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Susan E. Gover*

Occupational Health and Safety:
The New Regime for the East
Coast Offshore

The Governments of Canada, Nova Scotia, and Newfoundland and Labrador are moving to enshrine existing offshore occupational health and safety (OHS) practices into the Atlantic Accord legislation governing the regulation of petroleum-related activity off the eastern coast of Canada. The proposed OHS amendments discussed in this paper are intended to provide a comprehensive legal framework to achieve the same kind of protection for offshore workers that onshore workers currently enjoy. Application of occupational health and safety laws in the offshore will be clarified so that these amendments, and not other federal or provincial OHS laws, will apply to any workplace in the Nova Scotia or Newfoundland and Labrador offshore areas.

Les gouvernements du Canada, de la Nouvelle-Écosse et de Terre-Neuve-et-Labrador s'apprêtent à prendre les mesures nécessaires pour enchâsser les pratiques existantes en matière d'hygiène et de sécurité du travail dans les lois de mise en œuvre des Accords, lois qui régissent les activités pétrolières au large de la côte est du Canada. Les modifications proposées aux dispositions sur l'hygiène et la santé au travail dont traite cet article visent à mettre en place un cadre législatif complet pour que les travailleurs en zone extracôtière bénéficient des mêmes protections que les travailleurs sur la terre ferme. L'application des dispositions statutaires sur l'hygiène et la sécurité du travail dans la zone extracôtière sera clarifiée pour que ces modifications – et non d'autres lois fédérales ou provinciales en cette matière – s'appliquent à tous les lieux de travail au large des côtes de la Nouvelle-Écosse ou de Terre-Neuve-et-Labrador.

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High standards of safety in the workplace are achieved when well-designed equipment is operated properly by well-managed and well-trained persons. Occupational safety is maintained by keeping these factors in a state of positive balance, in what is normally a highly dynamic situation.

-Royal Commission on the Ocean Ranger Marine Disaster

Introduction

For centuries people have experienced the unique and harsh conditions of the North Atlantic Ocean. In a severe winter storm in February 1982, the Ocean Ranger, a mobile offshore drilling unit, sank off the East Coast of Newfoundland and Labrador resulting in the loss of eighty-four lives. This tragedy led to the establishment of the Ocean Ranger Commission, which had the task of addressing three basic questions: (1) why did the Ocean Ranger sink?, (2) why were none of the crew saved? and (3) how can other similar disasters be avoided?¹ The Commission made 136 recommenda-

1. Canada, *Report /Royal Commission on the Ocean Ranger Marine Disaster* (Ottawa: Royal Commission on the Ocean Ranger Marine Disaster, 1984-1985) at vii.

tions in the hope of preventing future disasters in the offshore; seventy recommendations found in Report Two were related to industry-wide issues.

On April 14, 1999, a worker was crushed in a sliding door on the Nordic Apollo in the Nova Scotia offshore area. This tragedy again heightened the need to pass legislation to better regulate worker health and safety in the offshore areas. As most involved in offshore activity agree, the proper approach to achieve public policy health and safety objectives is to codify requirements in the governing offshore legislation.

The safety of petroleum operations off the eastern coast of Canada, post-Ocean Ranger, is regulated by the Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board. Both boards are federal-provincial authorities established to administer the *Accord Acts*² passed by the Parliament of Canada and the legislatures of the respective provinces. A single regulatory authority in each province with an integrated approach to enforcement was seen as a necessary step to achieving regulatory compliance.³

Petroleum-related work or activity within the jurisdiction of these boards can only occur with authorization from the board. Once approved, petroleum-related activities are continuously monitored in the areas of safety, environmental protection, resource management and industrial benefits. However, beyond this ability to authorize work, the boards currently have limited authority within the *Accord Acts* to administer occupational health and safety. Twenty-one years after the sinking of the Ocean Ranger, a comprehensive legal framework, similar to that enacted for workers onshore, has yet to be enacted for the protection of offshore workers.

To bridge this gap in the interim, the boards currently administer offshore occupational health and safety through interpretation guidelines and through placing conditions in work authorizations.⁴ This practice is consistent with Recommendation 81 of the Ocean Ranger Report which suggested that more extensive regulations and guidance notes should be developed and framed in terms of principles, performance standards and criteria supplemented with a comprehensive body of guidance notes.⁵

2. *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3; *Canada-Newfoundland and Labrador Atlantic Accord Implementation (Newfoundland and Labrador Act)*, R.S.N.L. 1990, c. C-2; *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*, S.C. 1988, c.28; *Canada-Nova Scotia Offshore Petroleum Resources Implementation (Nova Scotia Act)*, S.N.S. 1987, c.3. References will be to the federal version. [Collectively, the *Accord Acts*.]

3. *Supra* note 1 at vii.

4. Safety Plan Guidelines, online: Canada-Newfoundland Offshore Petroleum Board <<http://www.cnopb.nfnet.com/publicat/guidelin/safetygl/safeplan.htm>>.

5. *Ibid.*

Under the current practices and regulation, there were only twenty-three injuries in the Newfoundland offshore area for 2,548,000 hours worked in 2001-2002, an injury rate of 9.02 per million hours worked.⁶ However, greater certainty is needed for workers, industry, and the regulators to more effectively protect those working in the offshore.

This paper will examine the proposed changes to the governing legislation which will adopt the current offshore occupational health and safety practices of the two offshore boards while incorporating the best of the onshore legal regimes of the three legislative authorities (Canada, Newfoundland and Labrador, and Nova Scotia).

I. Overview

To ensure consistency and certainty for the operators working in the offshore of eastern Canada, all three governments have been cooperatively and diligently working toward a regime to ensure that identical amendments, where possible, are made to the *Accord Acts* of both provinces. This is especially important for work off the eastern coast of Canada where mobile drilling units are procured by operators to operate within both offshore jurisdictions and short time frames. All parties involved need to know what protections are afforded and their respective obligations. If differing legislative requirements existed between the two provinces, workers' protections would depend on the location of their offshore workplace.

All jurisdictions have agreed that any amendments must recognize the following principles:

- Occupational health and safety laws for the offshore should be at least as stringent as those for the onshore;
- Support for an occupational health and safety culture should recognize a shared responsibility in the workplace;
- Production issues should be separate from occupational health and safety issues;
- Joint jurisdiction of the federal and respective provincial governments must be recognized;

6. CNOBP, Annual Safety Statistics, online: CNOBP <<http://www.cnopb.nfnet.com>>.

- Any amendment must be comprehensive and apply to all offshore petroleum activities within the jurisdiction of the boards;
- Consideration should be given to an effective and efficient use of regulatory resources.⁷

The legislation will be the first step in moving toward an improved occupational health and safety legislative regime for petroleum-related activities in the East Coast offshore areas. As supporting regulations will be developed over time, as an interim measure, the *Oil and Gas Occupational Safety and Health Regulations*⁸ will apply to employment on any marine installation and structure that is within the offshore area.

A new part will be added to the *Accord Acts* for these occupational health and safety amendments. As a result, parties with responsibility for safety must become familiar with the legislative requirements under both this new Part and Part III. The latter currently applies to safety, which also impacts health. The authority to issue an authorization as well as the declaration of fitness provisions will remain in Part III. In this paper the analysis focuses on ten major policy aspects of the proposed legislation.

II. *Definition of Marine Installation or Structure*

As many vessels and installations will be operating within the offshore area pursuant to an authorization for a work or activity, the governments have recognized the possible application of two distinct occupational safety regimes: one for marine transport operating pursuant to the *Canada Shipping Act*⁹ and the *Canada Labour Code*,¹⁰ and another for the petroleum-related activity applying on the same vessel as authorized by the boards pursuant to the *Accord Acts*. Operators of vessels falling within the *Canada Shipping Act* will normally follow the provisions of the *Canada Labour Code* but will come under the jurisdiction of the boards pursuant to the *Accord Acts* when conducting a petroleum-related activity in the offshore area. To create greater certainty, one of the major amendments will be a new definition of “marine installation and structure”¹¹ as opera-

7. *Proposed Amendments to the Accord Acts to Incorporate an Offshore Occupational Health and Safety Regime* (Government of Canada, Government of Newfoundland Labrador and Government of Nova Scotia, 2002) [Proposed Amendments].

8. *Oil and Gas Occupational Safety and Health Regulations*, S.O.R./94-165, as amended.

9. *Canada Shipping Act*, S.C. 2001, c.26 (amendments not in force); R.S.C. c. S-9.

10. *Canada Labour Code*, R.S.C. c.L-2.

11. *Supra* note 2, *Canada-Newfoundland Atlantic Accord Implementation Act*, s. 152(1); *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*, s. 157(1).

tors will need to know what regime will apply.

This revised definition becomes important as a “work place” is defined as “any marine installation or structure where an employee is or is likely to be present for the purposes of work or activity.”¹² The amendments will apply to any activity “at or near the work place,” a phrase used throughout the amendments to further describe the extent of the application of the health and safety amendments for a petroleum-related activity.

III. *Allocation of Responsibility*

The framework for accountability is premised upon a hierarchy of control with the operator (i.e., the holder of the work authorization) being ultimately accountable for ensuring health and safety. As stated in the *Ocean Ranger Commission Report*:

Industry must be held fully accountable for that assurance, even as its invaluable expertise and knowledge should be regularly canvassed by the governments that carry the ultimate duty of defining and implementing the public interest in this critical area of public policy.¹³

The Newfoundland draft discussion paper states that the allocation of responsibility for the occupational health and safety regime is premised on the following principles:

- 1) an operator has overall responsibility for ensuring the health and safety of persons engaged in work or activities related to the operator’s authorization; and
- 2) other parties, including employers, employees, supervisors, certifying authorities, interest holders and owners have shared responsibilities for ensuring health and safety at the work place and are responsible for co-operation and co-ordination of their activities with one another.¹⁴

The responsibilities of each party are based upon general and specific

12. “Amending the Accord Acts to Incorporate Occupational Safety and Health” (Newfoundland and Labrador version), Discussion Paper, (7 April 2003), online: East Coast Offshore Occupational Health & Safety <http://www.offshoreohs.ca/media/documents/Nfld_Discussion_Apr07_2003.pdf> at 16 [OHS Amendments].

13. *Supra* note 1 at 127.

14. OHS Amendments, *supra* note 12, s. 205.04.

duties which will be described in the amendments. The changes recognize the complexity of any offshore work installation and the ability of any party to act in accordance with the occupational health and safety management system, occupational health and safety programs, and occupational health and safety policies.

Governments are also held accountable for ensuring the boards properly exercise their mandates. The current provisions in the *Accord Acts*¹⁵ which allow the governments to issue directives to the boards will be revised to allow the federal and provincial ministers to jointly issue, where necessary, written directives to a board in relation to occupational health and safety matters. In addition, the amendments provide for an Advisory Council, with representatives from industry, governments, and employees to provide advice to the boards and governments on matters relating to occupational health and safety in the offshore area. It is noteworthy that the Ocean Ranger Commission recommended an intergovernmental technical committee be established to assist in the formulation and regulation of the offshore.¹⁶

IV. *Right to Participate - Committees*

Any large installation may have as many as eighty to 280 employees on site at any given time. In this environment, communication is critical to protecting employees. To ensure employees at or near the workplace have a voice on health and safety issues, each operator is required to ensure a workplace committee is established for the marine installation or structure.¹⁷ The committee can set up its own rules of procedure and any member of the committee will be paid for performing committee functions or participating in committee training. The workplace committee by its nature and mandate will play an important role in communication and will have representation from management and the employees.

Included in the amendments are provisions to address committee membership, frequency of meetings, and chairpersons. The amendments also give the workplace committee an active role in the following areas:

- workplace inspections;
- notification and consideration of work refusals;

15. *Supra* note 2, *Canada-Newfoundland Atlantic Accord Implementation Act*, s. 42; *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*, s. 41.

16. *Supra* note 1, Recommendation 82.

17. Proposed Amendments, *supra* note 7 at 8.

- participation in the development and implementation of programs and policies; and,
- identification of hazards or dangers.¹⁸

The Chief Safety Officer appointed by a board pursuant to the *Accord Acts*¹⁹ will receive monthly minutes of the meetings of the workplace committees, which will greatly assist in the identification of any systemic concerns relating to health and safety. The information will assist in the identification of problems which may exist industry-wide, and are not unique to one particular marine installation or structure.

The Chief Safety Officer will also have the authority to establish special committees as may be required from time to time to review a particular concern or address an area of concern at or near the workplace.²⁰

V. *The Right to Know*

To ensure an effective occupational health and safety regime, communication among all parties is paramount. To address this specific concern, the amendments place duties on the parties to provide pertinent information to employees. Every operator, for example, will be required to post (and the employer to make available) a copy of the Act and any relevant code of practice, the emergency phone number for the respective offshore board, OHS policies, orders, compliance notices, notices of appeals or decisions.²¹ Further, the operator shall make available to any employee, upon request, a copy of any regulation, or other information regarding employees' rights and responsibilities for occupational health and safety that a safety officer considers advisable.²²

VI. *The Right to Refuse*

If an employee has a reasonable belief that an activity is dangerous, that employee may, pursuant to the amendments, refuse to perform that work

18. OHS Amendments, *supra* note 12, s. 205.46(a).

19. *Supra* note 2, *Canada-Newfoundland Atlantic Accord Implementation Act*, s. 140; *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act*, s. 142.

20. OHS Amendments, *supra* note 12, s. 205.47.

21. *Ibid.*, s. 205.26(2).

22. *Ibid.*, s. 205.26(2)(e).

in accordance with a formalized framework.²³ In developing this right, consideration was given to the management of the offshore operations. In some cases, there can be up to twenty different employers with employees working at a marine installation or structure. In many situations, an employee's direct supervisor may be employed by a different employer. As a result, a mechanism had to be included in the amendments to accommodate this unique relationship and organizational structure.

Generally, an employee will be able to refuse to perform an activity until either the employer has taken remedial action to the employee's satisfaction or a safety officer has advised the employee that a danger does not exist and that the employee should return to work. The employee must immediately report the circumstances to the immediate supervisor at the workplace, and if the supervisor agrees that a danger exists, the supervisor must immediately take appropriate action to remedy the problem. At that point, the operator, workplace committee, and employer are advised. The workplace committee can make recommendations to the employer or employee. Because of the hierarchy of control, notice must be given to a safety officer as soon as an operator is apprised of a refusal. The safety officer may conduct an independent investigation of the matter upon receipt of notice or any time thereafter in the process. If the employee's concerns cannot be accommodated, an employer may assign reasonable alternative work until the activity forming the basis for the refusal is no longer dangerous.²⁴

An employee may not refuse an assignment if refusal endangers the life, health or safety of another person or results from a normal condition of employment.²⁵ Many activities on an installation are inherently dangerous and would otherwise constitute a dangerous activity forming the basis of a refusal (e.g., firefighting).

If other employees are affected by any work stoppage resulting from the refusal, these employees will be paid as if no work stoppage had occurred. In those circumstances, the employer or operator has the right to assign reasonable alternative work. However, if there is willful abuse of the right to refuse, an employer may claim repayment of wages from any employee having knowledge that the refusal had no basis.²⁶

23. *Ibid.*, ss. 205.31-.35.

24. *Ibid.*, s. 205.33.

25. *Ibid.*, s. 205.31(2).

26. *Ibid.*, s. 205.35.

VII. *Right to Protection from Reprisals and Disciplinary Actions*

A complaint process will be established to address alleged reprisals and disciplinary actions taken against an employee in relation to matters affecting health and safety.²⁷ Safety officers will be granted the authority to investigate and make orders with respect to such actions.

VIII. *Powers of Enforcement for Safety Officers*

The powers of safety officers which are currently described in Part III will be incorporated in the new Part III.1. These powers include the ability to investigate accidents, incidents and complaints, perform inspections, obtain expert advice, issue orders and initiate prosecutions.²⁸ In addition, during the course of an inspection or investigation, safety officers will have the authority to enter, inspect, test, order the production of documents, and seize items and information with or without a warrant as the circumstances require.²⁹

Safety officers will be able to make orders either verbally or in writing. Verbal orders must be subsequently confirmed in writing to comply with the requirement that these orders be posted.³⁰ Every order will remain in effect until the safety officer determines whether there has been compliance.³¹ There are several avenues a safety officer may choose to ensure any non-compliance is addressed or prevented in the future: warning, direction to comply, order or prosecution.³²

The workers on an offshore installation live on that installation for up to three weeks. The living quarters are located on the marine installation and structure, and by definition, may not be considered a separate marine installation and structure. As a result of this arrangement and the need for safety officers to have the ability to inspect the entire installation, special search warrant provisions for living quarters will be incorporated into the legislation. For example, there is a requirement that certain protective equipment be used by employees. A safety officer who faces an uncooperative employee will now have the ability to seek and obtain a warrant to inspect a survival suit located in the employee's locker.³³ Similarly, a

27. *Ibid.*, ss. 205.39-45.

28. *Ibid.*, ss. 205.41-45.

29. *Ibid.*, s. 205.54.

30. *Ibid.*, s. 205.67.

31. *Ibid.*, s. 205.68(1)(b).

32. *Ibid.*, 205.67; Proposed Amendments, *supra* note 7 at 9-10.

33. *Supra* note 12, s. 205.55.

warrant may be required where a manager fails to consent to entry into his cabin where there is a belief that documents are located within those quarters.

In formulating the policy and amendments for the powers of safety officers, it was important to look at powers of inspection compared with powers of investigation in other legislation. The Supreme Court of Canada has recognized the distinction between inspections and investigation in other contexts. Specifically, the Court has held in *British Columbia Securities Commission v. Branch*:

Courts must try to differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7 of the Charter, the latter do not.³⁴

The Court went on to state that inspection of documents and premises was a routine matter expected for many activities and in those instances would not require a warrant.³⁵ The distinction was again considered in a recent decision of the Supreme Court of Canada, *R. v. Jarvis*,³⁶ wherein the Court visited the question of what constitutes the predominant purpose of an inquiry. The Court held that where the inquiry determines the question of penal liability, the protections afforded in the *Charter* relevant to the criminal context will apply.³⁷

These proposals also reflect the findings of *R. v. Inco*.³⁸ In that case, the Ontario Court of Appeal held that an inspector cannot use statutory powers of inspection for the investigation of an offence. Hence, a safety officer, applying *Inco*, will have to consider at the outset the purpose of the entry into the workplace (i.e., inspection versus investigation) as any evidence obtained during an inspection may not be admissible if that inspection becomes an investigation into a complaint. The powers of entry and search and seizure would prudently require a warrant. To do otherwise would violate section 8 of the *Charter*.³⁹ It is noteworthy that the Court in

34. [1995] 2 S.C.R. 3 at 8.

35. *Ibid.* at 35-36.

36. [2002] 3 S.C.R. 757.

37. *Ibid.* at 98.

38. *R. v. Inco Limited* (2001), 54 O.R. (3d) 495 (C.A.).

39. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Inco stated that the need for regulatory compliance did not outweigh the privacy interests of a corporation under a statutory duty to provide information. Leave to appeal was filed with the Supreme Court of Canada on September 5, 2001, but it was refused.

IX. *Maternity-Related Assignment and Leave*

These provisions will be similar to those found in the *Canada Labour Code*.⁴⁰ They do not affect an employee's basic right to refuse as provided by these amendments. These provisions will address medical certificates, reassignment and job modification. Any actions taken by the employer must also be consistent with the *Canadian Human Rights Act*.⁴¹

X. *Regulation-making Authority*

To provide the flexibility necessary to administer occupational health and safety in the offshore and to respond to the rapidly advancing technology, broad regulation-making authority is granted for carrying out the purposes of the new Part respecting:

- (a) the defining of words and expressions not specifically defined in the Act;
- (b) the keeping of records and the communication of information;
- (c) the establishment of standards and codes of practice for health and safety;
- (d) marine installations or structures and certain equipment located on them;
- (e) fire safety and emergency measures;
- (f) training of employees;
- (g) equipment, machines and devices to be used by employees; and
- (h) prevention, investigation, recording and reporting of incidents, accidents and occupational diseases.⁴²

This is a portion of the list of the areas which may be regulated. It is also important to recognize that the ability to make regulations may be insufficient to accommodate the technological innovations common to the oil and gas industry. As a result, the Chief Safety Officer has been given the

40. R.S.C. 1985, c. L-2, ss. 204-206.

41. R.S.C. 1985, c. H-6.

42. OHS Amendment, *supra* note 12, s. 205.83.

ability to authorize an alternate method, measure, equipment or standard in lieu of any required by regulation where he is satisfied it will provide a level of safety and protection of health equivalent to that prescribed by regulation.⁴³ In many circumstances, a standard may be raised and compliance with the new standard is necessary notwithstanding that a lower standard is already prescribed. This unique power allows the regulators to quickly respond in a dynamic environment.

XI. Appeals Process

The appeal body will differ between the jurisdictions. In Nova Scotia, an appeal will be heard by the Nova Scotia Occupational Health and Safety Appeal Panel as defined in the *Occupational Health and Safety Act*.⁴⁴ In Newfoundland and Labrador, the appeal will be heard under the auspices of the Labour Relations Board, an independent board established pursuant to the provisions of the *Labour Relations Act*.⁴⁵

Any order under Part III.1 and any regulation made thereunder can be appealed, but to ensure the protection of persons at or near the workplace, the order under appeal is not automatically stayed during the appeal process. An order by a safety officer can initially be appealed to the Chief Safety Officer.⁴⁶ The only exception to these rules (stays and CSO appeals) would be an order relating to a failure to pay wages or to a reprisal action.⁴⁷

XII. Offence Provisions

Failure to meet any requirement of the governing *Accord Acts* is a strict liability offence for the purposes of prosecution and subject to the defence of due diligence.⁴⁸ If a corporation commits an offence under the occupational health and safety provisions, any person who directed, authorized, assented, acquiesced or participated in the commission of the offence will now be deemed a party to that offence and may be prosecuted.⁴⁹

43. *Ibid.*, s. 7.1.

44. S.N.S. 1996, c.7.

45. R.S.N. 1990, c. L-1.

46. OHS Amendments, *supra* note 12, s. 205.7(1).

47. *Ibid.*, s. 205.7(2).

48. *Ibid.*, s. 205.8.

49. *Ibid.*, s. 205.79.

These individuals include any officer, director or agent of the corporation and any other person exercising managerial or supervisory functions within the corporation.

These provisions result from the recommendations of the Westray Mine Public Inquiry and to a lesser extent from the Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights - Corporate Liability.⁵⁰ It is noteworthy that the federal government proposes to codify a general duty of reasonable care with respect to workplace safety by enacting a new section of the *Criminal Code* to ensure the safety of workers.⁵¹

In addition to the current offences and penalty provisions afforded in the *Accord Acts*, the penalty provisions will also be amended to provide for sentencing alternatives that recognize the uniqueness of the offshore oil industry. They include making payment to the board of monies for the purposes of conducting research relating to health and safety, and directing the offender to publish the facts relating to the offence or prohibiting the offender from engaging in particular activities.⁵²

Conclusion

When this paper was written, the consultation process was not complete. Other policy areas yet to be clarified deal with the reporting structures and the ministerial roles for the governments involved. Current practices have proved to be workable and have greatly assisted in the legislative review process and drafting of the amendments. Ultimately, these amendments are another step in ensuring that everyone performing petroleum-related work in the offshore areas enjoys a safe and healthy work environment.

50. Canada, *Response to the Report of the Standing Committee on Justice and Human Rights – Corporate Liability* (Ottawa: Government of Canada, 2002).

51. *Ibid.* at 17.

52. OHS Amendments, *supra* note 12, s. 205.82.