

PART II: THE FACTS

A. Introduction

1. The facts of this case were addressed in detail in the parties' written and oral submissions in Phase One of the arbitration. The evidence presented focused on the conduct of the parties, from the initial negotiation of interprovincial boundary lines in the late 1950s and early 1960s and the subsequent application of those boundaries, through to the legislative adoption of the Nova Scotia-Newfoundland boundary in the *Canada-Nova Scotia Accord Act*, as it related solely to the question of whether the parties had resolved the boundary by binding agreement.
2. In the present phase of the arbitration, the question is different, but the factual record remains highly relevant. As demonstrated in Parts IV and V below, the conduct of the parties with respect to their mutual boundary is fundamental to determining how that boundary should now be delimited. As the Tribunal noted in its Award of May 17, 2001:¹

[T]he conduct of the Parties may be relevant to delimitation in a variety of ways, while stopping short of a dispositive agreement. Such conduct thus remains relevant for the process of delimitation in the second phase of this arbitration.

3. Accordingly, and so as to avoid repeating what is written (and what has been previously pleaded) elsewhere, the facts as set out in Nova Scotia's Memorial and Counter-Memorial in Phase One of the arbitration are to be considered incorporated by reference into the present Memorial.²
4. What follows is a "broad brush" overview of certain of the central facts of the case addressed in Phase One of the arbitration, which are of particular relevance to the delimitation that must now be effected. These principally concern evidence of the parties' negotiation and implementation of their mutual boundary; their

¹ Phase One Award, para. 7.8.

² The facts as presented by the parties are, of course, subject to by the findings of fact set out in the Tribunal's Phase One Award.

permit practice (in respect of which the Tribunal did not find it necessary to rule³), including additional evidence regarding the work actually conducted by several companies under the permits issued in the boundary area; and other relevant matters that remain unresolved. In addition to the matters discussed here, Part IV of this Memorial (“The Relevant Circumstances”) necessarily addresses factual issues; certain facts, in particular new facts related to such matters as geographic circumstances and resource location, are addressed in that Part.

B. The Parties’ Conduct In Respect Of The Negotiation And Implementation Of The Line Dividing Their Offshore Areas

5. By far the most significant features of the conduct of the parties are that, at one time, they actually **reached an agreement on the location of a boundary dividing their respective maritime claims**, and they subsequently conducted themselves in such a way – primarily in respect of the issuance of exploration permits – **that they established a *de facto* line**. These two facets of the parties’ conduct are examined here.

i) The Parties Agreed On The Location Of A Boundary Line

a) Agreement On The Boundary Was Reached In 1964 And Reaffirmed In 1972

6. The essential aspects of the history of the parties’ negotiations and the conclusion of their agreement on the location of the boundary are as follows:

- In 1964, following four years of negotiation, the Premiers of the five East Coast Provinces agreed upon the location of mineral rights boundary lines for the division of their respective maritime

³ Phase One Award, para. 6.8: “Whatever the position may have been with the permits, the Tribunal does not find it necessary to analyse the oil permit practice of the Parties in any detail for present purposes. This may be a matter for a second phase of the arbitration, and the Parties are at liberty to adduce further evidence of their oil permit practice in due course.”

An Agreement Was Concluded At The Conference Of September 30, 1964

The Atlantic Premiers ... unanimously agreed: ...

- 5 That the boundaries described by Metes and Bounds ... be the marine boundaries of the Provinces ...

(emphasis added)
(Annex 24: *Communiqué*)

The **Conference agreed** on the marine boundary lines between each of the provinces.

(emphasis added)
(Annex 26: *Matters Discussed on September 30, 1964*)

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.

(emphasis added)
(Annex 27: Letter to Premier Lesage (October 2, 1964))

... **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**

(emphasis added)
(Annex 28: Premier Lesage's response)

This submission is presented on behalf of the four Atlantic Provinces **pursuant to agreement reached** at the Atlantic Premiers Conference on the 30th of September last.

(emphasis added)
(Annex 31: *Joint Submission* at 19)

claims, and proposed the lines to the federal government for implementation (which proposal was rejected);

- The agreement described turning points defined as midpoints between coastal features, beginning at the so-called “tri-junction” with Québec (point 2015) through points 2016 and 2017, thence “S.E.” or “southeasterly” to the edge of the continental margin. As discussed more fully below, the agreement also included the definition of the general methodology used to draw the boundaries (see **Figure 4**, included in **Figure 32**, for the map that accompanied the agreement);⁴
- In 1968-1969, representatives of the East Coast Provinces prepared precise coordinates for the turning points identified in 1964 (see **Figure 7**, included in **Figure 32**);⁵
- In 1972, the five Premiers agreed upon the technical delineation and description of the boundaries first described and delimited in 1964. This agreement was publicly confirmed by Premier Moores of Newfoundland in a statement to the House of Assembly;⁶
- The agreed Nova Scotia-Newfoundland boundary was incorporated into the *1977 MOU*, to which the federal government and the Maritime Provinces were parties, as well as the 1982

⁴ Nova Scotia Memorial, pp. II-3, II-19; **Figure 32: Agreement on the Boundary Was Reached in 1964, Reaffirmed in 1972 and Applied by Nova Scotia in 1982.**

⁵ Nova Scotia Memorial, pp. II-19, II-23.

⁶ Nova Scotia Memorial, pp. II-23, II-31. See also **Annex 58: Newfoundland, 36th General Assembly, “Statement by Premier Moores” in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) at 2491. As will be recalled, Newfoundland claimed in its pleading in Phase One that Premier Moores’ statement of June 19, 1972 did not disclose any agreement among the provinces. The Tribunal, at para. 5.18 of its Award, rejected this argument and found that the statement, correctly interpreted, disclosed that Premier Moores “evidently supported” the “agreements which he had just announced to the House of Assembly.”**

June 19, 1972

Tape 798

JM - 1

The House met at 3:00 P.M.

Mr. Speaker in the Chair.

MR. SPEAKER: Order!

HONOURABLE FRANK D. MOORES (PREMIER): Mr. Speaker, I would like to make a statement to the members of the House regarding the meetings in Halifax over the weekend of the five Eastern Provinces with the four Atlantic Premiers and the Vice-Premier of Quebec.

The result of those meetings was a seven-point agreement outlining the areas of co-operation between the provinces. In arriving at the seven points, a number of topics related to offshore resources were discussed including ownership, financial arrangements and development.

The seven points are:

(...)

2. **The Governments of the five Eastern Provinces have agreed to the delineation and description of the offshore boundaries (sic) between each of these five Provinces.**

(our emphasis)

(Annex 58: Newfoundland, 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) at 2491)

Canada-Nova Scotia Agreement (Figure 10, included in Figure 32) and its 1984 implementing legislation;

- As the Tribunal has found, the agreement on boundaries was not legally binding on the parties, in part because of its “conditional character and its linkage to a provincial claim to existing legal rights to the offshore.”⁷
7. There is no dispute as to the fact that the provinces concluded some form of agreement. That is, they agreed on **something** in 1964 and 1972, even if that agreement was not legally binding. On this, the parties now agree. As articulated by counsel for Newfoundland and Labrador during the March, 2001 hearing, the parties’ agreement could be described as follows:

- “a present indication of what those boundaries are going to be.”⁸
- “an agreement on what they will conclude in their future agreement.”⁹
- “an agreement to agree in the future.”¹⁰
- “setting out the terms on which, when they do enter into an agreement, they will use these terms.”¹¹
- “what the boundaries will be when an agreement is entered into.”¹²

⁷ Phase One Award, para. 7.5. As with Nova Scotia’s pleadings in Phase One, nothing in this Memorial is intended to waive or qualify any interest, right or claim that Nova Scotia may choose to assert in the future with respect to the offshore.

⁸ Transcript of Oral Argument, March 15, 2001, p. 394.

⁹ Transcript of Oral Argument, March 15, 2001, p. 394.

¹⁰ Transcript of Oral Argument, March 15, 2001, p. 394.

¹¹ Transcript of Oral Argument, March 15, 2001, p. 394.

¹² Transcript of Oral Argument, March 15, 2001, p. 395.

- A description and definition of the boundaries – “the defined element” of an agreement.¹³
- “the Premiers did agree on the lines that it was desirable to agree formally on as boundaries at some stage in the future.”¹⁴
- “the identification of the boundary lines.”¹⁵

b) The Methods For Drawing The Boundary Were Also Agreed

8. 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. These methods included the following: ¹⁶
2. Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas.
 3. Mineral right boundaries are so drawn as to join median points between prominent landmarks selected so far as possible along parallel shores.

C. Offshore Oil And Gas Permit Issuance

9. The significance of the parties’ practice in issuing offshore oil and gas exploration permits is demonstrated in Part IV, below. Here, certain facts relating to this conduct are briefly considered, as is information recently obtained by Nova Scotia

¹³ Transcript of Oral Argument, March 15, 2001, p. 397.

¹⁴ Transcript of Oral Argument, March 16, 2001, p. 696.

¹⁵ Transcript of Oral Argument, March 16, 2001, p. 697.

¹⁶ See Annex 31: “Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland” with annex entitled “Notes Re Boundaries of Mineral Rights as between Maritime Provincial Boundaries”, presented to the Federal-Provincial Conference of Prime Ministers (14-15 October 1964). Agreement on this methodology was confirmed by the Premiers’ 1972 agreement, and more explicitly by Minister Doody of Newfoundland in his letter to Nova Scotia of October 6, 1972, where he declared that Newfoundland was “not questioning the general principles which form the basis of the present demarcation”; Newfoundland Document #57.

ANNEX

NOTES RE: Boundaries of Mineral Rights as between
Maritime Provincial Boundaries

General

The basis on which the following boundaries to mineral rights are suggested may be outlined as follows:

1. Mineral deposits under shelf waters between Provinces pertain to one or another Province.
2. **Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas.**
3. **Mineral right boundaries are so drawn as to join median points between prominent landmarks selected so far as possible along parallel shores.**
4. In cases where three provinces meet but boundaries for one pair would overlap on the third, a N-S or other prime directional line is used to connect the closest point definable from the considerations in paragraph 3 above to the conflicting boundary.

(our emphasis)

(Annex 31: "Notes re: Boundaries", annex to the *Joint Submission*, at 20.)

regarding work actually conducted under the permits. In addition, certain factual issues that were addressed in Phase One but which remain in dispute are clarified.

i) **Summary Of The Parties' Permit Practice**

10. The evidence presented in Phase One of the arbitration discloses a number of important facts, the salient aspects of which are examined below.¹⁷

a) The Permit Practice Of Nova Scotia

11. From 1965 onwards, Nova Scotia issued offshore exploration permits that fully conformed with the location of its boundaries agreed with its neighbouring provinces, namely, Prince Edward Island, New Brunswick, Québec and Newfoundland.¹⁸ The permits were drawn to a standard grid system, and the permit map based on the grid system was published, clearly marked with the "Mineral Rights Boundary Line" (Figure 16).¹⁹ These permits were relied on by industry and were the basis on which, as illustrated below, significant sums were expended for oil and gas exploration.
12. Out to the Flint Island – Grand Bruit midpoint (point 2017), the line used in the published Nova Scotia permit grid map was undoubtedly the agreed line from 1964, later updated to include the precise turning points determined in 1968-1969.²⁰ From point 2017 to the Southeast, the line in the Nova Scotia map followed the 135° line. To Nova Scotia's knowledge, Newfoundland never protested either the permits issued on the boundary or the published permit map.

¹⁷ Nova Scotia Memorial, Part II H, IV C; Nova Scotia Counter-Memorial, Parts IV C, IV D.

¹⁸ The termination dates of these permits varied, but, as will be shown below, permits issued on the boundary were actively being worked by companies until at least the mid-1970s. Final termination of all permits came with the transition to the joint management approach under the *Canada-Nova Scotia Agreement* of 1982. See Annex 175: Various correspondence between Gordon Coles, Deputy Attorney General of Nova Scotia, and John Laffin, Deputy Minister of Mines, related to the transition to the new system in 1982. See also Annex 176: Two letters from R. Slater, Mining Engineer and Supervisor of Mineral Rights, Nova Scotia Department of Mines and Energy to Mobil Oil, confirming the end of the provincial permit system (4 November 1982; 16 February 1983).

¹⁹ For a full explanation, see Nova Scotia Memorial, Appendix A. Figure 16: Implementation of the 1964 Agreement by Nova Scotia: Offshore Exploration Permits 1965-1971.

²⁰ For a full explanation, see Nova Scotia Memorial, Appendix A, paras. 7-10.

13. At the hearing in Phase One, the Tribunal raised the question as to whether the permits issued by the parties were “just pieces of paper” or whether they “actually gave rise to activity”.²¹ In response, Nova Scotia submitted a map showing actual wells drilled under Nova Scotia permits (**Figure 33**).²² Additional information on this issue can now be provided, based on a search of Nova Scotia’s records.
14. Under the Nova Scotia system, the holder of an exploration permit was required to deposit with the province, as a condition of the permit and in addition to the rental fees charged, an amount of money as security against a commitment to perform a certain value of work. When the work was completed and verified by means of an audited report, the company was reimbursed the amount of its security.²³ Sample Expenditure Statements related to work conducted (or to be conducted) under Nova Scotia permits up to the mid-1970s, including permits along the boundary, are provided at **Annex 178**.²⁴
15. These records reveal two crucial facts. First, the expenditures involved were often substantial.²⁵ Second, the work included a range of exploration activities, including the drilling of exploratory wells.²⁶

b) Newfoundland’ Permit Practice

16. The practice of Newfoundland as regards the issuance of exploration permits was addressed in some detail in Phase One, with particular reference to two permits

²¹ Transcript of Oral Argument, March 15, 2001, p. 547.

²² **Annex 168**: Map representing drill sites - Nova Scotia Permit Areas to 1976; **Figure 33**: Drill Sites: Nova Scotia Exploration Permits as of June 1976.

²³ **Annex 177**: Nova Scotia Petroleum Regulations, 1970.

²⁴ **Annex 178**: Expenditure Reports relating to work conducted (or to be conducted) by Mobil Oil Canada, Ltd. under permits issued by Nova Scotia. Permits 209, 210, 218, 222 and 224 along the boundary are all covered by these reports.

²⁵ By 1974, Mobil’s combined expenditures on four licence groups was over \$36,000,000. See **Annex 179**: Letter from R. Slater, Nova Scotia Department of Mines, to Mobil Oil Canada, Ltd. (2 May 1974). See also **Annex 180**: Nova Scotia Ledger of Expenditures for Mobil Oil Canada, Ltd. (1 June 1971).

²⁶ Seismic work was also included in the relevant expenditures. No permit was required for seismic work, but any expenditures related to such work were considered legitimate expenditures for purposes of fulfilling the work requirements under the permits.

issued by the province along the southeastern portion of the boundary with Nova Scotia.²⁷ The salient points of this evidence are reviewed here.

- *The 1967 Mobil Permit*

17. In 1967, Newfoundland issued an exploration permit to Socony Mobil that extended from latitude 46° N to latitude 45° N along the boundary, and precisely abutted permits issued by Nova Scotia on its side of the line. The Mobil permit was drawn with specific reference to a point on the boundary to the Northwest of point 2017, and its western limit is virtually identical to the 135° line (Figure A-5).²⁸ The Mobil permit was renewed (as a “Class A” permit with production rights) in 1972, and was shown on an overall permit map published with the Newfoundland White Paper of 1977.²⁹

- *The Katy Permit of 1971*

18. In May, 1971, Newfoundland issued an exploration permit to Katy Industries for an area in the vicinity of the boundary, running from just north of latitude 46° N to latitude 43° N.³⁰ The permit specified no construction method, but the attached plan showed a permit drawn on a conic projection chart so as to exactly match a straight-line extension of the last portion of the inner segment of the boundary agreed in 1964 (between turning points 2016 and 2017) (Figure A-7).³¹ This permit was renewed (as a Class B permit with non-exclusive drilling rights) in

²⁷ See Nova Scotia Memorial, Appendix A, paras. 12-36.

²⁸ See Nova Scotia Memorial, Appendix A, paras. 21-23 and Figure A-5: Construction of the Mobil Oil Permit of September 15, 1967 in Conformity with the 1964 Agreement Boundary. As demonstrated, the Mobil permit very nearly matches a straight line extension of the last portion of the inner segment of the boundary (between turning points 2016 and 2017). Allowing for the fact that, in 1967, the coordinates of the turning points had yet to be defined by the *JMRC*, a certain degree of error in drawing the permit was to be expected.

²⁹ Newfoundland Document #25. Neither the map nor the White Paper indicates whether the permit was still in force at the time.

³⁰ Annex 80: “Government of Newfoundland and Labrador Department of Mines, Agriculture and Resources Interim Permit” issued to Katy Industries, Inc. (19 May 1971), with correspondence (11 May 1971) and Map (hereinafter Katy permit).

³¹ See Nova Scotia Memorial, Appendix A, paras. 24-35 and Figure A-7: Construction of the Katy Industries Permit of May 19, 1971 in Accordance with the 1964 Agreement Boundary.

1972 and was shown on the 1977 permit map published with the White Paper (again, with no indication whether it remained in force).

- *Other Newfoundland Permits: Seismic Only*

19. From 1973 to 1975, Newfoundland also issued a number of seismic permits, with no attendant exploration or production rights.³² These are dealt with in Part IV below, in the context of an examination of Newfoundland's purported objections or alleged practice contrary to the agreed line.

c) Newfoundland's Explanations Regarding The Nova Scotia Permits and Its Failure To Object To Them.

20. In its Counter-Memorial in Phase One, Newfoundland asserted that Nova Scotia "followed one practice for permits issued inside the Gulf of St. Lawrence and the Cabot Strait area and its approaches, and a different practice for permits issued in the outer area"³³, and that "Nova Scotia did not limit permits in the outer area by reference to any boundary."³⁴ These allegations, however, were demonstrated during the hearing to be manifestly incorrect and based upon a selective and self-serving review of the relevant permits. In fact, each and every permit issued by Nova Scotia along the boundary was drawn with reference to Nova Scotia's published grid map and conformed to the boundary clearly marked upon that map.³⁵

d) Newfoundland's Explanations For Its Own Permit Practice

21. At the outset, it is worth stating that the issue of whether the Newfoundland permits in fact overlap the agreed boundary or exactly match the boundary is far

³² Newfoundland Counter-Memorial, paras. 223-226, Newfoundland Supplementary Annex of Documents, Documents #45-51.

³³ Newfoundland Counter-Memorial, para. 236.

³⁴ Newfoundland Counter-Memorial, para. 237.

³⁵ Transcript of Oral Argument, March 13, 2001, pp. 263-266. See also Annex 181: Permits Containing "Common Boundary" Provisions, Nova Scotia Oral Presentation, p. PS-R-3, for the map demonstrating Newfoundland's selective use of permits.

less significant here than in Phase One of the arbitration. As will be shown in Part IV below, evidence of the parties' permit practice is relevant in this phase for what it demonstrates regarding the existence of a consensus on the boundary, and confirming the fact that the parties' permits were drawn generally so as to conform to that boundary. It is not necessary to show that such permits were constructed with the degree of precision that was required to support a finding that the boundary had previously been determined by binding legal agreement.³⁶ On the whole, the evidence amply demonstrates the establishment of a boundary, in practice, of which the parties and the third-party companies to which they issued permits, were well aware.

22. In this light, Newfoundland's divergent arguments relating to its Mobil and Katy permits are re-examined briefly.

- *The 1967 Mobil Permit*

23. In its Counter-Memorial, Newfoundland offered no explanation for how or why it issued a permit to Mobil in 1967 that happened to follow the 135° line, at a time when (Newfoundland contends) the line did not exist. At the hearing, Newfoundland speculated that the permit had been issued, in effect, blindly, as a response to a specific request from Mobil, which held partially matching lands on the other side of the line. Newfoundland offered no evidence, however, to support this claim.³⁷ In fact, the evidence refutes Newfoundland's speculative theory.
24. The manner in which the Mobil permit was constructed is described in the document itself. The "Southwest corner" of the permit (the southern end of the permit's western limit) is specified as a defined point on the boundary that matches (but does not refer to) the "Southeast corner" of the corresponding Mobil permit on the Nova Scotia side. However, neither the western limit nor the

³⁶ See Phase One Award, para. 6.8, on the requirement of precision in Phase One.

³⁷ See Transcript of Oral Argument, March 15, 2001, pp. 542-543.

“Northwest corner” of the permit issued by Newfoundland, is defined by reference to points that correspond to those specified in the relevant Mobil permit on the Nova Scotia side. Of course, this would have been done had this in fact been the method by which the permit was drawn. Instead, the limit of the Newfoundland permit is defined by means of a **construction line running northwesterly** to a point on the inner segment of the agreed boundary (Figure A-5).

- *The Katy Industries Permit of 1971*

25. Newfoundland’s original explanation for the Katy permit was that it was drawn according to a supposed Newfoundland permit grid:³⁸

[I]t is quite clear that it was drawn according to the Newfoundland and Labrador permit grid. Thus, every intersection of the line with the permit grid can be transposed onto a chart showing the Newfoundland and Labrador permit grid.

26. Newfoundland also claimed that Nova Scotia had illustrated the Katy permit by transposing it to a Mercator projection “on maps without the Newfoundland and Labrador permit grid”³⁹ so as to suit its own partisan ends:⁴⁰

It becomes clear, therefore, why [the Nova Scotia Figures] do not include permit grids. If they had done so, it would have been obvious that the fictional Nova Scotia representations of the Katy permit do not correspond to the actual permit issued.

27. The defect in these assertions is that, at the time the Katy permit was issued, **there did not exist a Newfoundland permit grid** on which the permit could have been drawn (or which Nova Scotia could have concealed). The only evidence on record regarding a permit grid system in place in Newfoundland is the *1977 Petroleum Regulations*.⁴¹ No evidence has been presented to suggest that such a system was in existence prior to introduction of the *1977 Regulations*, and there is

³⁸ Newfoundland Counter-Memorial, para. 89 (footnote omitted).

³⁹ Newfoundland Counter-Memorial, para. 87.

⁴⁰ Newfoundland Counter-Memorial, para. 90.

⁴¹ **Annex 109: Newfoundland and Labrador Petroleum Regulations 1977**, Nfld. Reg. 139/78.

no reference to grid numbers in the Katy permit, as there would have to have been on a permit drawn to this method.⁴² In the end, the only reasonable interpretation of the Katy permit is that it was drawn by reference to the line agreed in 1964, as illustrated by the precise relationship of the permit limit to the straight-line extension of the portion of the boundary between points 2016 and 2017.

ii) **Newfoundland's Subsequent Conduct Demonstrating Acquiescence**

28. The "relevant circumstances" arising from evidence of Newfoundland's conduct after 1972, demonstrating its acquiescence to the boundary agreed in 1964 and applied in practice in the period 1964 to 1972 – including its silence in the face of Nova Scotia's permits, its participation in the work of the JMRC and its failure to object to the *1977 MOU* – is addressed in Part IV, below.
29. Two key matters remain to be addressed here, however, relating to the conduct of the parties in the summer of 1972 (in particular, their use of the "Crosby Map") and the notable fact that Newfoundland did not object to the 1984 legislation implementing the 1982 *Canada-Nova Scotia Agreement*.

a) The Events Of June To August, 1972

30. On June 6, 1972, Dr. Crosby of the federal Department of Mines and Energy provided a briefing to Newfoundland Government officials, including Premier Moores, at which he provided Newfoundland with a map showing offshore areas

⁴² This was explained by Nova Scotia during the March 2001 hearing (Transcript of Oral Argument, March 13, 2001, pp. 269, 274-275) and was not rebutted by Newfoundland. Instead, Newfoundland took a different tack, suggesting (again unsupported by evidence) that the drafter of the Katy permit must have intended to draw a permit to the west of the Mobil permit (Transcript of Oral Argument, March 15, 2001, p. 414). This was tied, apparently, to another unsupported allegation in the Newfoundland Counter-Memorial, to the effect that the drafter of the Katy permit "was well aware of the Mobil permit" and had "marked it on the plan." (Newfoundland Counter-Memorial, para. 91). In fact, the Katy permit appears to have been drawn on a chart that already had a number of permits depicted, including Mobil, and there is no basis for Newfoundland's claim. Perhaps for these reasons Newfoundland was forced, ultimately, to admit that it had not the slightest idea how the Katy permit was drawn (Transcript of Oral Argument, March 15, 2001, p. 545) and it left the matter to the Technical Expert to decide (Transcript of Oral Argument, March 20, 2001, p. 969).

divided among the provinces and extending to the continental margin.⁴³ This map was a version of the map provided to Nova Scotia in 1971 (reproduced in **Figure 9**).⁴⁴ The two maps are almost, but not quite identical: the version provided to Newfoundland includes proposed federal-provincial mineral resource administration (“m.r.a.”) lines near the coasts, but these do not affect the interprovincial boundary.⁴⁵

31. Nova Scotia has demonstrated that this map was used by the Premiers as the basis for their discussions on August 2, 1972.⁴⁶ Newfoundland, on the other hand, denies that the map was presented to the East Coast Premiers in 1972,⁴⁷ and claims that the map provided to Newfoundland in June 1972 was different from that shown in **Figure 9** and in fact showed no interprovincial boundaries.⁴⁸ Both of these assertions are wrong.⁴⁹
32. The confusion is entirely of Newfoundland’s making. In its Counter-Memorial, Newfoundland noted, quite correctly, that two versions of the map in question had been presented to Nova Scotia in 1972 – one depicting each province “having a

⁴³ Annex 137: Memorandum from D.G. Crosby, Director, Resource Management and Conservation Branch, Energy, Mines and Resources Canada to J. Austin, Deputy Minister of Energy, Mines and Resources (23 May 1973) attaching draft “Minutes of Meeting of Federal – Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration – Arrangement of April 9, 1973, May 7-8, 1973” and attachments (hereinafter “Minutes of Meeting, May 7-8, 1973”) at p. 2 of attachment “Checklist for Agreement”. This document was included with the material received from the federal government after Nova Scotia filed its Memorial.

⁴⁴ This was conceded by Newfoundland. See Newfoundland Counter-Memorial, para. 66; **Figure 9**: East Coast Offshore Map Presented to Premiers in 1972. See also Annex 51: Map: East Coast Offshore Areas, prepared by Federal Department of Energy Mines and Resources and Presented to East Coast Premiers in 1972.

⁴⁵ Nova Scotia Memorial, p. II-27, footnote 73.

⁴⁶ In its Memorial, p. II-26, Nova Scotia also stated that the map was “before” the Premiers at the meeting of June 17-18. This wording was imprecise. Although both Nova Scotia and Newfoundland had the map prior to the meeting, the actual use of the map at a meeting of Premiers can only be confirmed for the August 2 meeting.

⁴⁷ Newfoundland Counter-Memorial, para. 69.

⁴⁸ Newfoundland Counter-Memorial, para. 67.

⁴⁹ Nova Scotia Memorial, p. II-27, footnote 74. See also Annex 53: Letter from G.D. Walker, Legislative Counsel, Government of Nova Scotia to L. L. Pace, Attorney General, Government of Nova Scotia, attaching material for the August 2, 1972 meeting of First Ministers (1 August 1972) and Annex 56: “Minutes of Meeting of First Ministers of the Five Eastern Provinces on Offshore Minerals held in Halifax in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972” (2 August 1972); delegation list, agenda and Communiqué attached. (hereinafter *Minutes of August 2, 1972 Meeting*).

delineated geographical area”, and one illustrating a common fund approach.⁵⁰ However, Newfoundland went on to claim that Dr. Crosby’s notes for the meeting with Newfoundland:⁵¹

... suggest that it was not Figure 9, but rather the map which depicted revenues being divided on the basis of a common fund, that was provided to Newfoundland and Labrador officials at that time.

33. The basis for this contention is Newfoundland’s comparison of what it calls Dr. Crosby’s “... description of the map which depicted revenues being divided on the basis of a common fund” and “... his description of the map he intended to use for his briefing session with Premier Moores”.⁵² Newfoundland states unequivocally: “The description of the two maps are virtually identical.”⁵³ Unfortunately, the statement is unequivocally wrong, as readily appears from the documents in question.
34. The map depicting a common fund approach, as presented to Nova Scotia in 1971 (Figure 9) contained **no provincial offshore area calculations**.⁵⁴ Dr. Crosby’s notes for his briefing session with Premier Moores, on the other hand, contain the following description:⁵⁵

⁵⁰ Newfoundland Counter-Memorial, para. 66.

⁵¹ Newfoundland Counter-Memorial, para. 67 (footnote omitted).

⁵² Newfoundland Counter-Memorial, para. 67, footnote 80.

⁵³ Newfoundland Counter-Memorial, para. 67, footnote 80.

⁵⁴ Annex 50: Letter from I.G. McLeod, Deputy Attorney-General, Government of Nova Scotia to G.A. Regan, Premier, Province of Nova Scotia (13 May 1971).

⁵⁵ Annex 52: “Notes Related To Revenue-Sharing Map For Briefing Session With Premier Moores” from D.G. Crosby (19 May 1972).

Gulf of St. Lawrence Pool

(...)

Atlantic Pool

Continental Shelf - Total area (outside m.r.a. lines) – 328,000 square miles

Newfoundland – 244,500 square miles (75%)

Nova Scotia – 83,000 square miles (25%)

Atlantic Pool

Continental Slope – Total area - 215,000 square miles

Newfoundland – 161,000 square miles (75%)

Nova Scotia – 54,000 square miles (25%)

(emphasis added)

35. Clearly, the map used at the briefing session with the Newfoundland Premier and senior officials included boundaries between the provinces' respective offshore areas, which permitted the calculation of the area accruing to each province,⁵⁶ as shown in Dr. Crosby's notes.
36. In sum, a version of the map shown as **Figure 9**, clearly depicting the Nova Scotia-Newfoundland boundary, *inter alia*, was provided to and discussed with Premier Moores and his officials by a representative of the federal government on

⁵⁶ The map shown to Premier Moores also included "mineral resource administration lines" (referred to as m.r.a. lines) delineating federal and provincial areas, which reduced the area of "continental shelf" for each province. However, the areas designated as "continental slope" on the map and in Dr. Crosby's notes are divided on exactly the same basis as in the "geographically delineated" map provided to Nova Scotia in 1971. This could only be so if the same boundary line, running out to the continental margin, were shown on both maps.

June 6, 1972.⁵⁷ A map with the same boundary was used by the Premiers at their meeting of August 2, 1972, during which their June 18, 1972 agreement on delineation of the boundaries was confirmed and the Premiers discussed the question of revenue-sharing.⁵⁸

b) Newfoundland's Failure To Object To The 1984 Canada-Nova Scotia Legislation

37. By 1982, given the decision of the Supreme Court of Canada in the *BC Offshore Reference*,⁵⁹ it would have appeared to most observers that the federal government was at least likely to have jurisdiction over the Atlantic offshore. Certainly this is consistent with Newfoundland's position in the Phase One, where it argued that the provinces knew that they had no authority to conclude a binding agreement, since they had no jurisdiction over the subject-matter of that agreement.⁶⁰ The necessary implication would have been that the federal government also had the power to establish cooperative management regimes in the area. In any event, even if, as Newfoundland has argued, it truly believed at the time that it had a better jurisdictional claim than other provinces,⁶¹ federal

⁵⁷ Annex 48: "Memorandum to the Minister: Offshore Mineral Rights, Federal Provincial Meeting in St. John's Newfoundland, June 6, 1972" from J. Austin, Deputy Minister, Energy Mines and Resources Canada to Minister of Energy Mines and Resources Canada (15 June 1972); "Note for file: Offshore Mineral Rights, Federal Provincial Meeting in St. John's Newfoundland, June 6, 1972" (14 June 1972) at 2, 4.

⁵⁸ Annex 56: "Minutes of Meeting of First Ministers of the Five Eastern Provinces on Offshore Minerals held in Halifax in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972" (2 August 1972); delegation list, agenda and Communiqué attached. (hereinafter *Minutes of August 2, 1972 Meeting*), and Annex 53: "Letter from G. D. Walker, Legislative Counsel, Government of Nova Scotia to L. L. Pace, Attorney General, Government of Nova Scotia, attaching material for the August 2, 1972 meeting of First Ministers (1 August 1972). See also Newfoundland Supplementary Annex of Documents, Document #10, the post-meeting report by Cabot Martin of Newfoundland, in which Mr. Martin confirmed that the relevant proposal based on the division of areas (under agenda item 6) was in fact discussed at the meeting, and that the "proposal of the Nova Scotia Government was acceptable to [Newfoundland]" (p. 6). He also noted that while "agreeing internally to this formula for the distribution of revenues", Newfoundland suggested to the federal government a different organizational approach, based on a two-tier agency for offshore management (p. 7).

⁵⁹ Annex 182: *Reference Concerning Property In and Legislative Jurisdiction Over the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 (hereinafter *Hibernia Reference*).

⁶⁰ Newfoundland Counter-Memorial, para. 79.

⁶¹ Newfoundland Counter-Memorial, para. 176.

conduct purporting to share management of a specified offshore area with Nova Scotia, if it affected areas that Newfoundland regarded as its own, would have provoked a protest by Newfoundland. From the record it is evident that no such protest was made.⁶²

38. By 1984, when the legislation implementing the *Canada-Nova Scotia Agreement* was adopted, the situation was even clearer. The legislation was introduced and passed by Parliament shortly **after** the Supreme Court of Canada had determined, in the *Hibernia Reference*, that **Newfoundland had no jurisdiction over the continental shelf**.⁶³ The 1984 federal legislation establishing a Nova Scotia-Newfoundland boundary, consistent with the line that had been developed in the practice of the parties, was thus opposable to Newfoundland and would undoubtedly have been viewed as especially relevant to any similar arrangement it might be contemplating.⁶⁴ The legislation was precise as to the location of the outer segment of the boundary, and, significantly, made no provision for arbitration or for its amendment in the event of a dispute with a neighbouring province.⁶⁵

⁶² Although Newfoundland argued that it “condemned” the 1982 *Canada-Nova Scotia Agreement*, it was notably silent as regards the location of the boundary. Newfoundland Counter-Memorial, para. 185 and Newfoundland Document #94.

⁶³ **Annex 182:** *Hibernia Reference*, *supra* note 59. **Annex 183:** Extracts *Commons Debates* (Hansard), from for May 31, 1984, p. 4227 and June 29, 1984, p. 5345. The federal legislation implementing the 1982 *Agreement* was introduced as Bill C-43 in the House of Commons on May 31, 1984 and the Act received Royal Assent on June 29, 1984. See also **Annex 70:** *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29 (excerpts).

⁶⁴ The later negotiation of the arbitration clauses in the 1985 *Atlantic Accord* and *Nova Scotia Accord* was, of course, still in the future and could have no impact on Newfoundland's perception of the legislation.

⁶⁵ **Annex 70:** *Supra* note 63.

39. Again, the record reveals that Newfoundland did not object to this imposition of a boundary. No cogent explanation for this omission has been proffered by Newfoundland in the arbitration.⁶⁶
40. Newfoundland argued during the Phase One hearing that the province had no reason to object to “the [1982] Agreement and the [1986] Accord”, which were of “no legal relevance to Newfoundland and Labrador”.⁶⁷ It avoided mention of the 1984 legislation, however, which clearly **was** of “legal relevance” to Newfoundland, given the *Hibernia Reference* decision. Newfoundland also identified during the hearing what it regarded as the most important justification for its failure to react to the bilateral initiatives undertaken by the federal government and Nova Scotia to set the boundaries of the latter’s offshore area: the presence of dispute settlement provisions in the 1982 *Agreement* and 1986 *Accord*. Again, this explanation ignores the obvious impact of the 1984 legislation:⁶⁸

And above all this, of course -- in fact both the '82 Agreement and the '86 Accord expressly contemplated that there would be disputes with other jurisdictions and other provinces as to the description of offshore regions and offshore areas.

⁶⁶ Indeed, the significance of this silence is demonstrated by the lengths to which Newfoundland has gone to avoid dealing with it. In the Newfoundland Memorial, paras. 88-94, its fire is concentrated on the 1982 *Canada-Nova Scotia Agreement*, which contained a provision allowing the Minister to amend the limits of Nova Scotia’s offshore area, and on the alleged innovation by Mr. Blackie that is the 135° line. Its consideration of the 1984 federal statute is limited to two short paragraphs. In the first (para. 95), the absence of any arbitration or amendment provision is dismissed summarily as “inexplicable”. In the second (para. 96), Newfoundland observes that neither Canada nor Nova Scotia “sought the concurrence” of Newfoundland – which of course they had no reason to do, given that the federal government was acting within its own jurisdiction, as had just been confirmed by the Supreme Court of Canada. In its Counter-Memorial, Newfoundland took a safer course and simply ignored the 1984 legislation, preferring instead to highlight the fact that Newfoundland issued a statement “condemning” the 1982 *Agreement* (though not the location of the boundary, even then; Newfoundland Counter-Memorial, para. 185), which included the federal power to re-draw the boundaries.

⁶⁷ Transcript of Oral Argument, March 16, 2001, p. 691.

⁶⁸ Transcript of Oral Argument, March 16, 2001, p. 691.

D. Conclusion

41. This is, of course, but a recapitulation of certain elements of the factual record, as presented in Phase One and as clarified and updated. It is not intended to be exhaustive. A more comprehensive consideration of the “relevant circumstances” of the delimitation is provided in Part IV of this Memorial.

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