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Esteban Salcedo[1]

Abstract

Using a legal history methodology, this paper examines existing marine renewable energy law and policy in Nova Scotia with a focus on its application in the Bay of Fundy. This paper critically assesses the current approach to coastal management in light of recent recommendations summarized in the Fournier report. This paper argues that, despite clear calls to develop integrated ocean management and marine spatial planning in policies and regulations, Canada and Nova Scotia have failed to do so because of unclear federal-provincial boundaries. Ambiguous domestic borders in the Bay of Fundy have been at the source of an overly cautious, issue-driven and jurisdictionally uncertain approach to ocean governance which has permeated marine renewable energy law. This approach is unsuited for today's environmental objectives and does not hold promise for goals to reconcile competing interests in increasingly industrialised waters. Through a historical account of shifting limits in the Bay of Fundy, this paper connects existing doubts and frictions associated with domestic offshore boundaries to ineffective coastal management in an attempt to renew interest in federal-provincial maritime delimitation.

1. PhD Student, University of Ottawa, Faculty of Law, Ottawa, Canada. This research was supported by the Social Sciences and Humanities Research Council of Canada (SSHRC), the Canadian Energy Law Foundation and the University of Ottawa. The author would like to thank professors Elizabeth Judge, Heather McLeod-Kilmurray and Sophie Thériault (University of Ottawa) for their guidance in writing this paper.

I. INTRODUCTION

It is now widely acknowledged that managing and regulating coastal activities in a vacuum does not serve environmental and social interests.[2] Integrated ocean management and marine spatial planning have surfaced as guiding concepts for coastal governance from this widespread recognition. However, despite clear references to integrated ocean management within the *Oceans Act*[3], and related regional action plans,[4] such type of management remains an aspiration for the marine renewable energy sector in Nova Scotia. The provincial *Marine Renewable-energy Act*[5] (hereinafter "the Act") follows a narrow approach to coastal regulation and stays shy of addressing and preventing potential conflicts of use in marine areas. Despite clear calls to include marine spatial planning and other inclusive management tools within marine renewable energy law and policy,[6] why have recent regulatory developments stayed clear of this recommendation?

Using a legal history methodology, I argue that persisting ambiguity on federal-provincial boundaries in the Bay of Fundy has silenced the issue of regulatory jurisdiction and contributed to a very near-sighted framework for the tidal energy sector in Nova Scotia. In an effort to avoid jurisdictional confrontation, the Government of Nova Scotia has failed to address coastal planning and management in an inclusive and wholesome manner. Enacted legislation is specifically tailored to the immediate needs of the tidal energy industry. This is reflective of a "tippy-toe" approach or, as some have called it, an issue-driven practice inconsistent with the foundations of pre-emptive spatial planning and integrated ocean management.[7]

At the very core, the issue of jurisdiction is a constitutional debate. This has been recalled during some of the most important milestone

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2. Sylvie Guénette & Jackie Alder, *Lessons from Marine Protected Areas and Integrated Ocean Management Initiatives in Canada*, 35 COASTAL MANAGEMENT 51–78, 51 (2007).

3. Oceans Act, S.C. 1996, c 31 (Can).

4. Fisheries & Oceans Canada, *Regional Oceans Plan - Maritime Region: Background and Program Description* (Dartmouth, NS: Bedford Institute of Oceanography, 2014).

5. Marine Renewable-energy Act, S.N.S. 2015, c 32 (Can.).

6. Robert O. Fournier, *Marine Renewable Energy Legislation: A Consultative Process*, Halifax: Report to the Government of Nova Scotia (2011), at 26.

7. Sue Nichols & David Monahan, *Fuzzy Boundaries in a Sea of Uncertainty: Canada's Offshore Boundaries* in *The Coastal Cadastre - Onland, Offshore - Proceedings of the New Zealand Institute of Surveyors Annual Meeting* (Bay of Islands, NZ: 1999), at 10.

moments in Canadian offshore resource administration history.[8] Section 92A of the *Constitution Act, 1867*[9] sets out that "*In each province*, the legislature may exclusively make laws in relation to . . . development, conservation and management of sites and facilities *in the province* for the generation and production of electrical energy."[10] Determining whether the Bay of Fundy is *in the provinces* of Nova Scotia and New Brunswick, in whole or in part, is therefore important.[11] However, historical evidence suggests that offshore jurisdiction has been a taboo subject in Canada for some time. Without attempting to resolve the thorny issue of domestic jurisdiction, this paper examines the current legal framework and focuses on inconsistent jurisdictional discourses to reveal the influence of unclear borders on offshore governance in the Bay of Fundy.

Increased awareness on the correlation between territorial ambiguity and a regulatory approach that fails to address competing interests in a reconciling fashion might just be what it takes to renew a faded interest in domestic maritime boundaries. Some have argued that "[o]wing to the different and sometimes unique historical development of the Canadian provinces from their colonial days, it is doubtful if this matter [of jurisdiction of offshore resources] will be finally determined until each province has had its day in court."[12] Others have instead put forth that, in a Canadian context, these conflicts are more likely to be resolved through political rather than judicial means.[13] Whether inside or outside a courtroom, the issue of domestic boundaries in the Bay of Fundy is one that needs fixing. Drawing federal-provincial borders is necessary for a more sustainable approach to marine and coastal management.

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8. When federal Prime Minister Pierre Elliott Trudeau announced the establishment of resource administration lines, the Member of Parliament for the riding of Lotbinière stated that "it would be both in the interest of the federal government and the provinces to meet and define clearly the jurisdiction of the governments, on the federal and provincial level, because, in the final analysis it concerns the very essence of the B.N.A. Act." *House of Commons Debates*, 28th Parl, 1st Sess, No 3 (2 December 1968), at 3344 (André Fortin).

9. Constitution Act, 1867, 30 & 31 Vict., c 3, § 7 (U.K.), *reprinted in* R.S.C. 1895, Appendix II, no 5 (Can.).

10. Meinhard Doelle et al., *Tidal Energy: Governance Options for NS: Final Report*, Halifax: Marine & Environmental Law Institute at Dalhousie University (2006), at 8 (emphasis added).

11. *Id.* at 8–9.

12. John B. Ballem, "Oil and Gas and the Canadian Constitution on Land and Under the Sea" in *The Constitution and the Future of Canada: Special Lectures of the Law Society of Upper Canada* (Toronto: R. De Boo, 1978), at 270.

13. Roderick Logan, *Mineral Resource Administration Lines*, 23 THE PROFESSIONAL GEOGRAPHER 160–163, 161 (1971).

Part II of this paper first discusses the recommendations set out in the Fournier report on marine renewable energy legislation. It then examines failed policy attempts to follow Fournier's advice on integrated ocean management and marine spatial planning while emphasizing an apparent connection between such failure and jurisdictional uncertainty. Part II concludes with a legislative history of the *Marine Renewable-energy Act*, illustrating a clear dismissal of integrated management principles. Part III first traces the colonial boundary history in the Bay of Fundy and then focuses on the post-Confederation discourse that brought distortions to a previously straightforward delimitation. It also explores the emergence of mineral resource administrative lines and their contributions to the domestic geopolitical landscape. Lastly, Part III highlights a regulatory pattern that resulted from jurisdictional uncertainty, a pattern in tune with recent legal and policy developments in the marine renewable sector.

II. THE CURRENT FRAMEWORK: CONTRASTING EXPECTATIONS WITH REALITY

A. The Fournier Report: A Guide to Future Legislation

When Nova Scotia's former Minister of Energy presented the *Marine Renewable-energy Act* as an Act that "follow[ed] through on Dr. Bob Fournier's recommendations,"[14] one had reason to believe that the Act incorporated at least some reference to marine spatial planning. Robert Fournier's report, "*Marine renewable energy legislation: a consultative approach*," stressed the benefits of marine spatial planning on multiple occasions. The report was commissioned by the Government of Nova Scotia in 2010 at a time when it wished to obtain further clarity on what to include in future marine renewable energy law. Despite the report's insistence on marine planning, the overall idea behind this spatial approach to offshore governance remained notoriously absent from the adopted legal and policy framework.

In his report, Fournier pointed to integrated coastal management and marine spatial planning as tools to balance competing interests at sea, emphasizing the popularity of these tools in marine renewable energy law abroad.[15] He noted existing conflicts between several coastal activities and environmental interests, and argued that "[m]arine renewable energy represents but one more potential usage that carries with it potential

14. Nova Scotia, Legislative Assembly, *Hansard*, 62nd Assembly, No. 2 (7 May 2015), at 5150, 5152 (Hon Michel Samson).

15. Fournier, *supra* note 6, at 5.

benefits and conflicts."[16] Fournier saw possible spatial conflicts with the aquaculture sector and added that the provincial *Fisheries and Coastal Resources Act*[17] contained no provision dealing with activity overlap.[18] The *Marine Renewable-energy Act* later addressed this issue in a rather uncompromising manner, simply amending the *Fisheries and Coastal Resources Act* to grant precedence to Marine Renewable Electricity Areas.[19] In his report, Fournier had instead proposed developing a marine spatial plan to prevent activity conflict between the aquaculture sector and the marine renewable sector.[20]

The report encouraged Nova Scotia's Department of Energy to "play a leadership role in advancing [integrated ocean management] in parallel with the development of the [marine renewable energy] sector."[21] Recommendation 10 of the report specifically addressed the "lack of clarity regarding jurisdictional responsibilities" in the Bay of Fundy and pushed the provincial Department of Energy to negotiate with Fisheries and Oceans Canada to increase Nova Scotia's regulatory powers for the management of the bay.[22] Fournier also recommended that "the Department of Energy . . . actively embrace and advance the concept and practice of Marine Spatial Planning."[23] He warned against developing premature legislation without a prior "clearly delineated plan."[24] Fournier's motives to issue such a warning were that Nova Scotia did not have a clear vision of what marine energy industries could look like in the future.[25] Legislation without a prior plan "would be based on tenuous assumptions regarding the stability or volatility of the energy, economic, social, financial and technological sectors."[26] Although a plan for marine renewable energy was eventually developed in 2012 by the Government of Nova Scotia, its shortcomings are discussed in the section below.

Fournier encouraged the launch of a coastal strategy before "any serious renewable energy activities" took place in the Bay of Fundy.[27] The coastal strategy would protect different stakeholders, including marine

16. *Id*. at 31.
17. Fisheries and Coastal Resources Act, S.N.S. 1996, c 25 (Can.).
18. Fournier, *supra* note 6, at 20.
19. Marine Renewable-energy Act, S.N.S. 2015, c 32, § 73 (Can.).
20. Fournier, *supra* note 6, at 20.
21. *Id*. at 5.
22. *Id*. at 34.
23. *Id*.
24. *Id*. at 24.
25. *Id.*
26. *Id*. at 25.
27. *Id*. at 32.

renewable energy developers, and offer greater predictability in terms of the allocation of ocean space.[28] Fournier insisted, "[o]nce again we draw attention to the need for a Coastal Plan and especially the valuable subset known as Marine Spatial Planning."[29] At the time the report was issued, Fournier contemplated delays in implementing a coastal strategy and foresaw an activity decline for the Provincial Oceans Network, the leading cross-sectoral platform for coastal activities.[30] His comments turned to prophecy; the Provincial Oceans Network became minimally active and a comprehensive coastal strategy embracing marine spatial planning remains to be seen.[31]

B. A Missing Coastal Strategy

In 2015, the Canadian Broadcasting Corporation published a news piece in which it referred to "a coastal strategy that could have been."[32] The expression well captured Nova Scotia's failed attempt to adopt a comprehensive provincial strategy for its coastal areas. The events leading up to the current void are worth noting.

In 2008, a couple of years prior to the Fournier report, the Government of Nova Scotia established a Coastal Management Framework.[33] One of the short-term objectives of the framework was to clarify federal and provincial roles and responsibilities concerning coastal management.[34] This short-term objective visibly recognized jurisdictional ambiguity between both levels of government although it did not explicitly refer to jurisdiction per se. Still within the Coastal Management Framework, the Government of Nova Scotia laid out strategic activities to reach a better understanding of such roles and responsibilities. These activities included establishing a Sustainable Coastal Development Strategy and signing a Memorandum of Understanding with the Government of Canada.[35]

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28. *Id*. at 32.
29. *Id*. at 60.
30. *Id*. at 32.
31. The last updates of the Provincial Oceans Network concern the Draft Coastal Strategy later abandoned.
32. David Irish, *Nova Scotia Urged to Develop Unified Coastal Erosion Plan*, CBC News (Dec. 3, 2015), http://www.cbc.ca/news/canada/nova-scotia/ns-lack-of-coastal-management-1.3346071 [https://perma.cc/BRJ5-B7Q4].
33. Nova Scotia, "Coastal Management Framework" (2009).
34. *Id*.
35. *Id*.

Ironically, the Memorandum signed in 2011 read that nothing in the agreement would "be construed to be prejudicial to the interests of the Parties concerning ownership or jurisdiction of coastal and marine areas, submerged Crown lands and the seabed."[36] The Memorandum specifically addressed the need to focus on integrated ocean management and planning within the Bay of Fundy area,[37] but the clause was significantly hampered by the fact that the parties agreed "to clarify the roles and responsibilities of the federal and provincial departments" at a later stage.[38] The Memorandum, instead of setting straight the respective responsibilities of each government, as was originally agreed in the Coastal Management Framework, dismissed jurisdiction-based arguments and postponed further clarification of government roles.

As per the terms of the Coastal Management Framework, the Government of Nova Scotia also undertook the task of creating a Coastal Strategy in 2011. However, the strategy never made it past the draft stage.[39] In early 2012, while the process was still ongoing, Nova Scotia's House of Assembly Committee on Resources discussed the draft strategy at length. Several interventions made clear that federal-provincial conflicts and ambiguities in the near-shore areas existed. Mr. Greg Roach, of the Nova Scotia Department of Fisheries and Aquaculture, stated that the federal *Oceans Act's* far-reaching scope regarding coastal management demanded provincial intervention:

> we were saying, just a second, that's getting very close to the provincial domain. . . . [W]hen you get into the coastal zone where all the users interact, there is a lot more material to start to work on there, but it was, we believed, largely a provincial domain. Then we said, okay, we've got to get our own house in order as far as a coastal plan, coastal strategy, whatever you wish.[40]

The coastal zone coordinator then argued that talks on a coastal strategy were also driven by a desire to change the government's reactive mindset, as it was accustomed to "dealing with issues along [the] coast in a very sector-based or one-off approach."[41] He further stated, that "things like coastal water quality, [Environment] would look at it from one angle,

36. Memorandum of Understanding Between Canada and Nova Scotia Respecting Coastal and Oceans Management in Nova Scotia, March 23, 2011, clause G.

37. *Id*. at clause 2.2(b).

38. *Id.* at clause 2.3.

39. Irish, *supra* note 32.

40. Nova Scotia, Legislative Assembly Committee on Resources, *Hansard*, (23 February 2012), at 4 (Greg Roach).

41. *Id*. at 5 (Justin Huston).

[Fisheries] would look at it from a different angle" and therefore, no coordinated approach resulted from this practice.[42] The continuing lack of a coastal strategy suggests that these issues have changed little.

During the same committee hearing, a member asked government representatives if the idea of a Coastal Act had been considered as a way of moving beyond policy documents.[43] This proposition had previously been put forth by the Coastal Coalition of Nova Scotia and the Ecology Action Centre, who are both advocates for greater coastal management efforts. The coastal zone coordinator responded that, although the option was not totally discarded, it appeared to him that moving forward with a Coastal Act would be "putting the cart before the horse."[44] In May 2017, five years after that initial proposition, talks on a provincial *Ocean Act* resurfaced after renewed criticisms on the provincial government's lax approach to coastal management.[45]

Seeing as the federal-provincial Memorandum of Understanding on coastal management stayed clear of its original objective to define government roles, and seeing as no coastal strategy was successfully adopted at a provincial level, a safe assumption is that the Coastal Management Framework's goal to define clear federal and provincial responsibilities (and therefore address the issue of jurisdiction) was never accomplished. Instead, federal-provincial relations stayed at the level of broad statements of cooperation. Fournier described cooperation between both levels of government as "a reasonable approximation of the status quo."[46] Federal and provincial jurisdiction remained the elephant in the room.

Despite the lack of a provincial coastal strategy embracing marine spatial planning, Nova Scotia did adopt a strategy specific to marine renewable energy.[47] Similarly, the federal government, through the Department of Fisheries and Oceans, also created a Regional Oceans Plan for the Scotian Shelf, the Atlantic Coast, and the Bay of Fundy.[48] However, the contribution of these two strategies in light of integrated

42. *Id*.
43. *Id*. at 7 (Mat Whynott).
44. *Id*. at 8 (Justin Huston).
45. Michael Tutton, *N.S. Liberals Promise Coastal Law, Face Criticism for Lax Approach to Polluters* CTV News (8 May 2017), https://atlantic.ctvnews.ca/n-s-liberals-promise-coastal-law-face-criticism-for-lax-approach-to-polluters-1.3403477 [https://perma.cc/JF4V-VSJ6].
46. Fournier, *supra* note 6, at 52.
47. Nova Scotia Dept. of Energy, Marine Renewable Energy Strategy (May 2012).
48. Regional Oceans Plan, *supra* note 4.

ocean management and marine spatial planning principles which the Fournier report aggressively put forward remains rather limited.

The Marine Renewable Energy Strategy, although apparently "built off the recommendations made by Dr. Fournier,"[49] contains only a single mention of marine spatial planning in a footnote to the regulatory plan headline.[50] The footnote simply reiterates Fournier's recommendation to advance the concept and practice of marine spatial planning with no further context. The Strategy's regulatory plan does not push for marine spatial planning as a regulatory priority and this is reflected in the outcome legislation examined in the following section. The Marine Renewable Energy Strategy acknowledges that ocean turbines "may affect tourism, landscapes, seascapes, habitats, and ecosystems," and recognizes that ocean energy projects require "an integrated management approach."[51] However, the strategy's way of embracing integrated ocean management is by turning to the Provincial Oceans Network and aligning marine energy activities with the provincial Coastal Strategy.[52] As discussed earlier in this section, the provincial Coastal Strategy was abandoned in 2013, leaving integrated ocean management plans for the marine renewable sector severely amputated.

The Marine Renewable Energy Strategy further notes that the tidal energy sector has been managed by an informal One Window Standing Committee with members of federal and provincial governments "interested in, or with authority for, marine projects."[53] The phrasing is significant as it once more evidences extreme caution and a persisting collaborative status quo in the face of jurisdictional ambiguity. The Strategy notes that the One Window Standing Committee delivered good results in the context of a demonstration project but that "a more customized and improved integrated regulatory system" could be necessary with the expansion of the marine renewable sector.[54] In his report, Fournier similarly expressed a desire to move towards a more regulated framework.[55]

At the federal level, the Regional Oceans Plan for the Bay of Fundy simply "supports a spatial approach to oceans and coastal planning and

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49. Nova Scotia Dept. of Energy, *Marine Renewable Energy Legislation*, (December 15, 2017), https://energy.novascotia.ca/renewables/marine-renewable-energy/marine-renewable-energy-legislation [https://perma.cc/QW2L-UA4V].

50. Marine Renewable Energy Strategy, *supra* note 47, at 27.

51. *Id*. at 33.

52. *Id*.

53. *Id*. at 28.

54. *Id*.

55. *Id*.; Fournier, *supra* note 6, at 49.

management" and recognizes that "the principles of marine and coastal spatial planning can provide . . . solutions for oceans and coastal management problems."[56] Although the Plan explicitly links marine spatial planning with the marine renewable energy sector, it is silent on any course of action. In fact, the Plan addresses the issue in a rather peculiar way by including an illustration of marine spatial conflicts in relation to tidal energy without elaborating further.[57] This self-contained figure, however, offers one of the most comprehensive explanations of why marine spatial planning matters in the Bay of Fundy. It contains four consecutive maps, each showing specific interests in the bay, and highlights their overlapping and conflicting nature. The figure's explanatory text deserves to be quoted in full, for it captures the essence of activity conflict in the Bay of Fundy and the benefits of marine spatial planning:

> [The figure] illustrates some of the overlapping ocean uses and conservation priorities in the context of 16 potential tidal energy sites identified in the Bay of Fundy. Marine spatial planning can help resolve tidal energy development options through identification, awareness raising and potential avoidance of spatial and temporal ocean use conflicts throughout the Bay. Map overlays include several marine protection priorities such as North Atlantic right whale critical habitat, the Musquash Estuary Marine Protected Area, and several well-known Ecologically and Biologically Significant Areas. Coastal aquaculture sites occur on both sides of the bay, supporting an active local marine economy in Nova Scotia and New Brunswick. The bay is a very productive area for multiple fisheries that would blanket the map if all fishing activities were displayed … Commercial shipping routes into Saint John Harbour are illustrated by two dominate vessel traffic patterns at the entrance to the bay. In terms of seabed infrastructure, an active submarine telecommunications cable crosses the area at mid-bay.[58]

As it will be explained in the section below, Marine Renewable Electricity Areas (MREAs) established under the provincial *Marine Renewable-Electricity Act*, have been defined without resorting to marine spatial planning. Concretely, this means that some MREAs extend to some

56. Regional Oceans Plan, *supra* note 4, at 7.
57. *Id.* at 24.
58. *Id.*

critical mammal habitats and areas associated with traditional practices such as fishing.

This section attempts to provide an overview of the limited contribution of policy work towards integrated ocean management and marine spatial planning with a focus on marine renewable energy in the Bay of Fundy. A careful assessment of the policy outcomes examined above reveals that, at the heart of the current framework (or lack thereof), lies a buried debate on jurisdiction. At times, explicitly and at other times implicitly, federal-provincial tensions over jurisdiction have been a shaping factor in the decision-making process. Recognizing the need for coordinated coastal management in political discourse has not been greatly problematic. Developing and operationalizing such management, however, has. As noted during a meeting of the Nova Scotia Standing Committee on Resources, the idea behind a provincial coastal strategy was to take concrete action "instead of just saying at a high level that we love the coast, we want good, sustainable jobs and a clean environment."[59] However, the strategy fell into oblivion and concrete action along with it.

It is perhaps useful to recall that both the provincial Coastal Strategy and the federal-provincial Memorandum of Understanding were intended to achieve greater clarity on federal and provincial roles under the Coastal Management Framework. None of these so-called "strategic activities" fulfilled their desired effect. The Memorandum explicitly placed the issue of roles and jurisdiction off-limits, recognizing the sensitive nature of the question and foreseeing a certain polarity in the arguments of federal and provincial governments. Additionally, the Marine Renewable Energy Strategy relied on a non-existent provincial Coastal Strategy to articulate integrated ocean management. The federal Coastal Plan for the Bay of Fundy, although remarkably explicit on the concrete benefits of marine spatial planning, provided no indication as to how (and under what regulatory authority) such planning could be achieved.

In light of the above, and considering Fournier's assertion that federal and provincial jurisdictional issues concerning marine renewable energy "are complex and unlikely to be resolved in the near future," namely because the domestic jurisdiction over the of Bay of Fundy is unsettled,[60] the correlation between undefined federal-provincial boundaries and failure to implement integrated ocean management becomes obvious. Before discussing boundaries in the Bay of Fundy, the following section

59. Nova Scotia, Legislative Assembly Committee on Resources, *Hansard*, (23 February 2012) (Justin Huston) [hereinafter Legislative Assembly Committee on Resources (23 February 2012)].

60. Fournier, *supra* note 6, at 17-18; Doelle *supra* note 10, at 8-9.

provides a brief overview of how the legal framework, just as the policy framework, fell short of pushing for a holistic, pre-emptive and spatially aware structure for marine renewable energy regulation.

C. The Marine Renewable Energy Act

In 2015, the Nova Scotia legislative assembly adopted the *Marine Renewable-energy Act*. In 2017, prior to its entry into force, the Act was amended to better suit the needs of an evolving industry.[61] During the second reading of the amending act, the Minister of Energy stressed multiple times that these amendments were addressing and responding to the needs of developers.[62] He insisted, "[w]e're giving industry the tools they need to prove their innovations work. We're being responsive to the needs of the private sector."[63] His comments, which clearly put the industry as the driving force of the legislative process, set the stage for a proposal to include demonstration permits within the act and alter the boundaries of a previously established MREA. The motivations behind the amendment reflected a reactive and sector-based approach, an approach which the failed Coastal Strategy, a few years back, had tried to suppress.[64]

The near-sightedness of this industry-tailored Act was made apparent by recurrent references to the needs of a single company, Big Moon Power, during parliamentary debates. A member of the Nova Scotia legislative assembly went as far as saying that, according to her, the Act appeared to be custom-made for a specific player of the tidal energy industry. Mrs. Lisa Roberts recognized that Big Moon Power had captured the interest of decisionmakers and warned against the perils of enacting legislation with narrow goals and visible favoritism:

> People are excited about Big Moon Power, and I certainly think we need Nova Scotia to create the space where someone with a great idea that appears to work in prototypes can fully deploy it and see how it works. That is what I understand the point of this bill to be. A question that I hope might get explored a little bit in Law Amendments Committee is why, to my reading, this bill seems to only allow capacity for one company. Because of the limits in terms of megawatts on this bill, it seems to me like it's

61. An Act to Amend Chapter 32 of the Acts of 2015, the Marine Renewable-energy Act, S.N.S. 2017, c 12 (Can.).

62. Nova Scotia, Legislative Assembly, *Hansard*, 63rd Assembly, 1st Sess (12 October 2017), at 1153 (Hon Geoff MacLellan).

63. *Id*. at 1155.

64. Legislative Assembly Committee on Resource (23 February 2012) *supra*, note 59.

> very specifically designed for one idea, and I always think that's a little bit dangerous in terms of legislation.[65]

Despite Mrs. Lisa Robert's wish to see a revised bill after thorough examination by the Law Amendments Committee, the amending act was passed without any modifications.[66]

Mr. Alan MacMaster of the legislative assembly also took the time to voice his concerns on the development of marine renewable energy law during the second reading of the amending act. His intervention concerned the Petit Passage, an area which the Act designates as a MREA, and therefore allows energy development within its confines.[67] MacMaster, while believing in the economic benefits of the tidal industry, held that fishermen were worried about the Petit Passage being cut in half with the arrival of tidal turbines.[68] To this, MacMaster added that the Petit Passage is "one of the most prime areas in the province to see a whale" and "if technology is being introduced into an area that's sensitive like that, we can see why people are concerned."[69]

It's worth noting that the Petit Passage is labelled as ecologically and biologically significant under the federal Coastal Plan for the Bay of Fundy.[70] The federal Coastal Plan had therefore already pointed to the overlap between tidal energy sites and priority conservation areas such as the Petit Passage, roughly coinciding with Mr. MacMaster's remark on the area's significance for marine mammals. These corroborating statements are alarming when assessed from the angle of marine spatial planning, or rather a certain disregard for its underlying principles. Some authors, in fact, highlight that MREAs did not "undergo a formally structured planning framework" and this explains their inconvenient location in terms of environmental protection.[71] Sangiuliano and Mastrantonis suggest that a formal marine spatial plan would have had the effect of

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65. Nova Scotia, Legislative Assembly, *Hansard*, 63rd Assembly, 1st Sess (12 October 2017), at 1162 (Lisa Roberts).

66. Nova Scotia, Legislative Assembly, *Hansard*, 63rd Assembly, 1st Sess (18 October 2017), at 1488.

67. Marine Renewable-energy Act, S.N.S. 2015, c 32 Schedule F (Can.).

68. Nova Scotia, Legislative Assembly, *Hansard*, 63rd Assembly, 1st Sess (12 October 2017), at 1158 (Allan MacMaster).

69. *Id*.

70. Regional Oceans Plan, *supra* note 4, at 24.

71. Stephen Sangiuliano & Stanley Mastrantonis, *From Scotland to New Scotland: Constructing a Sectoral Marine Plan for Tidal Energy for Nova Scotia*, 84 MARINE POLICY 1–11, 2 (2017).

spatially defining MREAs differently than was done in the Act's schedules.[72]

This last point merits further explanation. Sangiuliano and Mastrantonis carried out a theoretical construction of a marine spatial plan for Nova Scotia based on the criteria utilized in the Scottish model. The authors concluded that the Petit Passage MREA, as described in the Act, should have been smaller in size due to constraints "associated with shipping, commercial fishing, tourism and recreational use, and indigenous cultural use."[73] Fishermen's concerns regarding shrinkage of the passage with the arrival of tidal turbines paired with Sangiuliano and Mastrantonis' proposition to reduce the size of the Petit Passage MREA because of commercial fishing are strikingly reconciling positions rooted in marine spatial planning. What's more, these two authors also noted that the Digby Gut MREA, not far from the Petit Passage, should have never been statutorily established by the *Marine Renewable-energy Act* due to a "*heavy* constraint emanating from marine mammal habitat, commercial shipping, and indigenous cultural use."[74] This is also not without recalling Mr. MacMaster's observations on the region's appeal for whale sightings.

Sangiuliano and Mastrantonis' theoretical construction of a marine spatial plan for the Bay of Fundy is an eye-opening exercise that illustrates the real dangers associated with an industry-driven approach, which is at odds with the basic foundations of integrated ocean management. Furthermore, the corroborating information conveyed by Mr. MacMaster during parliamentary debate, the federal Coastal Plan, and Sangiuliano and Mastrantonis article is strong evidence that MREAs, as currently established, did not frame the marine renewable energy sector to stay clear of imminent environmental, social and commercial conflicts.

Thus, despite some form of spatial awareness in the *Marine Renewable-energy Act*, namely through the establishment of confined Marine Renewable Electricity Areas, the above illustrates how a lack of intersectoral, pre-emptive and integrated planning undermines the effectiveness of MREAs, while posing significant problems to environmental interests and traditional coastal activities. Moreover, the Act has made apparent the existing uncertainty regarding jurisdictional control over parts of the Bay of Fundy. Beyond foreseeable consultation provisions which open the door to a federal role in ocean energy management,[75] the Act also excludes "any and all privately owned land

72. *Id*. at 7.
73. *Id*.
74. *Id*. (emphasis added).
75. *See*, e.g., Marine Renewable-energy Act, S.N.S. 2015, c 32, § 51 (Can.).

and land under the administration of Canada" from MREAs.[76] Whether or not "land" includes submerged areas is a question that has been previously raised in constitutional interpretation.[77] Only future interpretations of the Act will reveal what exactly is meant by this exclusion with regard to MREAs.[78]

The previous section relating to the marine renewable energy policy framework attempted to set out the relationship between jurisdictional ambiguity and the lack of cohesive ocean management. This section has drawn attention to the Act's sector-based approach, an unsurprising outcome considering the examined background policy, and concretely illustrated the multidimensional implications of a legal framework that sets aside the principles of marine spatial planning. From a geopolitical standpoint, spatial planning is simply not possible when federal and provincial governments are unsure of where one's jurisdiction ends and where the other's jurisdiction begins. This political obstacle to integrated and planned coastal management, as posited earlier, can be traced back to federal-provincial feuds on domestic boundaries in the Bay of Fundy. Part III of this paper tells the tale of shifting maritime borders in the area and discusses how unsettled claims of jurisdiction have shaped the current law and policy.

III. AN INCONSISTENT HISTORY OF BOUNDARIES IN THE BAY OF FUNDY

A. The Colonial Boundaries of the Bay

From the beginning, Great Britain took the position, both in its international and municipal dealings, that the bays in the Atlantic region were integral parts of the territory of the colonies.[79]

In 1621, the grant of Nova Scotia to Sir William Alexander described the western boundary of the province as a "straight line crossing the entrance or mouth of that great ship road" from Saint Mary's Bay to the

76. *See*, e.g., *Id*. at Schedules D-F.

77. Nichols & Monahan, *supra* note 7 at 4.

78. *See*, e.g., Canadian Environmental Protection Act, 1999, S.C. 1999, c 33 (Can.) and Canadian Environmental Assessment Act, 2012, S.C. 2012 c 19, § 52 (Can.) for statutes including submerged areas under the definition of "federal land."

79. Gérard V. La Forest, *Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident*, 1 THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 149-171, 150 (1963) [hereinafter La Forest, *Canadian Inland Waters*].

River Ste-Croix.[80] The "great ship road," as it was later explained, in fact referred to the Bay of Fundy.[81] The grant to Sir William Alexander had the effect of enclosing the Bay of Fundy within the province of Nova Scotia, at the time including modern-day New Brunswick.[82] Although some doubt existed as to whether "the limits mentioned in the Alexander grant were the true limits of the province,"[83] the bay's inclusion within the confines of Nova Scotia was confirmed in the commission to Montague Wilmot in 1763 and in the commission to Lord William Campbell in 1765.[84] Both these commissions described Nova Scotia's western boundary as a line drawn "across the entrance of the Bay of Fundy" from Cape Sable to the River St. Croix.[85]

Shortly after the Thirteen Colonies gained their independence from Great Britain and formed the United States in 1776, groups faithful to the British Crown began making their way into Nova Scotia.[86] These settlers gathered in large numbers along the mouth of the Saint John river, not far from its point of discharge into the Bay of Fundy, in what is nowadays part of New Brunswick. The banks of the Saint John river became populated with Loyalists coming from the newly formed United States. Great Britain therefore sought to create a new province, one with a closer administrative pole than Halifax.[87] Under this context, the king set a Royal Commission establishing the province of New Brunswick in 1784. The letters patent issued by the British crown, the ones which established the province of New Brunswick, described colonel Thomas Carleton's appointment as governor of the province and established the southern boundary of New Brunswick in the terms expressed below:

> Wee reposing especial Trust and Confidence in the prudence, Courage and Loyalty of you the said Thomas Carleton, of our especial Grace certain Knowledge and mere Motion, have thought fit to constitute and appoint you the said Thomas Carleton to be

80. John B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 1, 51 (Washington: Government Printing Office, 1898).

81. *Id*. at 50.

82. Gérard V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* 86 (University of Toronto Press, 1969) [hereinafter La Forest, *Natural Resources and Public Property*].

83. Moore, *supra*, note 80 at 51.

84. *Id*.

85. *Id*.

86. W. M. Jarvis, "Royal Commission and Instructions to Governor Thomas Carleton, August, 1784" in *Collections of the New Brunswick Historical Society 6*, 391 (Saint John, NB: The Sun Printing Company Limited, 1905).

87. *Id*. at 392.

> our Captain General and Governor in Chief of our province of New Brunswick bounded . . . to the South by ***a Line in the Center of the Bay of Fundy*** from the River Saint Croix aforesaid to the Mouth of the Musquat River by the said River to its source.[88]

Similarly, the Royal Commission to Lord Elgin, in 1846, described the western boundary of the province of Nova Scotia as being "a line drawn from Cape Sable across the entrance to the centre of the Bay of Fundy" and the northern boundary being "a line drawn along the centre of the said bay to the mouth of the Musquat river."[89] As a result of these two Royal Commissions, New Brunswick and Nova Scotia were clearly divided by a middle line in the Bay of Fundy.

In the years preceding the Canadian confederation, several indicators showed that Great Britain considered the Bay of Fundy to be an integral part of its provincial colonies. For example, *An Act to Compel Vessels Navigating in the Bay of Fundy to Carry Lights*,[90] passed in 1858 by the provincial government of New Brunswick under authority of the Crown, required vessels navigating in the Bay of Fundy to carry "a good signal light," failure to comply would result in a fine "of five pounds for each and every neglect."[91] Although the act referred to the Bay of Fundy as a whole and did not make a distinction between parts under Nova Scotian jurisdiction and those under New Brunswick jurisdiction, it is clear that the provincial parliament considered the bay to be fully within the British colony. However short, the act-imposed requirements on vessels navigating in those waters and implicitly recognized power of the coastal authority to collect penalties associated with breach of the act. The content of this act confirms Ballem's assertion that maritime provinces can provide statutory evidence of their exercise of jurisdiction in the Bay of Fundy prior to Confederation.[92]

The boundaries of New Brunswick and Nova Scotia were, as discussed above, originally established by executive acts of the British Crown. The Royal Commissions setting the limits of both provinces came from the English monarch and enjoyed highest authority at a time when

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88. *Id*. at 394 (emphasis added).

89. La Forest, *National Resources and the Public Property*, *supra*, note 82 at 86 n.7 (explaining that this information was provided to him by the Department of the Attorney General of Nova Scotia).

90. An Act to Compel Vessels Navigating in the Bay of Fundy to Carry Lights, Acts of the General Assembly of Her Majesty's Province of New Brunswick, 1858, 21 Vict., c 13 (Eng.).

91. *Id.*

92. Ballem, *supra*, note 12 at 268.

the sovereign's powers enabled him to demarcate the territory of his colonies.[93] To this day, these commissions continue to be the main grounds for colonial territorial claims based on historic titles.[94] The line at the centre of the Bay of Fundy, insofar as it represents the colonial boundary brought into Confederation by New Brunswick and Nova Scotia, has significant jurisdictional implications.[95]

Referring to the letters patent (or commissions) establishing provincial boundaries, Gérard La Forest stated that "these prerogative instruments had virtually statutory force."[96] Similarly, W. M. Jarvis wrote in 1905 that "[n]o question . . . can now arise as to the authority of Governor Carleton's Commission and Instructions or the later Commissions issued to other Governors in similar terms."[97] Both La Forest and Jarvis have pointed to the widespread recognition of boundaries established by Royal Commission, namely in subsequent acts adopted by British and Canadian parliaments.[98] These Royal Commissions form the point of departure to study the Bay of Fundy's modern geopolitical construction.[99]

In 1867, the *Constitution Act* declared that "the Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act."[100] These limits would have apparently been those established by the Royal Commissions referred to in the paragraphs above. For some, the inclusion of such boundaries within the *Constitution Act* of 1867 gave the Royal Commissions "whatever of validity may have at first been wanting."[101] However, others theorize that if a Canadian court were to find the offshore grants made in the Royal Commissions invalid under international law, Nova Scotia's claim to the Bay of Fundy on grounds of these commissions would fail.[102]

The North Atlantic Coast Fisheries Arbitration was the first post-Confederation instance in which conflicting claims in the Bay of Fundy implicitly questioned the scope of the Royal Commissions. In 1910, Great-

93. La Forest, *Canadian Inland Waters*, *supra* note 79, at 156.

94. *See*, e.g., *Dief Wants Russians out of the Bay of Fundy*, The Telegraph-Journal (Nov. 16, 1962), at 3 (telegraph text of New Brunswick Prime Minister Robichaud).

95. Constitution Act, 1867, 30 & 31 Vict., c 3, § 7 (U.K.), *reprinted in* R.S.C. 1895, app II, no 5 (Can.).

96. La Forest, *Canadian Inland Waters*, *supra* note 79, at 156.

97. Jarvis, *supra* note 86, at 394.

98. *Id*.; *see* La Forest, *Canadian Inland Waters*, *supra* note 79, at 156.

99. *See* Jarvis, *supra* note 86, at 394.

100. Constitution Act, 1867, 30 & 31 Vict., c 3, § 7 (U.K.), *reprinted in* R.S.C. 1895, app II, no 5 (Can.).

101. Jarvis, *supra* note 86, at 394.

102. Edward C. Foley, *Nova Scotia's Case for Coastal and Offshore Resources*, 13 OTTAWA L. REV. 281-308, 283-84 & 284 n.17 (1981).

Britain (still negotiating on behalf of Canada on international matters) and the United States submitted a dispute to the Permanent Court of Arbitration.[103] Their dispute concerned the United States' rights of fishing in Canadian and British Atlantic waters. Specifically, the matter related to the interpretation of a treaty concluded between the United States and Great Britain in 1818, under which the United States namely renounced a right to fish within three marine miles of bays "of His Britannic Majesty's Dominions in America."[104]

In interpreting the relevant treaty provision, the Court concluded that the three miles were to be measured "from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay."[105] However, this rule might not have enclosed the Bay of Fundy in the same way that the grant to Sir William Alexander did. This is because the Court suggested the application of such rule to bays, not exceeding ten miles in width, excepting those bays recognized as territorial.[106] If the bay did not fit one of these two categories, "the three marine miles [were] to be measured following the sinuosities of the coast."[107] It is perhaps this very debate on the nature of the Bay of Fundy which caused British and American representatives to exclude it from the arbitration. Through an exchange of letters, British and American ambassadors agreed that "no question as to the Bay of Fundy, considered as a whole" was to be included in the arbitration "it being the intention of the parties that their respective views or contentions" should not be affected by the Court's findings.[108]

The exclusion of the Bay of Fundy from the arbitration was significant in that it revealed Great Britain's strong territorial attachment and historical claims to the bay as well as American protests of such claims. Excluding the Bay of Fundy from the arbitration was however a double-edged sword. While it did not subject the Bay of Fundy to a three-mile limit "following the sinuosities of the coast" (and thus opening the central portion of the bay to foreign fishing), it also had the effect of leaving unconfirmed the status of those waters. Great-Britain's exercise of jurisdiction within the bay might have been enough for the Permanent Court of Arbitration to conclude that the Bay of Fundy was territorial and close it off to American fishers.[109] This could have prevented subsequent

103. N. Atl. Coast Fisheries (U.K. v. U.S.), 11 R.I.A.A. 167, 167 (Perm. Ct. Arb. 1910).
104. *Id*. at 171, 174.
105. *Id*. at 199.
106. *Id*. at 199, 196.
107. *Id*. at 199.
108. *Id*. at 220-21.
109. *Id*. at 199; La Forest, *Canadian Inland Waters, supra*, note 79 at 162.

confusion explored in the following section. In fact, La Forest argued that Great Britain's exercise of jurisdiction in the Bay of Fundy was apparent since "a substantial number of the seizures of American ships for violating the 1818 convention" happened within its waters.[110]

La Forest admitted, that "as a matter of courtesy, Great Britain allowed American fishermen to fish within the Bay of Fundy, but recalled that "relaxations of a claim [of territoriality] should not be construed as renunciations of it" because "[s]uch a construction . . . would not only be intrinsically inequitable, but internationally injurious, in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent."[111]

B. The Russian Fleet Incident: A Contradictory Discourse

In 1936, the parliament of Canada adopted *An Act to Amend the Customs Act*.[112] The Act described "Canadian waters" as "all territorial waters of Canada and all waters forming part of the territory of Canada," which the Minister of National Revenue also described as "roughly speaking . . . all the marine league, that is the waters included within the three mile limit" from the shore.[113] He also specified, that "the powers to be exercised outside the marine league, outside of Canadian waters, so-called, are very limited" and that these were, in essence, police powers.[114] According to the maps released by the Canadian Department of National Revenue by virtue of certain provisions of the Act, the central part of the Bay of Fundy, that is, the portion beyond the three mile limit calculated from the coast, was excluded from the national territory. This was a rather peculiar delimitation since it appeared to contradict Sir William Alexander's grant. This grant, as it should be recalled, had included the bay within Nova Scotia and, *a fortiori*, within Canada following section 7 of the *Constitution Act, 1867*.

The *Customs Act*'s delimitation of Canadian waters in the Bay of Fundy therefore operated as a drastic rupture from the previously strong colonial position that the bay in its entirety fell under Canadian jurisdiction. Oddly, the three-mile limit adhered to by the Department of National Revenue strongly resembled what would have been the three-

110. La Forest, *Canadian Inland Waters*, *supra*, note 79 at 161.

111. *Id.*; The North Atlantic Coast Fisheries Case, *supra*, note 103 at 199.

112. An Act to Amend the Customs Act, S.C. 1936, c 30 (Can).

113. *House of Commons Debates*, 18th Parl, 1st Sess, No 4 (29 May 1936), at 3221 (Hon James Lorimer Ilsley).

114. *Id.*

mile limit "following the sinuosities of the coast" developed in the North Atlantic Coast Fisheries Arbitration. This is precisely the kind of delimitation that Great Britain tried to avoid by excluding the Bay of Fundy from the arbitration. While the Canadian parliament's endorsement of the three-mile limit perhaps rested on existing customary practice in international maritime boundary delimitation, this resonated with Harrison's assertion that Canada confused, from this point onwards, its claims under international law and those strictly concerned with domestic matters on federal-provincial coastal jurisdiction.[115]

The federal government's unilateral definition of Canadian waters in the *Customs Act* marked the beginning of federal-provincial tensions regarding the status of the Bay of Fundy. It appears from chapter twenty-eight, section three of the *Constitution Act, 1871*[116] that the Canadian parliament could only alter the boundaries of provinces with the consent of concerned provincial legislatures.[117] A unilateral act from the Canadian parliament could not bypass Nova Scotia and New Brunswicks' claims to the bay and alter their British-drawn limits.[118] While some were of the view that the boundaries reflected in those maps were for the sole purpose of regulating customs and were without prejudice to Canadian territorial claims,[119] this view is challenged by the language employed in the Act, the comments made by the Minister of National Revenue, and subsequent federal government behavior.

In the early sixties, an incident involving the presence of a Russian fleet in the Bay of Fundy forced the federal government to take a position with respect to those waters. Unfortunately, federal officials did not speak with one voice and addressed the issue in a rather clumsy manner. On November 14, 1962, the New Brunswick Telegraph-Journal published an article quoting a federal government official saying that "as long as [the Russians] stayed outside the three-mile limit, they would be subject to no restrictions from Canada."[120] Although the Canadian government's inaction might have shocked more than a few at the peak of the Cold War, this position seemed consistent with the earlier views expressed by the Minister of National Revenue concerning the country's boundaries and the statutory definition of Canadian waters expressed in the *Customs Act*.

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115. Rowland J. Harrison, *Jurisdiction over the Canadian Offshore: A Sea of Confusion*, 17 OSGOODE HALL LAW JOURNAL, 469-505, 501 (1979).

116. Constitution Act, 1871, 34 & 35 Vict. c. 28 (Eng.).

117. *Id*. at § 3 La Forest, *Canadian Inland Waters*, *supra* note 79, at 168.

118. La Forest, *Canadian Inland Waters*, *supra* 79, at 168.

119. *Id*. at 167.

120. Dave Butler, *The Russians in the Bay of Fundy*, The Telegraph-Journal (Nov. 14, 1962).

The Telegraph-Journal reporter also noted that the Russian fleet, although alarmingly close to Canadian coasts, had stayed clear of the three-mile limit and anchored ten miles from the New Brunswick port of Saint John.[121] This was possibly due to a recognition, on both the Canadian and Russian sides, that Canada's jurisdiction did not extend beyond three miles from the shore, a position clearly at odds with the provincial delineations of the Royal Commissions.

On the same day of the Telegraph-Journal's first report of the Russian fleet incident in the Maritimes, Premier Robichaud of New Brunswick sent a telegram to federal Prime Minister Diefenbaker, with a copy to Nova Scotian Prime Minister Robert L. Stanfield.[122] In the telegram, Premier Robichaud stated:

> I am very much disturbed at the newspaper report regarding the presence of a Russian fishing fleet in the Bay of Fundy. . . . This report in part states "No particular interest is being shown the fleet by the Canadian departments of fisheries and transport." . . . The Bay of Fundy is an integral part of the Provinces of New Brunswick and Nova Scotia. It is so described in the commission establishing Nova Scotia, then including New Brunswick, in 1621. . . . The commission of Sir Thomas Carleton gave the boundaries of New Brunswick as including the northern half of Bay of Fundy. . . . These boundaries were preserved by section 7 of the BNA Act . . . . Request Canada protest to Russia in violation of Canadian territory.[123]

Prime Minister Diefenbaker, after receiving the telegram, addressed the issue in the House of Commons.[124] He asserted having examined previous debates pertaining to Canadian jurisdiction in coastal waters, and specifically, "whether or not the three mile limit applie[d] in certain areas such as in the Bay of Fundy."[125] He noted that a decision on the appropriate course of action was still pending.[126] When Mr. Pearson, then leader of the opposition, asked the Prime Minister to explain why this situation was

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121. *Id*.

122. *Dief Wants Russians out of the Bay of Fundy*, The Telegraph-Journal (Nov. 16, 1962) at 1.

123. *Id*. at 3 (quoting Dave Butler, *The Russians in the Bay of Fundy*, The Telegraph-Journal (Nov. 14, 1962)(first citing Moores *Arbitrations*, Vol. 1, at 33,50; and then citing Canadian Sessional Papers of 1881, No. 70 at 47).

124. *House of Commons Debates*, 25th Parl, 1st Sess, No 2 (14 November 1962), at 1617 (Right Hon JG Diefenbaker).

125. *Id.*

126. *Id.*

different from previous cases in which Canada had protested against the presence of American fishing vessels in the Bay of Fundy, Prime Minister Diefenbaker stated that this was "the type of question which require[d] notice in order that the situation may be looked into."[127] The issue of the Russian fishing fleet was again raised in the House of Commons the following day. Prime Minister Diefenbaker, responding to a question from the opposition as to whether the Canadian government would take any action, stated that:

> [t]he Bay of Fundy has always been considered, since the earliest days, first by Great Britain and thereafter by successive Canadian Governments, as Canadian territorial waters. As far back as 1763 it was described in official documents as being comprised within the boundaries of what is now Canada. There are strong geographic and economic considerations for this. Having regard to the fact that there have been two Soviet vessels in this area, instructions have been given that if these vessels, whose presence was reported yesterday, have not left already, they will be made aware of the position Canada takes and requested to leave.[128]

The federal government oscillated between a position reflective of its then recent maps and statutes, ones which placed the national boundary at three miles from the shore, and a position which reflected the historical character of the Bay with an emphasis on the boundaries that Nova Scotia and New Brunswick brought into Confederation. Prime Minister Diefenbaker's implicit message was that, after due consideration, the three-mile limit did not apply to the Bay of Fundy. He therefore ordered that action be taken against the presence of the Russian vessels. This seemed, at first glance, a victory for Nova Scotia and New Brunswick. However, the assertions of Premier Robichaud and those of Premier Diefenbaker require further semantical attention.

In his telegram, Premier Robichaud insisted that "[t]he Bay of Fundy [was] an integral part *of the Provinces of New Brunswick and Nova Scotia.*"[129] Although Premier Diefenbaker's later discourse seemed to echo Robichaud's position, it in fact asserted something meaningfully different; "the Bay of Fundy has always been considered . . . as *Canadian* territorial waters. . . . [I]t was described in official documents as being

127. *Id*.
128. *Id.*
129. *Dief Wants Russians out of the Bay of Fundy*, *supra* note 122 (emphasis added).

comprised within the boundaries of what is now *Canada*."[130] The latter statement is not technically incompatible with the first, but it clearly conveyed that the federal government was not ready to recognize New Brunswick and Nova Scotia's claims of ownership over the Bay of Fundy.

The Canadian Parliament might have also had motives other than those resting on historical titles for showing some teeth in the later stages of the Russian fleet incident. In the past, the government had struggled to justify the narrow definition of Canadian waters within the *Customs Act*, seeing as it "had defined [these] waters . . . more narrowly than was necessary."[131] Indeed, the government was asked on multiple occasions why it had chosen a three-mile instead of a twelve-mile limit to its coastal jurisdiction.[132] Perhaps the federal government's *volte-face* after an initial tolerance of the Russian fleet in the Bay of Fundy was triggered by a certain awareness of this fact. Public opinion also probably played a part in revisiting the government's first position regarding the Soviet boats surveying the Canadian coast.

C. Seabed Resources and the Surge of Administrative Resource Lines

Only a few years after the Russian fleet incident, a different debate developed out of the growing interest in minerals and oil found in the seabed. In 1967, the Canadian government requested an opinion from the Supreme Court of Canada regarding jurisdiction over offshore resources in light of its existing feud with the government of British Columbia.[133] Both levels of government argued that exploitation and administration of submerged resources fell under their sphere of competence.[134] To all the questions submitted, which concerned proprietary rights and jurisdiction, the Court concluded in favor of Canada.[135] The Court greatly relied on an English case, *R. v. Keyn*,[136] to conclude that a province's jurisdiction ended

130. *House of Commons Debates*, 25th Parl, 1st Sess, No 2 (15 November 1962) at 1650 (Right Hon JG Diefenbaker)(emphasis added).

131. La Forest, *Canadian Inland Waters*, *supra* note 79, at 168.

132. *House of Commons Debates*, 18th Parl, 1st Sess, No 4 (29 May 1936) at 3221 ("Mr. Bennett: Why did they make it that rather than twelve miles?"); *House of Commons Debates*, 25th Parl, 1st Sess, No 2 (15 November 1962) at 1650 (Mr. Barry Mather[:][W]ill the government consider amending the coastal waters act to establish a 12 mile fishing limit?").

133. *Reference Re: Offshore Mineral Rights*, 792 SCR (1967) (Can.).

134. *Id.*, at 796.

135. *Id.*, at 821-22.

136. *R v. Keyn*, 2 Ex. D. 63 (1876).

at a point commonly referred to as the "ordinary low-water mark" unless historical titles and positive exercise of jurisdiction by the province (prior to Confederation) could be demonstrated.[137]

Some put forth that the Court's conclusions were without prejudice to the claims of other provinces since the opinion was specific to the case of British Columbia.[138] Moreover, as made apparent through the second part of the paper, Nova Scotia and New Brunswick have seemingly strong evidence to support a historical claim in the Bay of Fundy, which could grant them jurisdiction over the waters and the seabed.[139] Harrison and Doelle are of the view that the Supreme Court of Canada, in *Reference Re: Offshore mineral rights*, implicitly recognized the historical title of these two maritime provinces over the Bay of Fundy, while nevertheless pointing to the non-binding character of the Court's opinion.[140] In the Reference, the Court alluded to a New Brunswick case in which the provincial court found that a ship seizure in the Bay of Fundy occurred within the territory of the province.[141] The Supreme Court of Canada, taking into account the Royal Commission to Thomas Carleton and the boundary drawn at the centre of the Bay of Fundy, confirmed that this seizure happened "within the Province of New Brunswick."[142] However, this distinguishing by the Court was soon after tempered by high-level political statements.

Prime Minister Pierre Elliott Trudeau, in the aftermath of the Supreme Court's opinion, addressed the House of Commons and stated:

> The reference to the Supreme Court was designed to determine in the most authoritative way where the jurisdiction rests. . . . In light of the Supreme Court's unanimous finding in favor of the crown in right of Canada, ***on the basis of principles that would appear to be substantially applicable to the east coast as well as to the west coast***, the main problem becomes one of delineating the areas concerned to meet the practical requirements of mineral resource administration. . . . [W]e have drawn so-called mineral resource administration lines, always well within the area of federal jurisdiction on the basis of the principles laid down in the Supreme Court opinion, with the intention that the federal government will

137. *Reference Re: Offshore Mineral Rights*, 792, 804-807 SCR (1967) (Can.).

138. *See* Harrison, *supra* note 115, at 470; Ballem, *supra* note 12, at 264; *House of Commons Debates*, 28th Parl, 1st Sess, No 3 (2 December 1968) at 3344 (Mr. Baldwin).

139. Ballem, *supra* note 12, at 268.

140. Harrison, *supra* note 115, at 500; Doelle et al., *supra* note 10, at 11.

141. *Reference Re: Offshore Mineral Rights*, 792, 809 SCR (1967) (Can.).

142. *Id.*

> administer all offshore mineral rights seaward from these lines. . . . ***The proposed administrative lines enclose several offshore areas which are linked closely with adjacent provincial lands. . . . Off the east coast they include large areas of the sea bottom in the Bay of Fundy. . . .*** It is clearly in the interest of all levels of government that conditions are such as to facilitate the rapid development of Canada's offshore minerals. For our part, ***we wish to do everything possible to avoid jurisdictional disputes that would hinder or delay the development of these natural resources.*** This is the spirit in which we are offering to work out these arrangements with the provinces.[143]

Trudeau's statement set the framework of what I, in this paper, argue to be the modern-day approach to ocean governance in the face of jurisdictional ambiguity. Several of his remarks are worth commenting on. First, Trudeau raised considerable doubts regarding the scope of the Supreme Court reference by claiming a pan-Canadian application of the Court's findings.[144] Second, the Prime Minister developed a system that shut the door to further claims of jurisdiction, clearly expressing that the federal government had no desire to pursue domestic boundary debates.[145] This desire to avoid domestic jurisdictional discourse has been present ever since. Third, Trudeau institutionalized an issue-driven practice when developing administrative lines for the sole purpose of regulating offshore mineral resources. The relevance of those lines and those that followed (for example, those of the offshore oil industry) seems unclear with respect to other offshore activities such as marine renewable energy. Fourth, the Prime Minister's initiative to develop administrative lines with no territorial (and jurisdictional) implications added confusion to an already complex governance structure under Canadian federalism.

Trudeau's federal resource administration lines closed off the Bay of Fundy and recognized the right of Nova Scotia and New Brunswick to administer mineral resources in the bay. However, they did not contribute to greater territorial clarity given their confined purpose and their lack of jurisdictional significance. Furthermore, the resource administration lines proposed by the federal government were contested by the Atlantic

143. *House of Commons Debates*, 28th Parl, 1st Sess, No 3 (2 December 1968), at 3342 (Right Hon Pierre Elliott Trudeau)(emphasis added).

144. Harrison, *supra* note 115, at 469.

145. Logan, *supra* note 13, at 162. ("by drawing the mineral resource administration lines entirely within areas of federal sovereignty, Ottawa is clearly trying to avoid the thorny question of precisely defining provincial limits").

provinces and Québec in a 1972 communiqué.[146] Instead, these provinces urged Ottawa to recognize the boundaries that were agreed upon among themselves at an earlier date, largely reflecting the limits defined in a 1964 joint statement.[147]

In 1964, the four Atlantic provinces had indeed drawn their interprovincial boundaries without the federal government's participation and included them in a joint statement.[148] In this statement, Nova Scotia and New Brunswick relied on the line in middle of the Bay of Fundy to divide their provinces. However, the full extent of this delimitation was unclear. It was only in 2001, when a dispute arose between Newfoundland, Labrador and Nova Scotia regarding their interprovincial boundaries, that an arbitral tribunal clarified the scope of the document. While Nova Scotia aggressively argued that the document reflected an "agreement" binding between the parties,[149] the tribunal came to the opposite conclusion. It noted that "[t]he tenor of the Joint Statement [was] inconsistent with any intent to enter into a final and binding agreement with immediate effect," and that, "[t]he terms of the Joint Statement [were] more consistent with a political, provisional or tentative agreement, which may [have led] to a formal agreement but which [was] not in itself that agreement."[150]

It's important to add that in 1972, when the Atlantic provinces and Québec contested the federal resource administration lines and put forward their own boundary delimitation, Premier Regan of Nova Scotia ensured correspondence with Ottawa.[151] Regan sent a telegraph to Prime Minister Trudeau with the claims of the 1972 communiqué and, in turn, received a letter from his federal counterpart stating Ottawa's refusal to recognize the interprovincial boundaries agreed among the Atlantic provinces.[152] Trudeau's letter indicated that "ownership and the extent of provincial territory, as well as the location of provincial boundaries are matters of law. The only way they can properly be settled, if the provinces definitely wish to contest them, is in the Supreme Court."[153] Trudeau added that he saw "no purpose to be served by discussion of these legal matters."[154] In 1977, the federal government signed a Memorandum of Understanding

146. *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of their Limits of Offshore Areas Phase 1* (2001), at 55.
147. *Id*. at 55-58.
148. *Id*. at 30.
149. *Id*.
150. *Id*. at 77.
151. *Id*. at 55.
152. *Id*. at 58.
153. *Id.*
154. *Id*.

with Nova Scotia, New Brunswick and Prince Edward Island in which it recognized the 1964 lines for resource administration purposes, but not as provincial boundaries.[155]

The government of Canada therefore presented litigation as the only effective means of settling the federal-provincial boundary dispute. As a result, the jurisdictional debate in the political sphere has been completely cut off. In the Atlantic region, only Newfoundland and Labrador turned to the courts to resolve its maritime claims.[156] A clear prohibition of boundary-related discussions between federal and provincial governments combined with a political back and forth on the status of the Bay of Fundy and visible confusion regarding single-purpose delimitations has resulted in the current "tippy-toed" approach to ocean governance. This approach, described at length in the first part of this paper as regards marine renewable energy law and policy, is confirmed by practice in the offshore oil and gas sector. On this issue, Canadian and Nova Scotian governments have "agreed to disagree"[157] and, in the process of doing so, adopted an overly cautious method of addressing offshore management.

While a thorough examination of the history and functioning of the Canada-Nova Scotia Offshore Petroleum Board is beyond the scope of this paper, some elements supporting this paper's claims are worth noting. In 1986, the federal and provincial governments concluded the Canada-Nova Scotia Offshore Petroleum Resources Accord, which was later implemented through "mirror" legislation.[158] This practice, which consists of enacting equivalent legislation at federal and provincial levels, has the effect of bypassing the issue of jurisdiction.[159] Both the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[160] (at federal level) and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*[161] (at provincial level) describe

155. *Id*. at 59-60, note 106; Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces (February 1, 1977).

156. *Reference re Newfoundland Continental Shelf*, 1 SCR 86 (1984).

157. William Lahey, *Regulation and Development of a New Energy Industry: Tidal Energy in Nova Scotia*, 3 ENERGY REGULATION QUARTERLY 3 note 74, (2015).

158. *Id*.

159. *Id*.

160. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c 28.

161. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act, S.N.S 1987 c 3.

the limits of the offshore areas under joint management.[162] For the Bay of Fundy, the limit essentially reflects the 1964 and 1977 administration line, cutting the bay in half.

However, both governments have clearly forbidden territorial claims based on the provisions of those implementing acts. The federal statute reads, "[f]or greater certainty, the provisions of this Act shall not be interpreted as providing a basis for any claim by or on behalf of any *province* in respect of any interest in or legislative jurisdiction over any offshore area or any living or non-living resources of any offshore area."[163] Similarly, Nova Scotia's implementing act states that "[t]he provisions of this Act shall not be construed as providing a basis for any claim by or on behalf of the *Government of Canada* in respect of any entitlement to or legislative jurisdiction over the offshore area or any living or non-living resources in the offshore area."[164]

When it comes to offshore governance, the government of Canada and the government of Nova Scotia both address the issue as though walking on eggshells. Regulation is replete with disclaimers, as each government avoids giving the other reason to believe that they have somehow ceded to their claims of jurisdiction. In the process of being excessively cautious, both governments have developed an approach to ocean governance that is issue-driven, narrowly defined and jurisdictionally ambiguous. This is the legacy of historically inconsistent discourse on domestic boundaries.

IV. CONCLUSION

This paper first examined the coastal law and policy applicable to marine renewable energy in the Bay of Fundy. It focused on the political arguments supporting the existing framework and on the legislative history of the *Marine Renewable Energy Act*, with a view to highlight a well-engrained issue-driven approach to ocean governance. The paper examined the marine renewable energy law and policy in light of the Fournier report to demonstrate a clear disconnect between enacted legislation and strong calls to develop integrated ocean management and spatial planning approaches. It showed that legal and policy decisions

162. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c 28, Schedule II; Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act, S.N.S. 1987 c 3, Schedule II.

163. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c 28, s 3.

164. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Nova Scotia) Act, S.N.S. 1987 c 3, s 3.

impeding inclusive and spatially aware management were directly or indirectly shaped by jurisdictional considerations. The second part of the paper placed the emphasis on the Bay of Fundy's geopolitical delimitations throughout history, demonstrating that jurisdictional hesitation has in fact developed out of ambiguities concerning domestic boundaries. The paper studied resource administration lines and marked that they added a layer of confusion while leaving unresolved the jurisdictional debate. It concluded with a brief assessment of the federal-provincial arrangements in the oil and gas sector in what marks a full-circle with the paper's initial arguments on issue-driven, overly-cautious and jurisdictionally vague approaches to coastal management.

Uncertainty in jurisdiction is the most significant barrier to organized marine planning.[165] Jurisdictional boundaries matter. They are especially relevant in view of current environmental challenges that require comprehensive approaches rather than issue-driven ones. Furthermore, technological developments and increasing offshore activity, namely related to marine renewable energy, make sustainable frameworks an urgent necessity. Resolution of federal-provincial conflicts of jurisdiction through a judicial or political boundary delimitation in the Bay of Fundy is crucial to the integrated management of the bay's uses and resources.

165. Nichols & Monahan, *supra* note 7 at 4.