Introduction

Canada is a federation and the provinces have primary jurisdiction for labour, including OHS and workers’ compensation. The federal government adopts legislation applicable only to its own employees and to a constitutionally limited number of employers, about 10% of the workforce. Here we will describe the federal legislation and the legislation of the province of Québec.

Occupational illnesses and injuries are compensated in each province, through state run public corporations that have exclusive authority to decide. Although there are substantial similarities between each province, there are also significant differences. The Federal government has no workers’ compensation scheme, delegating decision making and rule making to the provinces through the Government Employees Compensation Act, RSC 1985, c. G-5. Separate organisations implement the provincial legislation, there is no over-arching authority responsible for workers’ compensation in Canada. Each provincial law is different and federally regulated employees are compensated according to the provincial law applicable to their case.

The Association of Workers’ Compensation Boards of Canada (AWCBC) provides statistics regarding accepted compensation claims. The most recent data, from 2013, is reported in the National Work Injury/Disease Statistics Program (NWISP)\(^1\); 241,933 lost time injury claims were accepted in Canada that year, as well as 902 accepted claims for fatalities. Health and social services is the sector with the highest number of compensated lost time injuries, followed by manufacturing. The statistical reports provided by this institution show a steady decline in compensated lost time injuries, falling from an all time high of 602,531 in 1989 to 241,933, the lowest since statistics were first reported by the AWCBC, in 1982. However fatality claims have not followed a similar pattern, with the highest number recorded in 2005, 1098 fatalities, and 902 recorded in 2013. The data includes fatalities caused by accident and disease and in many provinces disease attributable to asbestos exposure accounts for a large number of

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\(^{*}\) The author wishes to thank Andrew King for comments on a previous version of this text.

\(^{1}\) [http://awcbc.org/?page_id=14#injuries](http://awcbc.org/?page_id=14#injuries), consulted June 11\(^{th}\) 2015.
compensated fatalities annually. The AWCBC does not provide pan-Canadian statistics for work injury that does not involve lost time, nor does it separate disease and accident claims. Studies have shown that regulatory filters either discourage workers from applying for compensation or increase the chances of denial of certain types of claims, particularly soft tissue injuries, musculoskeletal disorders and mental health problems\(^2\). An empirical study in Québec found that over 80% of employees suffering from musculoskeletal disorders that prevented them from working and that they attributed to work did not claim compensation\(^3\). Actual claim suppression has also drawn the attention of regulators, and the province of Manitoba has published a report documenting this behaviour and declared its intention to take steps to reduce claim suppression\(^4\).

Given that this report focuses on the province of Québec, it is worth noting that in 2013 Québec reported 184 fatalities to the AWCBC and 67,687 lost time injuries. The annual statistical report of the CSST\(^5\) provides a fuller picture, showing that in 2013, 83458 work accident claims were accepted, (84%); and 15458 were not; 4910 occupational disease claims were accepted (46%) and 5762 were not (either refusals, pending a decision or unknown on March 1\(^{st}\) 2014). The same report notes that while accepted claims for accidents were down 2.4% between 2012 and 2013, accepted claims for occupational disease rose by 19.3% in the same year. Fatalities attributable to accidents (-16%) and diseases (-11%) were down from the previous year.

1. Does the regulation on health and safety in the workplace in your country establish the employer’s obligation to prevent occupational hazards? If the answer is positive, what prevention obligations does your country’s regulation on health and safety in the workplace establish?

Federal legislation provides for a general duty clause imposed on the employer as well as listing specific obligations. There are also many regulations that govern specific

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hazards and procedures. Part II of the *Canada Labour Code*, RSC, c. L-2 (CLC), enacts a general duty clause at s. 124 that provides that: “Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.” It further specifies in the subsequent provisions that the employer must meet a broad range of requirements (forty five are listed, that in turn refer to regulations). Listed obligations include provision of appropriate training, protective equipment, and development of appropriate prevention plans.

The Québec *Occupational Health and Safety Act*, RSQ, c. S-2.1 (OHSA) includes a general duty clause (s. 51) that provides that «Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker» and it stipulates requirements relating to training, provision of protective equipment and information, as well as requiring that the employer ensure that the organization of work and the working procedures and techniques do not adversely affect the health or safety of the worker, a requirement that does not appear in the federal legislation or in most legislation in other Canadian provinces. It does not, however, require risk assessments and prevention plans in all workplaces, nor do the requirements regarding health and safety committees apply to most workplaces in Québec, contrary to the situation in the federal jurisdiction and in most other Canadian provinces. Labour inspectors in Québec can require that employers go beyond the explicit obligations provided for in regulations, the general duty clause of s. 51 allowing them to intervene even in the absence of a violation of a specific regulation.

2. Is the obligation to prevent occupational hazards an obligation of means or an obligation of results?

Employers must show due diligence in the protection of their workers’ health. They are not bound by an obligation of results in relation to the general duty clause. However when specific standards, such as threshold limit values for exposure to regulated substances, are set the employer must comply with that standard. The Ontario Ministry of Labour provides a description of the regulatory environment prevalent in Ontario, and other Canadian provinces are similar in their approach.

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6 Domtar inc. c. CALP et CSST et Lapointe, [1990] CALP 989-999 (C.A. Qué.).
3. According to the regulations in your country, how can the employer organize or manage the prevention of occupational hazards in the company? Specifically, can the company manage its prevention internally or must it hire external preventive services?

There is no obligation either in Québec or in the federal legislation to hire an external company to provide occupational health and safety services.

Unlike most Canadian provinces, Québec mandates the public health system to develop health programmes and prevention programmes that include a risk assessment process, in collaboration with workplaces, in sectors 1, 2 and 3 (only a minority of workplaces are governed by these provisions).

4. In your country does the company have the obligation to periodically monitor their workers’ health in relation to the risks and hazards inherent in their workplace? If the answer is positive, does the worker have the obligation to bear these health surveillance measures?

In Québec the law provides for specific health programs to be implemented by the physician in charge of health services for each establishment, in certain specific industries and establishments (sectors 1, 2 and 3). The physician in charge of health services is chosen by the unanimous decision of the health and safety committee members, and if none is designated the public health director designates a physician to be responsible for the establishment. In practice most physicians in charge of health services are drawn from the public health network of physicians.

The specific health program for an establishment may include monitoring of the health of individual workers, and the workers are obliged to collaborate (OHSA s. 113 and 49). Furthermore, there is a specific regulation governing pulmonary health of miners, requiring surveillance of the health of workers exposed to asbestos or silica. In the federal jurisdiction the Minister may undertake medical surveillance, pursuant to s. 139 CLC.

5. What prevention obligations does the legal regulation establish regarding pregnant workers or women workers during breastfeeding?

Although most Canadian provinces have no provision specific to pregnant or breastfeeding workers, both the Federal legislation and the Québec legislation have

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8 Regulation respecting pulmonary health examinations for mine workers, RRQ c. S-2.1, r. 7.
provided for such protections. The Québec legislation is broadest in scope. The OHSA (ss.40ss) provides that a worker who is exposed to conditions that “may be physically dangerous to her unborn child or to herself, by reason of her pregnancy”, upon production of a medical certificate identifying the hazards in question, may require that the employer reassign her to work that does not expose her to those hazards. If she is not immediately reassigned, she has the right to withdraw from work until such time as the employer assigns work that does not present danger to herself or her foetus, or until delivery. While she is not working she will receive 90% of her net salary (same compensation as granted to injured workers), although the last 4 weeks of benefits before delivery will be paid through the parental insurance program. Working conditions considered hazardous include chemical, physical, biological and ergonomic hazards, as well as security issues. Similar provisions exist to protect the child when a worker is breastfeeding, although they can only be used if there is evidence of a hazard in the workplace, in most cases a biological or chemical hazard, and they do not apply to cases where work makes breastfeeding difficult, if hazards are not present. In 2013, 32,921 pregnant workers had successful applications requesting reassignment. 266 workers applied for reassignment while breastfeeding because working conditions presented hazards to their babies.

S. 132ss of the CLC provide the possibility for a federally regulated worker who is pregnant or nursing to request reassignment if she believes her work is hazardous to herself because of her pregnancy or for her foetus or child. Her job is protected until the existence of the risk is determined by a medical practitioner, but there is no provision for salary replacement beyond the time when the presence or absence of risks are established. If the employee is not reassigned despite the existence of the risks she is allowed to take unpaid leave.

6. Does the regulation on health and safety in the workplace in your country establish the obligation to adopt preventive measures regarding especially sensitive workers? What are these prevention obligations?

Human rights legislation in most Canadian provinces, and in the federal jurisdiction, requires that the employer take reasonable measures to accommodate a worker who has a disability, and it is under the human rights legislation rather than the Occupational Health and Safety legislation that employers will be called upon to accommodate the worker, up to the point of undue hardship.

In Québec, s. 32ss OHSA provides for the possibility of applying for protective reassignment if a worker provides a medical certificate attesting that exposure to a contaminant entails a danger to the individual’s health, if his or her health already
shows signs of deterioration (for example if blood lead levels are high or if the worker has allergies to smoke). Although this provision exists since 1980, it is rarely applied because the regulator never adopted regulations defining contaminants, so workers who wish to prevail themselves of those provisions must usually petition the appeal tribunal for a ruling on the application of the legislation.

7. Does the regulation of health and safety in the workplace provide specific preventive obligations regarding psychosocial risks?

Although the federal CLC does not specifically address psychosocial risks it does provide for regulatory powers governing occupational violence and Part XX of the *Canada Occupational Health and Safety* regulation⁹ requires employers adopt policy and conduct risk assessments to prevent occupational violence. It also specifies that workplace bullying may be a precursor to occupational violence, and in a recent decision the Federal Court affirmed that « harassment may constitute work place violence, depending on the circumstances present in a given case»¹⁰.

In Québec, the OHSA is silent with regard to psychosocial factors but an appeal tribunal decision determined that all provisions of the OHS Act could be invoked to protect mental health¹¹. Thus a worker who was psychologically harassed successful invoked the right to refuse work that was dangerous to her mental health, and inspectors are required to respond to complaints based on hazards to workers’ mental health. The regulatory body does send inspectors to workplaces but they usually restrict their interventions to ensuring that appropriate policy is in place in the workplace. Occupational Health and Safety inspectors do intervene in some cases where the workers mental and physical health is compromised by the psychosocial work environment, but these interventions are rare¹².

The Québec *Labour Standards Act*, R.S.Q. c. N-1.1, art. 81.18ss, provides that employers have the obligation to prevent psychological harassment and other regulatory bodies enforce that legislation.

⁹ SOR/86 304
8. What specificities does your country’s regulation establish regarding prevention of occupational hazards in cases of business plurality?

The CLC appears to make a federally regulated employer responsible for employees in its workplace, even if those employees are not directly employed by the employer, although the situation becomes less clear when the workers are not normally governed by federal legislation, as is the case when a provincially regulated sub-contractor sends workers to perform work in a federally regulated workplace, the legislation being applicable only if it is not necessary to conclude that an “employee” was present at the time of the offence\(^\text{13}\). Case law concerning temporary employment agencies suggests that the federal legislation is sometimes set aside when the tribunal concludes that the temporary employment agency is the “employer”\(^\text{14}\). Increased complexity regarding business plurality arises in the application of federal legislation because of inter-jurisdictional issues, as additional obstacles to the application of the legislation arise when the employee of the sub-contractor is not a federally regulated employee because the sub-contractor is not federally regulated.

In Ontario, a jurisdiction we have not examined in this paper, the largest jurisdiction in Canada, the employers’ obligations in the Occupational Health and Safety Act\(^\text{15}\) clearly apply to all “employers” including sub-contractors and temporary employment agencies as well as their clients, so that the Ministry of Labour can hold both the client employer and the agency employer liable for violations, depending on their respective failures to comply with the Act\(^\text{16}\).

In Québec, there was much debate as to the application of legislation to both the client employer and the sub-contractor or temporary employment agency\(^\text{17}\), however recent

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\(^{13}\) Nutreco Canada Inc. (Meunerie Shur-Gain inc. Yamachiche, 2012 OHSTC 27. The order against the federally regulated employer was not upheld in this case, but not by reason of the contractual arrangements between the sub-contractor, the workers and the employer. See also Parks Canada and Public Works and Government Services Canada, 2012 OHSTC 9. See however Les Éleveurs des Trois-Rivières v. Confédération des syndicats nationaux, 2013 OHSTC 26.

\(^{14}\) Day & Ross Dedicated Logistics inc., 2011 OHSTC 2.

\(^{15}\) RSO 1990, c. O.1, s. 1.


\(^{17}\) Ibid and K. Lippel et A.M. Laflamme, « Les droits et responsabilités des employeurs et des travailleurs dans un contexte de sous-traitance : enjeux pour la prévention, l’indemnisation et le retour au travail ». 

judgements have found the client employer liable under the OHSA\textsuperscript{18}, and several “employers” were found liable in a recent case involving cascading sub-contracting\textsuperscript{19}.

9. Does the regulation of health and safety in the workplace provide for participation of workers’ representatives in the prevention of occupational hazards in the company?

Federally, there is a requirement that an occupational health and safety committee involving workers and managers be set up in all workplaces with 20 or more workers. If the workplace has more than 300 workers, there is an obligation to set up a policy health and safety committee. Every province, except Québec and Alberta, requires joint health and safety committees except in very small firms.

In Québec, the requirement to set up a joint health and safety committee is not mandatory anywhere, although if workers or a union request such a committee be set up, the employer is required to do so in those sectors that are designated as priority sectors 1 and 2 in the regulations. The vast majority of Québec workers, and the vast majority of compensated claims are from sectors other than 1 and 2. The vast majority of workplaces are thus not legally obliged to have health and safety committees or to ensure worker participation in governance issues relating to health and safety\textsuperscript{20}. In those workplaces where a joint health and safety committee is mandated by the legislation, there is also a requirement to have a safety representative.

10. What are the liabilities –tort, administrative and/or criminal– that can arise as a consequence of the company’s breach regarding workplace health and safety?

Tort based litigation against the employer is not available to workers in any jurisdiction in Canada because of exclusionary provisions in the provincial workers’ compensation legislation.

Statutory offences and penalties exist in all occupational health and safety legislation but the severity of those penalties varies considerably. Federally, under s. 148 of the

\begin{thebibliography}{3}
\bibitem{18} Sobeys Québec inc. \textit{c.} CSST, 2012 QCCA 1329, permission to appeal to the Supreme Court of Canada denied, 34989 (2012-12-20).
\bibitem{19} Olymel, s.e.c. \textit{et} Hamel St-Hilaire, 2013 QCCLP 6838.
\end{thebibliography}
CLC, the most serious offences are punishable by a fine of not more than $1,000,000 or imprisonment of not more than two years (or both).

Legislation adopted in 2009 determined that the offence provided for under s. 237 of the Québec OHSA, the most serious offence, is punishable by a fine of $3000 for an individual or $60,000 for a corporation, indexed to the cost of living for a first offence. The maximum for a third offence is $300,000 for a corporation and $12,000 for an individual. No sentence of imprisonment is possible. To convict a person under s. 237 it must be proven that by action or omission the defendant “does anything that directly and seriously compromises the health, safety of physical well-being of a worker”. Any other contravention of the Act is punishable under s. 236 by a fine of not more than $1500 for an individual or $3000 for a corporation for a first offence.

While the other provincial jurisdictions fall beyond the purview of this paper, it should be noted that other provinces may also provide for administrative sanctions, including penalty assessments and ticketing.

Since 2004, the Criminal Code of Canada contains specific provisions governing corporate criminal liability that were meant to facilitate conviction of corporations and officers for criminal negligence offences The legislation was introduced in response to regulatory failure of previous provisions applied following a mining disaster in which 26 miners lost their lives. The legislation is very rarely applied\textsuperscript{21}.