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Key Issues in the New Regime of Occupational Health and Safety: The Right to Refuse Work and Directors' and Officers' Liability

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Key Issues in the New Regime of
Occupational Health and Safety:
The Right to Refuse Work and Directors'
and Officers' Liability

This article examines the existing and proposed occupational health and safety regulatory regimes for oil and gas operations offshore Nova Scotia and Newfoundland and Labrador. The article provides historical context for both the existing and the proposed regimes. Two specific areas of concern are analysed: the right to refuse work and directors' and officers' liability. For each issue, the author offers observations on the potential impacts that the implementation of proposed legislation will have on offshore oil and gas operations in these jurisdictions.

Cet article étudie les régimes de réglementation existants et proposés en matière de santé et de sécurité du travail pour les activités d'exploitation des hydrocarbures au large de la Nouvelle-Écosse et de Terre-Neuve-et-Labrador. Il définit le contexte historique des régimes existants et des régimes proposés. L'auteur se penche sur deux sujets de préoccupation en particulier : le droit de refuser de travailler et la responsabilité des dirigeants et des administrateurs. Dans chaque cas, il soumet des observations sur les effets potentiels qu'aura la mise en œuvre des mesures législatives proposées sur les activités d'exploitation des hydrocarbures dans ces territoires.

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Introduction

The issue of safety continues to be of paramount importance in the offshore oil industry. While there can be no opposition to legislation which provides safety protections for workers in the offshore industry comparable to those onshore, the incorporation of a comprehensive offshore health and safety regime in the Newfoundland and Labrador and Nova Scotia offshore areas is only now being realized.

I. The Regulatory History

Exploration in the Newfoundland and Labrador offshore began in the 1960s when Premier Joseph R. Smallwood announced that the province claimed offshore resources. Since Newfoundland was, in 1949, the last province to enter Confederation and since there was no clear allocation of authority between the federal and provincial governments under the Constitution, there was some measure of credibility to his claim.

During their terms as energy ministers for the Province of Newfoundland, both Brian Peckford and Leo Barry asserted control over the offshore, notwithstanding the competing federal claim. Their ministries set up various regulatory mechanisms, including the now-defunct Newfoundland Petroleum Corporation. Near the same time, the Government of Canada responded to OPEC's rising influence by investing massively in oil and gas development. In addition, it created Petro-Canada and launched the National Energy Program. To say that the Trudeau government was disinterested in letting any province play a significant role was to understate the matter.

There were periodic discussions on the jurisdictional issues in the late 1970s, but nothing much happened. Prime Minister Trudeau was not inclined to negotiate seriously, and the Clark regime ended before it got to the topic. With Trudeau's return, the 1980 constitutional amendment process was launched, and the Province of Newfoundland sought, as part of that process, a joint offshore regime. Although initially some progress was made, the discussions led by Jean Chrétien and William Marshall ultimately collapsed with the parties reverting to their earlier positions.

In 1982, the drill rig *Ocean Ranger* sank in a vicious winter storm, taking the lives of all onboard. Both governments set up inquiries, but the subsequent outcry over their failure to cooperate forced them to jointly constitute the Royal Commission on the *Ocean Ranger* Marine Disaster headed by the Chief Justice of the Newfoundland Trial Division, T. Alex Hickman.¹ The Commission focused on all aspects of the offshore, including the need for a better regulatory process. If anything, it overemphasized the relevant marine dangers and unduly minimized the industrial dangers. These shortcomings set the tone for the subsequent regulatory process.

With a change of government in Ottawa, negotiations restarted, and on February 11, 1985, the Atlantic Accord² was signed in St. John's by Prime Minister Mulroney and Newfoundland Premier Brian Peckford. Notwithstanding the decision of the Supreme Court in the *Hibernia Reference*,³ the Atlantic Accord gave a significant role to the province and asserted that the province was entitled to be the primary beneficiary of offshore resources. A very similar agreement was subsequently reached with Nova Scotia, and parallel federal and provincial legislation was enacted first regarding Newfoundland and Labrador offshore, and then the Nova Scotia offshore.⁴

The Atlantic Accord has now been suspended by the implementing legislation, but it has a significant interpretive value, and it indicates each government's priorities at the time of its conclusion. Overall, its main tone

1. Canada, *Royal Commission on the Ocean Ranger Marine Disaster* (Ottawa: Minister of Supply and Services Canada, 1984).

2. The Atlantic Accord: Memorandum of Agreement Between the Government Of Canada And The Government Of Newfoundland And Labrador On Offshore Oil And Gas Resource Management and Revenue Sharing (11 February 1985) ["Atlantic Accord"]

3. *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 384 [*Hibernia Reference* cited to S.C.R.].

4. *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 [*Newfoundland Accord Act (Canada)*]; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1985, c. 28 [*Nova Scotia Accord Act (Canada)*] [hereinafter collectively referred to as the *Accord Acts*].

reflects an underlying mutual suspicion. From the Atlantic Accord, for instance, we see that Canada-Newfoundland Offshore Petroleum Board (CNOPB) members were not allowed to be public servants. An arbitration process exists to select a chairman in case of disagreement; the Board's responsibility was to serve both governments and loyalty to either was plainly considered to be suspect.

The Atlantic Accord's allocation of powers between the governments was ambiguous. The federal government was responsible for "Canadianization," shipping, fisheries and the like. The province alone was responsible for the royalty regime and "decisions related to provincial laws of general application having effect in the offshore," pursuant to clause 61.⁵ Some decisions bounce back and forth depending upon national self-sufficiency, with an elaborate (and I believe never used) calculation of who had what powers when.

The province had always focused on benefits, and several sections address this primary concern. The legislation that was to be introduced was to supercede the existing federal legislation, recognizing that where provisions of the *Canada Oil and Gas Act*⁶ and the *Oil and Gas Production and Conservation Act*⁷ were consistent with the Atlantic Accord, they would be retained.

Clause 61 of the Atlantic Accord⁸ sets out the undertaking by the federal government to pass legislation applying provincial laws "including social legislation such as occupational health and safety legislation and other legislation designed to protect workers" to the offshore. In the federal Accord legislation for Newfoundland,⁹ section 152 transforms the political deal into law. Newfoundland's *Occupational Health and Safety Act*¹⁰ and regulations, *inter alia*, are made applicable on any marine installment or structure in the offshore, subject to the proviso that the occupational health and safety legislation does not apply to matters for which regulation might be made under sections 149(1)(d), (m), (o) or (p) of the *Newfoundland Accord Act (Canada)*.

These are enormously broad sections:

- (d) concerning the safety and inspection of all operations conducted in connection with the exploration and drilling for and the produc-

5. Atlantic Accord, *supra* note 2, s. 61.

6. R.S.C. 1985, c. 0-6 (repealed).

7. R.S.C. 1985, c. 0-7.

8. *Supra* note 2.

9. *Supra* note 4, *Newfoundland Accord Act (Canada)*.

10. R.S.N.L. 1990, c. 0-3.

tion, conservation, processing and transportation of petroleum, and prescribing the means to be taken to ensure the safety of such operations.

...

- (m) prescribing the conditions under which drilling operations may be carried out.

...

- (o) prescribing minimum acceptable standards for methods, tools, equipment and materials.

...

- (p) prescribing minimum acceptable standards for the construction, alteration or use of any works, fittings, machinery or plant [etc.].

This arrangement allowed for Newfoundland's offshore occupational health and safety legislation to be restructured in a manner appropriate for its use in the offshore.

A first draft of occupational health and safety regulations under the *Newfoundland Accord Implementation Act (Canada)* was prepared. However, unlike most of the drilling and production regulations, which had a history with the federal government, occupational health and safety rules did not and the regulations were not promulgated. This greatly constrained the CNOBP and Canada-Nova Scotia Offshore Petroleum Board (CNSOPB) and caused one of the most bizarre failures of safety regulation of which I am aware. How does a government rationalize its failure to promulgate occupational health and safety rules in the area where the *Ocean Ranger* sank? The failure to regulate was mitigated by the Board's imposing compliance with the draft rules as a licensing condition. However, although imposed compliance was marginally effective, it had the peculiar consequence of curtailing all efforts at reform and progress for a regrettably long period. Fortunately, this period free of regulation is coming to an end. As we move toward a new system, it is informative to look at how some specific elements will be treated.

II. *The Right to Refuse Work*

Although section 152 of the *Newfoundland Accord Act (Canada)*¹¹ purported to nullify a majority of provincial occupational health and safety provisions within the offshore, one area which was not caught was the

11. *Supra* note 4, s. 152, *Newfoundland Accord Act (Canada)*.

right to refuse work. I will start with an overview of the right to refuse work as it existed prior to the proposed amendments, and couple this with an analysis of how the system will function if and when the proposed amendments become law.

Both the Nova Scotia and Newfoundland provincial *Occupational Health and Safety Acts*¹² provide an employee with a “right to refuse work” where the employee believes on reasonable grounds that the assigned work activity is likely to endanger the health or safety of the employee or the health and safety of another person at the workplace.¹³ In both jurisdictions, the right to refuse continues until remedial action has been taken which satisfies the employee. This refusal may last until the statutorily-mandated “committee” or workplace health and safety representative has investigated the matter and advised the employee to return to work, or until a provincial health and safety officer has investigated the matter and advised the employee to return to work.

Both *Accord Acts* require that offshore operators develop and submit a “Safety Plan” for approval by the respective offshore board. This Safety Plan must be approved before authorization for a work or activity will be issued. Both boards have prepared guidelines for the preparation of these Safety Plans by operators, and in doing so have indicated that the right to refuse work, as provided for in the provincial occupational health and safety legislation, must be recognized and accounted for by a prospective operator in the development of a Safety Plan. As a result, operators have recognized this right in developing their Safety Plans. For example, Husky Oil’s *Preliminary Safety Plan* prepared for its White Rose Development Application stated:

Husky Oil and contractor personnel will be informed of their right to refuse to do any work that they feel, based on reasonable grounds, is dangerous to their health and safety or to the health and safety of other persons at the worksite. Personnel shall also be informed of the procedures to be followed if such a situation were to occur.¹⁴

12. The Nova Scotia Act is *Occupational Health and Safety Act*, S.N.S. 1996, c. 7. The Newfoundland and Labrador Act is *Occupational Health and Safety Act*, R.S.N.L. 1990, c. 0-3 [hereinafter referred to collectively as the *OHS Acts*].

13. *Ibid.*

14. “White Rose Oilfield Development Application: Volume 5 Preliminary Safety Plan and Concept Safety Analysis,” online: Husky Energy <http://www.huskyenergy.ca/whiterose/development/downloads/Vol5_Part1.pdf>.

Where this right to refuse work is invoked by an employee, the occupational health and safety legislation places obligations on both the employer and the employee. While there is some variation in wording and structure between the two provincial acts, they are fundamentally the same regarding the primary obligations they create. In both jurisdictions, when an employee exercises the right to refuse work, the employee must immediately report the situation to a supervisor. If the situation is not remedied to the employee's satisfaction, the employee must report it to the provincial Occupational Health and Safety Division.¹⁵ The employee must also accept a reassignment to other duties while the unsafe situation is being rectified by the employer.

There are some variations between the legislation in the two provinces. For example, in both *OHS Acts*, the right to refuse work is qualified as existing only where "reasonable grounds" exist for the belief that the assigned task is likely to endanger health or safety. However, the Newfoundland OHS Act¹⁶ further mandates in section 48 that the employee is under a positive duty not to take advantage of this right without reasonable grounds for doing so. Thus, it might be argued that the Newfoundland OHS Act holds employees to a higher standard of accountability in exercising the right to refuse work.

For its part, the *Nova Scotia Occupational Health and Safety Act*¹⁷ contains provisions which are absent in the Newfoundland and Labrador legislation. For example, section 43(9) provides that an employee may not refuse work where the refusal puts the life, health or safety of another person in danger or where the danger which led to the work refusal is inherent in the work of the employee. One possible example of the type of work which might attract one or both aspects of this provision is that of firefighting, as it is inherently dangerous work upon which the safety of others is dependant. Thus, section 43(9) of the Nova Scotia OHS Act¹⁸ creates an obligation on employees which is not explicitly contemplated by the Newfoundland OHS Act.

When the obligations of employers under the two provincial occupational health and safety Acts are examined, one again finds that they are fundamentally similar. For example, under both Acts, when the em-

15. In Nova Scotia, the *Occupational Health and Safety Act* provides for an intermediate reporting step to a joint (employer/employee) occupational health and safety committee prior to escalation to the Division; see s. 43(2)(b).

16. *Supra* note 12, Newfoundland, s. 48.

17. *Supra* note 12, Nova Scotia, s. 43(a).

18. *Supra* note 12, Nova Scotia, s. 43(a).

ployee exercises the right to refuse, the employer may reassign the worker until the conditions which led to the refusal are rectified.¹⁹ Furthermore, under both Acts, the employer must continue to pay the employee the same wages and benefits that the employee would have received had the employee continued in his or her normal work regardless of whether the employee is reassigned to alternate work.²⁰ However, as with the obligations upon employees, there are minor differences between the two acts. The Nova Scotia legislation makes the ability of the employer to reassign the employee subject to any applicable collective agreements,²¹ while under the Newfoundland OHS Act, this prerogative is unqualified.²² Both acts preclude employers from taking punitive or discriminatory action against an employee who properly exercises the right to refuse work.²³ If there is punitive or discriminatory action in Nova Scotia, the employee must file a complaint to a Division Officer within thirty days, provided that an arbitrator has not already been appointed to deal with the complaint pursuant to a collective agreement. If an arbitrator has been appointed, the employee must have the complaint dealt with under the process set out by the collective agreement. Otherwise, the complaint will be investigated by a Division Officer who will issue a finding and an order specifying the remedial action to be taken by the employer, or determine that there are no grounds upon which to issue an order.²⁴ Under the Newfoundland OHS Act, there is no deadline specified by which complaints must be filed, and the employee has the choice to proceed under any existing collective agreement or to have the provincial Labour Relations Board deal with a complaint of discrimination.²⁵

As a result of the extension of provincial social legislation under the *Accord Acts* to the Nova Scotia and Newfoundland and Labrador offshore areas, the right to refuse work exists, with minor variations, in both jurisdictions. In the context of the East Coast offshore industry, many employers, as well as employees, operate or work in both jurisdictions. This creates a situation with the potential for confusion because there must be compliance with two sets of slightly different occupational health and safety regulations. However, the implementation of the proposed

19. *Supra* note 12, Newfoundland at s. 45(2); Nova Scotia at s. 43(5).

20. *Supra* note 12, Newfoundland at s. 45(3); *supra* note 12, Nova Scotia at s. 43(6).

21. *Supra* note 12, Nova Scotia at s. 43(5).

22. *Supra* note 12, Newfoundland at s. 45(2).

23. *Supra* note 12, Newfoundland at s. 49(d); Nova Scotia at s. 45(2).

24. *Supra* note 12, Nova Scotia at ss. 46(1)(c), 46(1)(d), 46(2).

25. *Supra* note 12, Newfoundland at s. 51.

amendments to the *Accord Acts* will create a uniform system of occupational health and safety regulations for both jurisdictions. Employers and employees alike will operate under a single occupational health and safety regime for both offshore areas. The proposed amendments as they relate to the right to refuse work are discussed below.

III. *Relevant Proposed Amendments*

The proposed amendments to the *Accord Acts* will effectively remove the operation of the provincial occupational health and safety acts and replace them with new provisions contained within the provincial *Accord Acts* themselves. The definition of provincial “social legislation”²⁶ will change so that provincial occupational health and safety legislation will no longer be included. This is full circle.

An extensive and comprehensive set of provisions will be added to the *Accord Acts* by the addition of new sections following section 205 of the *Newfoundland Accord Act (Canada)*,²⁷ and following section 210 of the *Nova Scotia Accord Act (Canada)*.²⁸ This will lead to a single occupational health and safety regime for both offshore jurisdictions. The federal government likes to cite uniformity as a benefit, but frankly that is a red herring. Each offshore operation is truly unique and presents its own challenges. Uniformity is primarily of benefit to regulators.

A number of provisions, new to one or the other of the provinces, will affect the way in which the right to refuse work will operate in the offshore jurisdictions. The right to refuse work is currently qualified under the *Nova Scotia Occupational Health and Safety Act* to preclude the right from being exercised where such refusal would put other employees at risk or where the danger complained of is an inherent aspect of the employee’s job. The proposed amendments incorporate this exception and thus the exception would operate in the Newfoundland and Labrador offshore area.

The protocol to be followed subsequent to the right being invoked by an employee would also be made uniform following adoption of the amendments. While both provincial occupational health and safety acts stipulate the employee is to report the reason for the work stoppage to a

26. *Discussion Paper Amending the Accord Acts to Incorporate Occupational Safety and Health*, online: East Coast Offshore Occupational Health and Safety <<http://www.offshoreohs.ca/media/documents/webdraftbillns.pdf>> [Proposed Amendments].

27. *Supra* note 4, *Newfoundland Accord Act (Canada)*.

28. *Supra* note 4, *Nova Scotia Accord Act (Canada)*.

supervisor, the *Nova Scotia Occupational Health and Safety Act* specifies the ensuing sequence of reporting requirements, which includes informing the workplace health and safety committee, and finally, if necessary, notifying the provincial division.²⁹ The *Newfoundland and Labrador Occupational Health and Safety Act* has adopted a less specific process. Under the proposed amendments to the *Accord Acts*, the new process would generally reflect the *Nova Scotia Occupational Health and Safety Act* provisions. The process of escalation would, however, conclude with an inspection by a safety officer appointed by the Offshore Petroleum Board, rather than one by the provincial Occupational Health and Safety Division as mandated by the provincial occupational health and safety legislation.

The variation between the two provinces in the treatment of the issue of reassignment is also addressed. The reassignment of an employee who refuses to work will be made subject to any relevant collective agreements, as is the case currently under the *Nova Scotia Occupational Health and Safety Act*.

The amendments also address issues which are not currently dealt with by either provincial occupational health and safety act. For example, the amendments provide that other employees affected by a work stoppage will continue to be paid their regular wages and benefits. The amendments also provide that an employer may reassign those employees, as well as the refusing employee. These amendments are made subject to any applicable collective agreements.

One new provision creates the potential for employees to be required to repay an employer for wages or benefits paid during a work stoppage if it is determined that the employee refused work knowing that no genuine circumstances existed to warrant the refusal. Furthermore, if other employees participate in the work stoppage having knowledge that the refusal is without merit, they can also be compelled to repay wages received during the stoppage. Clearly, however, the usefulness of these new provisions is in their deterrence value, not in their loss compensation ability.

Penalties for unwarranted work stoppages will create a disincentive against the frivolous exercise of the right by employees to refuse work. Where the *Newfoundland and Labrador Occupational Health and Safety Act* explicitly places a duty on employees to not "take advantage" of the right of refusal, the proposed amendment actually creates a remedial mechanism to deal with unjustified work stoppages. One might question the entire premise behind such an elaborate code as there is no evidence in the offshore of significant numbers of frivolous refusal of work claims.

29. *Supra* note 12, Nova Scotia at s. 43(2).

IV. *Directors' and Officers' Liability*

One of the goals under the proposed amendments is “support for an occupational health and safety culture that recognizes a shared responsibility in the workplace.”³⁰ In order to achieve this goal, responsibility for safety has been allocated to all members of the production chain. As outlined:

Duties will be defined for each player in the offshore workplace — from Operator to Employer; Supplier; Employee; Supervisor; Owner; providers of Service; Interest Owner; and Corporate Officials so that they are required to take all reasonable measures to ensure the health and safety of persons at the workplace. A specific set of duties is outlined for each player.³¹

The drafters of these rules should recognize that despite the magnitude of its many operations the industry operates worldwide at a very high level of safety. Contractors have tens of thousands of employees, and some operate in 100 or more countries. Schlumberger boasts its employees represent 140 nationalities. The Norwegian company, ABB Oil Gas and Petrochemicals, has 700 subsidiary companies. Many entities operating offshore are joint venturers or exist in other corporate forms. It is absolutely critical that any statutory statement of duties reflects the reality of offshore operations instead of an utopian ideal.

The proposed amendments to the *Accord Acts* include provisions outlining directors' and officers' liability. Noncompliance with the statute may result in the prosecution of these officials for safety shortcomings on the part of their respective corporations. The proposed amendment to the *Nova Scotia Accord Act (Canada)* in section 210.79 specifically states the elements of director and officer liability:

- (1) If a corporation commits an offence under the provisions of this Act or regulations concerning health or safety, any of the following persons who *directed, authorized, assented to, acquiesced in or participated* in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted:
 - (a) any officer, director, agent or mandatory of the corporation; and

30. *Supra* note 26.

31. *Supra* note 26.

(b) any other person exercising managerial or supervisory functions in the corporation.³²

In a corporate commercial context, terms such as “authorized” and “acquiesced” have been interpreted by the courts to imply an informed or an intentional act.³³ As such, directors and officers have frequently avoided liability simply by distancing themselves from corporate decisions. However, while many corporate cases have concluded that officers’ and directors’ liability will only accrue by virtue of a positive act on the part of the official, this proposition has been the subject of a long-standing legal controversy. In this context of uncertainty, the reliance by directors and officers on such strategies could potentially expose them to significant liabilities.

One specific area of uncertainty concerns the nature of conduct that will be considered “acquiescence.”³⁴ The issue has been considered in the environmental law context, which has produced conflicting provincial court decisions.³⁵ In *R. v. Bata Industries Ltd.*,³⁶ the court found that the prosecution did not bear the burden of demonstrating that the defendants failed to take all reasonable care. Instead, the defendants were required to establish a defence of due diligence on a balance of probability standard.

Recently, the case of *R. v. A & A Foods Ltd.*³⁷ re-opened the debate surrounding the proper interpretation of acquiescence. While this is a stand-alone case (it has been neither rejected nor followed in subsequent decisions), it should serve as a warning to officers and directors that in situations involving issues of public health and safety, courts may be willing to impose a strict liability standard. In *A & A Foods*, Justice Hood was extremely critical of the restrictive interpretation given to terms such as “authorized,” “permitted” and “acquiesced.”³⁸ He reiterated the position espoused in *Bata*, that directors and officers will be held to a strict liability standard and bear the onus of demonstrating due diligence.³⁹ In justifying his interpretation of the terms “authorized,” “permitted” and “acquiesced,” Judge Hood stated:

32. *Supra* note 26 at s. 210.79 [emphasis added].

33. *R. v. Armaugh Corp.* (1993), 1 C.C.L.S. 87 [*Securities Act*, R.S.O. 1980, c. 466]; referred to in *R. v. Boyle* (2001), 300 A.R. 284 [*Securities Act*, S.A. 1981, c. S-6.1].

34. J. Benidickson, *Essentials of Canadian Law: Environmental Law* 2nd ed., (Toronto: Irwin Law, 2002) at 168.

35. See *R. v. Bata Industries Ltd* (1992), 9 O.R. (3d) 329; and *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185.

36. *Ibid.*

37. (1997), 120 C.C.C. (3d) 513.

38. *Ibid.* at para. 31.

39. *Ibid.* at para. 18.

In *Armough* the learned judge seemingly restricted the meaning to be given to the terms: “authorized”, “permitted” or “acquiesced”, to positive action on the part of the accused officers or directors. This may have been due, at least in part, to the nature of the offence committed by the corporation. However, and with respect, I am not satisfied that he was correct in doing so, or that the terms necessarily imply a knowing or intentional act or degree of *mens rea*. Such an interpretation of those terms is, in my view, inconsistent with the offence being one of strict liability, an offence of negligence. It is also contrary to the decision in *Sault*.⁴⁰

As demonstrated by the conflicting case law on this point, the nature of the conduct attracting directors' and officers' liability is yet to be finally resolved. Likely as a result of these interpretive difficulties, the proposed amendment to section 210.22.1 of the *Nova Scotia Accord Act (Canada)* provides:

Every director and officer of a corporation shall take all reasonable measures to ensure that the corporation complies with this Act and the regulations and, where applicable, the commitments in a declaration and the conditions of the authorization.⁴¹

In conclusion, sections 210.79 and 210.22.1 appear to dictate that failure on the part of corporate directors and officers to establish procedural safeguards to ensure compliance with the Act may very well be viewed as “acquiescence” by a court of law.

1. *Strict Liability Offences - General*

The law surrounding strict liability offences is generally settled in Canada. In strict liability offences the commission of the physical elements of the offence, in and of themselves, may lead to conviction regardless of the accused's intent. In other words, strict liability offences require no *mens rea*.

The Supreme Court of Canada decision in *R. v. Sault Ste. Marie*⁴² first recognized strict liability offences under Canadian law. These offences generally apply to quotidian matters that are “in substance of a civil nature.”⁴³ Canadian jurisprudence has dictated that the regulation of

40. *Ibid.* at para. 31.

41. Proposed Amendments, *supra* note 26 at s. 210.22.1.

42. (1978), C.C.C. (2d) 353 (S.C.C.).

43. *Ibid.* at 357.

occupational health and safety falls within the above definition.⁴⁴ The key characteristic of a strict liability offence is that it places a reverse onus on the accused.

In *R. v. Wholesale Travel*, the Supreme Court of Canada addressed the issue of Charter rights in the context of strict liability offences and concluded that reverse onus provisions are generally constitutional.⁴⁵ To quote Justices L'Heureux-Dubé and Cory:

Quite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt. The means of proof of reasonable care will be peculiarly within the knowledge and ability of the regulated accused.⁴⁶

Further, the justices stated:

The imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities does not run counter to the presumption of innocence, notwithstanding the fact that the same reversal of onus would violate s. 11(d) in a criminal context. . . .⁴⁷

2. *Directors' and Officers' Offences — Penalties*

In the proposed health and safety legislation, directors and officers have the potential of being charged with indictable offences. Proposed section 210.77(2) provides:

- (2) Every person who is guilty under subsection (1) is liable
 - (a) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years, or to both.
 - (b) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both.⁴⁸

Notwithstanding that the proposed amendments to the *Accord Acts* were intended to make occupational health and safety laws offshore comparable to those onshore, the proposed amendments carry more severe penalties in

44. *R. v. Timminco Ltd.* (2001), 153 C.C.C. (3d) 521 (Ont. C.A.).

45. [1991] 3 S.C.R. 154 [*Wholesale Travel*].

46. *Ibid.* at 102.

47. *Ibid.* at 110.

48. *Supra* note 26 at s. 210.77(2).

the offshore context. Compare, for example the *Nova Scotia Occupational Health and Safety Act* which prescribes in section 74 that:

A person who

- (a) contravenes this Act or the regulations; or
- (b) fails to comply with
 - (i) an order or direction made pursuant to this Act or the regulations, or
 - (ii) a provision of a code of practice adopted pursuant to Section 66,is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred and fifty thousand dollars, or to a term of imprisonment not exceeding two years, or to both a fine and imprisonment.⁴⁹

Similarly the *Newfoundland Occupational Health and Safety Act* provides in section 67(2):

Where a person, other than a corporation, is convicted of an offence under subsection (1), he or she is liable to a fine of not less than \$500 and not more than \$250,000 or to a term of imprisonment not exceeding 12 months or to both a fine and imprisonment.⁵⁰

While the potential for imprisonment exists under both occupational health and safety acts, a prison term of up to five years and monetary penalties of up to one million dollars go well beyond the penalty provisions presently enacted onshore.

In *Wholesale Travel*, the Supreme Court of Canada dealt with the penalty provisions in the *Competition Act*.⁵¹ The Act prescribed that strict liability offences could be treated as offences carrying a penalty of up to five years in prison. Following that decision, it seems likely that similar provisions in the *Accord Acts* would stand up to similar scrutiny. While the Supreme Court of Canada's decision in *Wholesale Travel* has been criticized by legal scholars,⁵² it is still considered good law in Canada.

49. S.N.S. 1996, c.7.

50. R.S.N. 1990, c. O-3, *ibid*.

51. R.S.C. 1970, c. C-23.

52. *Supra* note 45. Don Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Thompson Canada Ltd., 1995) at 180.

3. *Strict Liability Offences — Due Diligence*

Those charged with strict liability offences may avoid liability by proving that reasonable care was taken to avoid the situation which precipitated the charges. If an accused reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent, or took all reasonable steps to avoid the particular event, he or she will not be found culpable.

In *Bata*, a leading case in director/officer liability, Judge Ormston described the burden of a due diligence defence:

[Directors] must establish that they exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore, in law, the acts of the corporation itself.⁵³

He went on to outline the factors relevant to the determination of whether a defence of due diligence will be successful:

- (a) Did the board of directors establish a health and safety “system” as indicated in *R. v. Sault Ste. Marie, i.e.*, was there supervision or inspection? was there improvement in business methods? did he exhort those he controlled or influenced?
- (b) Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with [occupational health and safety] laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner?
- (c) The directors are responsible for reviewing the [occupational health and safety] reports provided by the officers of the corporation but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.

53. *Supra* note 35 at 339.

- (d) The directors should substantiate that the officers are promptly addressing [occupational health and safety] concerns brought to their attention by government agencies or other concerned parties including shareholders.
- (e) The directors should be aware of the standards of their industry and other industries which deal with [occupational health and safety] risks.
- (f) The directors should immediately and personally react when they notice the system has failed.⁵⁴

It is important to realize that a corporation may not simply rely on the recommendations of a Chief Safety Officer in order to meet a due diligence defence threshold. In *R. v. Placer Developments*, the court held:

Reliance on specific instructions from government officials does not constitute a defence if a reasonably prudent person would question the implied or explicit advice from government officials. In many instances, corporations may possess more knowledge about the specific environment and nature of operations than the government department. Any reason to question government actions should be brought clearly to the attention of the government agency before adhering to advice or directions that are known to be deficient.⁵⁵

Major oil corporations are expected to possess sufficient expertise to ascertain the health and safety risks within the offshore industry without recourse to government assistance. As such, it is important that corporations take the initiative to ensure a safe workplace environment.

Directors and officers must remain vigilant in ensuring an adequate system is in place, not merely to avoid liability, but more importantly to foster a safe work environment. By having a proper safety policy in place, directors and officers will avoid liability by preventing the occurrence of accidents in the first place.

54. *Ibid.* at 362-63 [modifications for OHS added].

55. (1983), 13 C.E.L.R. 42 (Y. Terr. Ct.).

