

96. In any event, the Tribunal put this matter to rest in its Award in Phase One when it stated that viewed from the perspective of the relations of states under international law, "a letter such as Minister Doody's of October 6, 1972 would probably have been treated as the beginning of a dispute."[79]

97. In the end, Nova Scotia wishes to close the Doody letter saga with its favourite method of proof – assumption. The Tribunal is invited to assume that in fact Nova Scotia did reply to Minister Doody and that he was satisfied with that answer, or that he simply changed his mind.[80] In short, the absence of any proof of a Nova Scotia response is deemed to be satisfactory proof of a response. Once again, Nova Scotia is seeking to contradict the Tribunal's Award in Phase One. After reviewing the evidence, including the follow-up letter from Cabot Martin, the Tribunal stated, "no reply ever seems to have been sent."[81]

98. Nova Scotia's invitation to the Tribunal to overturn its finding of fact and to engage instead in an act of imagination, diverts from a point Nova Scotia conveniently overlooks. There was a response to Minister Doody's letter. It came from Michael Kirby, a senior Nova Scotia

---

[78] Nova Scotia Memorial, Phase Two, IV-39, para. 84

[79] Phase One Award. p. 62, para 5.24.

[80] Nova Scotia Memorial, Phase Two, VI-11, para. 19

[81] Phase One Award, p. 63, para. 5.25.

official. And as the Tribunal noted, "Mr. Kirby's response was mildness itself, and would have confirmed Minister Doody in his view that the location of the line was negotiable...."[82]

99. In short, faced with the opportunity of asserting that the provinces had already agreed on a line, of asserting that a line existed in Nova Scotia practice, of asserting concordant Newfoundland practice, what did the Nova Scotia official most intimately involved with the issue do? He confirmed that the location of the line was negotiable. In a case that Nova Scotia claims is based on conduct, this must be the most significant conduct of all.

C. The Map that was not before the Premiers on June 17-18, 1972

100. In Phase One, Nova Scotia made much of a "map presented to the East Coast Premiers in 1972," arguing that the Premiers had before them at their conference of June 17-18, 1972, a map prepared by a federal official, D.G. Crosby. Newfoundland and Labrador pointed out in its Counter Memorial that there was simply no evidence of the map being either "presented to the East Coast Premiers" or before them in their June 1972 meeting.[83]

101. In its Memorial in Phase Two, Nova Scotia admits that it was wrong.[84] Nova Scotia now accepts that, as Newfoundland and Labrador pointed out, there is no proof that the map was before the Premiers in their June 1972 meeting. Instead, Nova Scotia says, "the actual use of the map can only be confirmed for the August 2 meeting."[85]

102. Given that the issue had loomed so large in Phase One, Newfoundland and Labrador was eager to discover what this new "confirmation" could be. However, nothing emerges in Nova Scotia's Memorial. Proof that the map was at the August 2 meeting is no different than

---

[82] Phase One Award, p. 62, para. 5.24.

[83] Counter Memorial of Newfoundland and Labrador, Phase One, pp. 27-29, paras. 64-70.

[84] Nova Scotia in fact states that it was "imprecise". Nova Scotia Memorial, Phase Two, II-13, para. 31, footnote 46

[85] Nova Scotia Memorial, Phase Two, II-13, para. 31, footnote 46

the discredited proof that it was at the June 17-18 meeting. In short, there is no proof that it was at either meeting.

103. Nova Scotia equally tries to resuscitate its claim of a map "presented to Premier Moores" in 1972, seeking to draw an inference from the notes of D.G. Crosby which map (if any) might have been in front of him when he met with Premier Moores. The claim is that because Crosby's notes contained areal calculations there must have been a map in front of Premier Moores and his officials that "included boundaries between the provinces' respective offshore areas, which permitted the calculation of the area accruing to each province, as shown in Dr. Crosby's notes."[86]

104. But why does this follow? And how does it account for the fact that Crosby's notes contain many more calculations than appear on the map? Nova Scotia's argument is nothing more than assumption built upon assumption. It is just a theatrical construction which, even if true, could not constitute something on which a claim of acquiescence or estoppel could be founded.

D. The 1984 Draft Legislation

105. Nova Scotia claims that some significance should be drawn from the fact that there is no record of Newfoundland and Labrador objecting to the description of the offshore area in the draft 1984 federal legislation to implement the 1982 *Canada-Nova Scotia Agreement*. That legislation set out the line now claimed by Nova Scotia and contained no provision for arbitration or amendment in the event of a dispute with a neighbouring province.[87]

---

[86] Nova Scotia Memorial, Phase Two, II-15, para. 35.

[87] Nova Scotia Memorial, Phase Two, II-17, para. 38.

106. However, Nova Scotia, once again, ignores the context. By 1980, the federal government and the provinces were fully aware that there was a live dispute over the boundary. As held by the Tribunal in Phase One:

> By the time the Accord legislation was passed, it was clear that Newfoundland and Labrador, and Nova Scotia were in dispute as to the existence and location of a boundary separating their offshore claims, in particular in the Atlantic sector. As will be seen, the beginnings of that dispute go back to 1973, when Newfoundland and Labrador began to question the principle on which a line was purportedly drawn beyond Point 2017. Later the dispute became more general, as Newfoundland and Labrador withdrew from the East Coast Provinces' alliance and sought to establish its particular claims to offshore jurisdiction. The dispute continued even after the Newfoundland and Labrador's legal claim was rejected in 1984. The existence of a dispute was known to federal officials as well as to Nova Scotia.[88]

107. Moreover, the 1982 *Canada-Nova Scotia Agreement* itself provided a specific proviso to the description of the outer limits referring to the potential for a boundary dispute:

> 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.[89]

108. Such a statement would have been clearly understood by Newfoundland and Labrador as an assurance by the federal government that its legal rights were not in jeopardy. The 1984 legislation was just implementing the 1982 *Canada-Nova Scotia Agreement*. It was not

---

[88] Phase One Award, pp 48-49, para 5.7

[89] *Canada-Nova Scotia Agreement*, Schedule I

undermining any commitment made in that *Agreement* The assurance set out in the *Agreement* remained.[90]

E. The Alleged Publication of a Map Showing the 135 Degree Line

109. Nova Scotia has returned to another theme it pursued in Phase One: that it had published a map showing the 135 degree line,[91] and Newfoundland and Labrador had failed to object.[92] But, as Newfoundland and Labrador pointed out in Phase One, there is no evidence that such a map was published, or even in the public domain, at any time that could possibly be material to this dispute.[93] Indeed, in the Phase One hearing, counsel for Nova Scotia admitted, "we don't know a publication date."[94]

III. The Administrative Practice of the Parties

110. Much of Nova Scotia's argument relating to the conduct of the parties is based on permitting practice by the two provinces when they were involved in a dispute with the federal government over ownership of the offshore. But in the end, much is made of very little. The permits on which such great reliance has been placed were of a transitory character and they expired long ago. Moreover, the Nova Scotia account of permitting practice ignores the role of the federal government in respect of the offshore, a role that was known and understood by private companies.

---

[90] The 1984 legislation was introduced in the House of Commons on May 13, 1984 and passed June 28, 1984 only two days before the dissolution of Parliament. Subsequently, an election was held and when the Conservative government came to power in September 1984, negotiations began with Newfoundland and Labrador leading to the *Atlantic Accord* of February 11, 1985. In this context, there was nothing to protest.

[91] Nova Scotia Memorial, Phase Two, II-6, para. 11.

[92] Nova Scotia Memorial, Phase Two, VI-13, para. 23

[93] Newfoundland and Labrador Counter Memorial, Phase One, pp. 30-31, paras. 74-79.

[94] Transcript of Oral Hearing, Phase One, March 13, 2001, p 269, Supplementary Documents # 2

A. Nova Scotia's Permitting Practice

111. Nova Scotia makes an effort to support its contention that the permits issued by Nova Scotia were of significance. We are told that these permits were "relied on" by companies and were "the basis" on which "significant sums were expended for oil and gas exploration."[95] In support, Nova Scotia refers to a map produced to the Tribunal in Phase One that Nova Scotia claims shows "actual wells drilled under Nova Scotia permits."[96] Nova Scotia also produces new evidence in the form of sample expenditure statements "related to work conducted (or to be conducted) under Nova Scotia permits up to the mid-1970's, including permits along the boundary."[97]

112 The image portrayed by Nova Scotia is one that pervaded Phase One. That is, the issues in this case relate to a longstanding dispute between Newfoundland and Labrador and Nova Scotia, and that the two provinces were, at the relevant times, the only actors. What Nova Scotia conveniently ignores is that the relationship of the provinces to the offshore can only be understood by bringing the federal government into the picture.

113. One does not have to look far for hints that the world was not a world of provincial permits as Nova Scotia portrays it to be. The first hint is found on the face of Figure 33 itself. The well names shown there correspond to the federal land division system provided for in the *Canada Oil and Gas Land Regulations*.[98] The second hint is found in Nova Scotia Annex

---

[95] Nova Scotia Memorial, Phase Two, II-6, para 11.

[96] Nova Scotia Phase Two Memorial, II-7, para. 13; Figure 33: "Drill Sites: Nova Scotia Exploration Permits as of June 1976" (after II-7)

[97] Nova Scotia Phase Two Memorial, II-7, para. 14, Nova Scotia Annex 178.

[98] *Canada Oil and Gas Land Regulations*, CRC 1978, vol 17, c. 1518 See sections 4 to 9. By way of example, Figure 33 includes a well identified as "I-22" "22" relates to the section, as set out in section 7 of the Regulations. "I" relates to the unit, as set out in section 8 of the Regulations. Supplementary Statutory Instruments # 1.

178. In an interim statement filed by Mobil in respect of its obligations under provincial permits, reference is made to federal permits not Nova Scotia permits.[99]

114. But the problem goes deeper than this apparent slip by Mobil – or by Nova Scotia – as the following paragraphs will show.

(a) Nova Scotia Figure 33

115 At first glance, Figure 33 seems straightforward. Drill sites are shown, some of which are within areas covered by Nova Scotia permits in force as of June 1976. Nova Scotia does not state that Figure 33 supports its assertion that work was conducted on permits along the "boundary," as clearly no drill sites were in this area. Nova Scotia offers Figure 33 as proof that wells were drilled under Nova Scotia permits.

116. Nova Scotia fails to point out, however, that the areas where there were "wells drilled under Nova Scotia permits" were all areas under federal permits by the same companies.[100] **Figure 6.** This revelation is far from surprising. It is highly unlikely that any company would have undertaken significant exploration activity in this area without a federal permit, especially after the Supreme Court of Canada's decision in the *1967 BC Offshore Reference*.[101]

117. In short, the work that Nova Scotia refers to as "actual wells drilled under Nova Scotia permits" could equally be described as "actual wells drilled under federal permits." The Nova Scotia permits were not the basis on which "significant sums were expended for oil and gas

---

[99] Nova Scotia Annex 178. See Mobil Oil Canada, Ltd., Interim Statement of Expenditures, South Sable Island Marine Seismic. Reference is made to "Government Project #39-EC-231-73-6", "Permit Group #EC-2" and "Permits #W3002 to W3014 Inclusive."

[100] This fact is borne out by material Nova Scotia itself submitted to the Tribunal in Phase One. See Nova Scotia Memorial, Phase One, Figure 20 (after IV-19) and Nova Scotia Oral Presentation, March 13, 2001, Slide PS-28, "Petro Canada Permit Map."

[101] *Reference re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

exploration," as has been alleged by Nova Scotia. Companies, however, certainly "relied on" federal permits.

118. That it was federal permits that counted for private companies is illustrated by what industry itself was saying and seeing in leading journals at the time.[102] **Figure 7** shows maps of the Canada east coast offshore published in the annual bulletins of the American Association of Petroleum Geologists in 1970 and 1971.[103] They show the area blanketed with federal permits. There is no reference to provincial claims or to provincial permits.

119. There is no doubt that, in certain instances, companies also took out provincial permits and there are a variety of reasons why they might have done so. They may have taken out provincial permits as a form of insurance against a resolution of the issue of offshore ownership that would favour the provinces - a matter of hedging bets. Alternatively, the companies may have taken out provincial permits simply as a political gesture to maintain good relations with the provinces.

120. Whatever the reason, it is clear that in the case of Nova Scotia's provincial permits, many companies were paying monies pursuant to those permits under protest. At a meeting of federal and provincial officials in May 1976, Innis MacLeod of Nova Scotia stated that the province "maintained a suspense account for monies deposited under protest by companies that did not admit Nova Scotia's jurisdiction."[104] Later he admitted that "considerable sums of money had been paid to the Province under protest" and gave the figure of $2.5 million.[105]

---

[102] See, for example, D G. Crosby, "Canadian Offshore Mineral Resources Management" (1974) 58(6) *American Association of Petroleum Geologists Bulletin* 1059. Supplementary Authorities # 3

[103] R. Howie and J. Hill, "Developments in Eastern Canada in 1969" (1970) 54(6) *American Association of Petroleum Geologists Bulletin* 922 at p. 932; R. Howie and J. Hill, "Developments in Eastern Canada in 1970" (1971) 55(7) *American Association of Petroleum Geologists Bulletin* 966 at p. 970. Supplementary Authorities # 4 and # 5.

[104] Statement by Innis MacLeod, Deputy Minister of the Executive Council Office, Nova Scotia at Federal-Provincial Meeting, May 12, 1976, p. 7, Memorial of Newfoundland and Labrador, Phase One, Doc. # 71. For ease of reference, this document has been reproduced as Doc. # 3 in the Supplementary Documents submitted with this Counter Memorial.

[105] Statement by Innis MacLeod, *ibid.*, p. 14. Supplementary Doc. # 3

Indeed, it appears that some of the companies taking out Nova Scotia permits were determined that monies they paid would be refunded if the province ended up having no jurisdiction. One of Nova Scotia's concerns in 1976 was the possibility of legal action requiring the province to pay back money that it had already spent.[106]

(b) Nova Scotia Annex 178

121. Annex 178 is described by Nova Scotia as "sample expenditure statements" related to work "conducted (or to be conducted)" by Mobil. Nova Scotia intends Annex 178 to make two points. The first is that work was actually conducted under provincial permits which provided the basis for companies to expend "significant sums." The second is that work was actually conducted under these permits "along the boundary."

122. The first contention has already been discredited. All of the areas addressed by Annex 178 were areas for which Mobil held federal permits. Annex 178, however, differs from Figure 33 in one respect: it also includes information regarding seismic exploration.

123. That Nova Scotia has relied on seismic programs as evidence that work was actually conducted under Nova Scotia permits and that companies "relied" on Nova Scotia permits in conducting such work is somewhat surprising. In Phase One, counsel for Nova Scotia stated that a company did not require a permit or authorization from Nova Scotia prior to conducting a seismic survey.[107] So, how can it be said that companies "relied" on Nova Scotia permits when conducting programs for which no Nova Scotia authorization or permit was required? Indeed, Nova Scotia's lack of interest in seismic programs was expressed in the Phase One oral hearing in the following way: "If somebody had sailed a seismic ship past

---

[106] Statement by Innis MacLeod, *ibid*, p. 14. Supplementary Doc # 3.

[107] Transcript of Oral Hearing, Phase One, March 13, 2001, p. 302 Supplementary Doc. # 2.

Halifax Harbour conducting the survey at this time, Energy and Mines officials would have done nothing but wave presumably. It is not a matter for them to be concerned with."[108]

124. That "wave" must have been some kind of secret sign. For we now learn that Nova Scotia allowed non-permitted seismic work to be credited against provincial permit obligations. But, the Nova Scotia permits could not have been the "basis" on which these programs were conducted. Seismic programs were not work "conducted (or to be conducted)" under Nova Scotia permits. The work was done under federal permits and with federal authorization and then credited against provincial permit obligations.

125. The second contention - that work was actually conducted under Nova Scotia permits along the "boundary" - is also not supported by Annex 178.

126. Nova Scotia does not mention the moratorium block established in 1967 when Canada and France agreed to curtail petroleum exploration in an area south of St. Pierre and Miquelon.[109] All of the Nova Scotia permits held by Mobil in the vicinity of the line claimed by Nova Scotia to be a boundary were within this moratorium block, as were federal permits held by Mobil. To believe Nova Scotia's claim, one must also believe that Mobil did not respect the moratorium established by Canada and France. Mobil, of course, did respect the moratorium.

127 How is it, then, that Mobil was making expenditure claims in respect of Nova Scotia permits abutting the 135 degree line? In order to answer this question, it is necessary to explain the concept of "grouping."

---

[108] Transcript of Oral Hearing, Phase One, March 13, 2001, p. 303. Supplementary Doc # 2. This point was re-stated by Nova Scotia in less graphic terms in its Phase Two Memorial, II-7, para. 15, footnote 26.

[109] The area extended from 44 degrees N to 47 degrees N, and from 55 degrees W to 58 degrees W, excepting the eastern edge of the Banquereau Block on the Scotia Shelf.

128. Under the *Nova Scotia Petroleum Regulations*, licensees were required to expend certain amounts on exploration for each licence (permit) within specified periods.[110] However, the regulations also allowed a licensee, with the approval of the Minister responsible, to "group" licenses, so that exploration expenditures made on one license could be applied to any other license or licenses within a group. There were limits set out regarding the maximum size allowed for each grouping area.[111] In sum, grouping provided a licensee with the opportunity to meet expenditure obligations for a license without actually having conducted any work on that license.

129. The documents contained at Annex 178 make reference to four "Groups" of permits[112] which obviously covered large areas of the offshore. When claiming expenditure amounts, Mobil was not applying defined amounts to a specified "Group." Rather Mobil, in each instance, asked that amounts be credited "to a Credit Bank containing Groups 1-4 inclusive, for specific allocation at a later date."[113] Presumably, specific allocation of expenditures to the "Group" on which the work was actually conducted would have to be done at some point in the future.[114]

130. What Annex 178 shows is that companies were planning to allocate expenditures incurred in other areas to groups that included permits along the boundary. Annex 178 does not show that work was actually conducted under Nova Scotia permits along the boundary.[115]

---

[110] Nova Scotia Annex 177, *Nova Scotia Petroleum Regulations*, 1970 (Office Consolidation), s. 6.

[111] Nova Scotia Annex 177, *Nova Scotia Petroleum Regulations*, 1970 (Office Consolidation), s. 11.

[112] See, e.g., Nova Scotia Annex 178, letter to John C. Smith from B.B. Christie (July 31, 1974).

[113] *Ibid.*

[114] Although the *Nova Scotia Petroleum Regulations* did not appear to allow the allocation of expenditure amounts across grouping areas, Annex 180, described as a Nova Scotia Ledger of Expenditures for Mobil Oil Canada, Ltd. (June 1, 1971), suggests that Nova Scotia was indeed allowing such allocations

[115] Maps showing the location of seismic lines to be shot were apparently enclosed by Mobil, but they have not been produced by Nova Scotia. Nova Scotia Annex 178, letter to John C. Smith from R.C Maguire (April 9, 1973).

131. In any event, even if work had been conducted along the boundary, it would show nothing more than that this work was done by holders of federal permits. And, even if Nova Scotia had been able to prove activity by companies under permits abutting the 135 degree line, it is unclear what prejudice might be suffered or has been suffered from the fact that Newfoundland and Labrador did not agree to the line or from the Tribunal drawing another line.

132. Finally, it also has to be remembered that the majority of Nova Scotia permits submitted by Nova Scotia in Phase One were surrendered by the companies in the mid-1970s.[116] The relevant Mobil permits do not show a date of expiration or surrender. However, any surviving Nova Scotia permits were terminated by the 1984 legislation implementing the 1982 *Canada-Nova Scotia Agreement*.[117] At that time, it was the holders of federal permits whose rights were grandfathered into the new regime. Nova Scotia permits were simply terminated.

B. Newfoundland and Labrador's Permitting Practice

133. Nova Scotia's treatment of Newfoundland and Labrador's permitting practice, is largely a reiteration of what it claimed in its pleading in Phase One, often repeating as if they were new arguments what has already been responded to by Newfoundland and Labrador. Some of the contentions in the Nova Scotia Memorial are simply incorrect factually and can be dealt with quite briefly. Others require more detailed discussion.

---

[116] Nova Scotia Annex 76: permit 372 was surrendered on July 22, 1974; permits 267, 273, 276 and 287 were surrendered on November 5, 1975; permit 174 was surrendered on August 30, 1975; permits 268 and 269 were partially surrendered on November 5, 1975 and then fully surrendered on November 5, 1976. Counter Memorial of Newfoundland and Labrador, Phase One, Supp Doc # 54 permit 272 was partially surrendered on November 5, 1975 and then fully surrendered on November 5, 1980

[117] Letter to the Tribunal from L. Yves Fortier, March 20, 2001 See also Nova Scotia Memorial, Phase One, Appendix A, p. 1, footnote 1.

134. On the factual level, Nova Scotia states, "From the tri-junction point to point 2017, Newfoundland issued no permits."[118] This is simply wrong. Three of the interim permits issued to Katy Industries on 19 May 1971 were located near the Newfoundland coast in the Cabot Strait area inside Turning Point 2017.[119] Interim permits issued to Hudson's Bay[120] and Texaco[121] in 1974, were also inside Turning Point 2017.

135. Nova Scotia also claims that "Newfoundland never issued any relevant permits conflicting with" the 135 degree line."[122] The statement is either an unsubtle attempt to reject all Newfoundland's permits as "irrelevant," or it is again simply wrong. As Newfoundland and Labrador pointed out in its Phase One Counter Memorial, interim permits issued to Katy, Hudson's Bay, Amoco, Texaco and Pacific Petroleums, all overlapped the Nova Scotia line.[123] **Figure 8.**

136. Beyond this, faced with the fact that the records of the Newfoundland and Labrador permitting practice are incomplete, Nova Scotia appears to consider that it can replace an absence of facts with supposed facts, and build arguments on the basis of conjecture, supposition and fertile imagination.

137. In this section Newfoundland and Labrador will deal with Nova Scotia's contentions regarding the construction of the Mobil permit, Nova Scotia's claims about the "missing" Newfoundland and Labrador permit grid, and Nova Scotia's claims in respect of the 1977 Newfoundland and Labrador Petroleum Regulations.

---

[118] Nova Scotia Memorial, Phase Two, IV-26, para. 55

[119] See Counter Memorial of Newfoundland and Labrador, Phase One, Figure 10.

[120] Counter Memorial of Newfoundland and Labrador, Phase One, Supp. Doc. # 48

[121] Counter Memorial of Newfoundland and Labrador, Phase One, Supp. Doc # 50

[122] Nova Scotia Memorial, Phase Two, IV-37, para 79

[123] Counter Memorial of Newfoundland and Labrador, Phase One, Figure 13.

(a) The Mobil Permit

138. Nova Scotia makes much of the fact that the western limit of the interim permit issued to Mobil Oil on September 15,1967 was along 135 degrees. In Nova Scotia's view, this can only mean that Newfoundland and Labrador was accepting and applying the 135 degree line. Nova Scotia wants the absence of facts explaining why the Mobil permit was issued in this way to mean that inferences – and that is all they can be – should be drawn in its favour.

139. But what are the facts? Three are known. First, Mobil was issued a permit by the federal government effective February 3,1967. Second, it received a permit from Nova Scotia on February 20,1967 that encompassed the area of the federal permit. Third, it received an interim permit from Newfoundland on September 15,1967.

140. Nova Scotia wants to draw from the fact that the Newfoundland and Labrador permit abutted the Nova Scotia permit the inference that there had been a conscious decision by Newfoundland and Labrador to respect an agreed boundary. But, given the fact that the Newfoundland and Labrador permit was issued some seven months later than the Nova Scotia permit, it is just as likely that the Newfoundland and Labrador permit was issued to cover an area requested by Mobil than to conform to an agreed boundary with Nova Scotia.

141 All of this is conjecture, as of course it must be. And it is hardly the task of the Tribunal to choose between competing conjectures. Rather, it is simply not possible to draw conclusions about the conduct of the parties on the basis of an incomplete contemporary record relating to a single interim permit that expired almost 25 years ago.

(b) The "Missing" Newfoundland and Labrador Permit Grid

142. Nova Scotia has sought to support its claim that the Katy permit was drawn in accordance with the 135 degree line by arguing that its depiction of the Katy permit on a figure that has no permit grid is justified because at the time the Katy permit was issued, there was no

Newfoundland permit grid and no grid numbers were mentioned on the Katy permit map.[124] And, of course, it is true that at the time the Katy permit was issued, Newfoundland and Labrador had not yet established its own permit grid system. But, it is also irrelevant. A glance at the Katy permit map shows that there were lines on it. And those lines form a grid.

143. The map on which the Katy permit was drawn was geographically referenced using a grid of longitude and latitude of the type used by Newfoundland and Labrador in preparing descriptions for interim permits issued from 1965 to 1971. The grid on those maps was bounded on the east and west sides by successive 15 degree meridians of longitude and on the north and south sides with successive 10 degree parallels of latitude. The Katy permit was thus drawn on a geographically referenced map. Every point of intersection of the Katy line with the grid can be transposed onto a Mercator chart containing a geographically referenced grid. **Figure 9.**

144. Thus, Nova Scotia's revelation about the absence of an official Newfoundland and Labrador permit grid simply proves nothing. When the Katy line is transposed onto a chart containing a permit grid, it shows, as Newfoundland and Labrador illustrated in Phase One, that the western limit of the Katy permit extends well to the west of the 135 degree line.

145. Nova Scotia has still failed to explain why this is so. All it can do is fall back on a drawing, not of the line drawn by the drafter of the Katy permit, but of the line Nova Scotia imagines the Katy drafter to have intended to draw. **Figure 10.** Again, Nova Scotia's argument is based on conjecture. It is requesting the Tribunal to draw inferences from suppositions, and to ignore the facts.

---

[124] Nova Scotia Memorial, Phase Two, II-11, para. 27.

(c) The 1977 Newfoundland and Labrador Petroleum Regulations

146. Nova Scotia seeks to gain support for its position from sketch maps attached to the White Paper and to the 1977 *Newfoundland and Labrador Petroleum Regulations*, although it says several rather conflicting things about them. Although it claims that these sketches confirm the 135 degree line, it also says that they diverge for part of the Nova Scotia boundary.[125] Even though Nova Scotia acknowledges that the 1977 *Regulations* and the White Paper "are ambiguous"[126] and have specific difficulties which "severely limit their relevance to this case,"[127] it goes on to claim that the line in the *Regulations* sketch follows the 135 degree line out to 46 degrees N,[128] which in fact it does not.

147. The sketches are imprecise, they do not embody a line that was plotted in any technical sense. What they do show, unequivocally, is that a 135 degree line was not used. Of the White Paper sketch map, the Tribunal said in its Phase One Award that it "clearly does not show anything like a 135 degree line."[129] The same can be said of the sketch attached to the *Regulations*.

IV. Conclusion

148 Nova Scotia's arguments about conduct are essentially a rehash of its arguments made in Phase One. It relies on conduct that the Tribunal has already ruled does not constitute agreement on a line and seeks to show that the conduct nevertheless does reflect some kind of agreement. It seeks to draw from a clear statement that Newfoundland and Labrador did

---

[125] Nova Scotia Memorial, Phase Two, IV-42, para. 91.

[126] Nova Scotia Memorial, Phase Two, IV-42, para. 92.

[127] Nova Scotia Memorial, Phase Two, IV-41, para. 88.

[128] Nova Scotia Memorial, Phase Two, IV-47, para. 100.

[129] Phase One Award, p. 70, para. 6.6(8).