

## SUMMARY OF NEWFOUNDLAND & LABRADOR PHASE TWO MEMORIAL

### CONDUCT OF THE PARTIES

There is no conduct in this case that is relevant to the determination of an equitable result. The conduct has been too sparse, ambiguous, inconsistent, and brief to meet the stringent standards required in maritime delimitation cases. Nor does it demonstrate acquiescence or estoppel. The proposals exchanged in the early years of the dispute were always predicated on the understanding that federal recognition of the parties' claims would be required. Examination of the parties' permitting practices leads to the same conclusion. Their conduct was not mutual, consistent, or clear. First, the permits that Newfoundland issued between 1965 and 1976 disclose *no de facto* western boundary corresponding to any Nova Scotian eastern boundary. Moreover, with the promulgation of the *Newfoundland and Labrador Petroleum Regulations, 1977*, all prior permits lapsed. Thereafter Newfoundland issued no permits in the vicinity of the potential boundary. Second, the permits were intended to buttress a jurisdictional claim *vis-à-vis* the federal government. None of the permits Newfoundland issued after 1971 granted production rights. Third, the parties' conduct was short-lived. Minister Doody's letter of October 6, 1972 demonstrates that by 1973 a dispute existed between the parties as to the existence and location of the boundary.

### GEOGRAPHIC SETTING (Figure 2)

In the Gulf of St. Lawrence, the parties' coasts are adjacent. In the western-most portion of the Cabot Strait, the coasts are opposite. There is no striking difference or disparity between the parties' coasts in these areas. To the east the situation is more complicated. In *Canada v. France*, the Court noted that the "coasts of Newfoundland and Cape Breton Island from the Burin Peninsula to Scatarie Island, together with the opening to the Gulf of St. Lawrence, form a marked concavity." The distinction between this "inner concavity" and an outer area was the foundation of the Court's analysis.

The relevant coasts in a maritime delimitation are those facing the delimitation area. The south coast of Newfoundland, from Cape Ray to Cape Race, forms a single and continuous

geographical unit. The westernmost sector, from Cape Ray to Connaigre Head, runs almost due east. At Connaigre Head, the coastline turns sharply south to the headland of the Burin Peninsula. This portion of the Newfoundland coast forms the northern boundary of the inner concavity identified above. The eastern portion of Newfoundland's south coast, from the Burin Peninsula to Cape Race, faces directly toward the outer sector of the delimitation area.

The other side of the configuration is formed by Cape Breton Island, with the two coastal fronts outside the Gulf of St. Lawrence. The northeastern coastline stretches from Money Point to Scaterie Island and forms the Nova Scotian wall of the inner concavity. The other Atlantic coastline of Cape Breton runs in a southwesterly direction toward Cape Canso. Nova Scotia's mainland coasts do not face the delimitation area and are therefore not relevant.

The delimitation in the present case should take into account the area granted to France in the 1992 Award. This area was "carved out" of the zone that would otherwise have belonged to Newfoundland. But the Tribunal should not consider Sable Island as having a relevant coast. It is small and isolated from the rest of Nova Scotia. It is not an incidental feature of a larger coastal configuration. Considering Sable Island would create significant distortion.

In the inner concavity, Newfoundland's relevant coasts are substantially longer than Nova Scotia's. The outer area is almost entirely dominated by Newfoundland's south coast. The south-facing coast of Cape Breton Island, in contrast, has a tenuous relationship to the delimitation.

The Newfoundland coast in the Fortune Bay area, it should also be noted, forms a distinctively concave configuration. The Nova Scotia coast, in contrast, protrudes outward to form one of the headlands of the inner concavity at Scaterie Island.

To avoid distortion by incidental features, the measurement of the relevant coasts requires the establishment of general directional lines. The Tribunal should adopt the lines used by the Court in *Canada v. France*, with one modification. In *Canada v. France*, the Court excluded the Newfoundland coasts north and east of St. Pierre and Miquelon. These had previously been used as the basis of the 1972 territorial sea delimitation. This consideration has no relevance in the present case. The presence of St. Pierre and Miquelon does not interrupt the unity of

Newfoundland's continuous coastline. The total length of Newfoundland's south coast, then, is 319 miles. The total length of the relevant Nova Scotia coasts is 141 miles.

The relevant offshore area can also be calculated by appropriate modification of the method used in *Canada v. France*. The simplest option is to extend the lines perpendicular to the general coastal direction from Cape Race and Cape Canso to the 200 mile limit (Figure 4).

The continental shelf in this area extends beyond the 200 mile limit. But since the exact limits of Canada's jurisdiction have not yet been established, the Tribunal should not attempt to define them. Instead it should determine that the delimitation line shall continue indefinitely to the limit of national jurisdiction on the bearing at which it intersects the 200 mile limit. There are no geographical changes requiring a change in course at this point.

#### THE APPLICABLE LAW

##### *Principles*

The international law of the continental shelf governs this case in its entirety. But the delimitation provisions in Article 6 of the 1958 *Geneva Convention On the Continental Shelf* (GCCS) do not apply directly. The expression "principles of international law" in the Terms of Reference refer *prima facie* to generally applicable principles of international law and not to the *lex specialis* created by particular treaties. The law applicable to Phase Two of this arbitration is therefore customary international law.

The result of this delimitation would in any case be the same under either Article 6 or customary law. Article 6 is drafted in terms of equidistance and special circumstances. Customary law, in contrast, refers to "equitable principles," "relevant circumstances," and "equitable results." But international tribunals have been consistent in affirming the similarity of the two sources of law. Provisional equidistant lines are often used, even in cases of adjacency, but they are always tested against the basic principles of equity.

Those principles reflect the fact that it is the equitableness of the result that is of paramount importance. That result is determined with reference to a definite legal framework. This

framework requires especial consideration of legal title and coastal geography. Equally fundamental is the principle that continental shelf rights are inherent and need not be claimed or exercised. Except in cases that meet the strict conditions of acquiescence or estoppel, state conduct is a secondary consideration. What counts is the inherent title emerging from the facts of geography.

#### *Relevant Circumstances*

The present dispute can and should be resolved exclusively on basis of the delimitation area's coastal geography. The cases have been consistent in grounding rights to the continental shelf on coastal sovereignty. Put simply, states are entitled to the areas situated in front of their coasts. There can be other considerations, but geography is overwhelmingly the most important.

Geography is also key to the concept of "natural prolongation": the prolongation of the land mass into and under the sea forming the physical phenomenon of the continental shelf. Article 76 of the *LOS 1982*, which represents customary law, recognizes continental shelf rights out to a distance of 200 miles regardless of whether the physical continental shelf extends out to that limit. Within the 200 mile limit, therefore, geology and geomorphology are irrelevant.

In contrast to geography, the relevance of economic factors is limited. Delimitation is not an exercise in distributive justice. Though tribunals have occasionally considered resource dependence as a secondary factor, this is irrelevant to delimitations involving undiscovered and unexploited resources.

The conduct of the parties can also be relevant, but only if it meets a stringent standard. It must be consistent, sustained, and display an acceptance of the proposed line as an equitable basis of delimitation. Estoppel can also be relevant. But international tribunals have rarely found it to be established.

#### *Equitable Principles*

The principle of non-encroachment requires that delimitations accord each party its own

natural prolongation, without encroaching (“cutting-off”) the natural prolongation of the other. Boundaries passing close to the coast of either party are unacceptable.

An equitable delimitation is one that gives proportionate effects to coastal geography. There are myriad ways in which this principle can be applied. But there are two situations where concern for proportionality typically arises. The first is the potentially distorting effect of incidental features, such as islands, rocks, and promontories. Small, distant islands can have profoundly distorting effects. Under the equidistance method, such islands have the same effect as a hypothetical extension of the mainland to the island. This effect must be reduced or eliminated in order to achieve an equitable delimitation. The second situation concerns proportionality between length of a state’s coast and its maritime entitlements. Such proportionality may serve either as a factor in selecting and applying a delimitation method or as an *ex post facto* test of the equity of a provisional line.

In delimitations beginning within a coastal concavity but extending beyond into the open sea, it is appropriate to employ a “two-area” methodology. The concavity is a relatively defined area where the surrounding coasts face each other. Outside the concavity, the area is open-ended and the relevant coasts gradually recede into the distance.

### *Equitable Solutions*

Equidistance, while often useful, is by no means a mandatory methodology. It is most often appropriate for opposite coasts. In such cases the coasts’ seaward extensions meet and overlap. A series of constantly shifting basepoints causes the line to respond continuously and accurately to the changing contours of the two coasts. Equidistance is less appropriate for situations of adjacency, where coastal projections do not converge or overlap (Figure 6). An equidistant line from adjacent coasts extending into the open sea is generally controlled by a single pair of basepoints. This sometimes causes the line to veer inequitably towards the coast of one of the two states.

The application a median line may be especially inequitable in the context of “long distance”

delimitations. The distorting effects of geographical irregularities are magnified as the line moves out to sea. A related problem arises where an equidistance line beings within a coastal concavity and extends into an outer area. In such cases the line will generally emerge from the concavity at the mid-point of the closing line. Where the extent of the relevant coasts within the cavity is unequal, as in the present case, the centre of the closing line will fail to reflect the most critical aspects of the coastal relationship. The fundamental difficulty with equidistance is that it is based, not on the dominant features of the geography, but rather on the most protruding features.

A number of methods have been devised to eliminate or reduce the distorting effect of islands. Straight lines and other geometric methods can be used to eliminate their influence altogether. Islands can also be given reduced effect, for example by bisecting the angle formed by two equidistant lines, one giving full effect to the islands and the other ignoring their presence. Reduced effect can also be employed without a median line, as where an angle based on a perpendicular to the coast is bisected (Figure 9) or where half effect is given to an island as part of a formula for adjusting a line based on coastal lengths. Islands may also be “enclaved” by drawing a 12 mile limit around them (equivalent to the breadth of the territorial sea), but otherwise giving them no effect on the construction of the line. Another approach is to distinguish between islands forming “an integral part of the general coastline configuration,” that are given full effect, and other islands that are given no effect.

The distortion of incidental features and irregularities may also be avoided by the use of coastal fronts. A coastal front consists of a straight baseline (or series of baselines) drawn between the extreme points at either end of the coast. Coastal fronts permit the use of simplified geometrical delimitation methods such as bisectors and perpendiculars. Bisectors are appropriate when the coasts form an angle, as often occurs with coastal indentations or concavities (Figure 13). Perpendiculars, whether running from the general direction of the coast or to the closing line of a concavity, serve the same ends. Because they head straight out to sea on a constant course, they avoid cut-off.

## THE CHOICE OF A METHOD

### *Equidistance*

In this case the presence of incidental features departing from the general direction of the coasts makes equidistance inappropriate. The presence of St. Paul Island and Sable Island give Nova Scotia an unwarranted advantage, especially when combined with the protruding coasts of Cape Breton Island. Both St. Paul Island and Sable Island are notorious navigation hazards, and neither has been used in the construction of the Canadian system of straight baselines. The distorting effect of these islands is so radical that it precludes any attempt to adjust a provisional median line.

St. Paul Island lies close to the Cabot Strait closing line about 14 miles from the Nova Scotia coast. Though it is a tiny, barren wilderness, under equidistance it would effectively shift the Nova Scotia landmass one quarter of the way to Newfoundland. Sable Island is situated 88 miles from Nova Scotia. It sustains only federally-authorized personnel and is little more than an exposed reef. But its effect on a median line is dramatic, attracting a broad swath of maritime territory, gradually widening as the line moves seaward (Figure 14). The island's coasts, moreover, face north and south, not east. Only a narrow point of land actually faces towards the delimitation area. Further, under the *Constitution Act, 1867*, the federal government owns Sable Island and exercises exclusive jurisdiction over it. It should not therefore be used to provide Nova Scotia with entitlements to continental shelf areas.

The use of equidistance, even to draw a provisional line, is often inappropriate where there is a marked disparity in coastal lengths. In this case, the most extensive coasts fronting the delimitation are those of the south coast of Newfoundland. Within the inner concavity, the ratio is 2.42 to 1 in favour of Newfoundland. Outside, the Newfoundland coasts occupy an even more commanding position.

Apart from the position of St. Paul Island, there is nothing objectionable about the general course of an equidistant line in the Cabot Strait. But as it reaches the centre of the inner concavity, the line is pushed toward Newfoundland by the protruding coasts of Cape Breton and

the receding coast of Newfoundland's Fortune Bay. An equidistant line would "squeeze" Newfoundland's entitlement off this portion of its coast (Figure 15).

Outside the inner concavity, where the parties' coasts are adjacent, the use of equidistance is even less appropriate. This area is within the natural prolongation of the Newfoundland coasts from the Burin Peninsula to Cape Race. There is no competing projection from Nova Scotia. Equidistance would permit Nova Scotia to dramatically encroach upon Newfoundland's prolongation.

The inequity of equidistance is further buttressed by a consideration of the other boundaries in the region. Newfoundland has already had to bear the brunt of the zone allotted to St. Pierre and Miquelon. This should be taken into account in determining an equitable delimitation in this case. The use of an equidistant line in the Gulf of St. Lawrence would also be inappropriate given the fact that Quebec has not entered into an agreement with the federal government with respect to an offshore area. The boundary in this area should be determined by a method that does not by implication impinge on Quebec's interests.

#### *An Equitable Delimitation*

The only logical and equitable starting point is on the closing line of the Cabot Strait, midway between the two closest points on the parties' respective coasts: Money Point on Cape Breton Island and Cape Ray on Newfoundland. St. Paul's Island should be disregarded. Proceeding eastward, the first segment is a bisector of the angle formed by the two coastal fronts that face this part of the inner concavity. The coasts here face each other in a classically opposite relationship. Newfoundland does not therefore object to the use of an equidistant line in this sector, provided that St. Paul Island is not used as a basepoint. But given the inappropriateness of equidistance in the rest of the delimitation area, a consistent approach is preferred. The use of coastal fronts, moreover, eliminates the shift in the direction of the median line caused by the shallow indentation in the coast of Cape Breton Island southeast of Money Point. It is also generally consistent with the decision in *Canada v. France*. The line resulting from the bisector



averages the angles of the parties' coastal fronts and avoids cut-off or encroachment. It also reflects an equal division of areas of "overlap and convergence" of seaward extensions.

The relevant Newfoundland coastal front is the long line across most of the back of the concavity, from Cape Ray to Connaigre Head. A single coastal front is proposed for the Nova Scotia side of the concavity. The bisector of those two lines runs at an angle of 123.9 degrees (Figure 17).

Beyond Connaigre Head, the general direction of the Newfoundland coast turns sharply to the south, crossing Fortune Bay to meet the headland of the Burin Peninsula at Lamaline-Shag Rock. There the coastline resumes its east-west orientation in its final segment ending at Cape Race. It is this shorter coastal front that should control the delimitation of the area lying immediately between the Burin Peninsula and Fortune Bay and Cape Breton Island. The second segment of the line should give effect to the coasts that form the "jaws" of the concavity. Since there is only one coastal front on the Nova Scotia side, there should be no change on that side of the configuration.

Consistent with the coastal-front bisector approach, this part of the line should run at a bearing that bisects the angle formed the general direction of these coastal fronts. This bisector runs at angle of 163.15 degrees, causing the line to turn southward as the change in the direction of the Newfoundland coast would imply (Figure 18).

Determining where the second segment should begin requires consideration of relative coastal lengths. Consistent with the approach in the *Gulf of Maine* (where the disparity in coastal lengths was not as great as in the present case), the adjustment in the second segment should reflect the difference in coastal lengths within the concavity: 2.42:1 (Figure 18). This entails a shift in the position of the second segment of the line so that it intersects the closing line at a point that corresponds to that ratio (point C on Figure 18). The intersection of the first and second segments (point B on Figure 18) is determined automatically by the position and azimuth of the second segment.

The delimitation of the line in the final segment requires consideration of the Court's

decision in *Canada v. France*. There the Court found that St. Pierre and Miquelon had an “unobstructed” seaward opening to the south. France was therefore allotted a zone extending 200 miles in that direction. The south-facing projections of Nova Scotia’s mainland coast, the Court held, failed to extend to this area.

If St. Pierre and Miquelon had an unobstructed seaward projection toward the south that did not converge with any competing projection from Nova Scotia, then *a fortiori* the coastal front of Newfoundland east of the French islands must also enjoy a similar projection. The line must therefore follow a course that is sufficiently southerly in its bearing to avoid any such encroachment.

The starting point of the final segment begins at the point of intersection of the second segment with the closing line from Scaterie Island to the Burin Peninsula (point C on Figure 18). Practice and precedent suggest that the line run perpendicular to that closing line, extended to the outer limit of the continental shelf. Such a line would avoid any tendency to swing toward either coast. A single straight line is inherently suited to areas of open geography where there are no changing points of reference along the coast that would cause the boundary to change direction as it moves outward. This line follows an azimuth of 163.2 degrees (Figure 20). As it would differ from such a line by only 0.05 degrees, Newfoundland would not object to a single straight line extending seaward from the intersection of the first and second segments at Point B (Figure 20). But the conceptual justifications for each sector are unique. Newfoundland thus maintains the separate bearings of the two segments for purposes of its Memorial.

The delimitation of the short sector in the Gulf is straightforward. The coastal relationship moves from adjacent to opposite as the line moves west from Cabot Strait, but the geography is fairly simple. Equidistance might be used, but as indicated, the Quebec tri-point cannot be taken for granted. It would also be inconsistent with the approach to the remainder of the boundary. For the line running eastward from Cabot Strait, Newfoundland proposes a bisector of the angles formed by the two coastal fronts. But the immediately adjacent coasts on the western side of the Strait may be too short to support such an approach. A line perpendicular to the Cabot Strait

closing line, in contrast, would reflect the general direction of both the Newfoundland coast running northeast from Cape Ray and the Cape Breton coast running southwest from Money Point. This line also avoids any tendency to swing toward the territory of either party. Accordingly, Newfoundland proposes a perpendicular line, beginning at the mid-point between Money Point and Cape Ray and proceeding on a azimuth of 321.5 degrees, extending to the limit of the offshore areas of Newfoundland and Nova Scotia within the Gulf of St. Lawrence (Figure 21).

#### THE EQUITY OF THE RESULT

As noted, non-geographic factors, including resource access and the parties' conduct, have no relevance in this case. The equitableness of the result therefore turns on geographic factors alone. The appropriateness of a perpendicular to a closing line in the outer area depends on its correlation with the basic structure of the coastal geography. Although there is no single coastal direction, the seaward extensions of each coastal front can be represented by lines at a perpendicular angle to that front (Figure 23). The azimuth representing the average of these two perpendiculars (163.05 degrees) is essentially the same as the azimuth of the perpendicular to the closing line (163.2 degrees).

The other segments of the line also produce a proportionate result. The relevant area is defined by extending lines perpendicular from the general direction of the coast from Cape Race and Cape Canso out to the 200 mile limit. This excludes the Gulf of St. Lawrence. But that undefined area, extending to an indefinite closing point, neither requires nor lends itself to a proportionality test. The result is that the total length of the relevant Newfoundland coast is 319.8 miles. The total length of the relevant Nova Scotia coasts is 141.3 miles. Newfoundland thus has 69.4 percent of the coasts in the relevant area. Since it receives 69.6 percent of the relevant area, the Newfoundland line does not result in any disproportion (Figure 24).