



GOVERNMENT OF NEWFOUNDLAND AND LABRADOR
SUBMISSION TO THE OFFSHORE HELICOPTER
SAFETY INQUIRY (PHASE 1A)

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1. PURPOSE

The purpose of this submission is to inform the Inquiry, by way of written submission as agreed to by Counsel for the Inquiry, on the history of *The Atlantic Accord Agreement*, the *Canada-Newfoundland Atlantic Accord Implementation Act* and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* (the Accord Acts), as well as to clarify: the roles of the various parties and the regulation-making power under that legislation; the procedure for amending the Accord Acts; a brief overview on the process involved in the current amendments to the Accord Acts; an outline of the general principles of occupational health and safety that form the basis for onshore and offshore occupational health and safety legislation; and the occupational health and safety regime that is currently in place in the offshore area.

While the Accord Acts govern occupational health and safety in the offshore area, matters related to the safety and airworthiness of helicopters used in the transportation of workers to and from the offshore area are within the exclusive jurisdiction of Transport Canada and therefore will not form part of this submission.

2. HISTORY OF THE ATLANTIC ACCORD LEGISLATION

The Atlantic Accord Agreement (the Accord Agreement), was signed on February 11, 1985 to facilitate the orderly development of petroleum resources in the offshore area.

The purposes of the Accord Agreement were, among other things, to recognize the right of Newfoundland and Labrador to be the principal beneficiary of the offshore oil and gas resources; to recognize the equality of both governments in the management of the resources; to provide that the Government of Newfoundland and Labrador can establish and collect resource revenues; to provide for a stable and fair offshore management regime for industry; and, to promote within the system of joint management consistency with the management regimes established for other offshore areas in Canada. It was within the Accord Agreement that the two parties agreed to establish the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) to administer the relevant provisions of the Accord Acts.

For the purposes of defining the role of the C-NLOPB and each government in the Accord Agreement, decisions on offshore resources were divided into four categories, namely:

Decisions of the Government of Canada. Decisions made under legislation of general application not specifically related to oil and gas exploration and production, and decisions related to the application of federal taxes.

Decisions of the Government of Newfoundland and Labrador. The royalty regime and other provincial type revenues (e.g. provincial corporate income tax, rental and license fees); and decisions related to provincial laws of general application having effect in the offshore.

Decisions made by the C-NLOPB. The C-NLOPB is required to make decisions relating to the regulation and management of petroleum-related activities in the offshore area (e.g. administration of regulations respecting operational and occupational safety, declarations of discoveries, environmental protection and resource conservation).

Fundamental Decisions and Joint Directives. Where a fundamental decision under the Accord Act (e.g. issuance of rights, approval of development plans) is made by the C-NLOPB it shall give notice of the decision to both the federal and provincial ministers responsible for energy issues for approval before the decision becomes final. In addition to fundamental decisions, ministerial joint directives may be issued to the C-NLOPB, which the C-NLOPB shall comply with, related to, among other things, fundamental decisions and Canada-Newfoundland and Labrador benefits plans.

The Accord Agreement was implemented by the enactment of mirror (parallel) legislation, namely, the *Canada-Newfoundland Atlantic Accord Implementation Act* and

the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* to govern all petroleum operations in the offshore area. In addition, the Accord Agreement and the Accord Acts established that the C-NLOPB would be responsible for, on behalf of the Government of Newfoundland and Labrador and the Government of Canada, the joint management of petroleum resources in the offshore area.

A similar memorandum of agreement was entered into between the federal government and the Government of Nova Scotia. The *Canada-Nova Scotia Offshore Petroleum Resources Accord* was signed on August 26, 1986 and implemented by the enactment of parallel legislation.

3. THE ROLE OF VARIOUS PARTIES UNDER THE ACCORD LEGISLATION

Under the Accord Acts, the C-NLOPB has the legal powers and capacities of a corporation incorporated under the *Canada Business Corporations Act*. It can only be dissolved by the joint operation of an Act of Parliament and the Legislature of the Province. The Accord Acts establish its structure and the capacity to hire staff to perform the duties and functions of the C-NLOPB under the Accord Agreement and the Accord Acts. The C-NLOPB consists of seven members, three appointed each by the federal and provincial government with the Chairman appointed jointly.

The C-NLOPB's responsibilities include the administration of the Accord Acts and regulations, which includes operational and occupational health and safety; the issuance and administration of petroleum and exploration and development rights; administration of statutory requirements regulating offshore exploration, development and production; the approval of Canada-Newfoundland and Labrador benefits and development plans; and the mandate to administer the registration of interests and instruments in petroleum in relation to the offshore area. The C-NLOPB also has the power to attach as conditions of the authorization, terms and conditions including those related to safety or occupational health and safety.

The Government of Canada and the Government of Newfoundland and Labrador are responsible for any amendments to the Accord Acts and the making of regulations. The C-NLOPB, as administrator of the Accord Acts and regulations, plays an essential role in advising governments, due to its operational and technical expertise, on matters relating to proposed amendments to the Accord Acts or the development of regulations. The Accord Acts provide the C-NLOPB with the ability to make recommendations to both governments with respect to proposed amendments to the Accord Acts and any regulations made under the Accord Acts.

4. THE REGULATION-MAKING POWER WITH RESPECT TO OCCUPATIONAL HEALTH AND SAFETY UNDER THE ACCORD ACTS

Amendments to both the Federal Accord Acts and the Newfoundland and Labrador and Nova Scotia Accord Acts that were made in 1992 and which implemented a number of major recommendations flowing from the *Ocean Ranger Royal Commission* and the *Harrison Task Force Report* had an unforeseen impact upon the ability of governments to promulgate occupational health and safety regulations under the Accord Acts.

The provision in the Accord Acts dealing with 'social legislation' provides that the provincial occupational health and safety legislation applies in the offshore area. However, the 1992 amendments to the Accord Acts limited that application so that any content in the provincial occupational health and safety legislation would not take effect if the same subject matter could be addressed by regulations made under the Accord Acts. The regulation-making authority under the Accord Acts allows the creation of regulations with respect to safety and the result is that the power to regulate offshore occupational safety no longer rests with the Government of Newfoundland and Labrador and is instead made the subject of the joint management scheme under the Accord Acts. The wording results in rendering inapplicable in the offshore area all those provisions of the provincial *Occupational Health and Safety Act* that deal with safety. Regulations made under the joint management scheme under the current authority of the Accord Acts can only deal with safety and not occupational health and safety.

The concepts of occupational health and occupational safety are too closely intertwined to be separated in this manner. It is difficult to determine which aspects of the provincial occupational health and safety legislation relate to occupational health as opposed to occupational safety. It is equally difficult to draft regulations under the Accord Acts that relate solely to occupational safety. There was never a policy direction to arrive at this result; it was an unanticipated consequence of the amendments coming out of the *Ocean Ranger Royal Commission* and the *Harrison Task Force Report*.

Given the ambiguity regarding the ability to adopt regulations for occupational health and safety under the Accord Acts, the C-NLOPB uses terms and conditions of work authorizations as a means to ensure a comprehensive and enforceable occupational health and safety regime for offshore workers. The overall safety of individuals in the offshore area is protected under this regime. Amendments are under way to provide regulation-making authority for occupational health and safety under the Accord Acts ensuring a comprehensive legislative occupational health and safety regime for the offshore.

5. MEMORANDUM OF UNDERSTANDING

In 2001, various departments of the Government of Newfoundland and Labrador, the C-NLOPB and Natural Resources Canada renewed an earlier (1989, 1994) Memorandum of Understanding (MOU) concerning the administration of legislation related to the occupational health and safety of workers in the offshore area and the consultative process to be followed by the parties to the MOU. The purpose of the MOU was to enhance the C-NLOPB's ability to carry out its responsibility for occupational health and safety (OHS) under the Accord Acts. The MOU provided that the C-NLOPB would consult with the government departments to ensure that the OHS regime implemented by the C-NLOPB was consistent to the extent relevant with the OHS regime implemented by the Province. As well, relevant government departments agreed, upon request of the C-NLOPB, to provide advice to the C-NLOPB concerning regulatory practice in the Province affecting the occupational health and safety of the workers. The C-NLOPB committed to take into account regulatory practice in the Province and in other offshore jurisdictions in formulating recommendations or establishing OHS guidelines for the offshore area and, where appropriate, to promote consistency with other offshore jurisdictions in Canada. The MOU also contains provisions relating to co-operation between parties in matters dealing with occupational health and safety committees and worker representatives, the right to refuse unsafe work and the prevention of discriminatory action against workers, in the offshore area. For those purposes, provisions are included on inspections and investigation, the training of inspectors, the designation of C-NLOPB personnel as OHS officers, records and statistics required with respect to OHS, reports of incidents and the training of offshore workers.

6. AMENDMENT PROCESS UNDER THE ACCORD ACTS

In 1999, Canada, Newfoundland and Labrador and Nova Scotia embarked on a process to formulate amendments to their respective Accord Acts to provide for a comprehensive legislative occupational health and safety regime in the offshore area which would provide, among other things, an ability to make regulations relating to occupational health and safety.

Amendments to either the Federal Accord legislation or the Provincial Accord legislation have force and effect when the amendments to both the Federal Act and the Provincial Act have been passed. This means that the amendment process will always involve both the Federal and Provincial governments. Governments have agreed that consistency in the East Coast offshore regimes, of Newfoundland and Labrador and Nova Scotia, is a desired outcome as well.

The number of parties, the complexities and process involved in the subject matter of occupational health and safety as well as the realities of working within three separate government systems (Federal, Newfoundland and Labrador and Nova Scotia) has resulted in a much longer process that was envisioned when the amendment process was embarked upon. Negotiations around the amendments have involved affected groups within the three governments with each jurisdiction having representatives from the department responsible for the Accord legislation, representatives from the department responsible for occupational health and safety, and representatives from the each of the Departments of Justice. Representatives from both the C-NLOPB and the Canada-Nova Scotia Offshore Petroleum Board have also been full participants in this process. Final decisions on policy that will form part of the drafting instructions for the amendments must also be approved by the Federal Cabinet, the Newfoundland and Labrador Cabinet and the Nova Scotia Cabinet.

During 2000-01, discussions among the parties focused broadly on all aspects of the policy to be embodied in the legislative amendments, plus the administrative oversight roles of Labour and Energy ministries. Following these discussions, officials prepared a paper entitled *"Proposed Amendments to the Accord Acts to Incorporate an Occupational Health and Safety Regime – November 2002"* and held workshops in St. John's and Halifax with stakeholders to receive feedback. Following these sessions, detailed policy discussions and legal drafting continued and a draft Bill was prepared in 2003. A further discussion paper was prepared in 2003 followed by more stakeholder workshops. These consultations sessions resulted in further policy discussions respecting an appropriate occupational health and safety regime. In 2005 an agreement was reached on a new governance model for the occupational health and safety section of the Accord Acts; Governments then proceeded to seek a mandate to draft legislation based on this new governance model. Drafting began in 2007 and officials continue to meet on issues requiring further policy clarification in an effort to conclude legal drafting.

Officials plan to conduct stakeholder information sessions in early 2010 on proposed amendments to the Accord Acts to incorporate the occupational health and safety regime. These amendments would be presented to each jurisdiction's respective Cabinet for approval in 2010.

The longevity of this amendment process has not affected the ongoing regulation of occupational health and safety. As noted, occupational health and safety regulations have continued to be imposed in the offshore area through the terms and conditions of work authorizations. Nor do the amendments proposed to the Accord Acts impact the safety and airworthiness of helicopters used in the transportation of workers to and from the offshore, as these matters are within the exclusive jurisdiction of Transport Canada.

7. GENERAL PRINCIPLES OF OCCUPATIONAL HEALTH AND SAFETY

Occupational health and safety is a cross-disciplinary area concerned with protecting the health, safety and welfare of people engaged in work or employment. The goal of occupational health and safety is to promote and foster a safe working environment.

There are certain accepted principles that form the basis of the discipline of occupational health and safety namely that employers are responsible for working conditions and that all workers have rights; and both the employer and the worker have a duty to work together in creating a safe and healthy work environment.

In Canada, and in Newfoundland and Labrador, the occupational health and safety legislation is based on the internal responsibility (IRS) principle, with workplace parties held responsible for their own health and safety. The IRS philosophy delineates the legal responsibilities among the workplace parties, primarily employers and employees, as well as the role of government in achieving safe and healthy workplaces. The *Provincial Occupational Health and Safety Act* and regulations reflect the IRS principles and impose certain minimum standards and conditions.

OHS legislative requirements impose strict duties and outline the legal responsibilities on the various workplace parties. The duty of care placed on employers obligates that they do all that is "reasonably practicable" to provide a safe work environment. Subject to the exercise of due diligence, the employer is normally held directly accountable for the working conditions.

OHS legislation generally does not impose or prescribe specific "step by step" procedures one must take in achieving a healthy and safe workplace. Instead, it holds employers responsible for assessing the workplace and implementing the means, measures and/or mechanisms to ensure the health and safety of employees. OHS regulations, on the other hand, tend to be more prescriptive or prohibitive and address hazard specific controls in a more technical and or industry specific fashion.

From the employee perspective, there are three generally accepted "rights" which are enshrined in OHS law. These rights are referred to the "Right to Know", the "Right to Refuse" and the "Right to Participate". Essentially these rights translate into workers having the right to know about unsafe conditions that may exist in their workplace, having the right to participate in discussion affecting their health or safety through representation on an occupational health and safety committee, and ultimately having the right to refuse unsafe or unhealthy work. Workers have a duty to take care of their own safety and health, as well as the safety of anyone who may be affected by what they do or fail to do.

OHS principles which are also reflected in legislation are based on the philosophy where one first does what is reasonable and practical to eliminate hazards altogether and then further minimize the risk of exposure by way of control measures or other administrative processes. This is commonly referred to as the "hierarchy of controls".

The joint occupational health and safety (JOHS) committee, a cornerstone of the IRS and reflected in legislative frameworks, is the forum for employers and employees to work together to achieve this goal. The JOHS Committee is given its mandate and also has duties and responsibilities assigned to it in the OHS Act. Government supports this responsibility through the setting of training standards for and making resources available to committee members and by providing advice and technical information as necessary.

The management of OHS in the workplace is also facilitated by the establishment of OHS programs, which are a set of written safety related documents specific to the work environment. Employers must develop a written program in consultation with their employees. The OHS committee is the mechanism to facilitate cooperation between the employer and employees in this regard.

Government's role, through enforcement activity, is to assess how effective the workplace parties are in working together to meet their respective responsibilities. Through inspections and investigations, OHS officers assess the workplace and intervene where necessary to ensure that the required mechanisms are in place for the workplace parties to manage safety themselves on a day to day basis.

The principles of occupational health and safety that form part of the safety regime in place in the offshore area through the provisions of the Accord Acts and as part of the conditions of the authorization issued by the C-NLOPB, are consistent with the general principles of occupational health and safety. Those principles, which are consistent with the provincial *Occupation Health and Safety Act*, will be reflected in the amendments to the Accord Acts that are currently being drafted. The proposed amendments will reflect, to the extent they are applicable and practical, provincial or federal occupational health and safety legislative regimes. Where equivalent onshore provisions do not exist or do not reflect the unique nature of the relationship of operators vis a vis contractors or the remote nature of the work environment, provisions were drafted to reflect C-NLOPB practices and to be consistent with the spirit of occupational health and safety and the internal responsibility principles on land.

8. THE CURRENT OCCUPATIONAL HEALTH AND SAFETY REGIME IN THE OFFSHORE

It is expected that each of the three governments will consider a Bill in 2010 that, if approved, would be placed before their respective legislatures for debate. In the interim, the draft regulations, as well as certain provisions of the provincial occupational health and safety legislation, will continue to be administered and enforced by the C-NLOPB as terms and conditions of authorizations for offshore drilling and production activities.

Under the Accord Acts no person is entitled to carry on any work or activity related to exploration or drilling of petroleum in the offshore area unless the person is the holder of an operating licence and an authorization before the commencement of operations. The authorization is subject to such approvals, or conditions, as the C-NLOPB determines.

The standard authorization issued by the C-NLOPB, referred to as an "operational authorization" contains two key conditions which together constitute a comprehensive occupational health and safety regime. First, the C-NLOPB as part of its standard conditions requires that a draft regulation entitled the "*Petroleum Occupational Safety and Health Regulations*" be complied with until the Act is amended to include occupational health and safety regulations. Another standard condition requires that Operators follow a supplementary document created by the C-NLOPB called the "*Other Requirements Respecting Health and Safety*" which includes requirements respecting employer general duties, occupational health and safety committees, and the right to refuse to work.

The Accord Acts provide for effective enforcement of these conditions. The C-NLOPB may suspend or revoke an operating license or an authorization for failure to comply with, contravention of, or default in respect of a requirement, approval, fee or deposit subject to which the license or authorization was issued. Further, the Accord Acts create an offence for every person, including a corporation, who undertakes or carries on a work or activity without an authorization under or without complying with the approvals or requirements of the authorization and provides for a penalty of up to one million dollars or imprisonment for a term of up to five years.

9. CONCLUSION

The protection of offshore workers is of paramount importance to all parties involved in the exploration and production of our offshore resources. Despite the slow progress on the occupational health and safety Accord Act amendments, worker safety in the offshore has not been compromised. Pursuant to the Accord Acts, the C-NLOPB, prior to authorizing a work or activity, must consider the safety of the work or activity by reviewing the system as a whole and its components, including its structures, facilities, equipment, operating procedures and personnel. In addition, the aspects respecting occupational health and safety are an integral component of the authorization process. Working in a harsh environment requires a concerted effort from all responsible and the ability to keep pace with technological advances and best practices both nationally and internationally. We are confident in the administration of this important component of offshore operations and are committed to the future advancement of offshore safety with all responsible parties.