



Workers' Safety in the Newfoundland and
Labrador Offshore Oil and Gas Industry –
The NL Federation of Labour's Response to
proposed amendments to the Atlantic
Accords to incorporate OHS

Building a Preventative Offshore OHS
Safety Culture

Submitted to OHS Division Government Services and the
Department of Natural Resources
Attention Kim Dunphy, ADM OHS & Fred Allan, Director
Regulatory Affairs Natural Resources
June 23, 2010

Who we are

The Newfoundland and Labrador Federation of Labour (NLFL) represents more than 65,000 working women and men in every sector of our economy, as well as 30 affiliated unions and 500 union locals.

The NLFL is dedicated to advancing the cause of working people and promoting a progressive civil society where no one gets left behind.

We advocate for improved workplace rights and stronger laws including occupational, health and safety laws as well as Workers' Compensation and Employment Insurance programs that are fair and there when people need them. We fight for better labour laws and strong, accessible public services such as universal health care, education, worker training, elder/home care and child care and early learning. We stand up for the principles of equality, equity and social justice and we work with our affiliate unions and social partners to build a better world for all citizens.

**Labour's response to the proposed
Atlantic Accord Amendments,
incorporating a health and safety regime**

Our Federation welcomes the opportunity to comment on the proposed amendments to the Atlantic Accord Acts, intended to incorporate an offshore occupational, health and safety regime into the Canada-Newfoundland and Labrador Atlantic Accord implementation Act.

Before addressing the proposed amendments, the Federation will first comment on our concerns with the timing of these amendments and the potential impact on recommendations from the Wells Inquiry which is currently investigating offshore helicopter safety as well as the role of the regulator, C-NLOPB, with respect to safety.

As you are aware, the Wells Inquiry will make recommendations on the following:

- i. safety plan requirements for companies operating in the offshore area and the role that these companies play to ensure their safety plans are maintained by helicopter operators;
- ii. search and rescue obligations of helicopter operators required by contract or legislative or regulatory requirements; and,
- iii. the role of the Board and other regulators to ensure companies comply with legislative requirements for worker safety.

It is this last area of its mandate – **“the role of the Board and other regulators to ensure companies comply with legislative requirements for worker safety”** – that overlaps with the proposed amendments to the Atlantic Accords of Newfoundland and Labrador and Nova Scotia.

As outlined in a letter in May 2010 to the premier and deputy premier of Newfoundland and Labrador, the NL Federation of Labour is concerned that these amendments will be brought forward, introduced as legislation, prior to the report of the Wells Inquiry and prior to any opportunity to incorporate possible recommendations from Commissioner Robert Wells

into these amendments – recommendations that have the potential of strengthening what is being proposed.

We all know how difficult legislative change is when dealing with one government, but when dealing with three, the challenges are much greater. And if the amendments go part way to addressing concerns that may be raised by Commissioner Wells, we suggest the appetite for further legislative change will not be as strong.

The recommendations from Commissioner Wells have the potential of rendering these legislative amendments unsatisfactory or insufficient and given the length of time it has taken to get this far with respect to regulatory reform and the inclusion of social legislation (OHS) into the Atlantic Accord, our Federation is concerned about what this will mean for future legislative change.

NLFL Recommendation # 1:

We recommend awaiting the recommendations of the Wells Inquiry before continuing with the Atlantic Accord amendments thus allowing time for any pertinent recommendations to be incorporated in the above legislative reform.

The Separation of OHS and Production

The Federation of Labour attended a “stakeholder” briefing session held by officials with the federal, NL and NS governments in April. We also met with officials with NL OHS and Natural Resources in May to outline our concerns with what is being proposed and what isn’t.

The Federation also made several recommendations dealing with this matter in 2002 and on numerous other occasions, including pointing out the jurisdictional ambiguity and conflicting mandates of the CNLOPB in our presentation to the Wells Inquiry in February of this year.

The NL Federation of Labour agrees with those underlying principles outlined in the proposed amendments including:

- i. Offshore occupational health and safety laws that provide workers with protection at least as good as that which exists for onshore workers;
- ii. Protection of employee rights (to know, to participate, to refuse and to be protected from reprisal);
- iii. Support for an occupational health and safety culture that recognizes the shared responsibilities in the workplace;
- iv. Clear separation of occupational health and safety and production issues; and
- v. An effective and efficient regulatory regime.

However, given the high-risk nature of this industry, sometimes protection “at least as good as” is clearly not sufficient. There is no doubt the new governance model being proposed with respect to OHS is an improvement on what is currently in place. The proposed amendments will result in a new section under the Atlantic Accord which will be administered by the provincial minister responsible for OHS (and the federal minister responsible for Natural Resources in consultation with the federal minister responsible for Labour.)

It makes complete sense that the department and minister responsible for OHS be the department and minister that administers this section of the Accord and not the department and minister responsible for the economic development of the offshore oil and gas industry.

The inherent conflict between safety and production or economic development is not something to be disputed. Jurisdictions around the globe have clearly seen the need to make this distinction and to provide a transparent and effective governance model that workers and citizens can have faith in.

Indeed one of the underlying principles agreed to by all three governments, according to the stakeholder discussion document, is a “clear separation of occupational, health and safety and production issues.” This is not achieved under the current structure of the CNLOPB.

In order to meet that goal, federally, this new section of the Atlantic Accord should not be administered by the Department of Natural Resources, for the diverse and same reasons it should not be the case provincially. The mandate of Natural Resources Canada is not to deal with worker safety. This clearly comes under the preview of Labour Canada which administers workers’ safety as per its mandate with respect to the federal Labour Code.

NLFL Recommendation # 2:

The federal Department of Labour Canada should be chiefly responsible for administering the proposed Part III.I dealing with workers’ occupational, health and safety and not the federal Department of Natural Resources. Given the recent tragedies in the offshore oil and gas industries both at home and south of the border, we must make every effort to ensure those working in the offshore have faith and confidence in the laws, structures and governance models designed to protect their safety.

This fits with the stated objective in the discussion document issued to stakeholders in April 2010 sessions. That document noted that the three governments agreed to a number of underlying principles including the “clear separation of occupational, health and safety and production issues.” This cannot be achieved under the current proposal that would see Natural Resources Canada being the lead department on matters of OHS.

While the Federation of Labour is pleased to see this new governance model and the additional powers for the provincial minister responsible for OHS (comments on these additional powers are below), the proposed model does not address the bigger and broader concern we have with the structure and mandate of the CNLOPB.

Our view has been and continues to be that the CNLOPB is an agency with a competing and conflicting mandate – worker safety and economic development of the resource.

As was pointed out in the mandate and terms of reference of the Offshore Helicopter Safety Inquiry, the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) was established by the Government of Newfoundland and Labrador and the Government of Canada as a joint, independent, arms-length regulator of ***exploration, development, and production of oil and gas resources in the Newfoundland and Labrador Offshore Area.***

It is our opinion that one agency cannot promote development of the resource and worker safety effectively. And while the CNLOPB is a regulator, it has proven through its actions, and comments that it views itself as an agency to promote oil and gas development.

The Federation's position on this point, a long-standing position developed after the Ocean Ranger disaster of 1982, has been supported by other reports, publications and Commissions of Inquiry, including Lord Cullan's report on the Piper Alpha disaster.

Indeed testimony by CNLOPB officials at the Wells Inquiry supports our view that this agency has at best allowed a culture of self-regulation and at worst is much too cozy with the oil companies to effectively protect worker safety.

There have been numerous incidents that have come to light which reinforce the almost "fudge and delay" tactics that have been employed in a number of areas where different decisions and stronger enforcement and action from the CNLOPB should have been taken.

They include: the unacceptable nine years it took to install helicopter underwater emergency breathing apparatus; the length of time it took to respond to repeated concerns by workers regarding the fit of the survival suits; the decision to delay replacing studs on helicopter gear boxes; the fact that night flights were permitted even when search and rescue capabilities were seriously diminished and response times were totally inadequate; and the fact that OHS regulations have been in draft form for over two decades all point towards a culture where worker health and safety was secondary behind the goals of production and economic development.

The dual and competing mandate of this board has cultivated this culture of self-regulation. And too often the successes of the industry, as have been noted numerous times in various annual reports of the CNLOPB, are viewed as successes of the CNLOPB. This is part of a bigger problem of implementing a culture of safety prevention.

Recently, the Obama administration in the United States took action to split the duties of its Mineral Management Service – a body that had mandates for both development and safety. This came about after the oil well explosion that claimed the lives of 11 offshore workers exposed just how cozy regulators in that country had become with industry.

The crash of Cougar Flight 491 and the tragic loss of 17 lives in our province in March 2009 exposed just how successful the oil and gas industry has been with respect to delaying or implementing improvements in health and safety and responding to concerns raised by workers through their joint OHS committees. This has become apparent from testimony at the Wells Inquiry. It also became apparent that the regulator failed to deal effectively with these fudge and delay tactics by enforcing strict deadlines to comply with safety improvements. Indeed, the regulator refused to play any kind of proactive safety role at all, including in the area of search and rescue.

If you doubt how the CNLOPB sees its role and its main job you need only read their latest annual report and the message from its Chair Mr. Ruelokke in which he cheers the “banner year for land rights issuance” and the one billion barrels produced in our offshore. He goes on to say that the past year had seen several significant successes and accomplishments; however the year was “marred by the tragic crash of Cougar Flight 491.”

I would strongly contend that this statement diminishes the significance of this tragedy – something Premier Danny Williams described as affecting every Newfoundlander and Labradorian. It was much more than a mar on a year filled with accomplishments and successes. It will, like the Ocean Ranger disaster, be forever imprinted on our collective memory.

An agency whose job was safety first and safety last would have taken a completely different view. There would have been no reference to a “banner year” when 17 people lost their lives. The fact that the CNLOPB sees the success of the oil industry as its success is part of a deep-seeded cultural and systemic problem – regulators are to regulate, not cheerlead.

This notion of conflict or competing mandates was raised by the Royal Commission into the 1982 sinking of the Ocean Ranger which took 84 lives, by the Commission that reviewed the loss of 167 lives in the Piper Alpha disaster in the UK in 1988 and in Norway through its tripartite social dialogue structure in the offshore oil and gas industry.

The UK, Norway and Australia have separate agencies or structures dealing with development and health and safety. And they have done so for very good reason.

And now, as mentioned above, the United States, in light of the death of 11 workers on an oil rig in the Gulf of Mexico, is moving to separate the mandates of its Mineral Management Service. Other jurisdictions have moved to split the duties.

For example, the Petroleum Safety Authority (PSA) in Norway plays absolutely no role in the areas of resource management, granting of permits for exploration or other matters connected to the development of the oil and gas industry.

The PSA is the regulatory authority for technical and operational safety, including emergency preparedness, and for the working environment. According to the PSA, it is subordinate to the Ministry of Labour, and has the regulatory responsibility for safety, emergency preparedness and the working environment in the petroleum sector. This responsibility was taken over from the Norwegian Petroleum Directorate (NPD) when the PSA was created.

In addition, in the UK, the Health and Safety Executive Offshore Division has responsibility for the health and safety of workers in the offshore. It also has nothing to do with the development of the resource as the CNOLPB does in our province.

Testimony at the Wells Inquiry has done much to expose the problems with the current structure of the CNLOPB as well as the lack of worker engagement with respect to their own occupational health and safety.

Testimony has highlighted how workers' basic and fundamental OHS rights have been violated, including the right to know, and the right to participate in a meaningful way. And of course when the right to know is violated, it is very difficult for workers to exercise their right to refuse. They must have the information first before they can make a decision as to whether or not what they are being asked to do constitutes unsafe work.

For example, if workers had known that the studs on the helicopter needed changing would they have flown? If they had known that another helicopter went down on the other side of the world because of the same problem, would they have expressed concern? Would they have exercised their right to refuse? Perhaps voicing their concerns or knowing that there was a process and system in place that allowed for such concerns to be voiced and acted upon, and that they would be listened to would have made a difference.

Faith and confidence in our laws. Faith and confidence that their basic and fundamental OHS rights mean something. Faith in the agencies and government departments charged with enforcement and confidence that those charged with enforcing and administering these rights are acting with vigilance. These are critical especially when you consider that our collective faith and confidence in the current system has been severely shaken. Part of restoring that confidence and in giving hope to the families of the victims of Cougar Flight 491 that their loved ones did not die in vain is putting in place a stronger foundation for future.

Currently, too many offshore workers are not confident that their rights are protected or that their concerns will be acted upon or that their

health and safety will always be placed first by the agency charged with worker safety.

Workers must also have faith that these laws have real meaning - that they are not just rights on paper. Today, their confidence has been shaken and only real and substantive change at the regulatory and workplace level will restore it.

Recommendation # 3:

In order to fully meet the stated underlying principle “a clear separation of occupational, health and safety and production issues,” a new agency with equal stature as the agency charged with economic development of the offshore be created to oversee, promote, administer and enforce safety, both worker and operational safety. We recommend a model similar to the Norwegian model which also incorporates worker participation through a tripartite system of social dialogue. Such an agency would report, as is being proposed in the new amendments, to the provincial minister responsible for OHS.

The proposed amendments – labour’s response

This legislative process has been underway for a number of years. The Federation of Labour first responded to consultations around this matter in 2002 – at which time we recommended the separate agency, among other improvements.

While this set of proposed amendments includes a number of progressive improvements, they are lacking in a number of areas.

There are several significant problems with the proposed amendments based on our understanding of what is being brought forward. We have not seen the proposed text of the legislation, just the summary discussion document and so-called intent of the amendments.

The creation of a separate safety agency with adequate enforcement powers has not been recommended. The right to refuse unsafe work is being diminished compared to what we currently have in place in Newfoundland and Labrador and the language of the legislation is being changed, weakened – at the demand of the federal government, we understand. According to page 20 of the discussion document, during the drafting of this bill, federal drafting conventions changed. The Federation of Labour stands strongly opposed to what we view as the watering down of language around government’s role with respect to the enforcement and administration of OHS laws.

1. Words matter – watering down the language of the legislation

Words matter. They certainly matter when they are the words that make up our laws and legislation and in particular the laws and legislation that protect worker safety and public safety.

According to information obtained at the briefing session on the Atlantic Accord Implementation Act, the federal government has pushed to have the language in the legislation watered down. For example instead of using words such as “administration and enforcement,” “inspect” or

“investigate,” the legislation will use words such as “verify compliance, examine and enquire.”

This, we understand, is in response to concerns the federal government has arising from the Supreme Court case entitled *R v. Jarvis*. In that case, the court considered prosecutions for tax evasion under the federal Income Tax Act. In *Jarvis*, the taxpayer had successfully argued at trial that certain evidence had been obtained without a caution or a warrant and that such evidence should be excluded because it had been obtained in violation of s. 7 of the Charter (principle against self-incrimination) and s.8 (protection against unreasonable search and seizure.)

At question was the issue of there being no regulatory distinction between officials who act as auditors and those who investigate offences and that it is difficult to determine when the audit function ends and the investigation begins.

In a subsequent case *R v INCO Ltd.*, the court stated that to determine whether the predominate purpose of the inquiry in question is the determination of penal liability one must look to all factors that bear upon the nature of that inquiry.

While there may be parallels between the statutory scheme for audits and investigations in the Income Tax Act, and the powers of inspectors and investigators in other areas of government jurisdiction such as environmental statutes – we must be clear that corporations do not have s. 7 protections under our Charter and in the *Jarvis* case we are not dealing with tax law. In the case of the Atlantic Accord, we are dealing with workers’ health and safety – a matter of life and possibly a matter of public safety depending on the nature of the investigation or audit.

It is in our view unacceptable that this case, dealing with tax law, is being used as rationale to water down how we investigate matters of occupational, health and safety.

While the Supreme Court noted that “there may well be other provincial and federal government departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts,” the Court did not point to workers’ safety as one of those areas

and we would argue that it is a stretch to consider that the Supreme Court wished for the state's power with respect to administering health and safety to be diminished based on a tax ruling.

Indeed, one could argue as does the federal Department of Justice in its "Federal Prosecution Service Deskbook" that the creation of regulatory offences is generally considered to be a "desirable way of advancing governmental policy objectives."

In *R. v. Wholesale Travel*³, Cory J. stated:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

Justice Cory, you note, does speak to the enforcement of standards. Justice Cory also noted that "Regulation is absolutely essential for our protection and well-being as individuals, and for effective function in society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement...of necessity society relies on government regulation for its safety."

Certainly, in the case of worker occupational, health and safety in high-risk industries such as oil and gas – and indeed public safety, as has become evident in the continued saga of environmental and economic carnage now unravelling before our eyes in the Gulf of Mexico – strong regulation and enforcement is absolutely critical to both the safety of those who work in such industries and the safety of the general public.

Therefore, we would argue that any attempt to water down the language in such important legislation is not only unacceptable, but we also contend it was not the intent behind the Supreme Court case as cited for rationale.

Indeed laws and regulations are only as strong as the education and enforcement that go with them and how those laws and regulations are practiced in the workplace and enforced by those charged with the protection of our well-being as workers.

We cannot rely totally on employers to make our workplaces safe. Because employers have by their existence a goal that competes with safety – that is to make a profit. We should accept that as a given and build from there. This is also why we need vigilant and proactive government involvement. This does not happen by watering down the language and in essence the legislative authority those charged with enforcing our safety have.

There are numerous examples of such language through the discussion document. For example, page 5 refers to the definition and role of the OHS Officer: a person designated for the purposes of “verifying compliance” with the OHS Part of the Accord Acts. We would contend that verifying compliance takes on an entirely different meaning than administering the legislation, or enforcing the legislation.

In addition on page 8, under Specific Duties of Operators, the reference to workplace OHS committees refers to their role to “examine visually” the workplace and to annual workplace examinations. This clearly replaces what would normally be referred to as workplace inspections. Inspection is a stronger and more forceful term than examine.

And if the intent as is outlined in the agreed upon underlying principles is “OHS laws that provide workers with protection at least as good as that which exists for onshore workers,” then the Federation contends that this test has not been met because of the proposed watering down of the legislative language. Clearly workers onshore will have stronger language to support them and their safety. What is being proposed is a less of a standard for offshore workers and the Federation, in the strongest terms possible, recommends not going this route.

And finally we question why the federal government has chosen this piece of legislation to test its theory with respect to the so-called interpretation of R v. Jarvis. Is it because the current ideology of the federal government would lean more towards the self-regulatory model of governance? And if we are to change legislative language including the language and terms by which we are to enforce regulations should this not be a matter of more intense public discourse and consultations? This is indeed a dangerous road to take and the experience in the United States with respect to the explosion of the BP oil well is but one example of how strong regulation and enforcement may have made a difference. Do we need further evidence and tragedy of why a culture of self-regulation with a diminished role for the safety regulator is the absolute wrong road to take?

NLFL Recommendations # 4:

That the language in the proposed legislation be as strong as possible including the use of words such as administer, enforcement, inspect and investigate. To do otherwise and to use words such as compliance, examine and enquire is to promote a model of self-regulation. Such an approach is unacceptable when dealing with matters as important as the health and safety of working people. One would think the lessons learned from the death of 17 people from the crash of Cougar Flight 491 and from the 11 deaths in the Gulf of Mexico are that strong regulation and enforcement are crucial to the health and safety of working people in such industries. As a society we should be looking for ways to strengthen legislation, not weaken it with weasel words, designed to give even more control to industry. Secondly such language goes against the first stated underlying principle guaranteeing protection for offshore workers “at least as good as” that which exists for onshore workers.

2. Workers' Basic OHS Rights

Newfoundland and Labrador guarantees a number of basic worker OHS rights, guaranteed by the Occupational, Health and Safety Act or what is known as social legislation.

Those rights are extended to the men and women who work in the offshore, by way of a Memorandum of Understanding, first signed in 1985 between the Government of Newfoundland and the Government of Canada.

Section 61 of that MOU refers to provincial laws, including social legislation such as occupation, health and safety legislation and other legislation designed to protect workers (such as labour standards).

A more detailed MOU dealing with OHS was signed in 2001 among the federal and provincial governments and the CNLOPB. This MOU basically contracts out to the CNLOPB the administration of portions of the provincial Occupational, Health and Safety Act that are not already covered in the Atlantic Accord Implementation Acts.

This MOU refers to the OHS Act as social legislation and deals with the rights of workers – including the right to know, the right to participate and the right to refuse. Up to this point, they have been referred to as “other requirements” by the CNLOPB.

The fact that these fundamental and core worker rights have been viewed as “**other requirements**” diminishes their importance - and perhaps highlights an underlying, troubling and systemic problem – an agency with conflicting mandates : safety and production.

Our understanding is the proposed amendments to the Atlantic Accord Implementation Act and the creation of Part III.I is intended to make clearer what these rights are and where they fall in the hierarchy of laws and regulations and who is charged with ensuring they are enforced.

That social legislation or the provincial Occupational, Health and Safety Act guarantees a number of rights for workers – as do health and

safety laws across our country. In Canadian occupational, health and safety laws, three rights are emphasized:

- The **right to know** about hazards of the workplace (and the employers' responsibility to ensure workers know of those dangers);
- The **right to participate** in health and safety activities, especially joint worker-management health and safety committees; and
- The **right to refuse** hazardous work.

In addition there is the right to a healthy and safe workplace and the right to be protected from discrimination or reprisal if you raise a health and safety concern in the workplace.

These rights came about as a result of many years of struggles by working people around the globe.

3. The Right to Refuse

We are proud to say in Newfoundland and Labrador that we have among the more progressive social legislation in the country with respect to these rights.

For example, the NL Right to Refuse states that:

45. (1) A worker may refuse to do work that the worker has reasonable grounds to believe is dangerous to his or her health or safety, or the health and safety of another person at the workplace

- (a) until remedial action has been taken by the employer to the worker's satisfaction;
- (b) until the committee or worker health and safety representative has investigated the matter and advised the worker to return to work; or
- (c) until an officer has investigated the matter and has advised the worker to return to work.

The only qualifier on that right is that the worker must have “reasonable grounds to believe” that the work being asked of them is dangerous and that by refusing they are not putting another person in danger.

This is more progressive than what is outlined in the federal Labour Code of Canada and the Nova Scotia OHS legislation which speaks to “normal condition of employment”, or “inherent” to the work of an employee. Both are flawed concepts and place restrictions on the workers’ rights to refuse unsafe work. The only restriction or constraint ought to be when that refusal would put another person in danger.

Section 9 of the NS OHS Act notes that an employee may not, pursuant to this Section, refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the work of the employee.

Since no such “danger is inherent to the work of the employee” clause exists in the NL OHS Act then we have a situation where the vast majority of onshore NL workers (outside those regulated by the federal law) will have a right to refuse that is not constrained in this way.

That the workers offshore have a different – weaker – right to refuse than those onshore is not acceptable. This is contrary to the “underlying principles” agreed by the governments involved in this amendment process, which include protections “**at least as good**” as those for onshore workers and the protection of employee rights, including the right to refuse, to know, to participate and to be protected from reprisal. (Governments of Canada, Newfoundland and Labrador, Nova Scotia, April 2010, page 1 discussion document entitled Proposed Amendments to the Accord Acts).

During the stakeholder session held in St. John’s in April 2010, we were informed that the amendments were based on the integration of the “best practices” available from the NL, NS and CLC legislation. The

weakening of the right to refuse for NL offshore workers is in no way upholding a best practice.

The perception of workers, and indeed their reality, will be that their right to refuse has been weakened. The likelihood of speaking out against unsafe equipment/practices will be lessened, impacting on the overall safety in the offshore and diminishing the Internal Responsibility System which can only operate effectively when workers have confidence in that system.

At present under the NL OSH Act, there is no constraint other than section 48, which states that “a worker shall not take advantage of his or her right to refuse to work under section 45 without reasonable grounds.”

Moreover, the NL Act right is strengthened by the specific duty clause referring to “imminent danger” (section 8) where a worker is prohibited from working if there is imminent danger to him or her or to co-workers: “A worker *shall not* (a) *carry out work where there exists an imminent danger* to his or her or another worker’s health or safety or the health or safety of another person; or (b) *operate a tool, appliance or equipment that will create an imminent danger* to his or her or another worker’s health or safety or the health of another person”. **Thus, refusing to do unsafe work is both a right and a duty under our legislation.**

This specific employee duty in the NL Act is not in the NS or CLC. In both CLC and NS laws, the nearest equivalent employee duty is to *report* anything hazardous to the worker him or herself and co-workers (CLC, section 126 (1g); NS, section 17 (2)), which is weaker language. So, if this NL specific duty to not do work that is “imminently dangerous” is missing from proposed amendments, then the right to refuse is weaker for offshore workers than those onshore.

We would point out here that this is a case where not having the draft amendments, the language, puts stakeholders at a distinct disadvantage, but what we do know is the proposal is to include this notion of inherent danger and what we recommend is the NL OHS language with respect to the right to refuse be adopted in its entirety. This is critical to building the confidence of offshore workers in the laws designed to protect their safety and a lesser standard than what the vast majority of onshore workers have

will not achieve this end and neither does it meet the underlying principles as agreed upon by all levels of government.

NLFL Recommendation # 5:

The right to refuse in the proposed amendments be strengthened; that the language in the NL OHS Act dealing with right to refuse be adopted in its entirety in the Atlantic Accord Part III.I. including Section 8 dealing with imminent danger. We must do everything in our power to build the faith and confidence of the offshore workforce in these new regulations and watering down their right to refuse in new legislation is not the way to achieve this goal. It also fails the test of “at least as good as that which exists for onshore workers and the test of “best practices.”

4. Right to Know and Right to Participate

The Wells Inquiry has heard testimony from the CNLOPB that it is not responsible for safety; that this is the responsibility of the operators. It has been our experience in the labour movement, that sometimes the internal responsibility system can be used to weaken the proactive role government must play.

This should not be the case and if we are to meet the third underlying principle as outlined in the discussion document – **support for an occupational health and safety culture that recognizes the shared responsibilities in the workplace** – we must put in place adequate structures, systems and accountability measures to support the IRS. That means strengthening the joint workplace committees and the role they must play in the broader OHS environment.

The internal-responsibility system is intended to be part of a larger framework that includes a proactive (not a passive or reactive) regulatory role. This IRS is in place in Norway too, but there is a strong regulatory framework to back it up; and strong worker participation at all levels - workplace and state.

The IRS system only works when these rights – right to know, participate and refuse – are practiced in our workplaces and reflected through the legislation.

What is required is a more detailed and prescriptive approach to outlining how these rights are actioned and what is required of employers, workers and Committees to achieve this.

For example, if employers are not abiding by the right to know (which we are pleased to see some extra emphasis in the proposed amendments around issues of transport of workers) then it is very difficult for the right to participate and the right to refuse to have meaning or to function. In the case of the crash of Cougar Flight 491, it appears employees were under the impression that the helicopters transporting them to and from their work were equipped with dry-run capabilities. Perhaps if the JOHSCs were allowed to function effectively and had the correct information, including the information about the gearbox issues, we may have been able to avoid a tragedy.

Often the right to participate refers to the functioning of joint occupational, health and safety committees in workplaces. These committees are where information should be discussed, where OHS matters are raised and dealt with, where safety gaps are addressed and closed and where solutions are found. They can not be merely committees on paper, they must have real say and respected as core to building a preventative safety culture. This has not been the case in the offshore industry.

In addition, the role played by government or an agency acting on behalf of government must be more than oversight and verification of safety plans. This attitude contributes to an environment of self-regulation.

Some of the proposed amendments it would appear are designed to overcome these types of problems, but while more powers to the minister are incredibly important, we must also make sure that more is happening in the workplace as this will raise the confidence of workers that their health and safety is a real priority. We can support this by ensuring the roles and

responsibilities of the committees and how they interact with the other workplace parties is reflected throughout the Atlantic Accord legislation.

This is where a regulator can play a more proactive role with respect to following up to ensure the committee system is operating and functioning as it should and where the regulator can act on issues raised in JOHSC minutes.

Also communicating OHS matters from one shift rotation to another is critical. The shift structure makes such communicating difficult. The discussion document outlines (page 24-25) the importance of communicating and informing employees. In many large industrial workplaces some of this work rests with the full-time (paid) OHS representative, usually appointed by the union. Such a system should also be in place in the offshore.

NLFL Recommendation #6:

We recommend that to ensure the rights to know and participate are given the support they need to be real rights in the offshore workplace, that full-time, paid health and safety representatives (appointed by the Union, if there is one) are in place and on duty every work rotation. This would be similar to the Norwegian safety delegate system and similar to what is in place in many large workplaces in Canada, including in auto plants and many mines. These full-time reps in Canada are usually negotiated between the parties during collective bargaining. We are recommending that in the case of the offshore that such a system be mandated as a condition of licence or authorization to operate in the offshore of Newfoundland and Labrador.

NLFL Recommendation # 7:

As part of a separate agency approach as per our recommendation # 3, that occupational, health and safety training be determined by a tripartite board that operates within such an agency. We fully support the recommended Offshore Safety Advisory Council that is being proposed under the new amendments.

5. Empowering the JOHSCs

Whereas the Atlantic Accord proposed amendments appear to address the duties of operators, employers, supervisors and employees that these duties be expanded in order to reflect the involvement and interaction of the JOHSCs as provided for under the NL OHS Act.

It appears from the discussion document that this has not been included in the proposed amendments. For example, the Duties of Operators/Employers under the proposed amendments are considerably less than what are in place under the NL OHS Act.

For example, Section 5 (f) of our legislation states that the employer shall consult and cooperate with the OHS Committee on all OHS matters. This does not appear evident in the Duties of Employers outlined in the discussion document and therefore does not meet the test of providing protection “at least as good as”.

In addition, the Duties of Employers as listed in the discussion document do not appear to address the JOHS Committee Recommendation Process as outlined in the NL legislation. For example, our legislation requires and outlines a process for employers to respond to Committee written recommendations. Such a process supports one of the key underlying principles agreed to by governments and that is “support for an occupational health and safety culture that recognizes shared responsibilities in the workplace.”

As well, employees must understand the role of their OHS Committee and how they can interact and why they should interact with their elected Committee representatives.

The involvement of the JOHSCs is critical to the functioning of the Internal Responsibility System. Testimony at the Wells Inquiry has exposed this is seriously flawed JOHSC process and it would appear from the proposed amendments that the intent is to further water down the role these committees must and should play in the workplace and in particular in high risk workplaces such the offshore oil industry. Since we have not seen the legislation it is obviously difficult to comment on this, but our concern is based on what has been outlined in the discussion documents that the role of the Committees will be diminished in the Atlantic Accord, meaning workers offshore will once again have a lesser standard of health and safety and health and safety involvement compared to workers onshore.

In addition, in order for the JOHSCs to operate as they should, they must have access to information that would contribute to their right to know and participate and support the Internal Responsibility System. Therefore, the Atlantic Accord OHS legislation should clearly state that all reports dealing with matters of safety especially those from the CNLOPB, Transport Canada and the Operators be made available to the JOHSCs and the Committees be given adequate time to consult. Similar requirements are provided for in the NL OHS legislation.

NLFL Recommendation #8:

The new legislation must provide for clear, expanded and prescriptive language outlining the role of employers, operators, employees and supervisors that ensure interaction and involvement of the JOHSCs as provided for in the NL OHS Act. And that the JOHSCs have access to all reports dealing with matters of safety. Such inclusion is necessary not only to meet the agreed upon underlying principles, but to ensure the integrity and operation of the JOHSCs and the Internal Responsibility System.

In addition, with respect to workplace committees, the operator is required to establish one committee for each workplace they control, with exception for temporary workplaces where a coordinator is appointed. In that case, the employer/operator appoints the coordinator.

We strongly object to this. The coordinator is expected to serve the role of a volunteer OHS committee. Instead of a coordinator for temporary workplaces, we expect those workplaces to also have a JOHSC where workers choose their representatives.

Temporary workplaces require heightened attention to OHS by their nature and in particular when one considers a temporary offshore oil worksite, we are likely referring to exploratory drilling. OHS requirements should reflect the heightened concerns and that currently Section 29 (page 16) does not effectively address this.

NLFL Recommendation # 9:

The employees choose their OHS representative even in temporary workplaces and that Committees be required.

6. Substitutions

According to the proposed amendments, the Chief Safety Officer may permit the use of specified equipment, methods, measures or standards in lieu of those required by regulation if he or she is satisfied that the protection of worker's health and safety will not be diminished. The CSO may specify conditions and the time period for the substitutions.

The NL OHS Act, 65.1 of the OH&S act states that the deviation affords protection for the H&S of workers equal to or greater than the protection prescribed by the regulations from which the deviation is requested. This clearly affords more protection to the workers than what appears to be the case with the amendments.

The Federation of Labour strongly opposes a lesser standard for offshore workers in this regard. Any deviation or substitution must provide equal or greater protection and not go below the established minimum standards. Given the testimony at the Wells Inquiry with respect to survival suits, we require a clear process that provides for meaningful consultation process with the JOHSC around proposed substitutions.

NLFL Recommendation # 10:

The new legislation must include language that ensures that substitutions are equal or greater than the protection prescribed in regulations and that the JOHSCs are meaningfully consulted on deviations or substitutions because as demonstrated this can be a matter of life or death.

7. Developing OHS Regulations to Support the Act

The current Offshore Petroleum Regulations which have been in draft form for two decades and which are currently made a condition of authorization are out of date and need modernizing.

In this regard, we expect there will be a consultation process to deal with this most important matter.

In the meantime, we are concerned that occupational health/disease issues have not been effectively addressed in this industry.

Section 35 and 73 as outlined in the draft amendments provide opportunity to address occupational health/disease issues, and the Federation would like to see a process started in order to action these sections in the new Atlantic Accord legislation. The Federation looks forward to participating in such a process.

8. Building a preventative safety culture

As already mentioned, we must strengthen the right to know, as all other rights depend on this one. If the right to know is violated it is near impossible for the other rights to have any meaning. These rights are the foundation of the IRS and they are how we build a preventative workplace culture. Such a culture requires strong laws and legislative authority. It means education, inspection, enforcement and true worker involvement.

It requires high-quality training including health and safety training that is developed with worker input and engagement.

It requires meaningful worker/union involvement at the workplace level through joint-occupational health and safety committees. OHS committees were designed to provide a mechanism for communication to bring issues forward and to have them acted upon.

It means employers must adopt prevention as an integral part of conducting their business; that workers and their representatives are consulted, trained, informed and involved in measures related to their safety and health at work.

According to legislation as workers we are responsible to work safely and to protect ourselves and not endanger others, to know our rights and to participate in implementing preventive measures. But how can we live up to those responsibilities if for example workplace practices including communications and decision-making do not allow for this to happen.

The International Labour Organization (ILO) through its Seoul Declaration on Safety and Health at Work stated that a preventive safety and health culture is one in which the right to a safe and healthy working environment is respected at all levels; where governments, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties and where the principle of prevention is accorded the highest priority.

According to the ILO, where high safety standards exist, they are a direct result of long-term policies encouraging tripartite social dialogue, collective bargaining between trade unions and employers and effective health and safety legislation backed by strong labour inspection.

By definition social dialogue, a commonplace practice in the European Union, takes many different forms. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organizations), with or without indirect government involvement.

In the labour movement, we believe every worker has the right to a safe and healthy workplace. But in our society it is the employers who control where we work, if we work, how we work, and whether our work is healthy or hazardous.

As we grapple with numerous health and safety concerns, we also face what employers view as "management's rights" such as the choice of materials, chemicals, the pace of production, shift work, excessive overtime; work cycle times; and the entire design and power structure of the workplace and production systems.

In order to build a preventive safety culture, we need to fix the workplace power imbalance so that workers, without fear of reprisal, have more of a say in their workplace, especially with respect to matters of health and safety.

It is workers who risk their lives, limbs, and health in the workplace. By contrast, the risk for employers is profit. I do not say this to create controversy, but merely to point out the reality.

Part of fixing this imbalance is through democratic workplace structures and evolved social dialogue at the enterprise or company level and at the industry, provincial and national levels.

For example: the union health and safety committees must develop their own agenda for health and safety improvements before meeting with management as the joint committee; management must be accountable for the recommendations that come from these committees and the regulatory agency is responsible for the enforcement side of these recommendations. In order for laws to be effective they must not be just vigorously enforced. They must be part of a proactive regime. For example, in countries like Norway, worker safety representatives or safety delegates have the power to shutdown production if there is unsafe work. This authority can help mitigate the inherent imbalance in power in the workplace.

There is something wrong with the regulatory regime when the regulator with a mandate for covering worker safety does not see that worker safety is in any way part of its responsibility.

What we like

There are a number of areas of significant improvement in the proposed amendments such as a clearer and more transparent governance model, increased powers to the Minister responsible for occupational, health and safety in our province, the establishment of an offshore OHS advisory council and the requirement for offshore operators/employers to make information and documents available to employees at the workplace and at points of embarkation when being transported. The fact that the last power will in fact be enabling legislation is also critical as it means the Minister can require the operator to divulge additional information to its employees.

In addition, Labour applauds the ability of the minister responsible for OHS, the "Provincial Minister", to appoint a special officer (who is not an

Offshore Board employee) in circumstances where the minister is not satisfied that the Accord Acts are insufficient in addressing a particular issue and where there is serious threat to the health and safety of offshore workers in the near term.

We do believe though that the powers of the regular safety officers who are being charged with the responsibility of merely verifying compliance with this new section are insufficient. Verifying compliance suggests a passive role, rather than the proactive approach we need to be seeing particularly in high-risk industries.

We also fully endorse the ability of the Provincial Minister to call a special audit or inquiry into activities of the Board in relation to occupational health and safety and to issue joint directives to the Board respecting development of guidelines, or the implementation of any recommendations made from an audit or inquiry.

We also support that the Operator (and not individual contractors etc.) has the overall responsibility for ensuring health and safety.

Conclusion

The Federation of Labour understands how difficult it can be for two provinces and the federal government to agree on joint legislation.

This should not and must not prevent us from developing the best legislation possible in an effort to protect the health and safety of those who work in our offshore oil industry.