

## CHAPTER VII THE EQUITY OF THE RESULT

### I. Introduction

259. In its Memorial, Nova Scotia accepts that the testing of the equity of the result achieved by a proposed delimitation is an important part of the delimitation process. Indeed, it says that it is “the most critical” stage in that process.<sup>266</sup> However, in testing whether its proposed line is equitable, Nova Scotia relies on tests that have no basis in law or are distorted versions of a recognized test. As a result, Nova Scotia is unable to demonstrate that its line achieves an equitable result as required by the law.

260. The tests that Nova Scotia proposes for determining the equity of the result fall into two categories: tests based on geography and tests based on non-geographical factors. The former consists of largely the traditional test based on the proportionality of coastal length to sea areas, although applied in a completely bizarre fashion, and includes as well some irrelevant macro-geographical factors. The latter consists of a series of factors, including concepts of equal division of entitlement, resource allocation, and conduct, many of which are considerations whose relevance has been rejected in maritime boundary delimitation.

### II. Geographical Tests

#### A. Proportionality

261. Although it is prepared to apply a traditional proportionality test to its claim, Nova Scotia evidences some reluctance in doing so, stating that proportionality arises only where there is a “significant disproportion” in coastal lengths,<sup>267</sup> and that it is less applicable in the context

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<sup>266</sup> Nova Scotia Memorial, Phase Two, V-17, para. 39.

<sup>267</sup> Nova Scotia Memorial, Phase Two, V-19, para. 44.

of the present dispute because of the Nova Scotia theory of basis of title.<sup>268</sup> However, it takes the view that “the relevant area is capable of objective and relatively accurate definition, and the relevant coasts are readily linked to that area.”<sup>269</sup>

262. However, when Nova Scotia comes to apply the test and determine the relevant area, there appears to be nothing of the promised objectivity and accuracy. The “relevant area” for Nova Scotia is simply the area of “overlapping entitlements” developed from Nova Scotia’s distorted interpretation of the *Accord Acts*. The relevant area is not determined by reference to the coasts surrounding the area in which the delimitation is to take place. Rather, coasts are selected to fit an area already determined on the basis of the overlapping entitlement theory. The process is reversed. The relevant area is not determined on the basis of the geography; rather, the geography is fashioned to fit a predetermined relevant area.
263. Thus, Nova Scotia offers no objective basis for framing the relevant area for the purposes of a proportionality test. Furthermore, its determination of coastal lengths is contrived. Coasts that do not face into the area to be delimited are included in the calculation of coastal lengths.<sup>270</sup> And, of course, a contrived test produces the intended, contrived result.
264. In 1992 in the *Canada v. France* case the Court of Arbitration considered the length of the Canadian coasts in this area to be 455.6 nm. In this case, some nine years later Nova Scotia claims that in the same delimitation area the coasts of Newfoundland are 701 km (379 nm) and the coasts of Nova Scotia are 747 km (403 nm) in length. How did the coasts almost double in length? By Nova Scotia egregiously expanding the delimitation area to the point where the term “relevant” is simply meaningless, and then counting the lengths of the coasts that frame that predetermined area.

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<sup>268</sup> Nova Scotia Memorial, Phase Two, V-19, para. 45.

<sup>269</sup> Nova Scotia Memorial, Phase Two, V-20, para. 47.

<sup>270</sup> These include the Newfoundland coast from Cape Race to Cape Spear and the Nova Scotia coast from Cape Canso to Cape Sable and on to Cape Fourchu.

265. In short, Nova Scotia has failed to show in any “objective” and “accurate” way that its proposed line meets the test of proportionality. And clearly, it could not. If the Nova Scotia line is subjected to any properly applied proportionality test, it becomes clear that it is disproportionate.
266. In **Figure 15** the Nova Scotia line has been tested by the proportionality model proposed in the Memorial of Newfoundland and Labrador. The result is clear. Nova Scotia with 30.6% of the coasts in the area would receive 56.9% of the area. By contrast, Newfoundland and Labrador with 69.4% of the coasts receives 44.1% of the area. The Nova Scotia line produces a disproportionate result and thus cannot be regarded as equitable.

#### **B. Macro-Geography**

267. Nova Scotia also suggests that macro-geography is a factor to be taken into account in determining the equity of the result, although it cites no authority to justify such an approach in law. However, it appears that what Nova Scotia is seeking to do is determine whether there has been any cut-off. And, of course, as Newfoundland and Labrador pointed out in its Memorial, non-encroachment and the prevention of cut-off are equitable principles relevant to maritime boundary delimitation.<sup>271</sup>
268. Not surprisingly, when it turns to test its line for cut-off, Nova Scotia likes what it sees. The line, it notes, runs in a similar orientation to the Canada-United States boundary in the Gulf of Maine. The Nova Scotia coast is not cut off. But of course, Nova Scotia fails to address the other half of the question that any test that used the term “equity” would do. That is, what about cut-off of the Newfoundland coast? Not a word is heard from Nova Scotia on this.

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<sup>271</sup> Memorial of Newfoundland and Labrador, Phase Two, pp. 43-44, paras 110-111.

269. Nova Scotia notes that under its line the impact of the delimitation with France is “equitably shared” between the two provinces. Surely consideration of the French zone would have triggered something in Nova Scotia’s mind. The Court of Arbitration in *Canada v. France* said that any movement of the St. Pierre and Miquelon boundary to the west would have cut off the natural prolongation of the south coast of Newfoundland. How is it that an extension of the boundary with France to the west would cut off the Newfoundland coast, but the extension of a boundary with Nova Scotia to the east would not?
270. Nova Scotia’s illustrations demonstrate clearly that its line avoids cut-off of the Nova Scotia coast.<sup>272</sup> But those illustrations demonstrate even more clearly that the line completely cuts off the south coast of Newfoundland from its natural prolongation. Indeed, nowhere is this more obvious than in Nova Scotia Figure 42. **Figure 16.**
271. Cut-off was not just a factor in *Canada v. France*, it was also a critical factor in *Gulf of Maine*. But in neither case was the cut-off one-sided. Nova Scotia wishes to reverse the approach taken in both of those cases where cut-off had to be considered in relation to the coasts of both parties. The Nova Scotia claim does not do this. Nova Scotia’s line simply fails the test of avoiding encroachment or cut-off.

### III. Non-Geographical Tests

272. Nova Scotia suggests a number of tests that are thinly disguised efforts to have the Tribunal redress what Nova Scotia appears to see as the key issue in this case, that is, the Nova Scotia perception that it is disadvantaged in relation to Newfoundland and Labrador in respect of the potential wealth of the offshore.
273. Thus, Nova Scotia argues for equal division of overlapping entitlements. Applying that test to its “gerrymandered” areas of entitlement, it notes that Newfoundland and Labrador gets

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<sup>272</sup> See for example Nova Scotia Memorial, Figure 50 (after (V-72)).

more than its “share” but generously offers not to notice the difference. But, this is not a test of equity; it is just a restatement of the Nova Scotia claim.

274. Nova Scotia also tries to compare the total offshore areas appertaining to the parties to their total coastline lengths and concludes that its line is therefore proportionate. Again, it makes no attempt to justify such a comparison on the basis of any legal principle. The suggestion that it should compare the total United States coasts and maritime area with the total Canadian coasts and maritime area as a test of equity would have astonished the Chamber in the *Gulf of Maine* case. No court or arbitral tribunal has ever endorsed such a test. It should readily be rejected by this Tribunal.
275. Nova Scotia falls back as well on its claim for an “equitable” division of the resources within the “area of overlapping entitlements.”<sup>273</sup> Again, no attempt is made to provide a legal justification for such an approach as a test of equity. As Newfoundland and Labrador has pointed out, the relative economic position of the parties has been regarded as irrelevant to delimitation. Only where a proposed delimitation would produce “catastrophic repercussions” would such matters become relevant.<sup>274</sup> And, of course, Nova Scotia does not make such a claim, nor could it. As a result, its purported test is no test.
276. Finally, Nova Scotia relies once more on its refrain about the conduct of the parties.<sup>275</sup> Once again, this is not a test of equity but simply a restatement of the Nova Scotia claim.

#### IV. Conclusion

277. Nova Scotia has failed to show that its proposed line produces an equitable result. Its tests for equity either have no basis in law, or they are misapplied. In particular, its test of

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<sup>273</sup> Nova Scotia Memorial, Phase Two, V-25, para 61

<sup>274</sup> *Gulf of Maine*, p. 342, para 237. Supplementary Authorities # 13.

<sup>275</sup> Nova Scotia Memorial, Phase Two, V-18, para. 41.

proportionality designed to compare the lengths of coasts to the areas appertaining to the parties is based on an area that has been expanded so far beyond any conceivable definition of the area to be delimited to lose any credibility as a test of equity. Moreover, when the Nova Scotia line is tested against a properly constructed proportionality model, it is clearly shown to be disproportionate.