



Emerging Health & Safety Issues from Changing Workplaces
– A Canadian Discussion –

Gaps in Protection, Accountability and Responsibility for OH&S in the Changing Workplace

Presented by

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Presentation structure and objectives

- Description of Québec study
 - Methods and definition of concepts
 - Issues identified in the 2000-2003 study
 - What's happened since our report?
- How can these findings apply in other jurisdictions?
 - Each issue identified in the Québec study can be integrated in a checklist to look at your own jurisdiction.



Research Question

Is Québec legislation designed to protect workers' health and to provide compensation for work injury currently adequate to protect workers in the contemporary labour market?

- What changes need to be made and who is in the best position to make those changes?



Methodology used in 2003 study

Literature review

1. Concepts of non-standard employment
2. Health risks associated with non-standard employment
3. Regulatory challenges to be anticipated

Evaluation of the legislation in light of case law

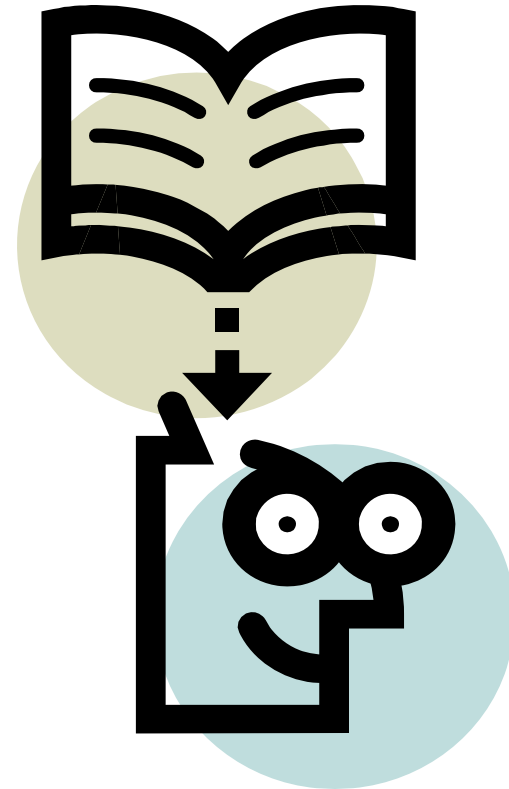
1. *Occupational Health and Safety Act (OHS)*
2. *Act Respecting Industrial Accidents and Occupational Diseases (AIAOD)*

Interviews with key informants



What is included in non-standard work?

- Non-standard because of:
 - Work hours
 - Employment relationships
 - Place of employment



Non-standard hours

Situations studied:

- Temporary work (including short-term work contracts)
- On-call work
- Part-time work
- Seasonal work

Situations not studied: night work, shift work, long hours



Non-standard employment relationships

Self-employment (13,2% - 15,5% of work in Québec between 1997 et 2003)

Work for a temporary employment agency

Multiple job holders, including holding of multiple non-standard jobs:

- 7,8% of part time workers and 2,5% of full time workers hold more than one job.



Non-standard place of employment

Home based work

- More than one million Canadians work at home.
- Bernstein, Lippel, Lamarche, *Women and Homework: the Canadian legislative framework*
 - <http://www.swc-cfc.gc.ca/publish/research/010419-0662854500-f.pdf>

Telework

- Cox, Desmarais et Lippel, *Les enjeux juridiques du télétravail au Québec*, www.cefrico.qc.ca.



Whose jobs are we talking about?

Gender Division

Women:

- Part-time
- Multiple job holders

Men:

- Self-employed with employees

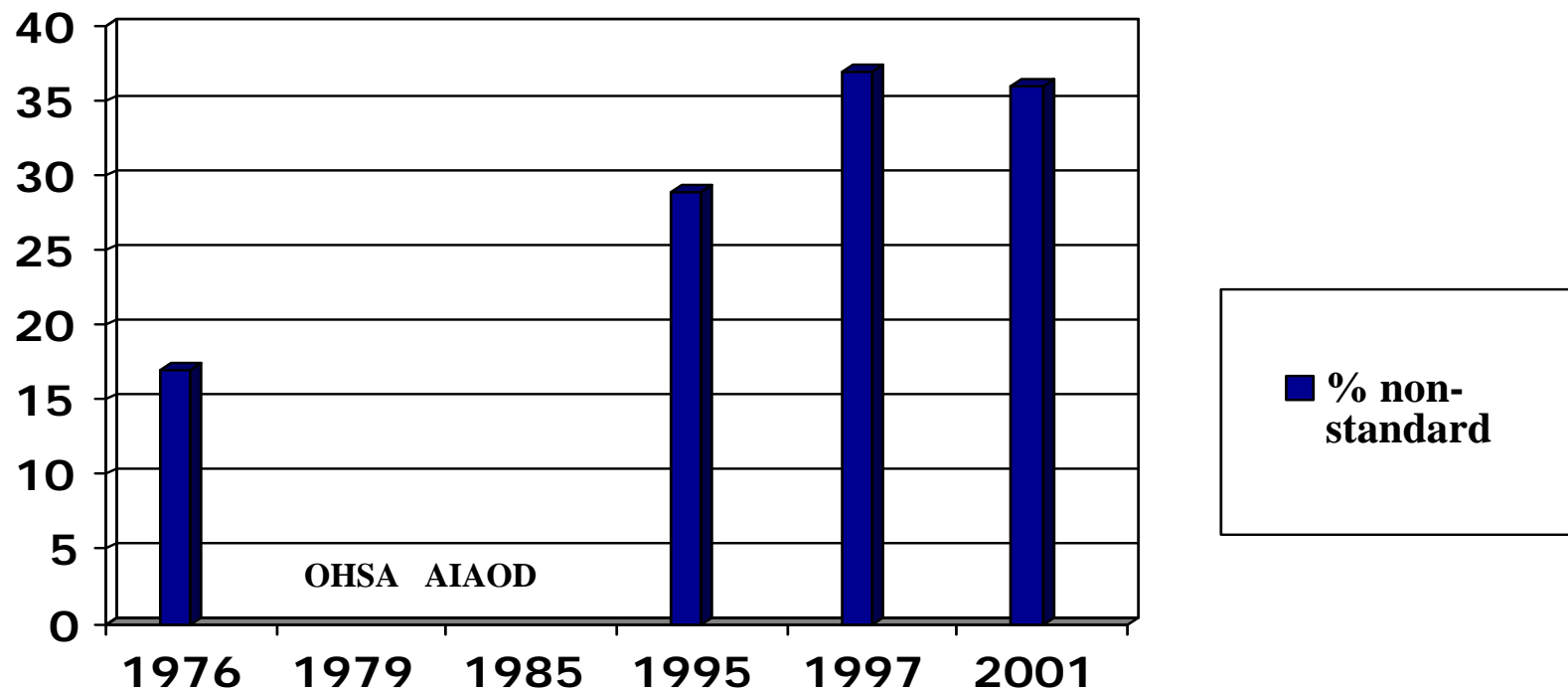
Mixed

- Temporary employment
 - On call
 - Seasonal employment
 - Temporary contracts
 - Via temporary employment agencies
- Home based work
- Telework
- Self-employment without employees

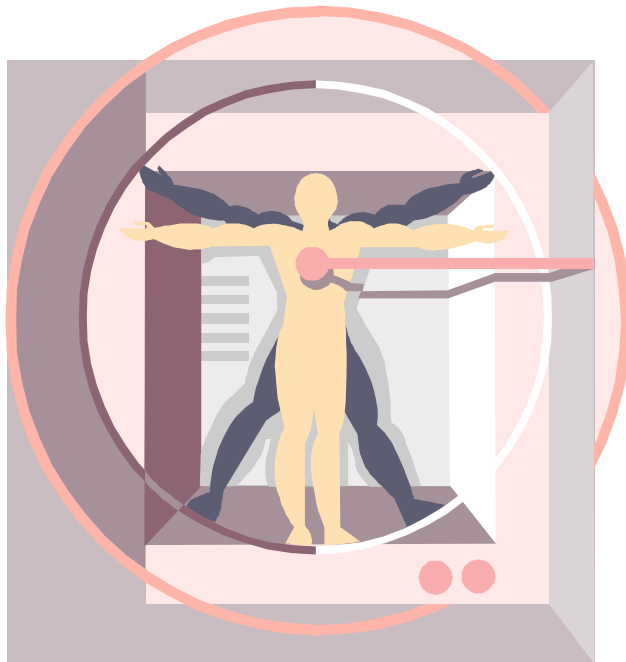
Conseil du statut de la femme, 2000
Rapport Delage, 2002



Is the law behind the times?



Issues for scrutiny



Anticipated
regulatory
failure...
the literature



Regulatory challenges associated with precarious employment

- Increase in risk exposure and difficulty in monitoring exposure
- Failure to report injuries and disease
- Lack of knowledge with regards to rights
- Reduced access to compensation
- Failure of traditional OHS protection mechanisms
- Distortion of compensation statistics which are less reliable for predicting OHS priorities

Michael Quinlan
Annie Thébaud-Mony



Risk factors identified in the literature

Lack of information

- on work hazards
- on the nature of exposure
- on work-relatedness of illness
- on rights

Low social support (less access to union representation and peer group support)

Subcontracting of risks



The 10 economic sub-sectors with the highest prevalence of occupational injury in Québec, 1995-1997

UNITÉ CAEQ	CATG PROF	DESCRIPTIF	Travailleurs	Lésions indemnisées	
			en nombre ETC	Nombre annuel moyen	Prévalence ETC (o/oo)
771	Man.	Bureaux de placement de personnel	1 363	897	81,5
422	Man.	Travaux de charpenterie	2 627	422	49,3
51	Man.	Services forestiers	1 809	422	46,5
403	Man.	Travaux de génie	5 138	876	45,3
653	Man.	Comm. de détail d'articles de quincaillerie	1 816	527	44,0
562	Man.	Comm. de gros d'articles de quincaillerie	1 148	317	43,3
309	Man.	Autres industries de produits en métal	2 306	1 006	40,8
499	Man.	Autres services publics	2 760	703	39,7
92	Man.	Services à l'extraction minière	1 478	137	39,6
425	Man.	Travaux de mécanique spécialisée	2 322	466	39,2

Duguay, Hébert, Massicotte, 2003



Legislation aimed at prevention of employment injuries

Occupational Health and Safety Act



Regulatory loopholes: a checklist

- Scope of legislation
 - Rights and obligations of precarious workers
 - Obligations of employers: the general duty clause and specific regulatory obligations
- Effectiveness of provisions applied to precariously employed workers:
 - Protective reassignment of pregnant workers
 - Right to refuse dangerous work
 - Inspection
 - Right to information
 - Health and safety committees
 - Health protection programmes



Synthesis of results for Québec

- The self-employed are inadequately protected.
- Various provisions do not apply appropriately to a variety of precariously employed workers.
 - Arbitrary wording of the general duty clause
 - Protective reassignment of pregnant workers
 - Inspection
 - Health protection programmes
 - Prosecutions



Self employment in Québec



Purpose of the occupational health and safety act

Art. 2: «The object of this act is the elimination, at the source, of dangers to the health, safety and physical well-being of *workers*»....



Québec Charter of Rights and Freedoms

Art. 46

«Every *person who works* has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being».



Protection of the self-employed

The self-employed must comply with obligations of both employers or workers if a worker is present at the worksite (art. 7 *O.H.S.A.*)



Self monitoring by the self-employed

When driving conditions are hazardous, do the rules of the association of self-employed truckers have mechanisms to permit prevention of hazardous behaviour?



Does self-monitoring lead to effective prevention?

«If the first 2 or 3 call the office to say they won't take the load, if the fourth on the list wants to take it, it's his right, we wouldn't tell him, well the other 3 won't take it, don't go. If the guy wants to take the risk, that's up to him.»



Who must comply with the general duty clause?

51. Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of **his** worker. He must in particular:

- 51. 1^o see that the **establishments under his authority** are so equipped and laid out as to ensure the protection of the worker;
- 51.2^o designate members of his personnel to be responsible for health and safety and post their names in a **conspicuous place easily accessible to the worker**.



Who must comply with the general duty clause?

51. Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of **his** worker. He must in particular:
- 51. 3° ensure that the **organization of the work** and the **working procedures and techniques** do not adversely affect the safety or health of the worker;
 - 51. 4° supervise the **maintenance of the workplace**, provide sanitary installations, drinking water, adequate lighting, ventilation and heating and see that meals are taken in sanitary quarters at the workplace....



Protective reassignment of non-standard workers

How are these protections applied to the self-employed, or to part-time, on call and temporary employment agency workers?



Protective reassignment of pregnant workers

Problem 1

The physician says no more than 20 hours of exposure per week

The courts will only look at exposure at one place of employment at a time, even if multiple job holders are exposed beyond that limit.

Problem 2

The worker who is unavailable for a reassignment because of a second job loses her right to be reassigned.



Inspections

Legal obstacles

- How do privacy rights conjugate with inspection of home-based workplaces?
- How is the inspector's job practicable when there are large numbers of non-standard employees?

Practical obstacles

- How many inspectors would be needed?
- Fuzzy boundaries regarding responsibility for safe conditions in the home workplace



Health protection programmes

The foundry is obliged to ensure that the lead levels of all its employees are monitored...but who's watching over the employees of sub-contractors?



What happens when the worker's name is not on the list for blood tests?

Recently a welder working for a sub-contractor of a foundry where he worked 6 months at a time for many years was compensated for saturnism (lead poisoning).

His name was not on the list of workers for whom measures of lead levels were required, so the public health officials didn't know about him.

- Who's responsible?
- Does it matter after it's too late?



Prosecutions for violations of OHS obligations

An inspector can issue a remedial order requiring a «person» to comply with the Act (s. 182) or issue an order if a person is acting illegally (art. 190)

The inspector must advise the «employer» on arriving at a workplace and before making an investigation or an inspection (s. 181)

«Every person» who contravenes the act is guilty of an offence...

(s. 236, 237)

- But who is targeted by the specific obligation that has been violated?



Right to compensation

*Act respecting Industrial
Accidents and Occupational
Disease*



Importance of the issue

Workers' compensation is often the only salary replacement available (90% net)

No statutory obligation for salary insurance

- 58% full time workers have access to some form of insurance benefits from employment contract
- 14% of temporary and 17% of part time have similar access.



Checking for loopholes in the law

- Who is a worker?
- Who is the employer?
- Who pays the premiums for injury?
- Proving an occupational disease claim
- Do compensation provisions accurately protect lost ability to earn a wage?



Ambiguous concepts

The nature of the employment contract
worker, independent operator, other forms of
self-employment

Your status

or

What you believe your status to be



Worker or self-employed?

The employer sells his equipment to the worker and informs him he is henceforth self-employed: will the AIAOD continue to apply?



Who is the employer?

Who pays the premiums?

Who pays for the ambulance?

Who can contest the claim?

Right to return to work...but where?



Workers' comp legislation includes prevention incentives: who do they target?

Employers pay for all WCB costs because they are, in exchange, protected from law suits.

Experience rating is often used to provide incentives to employers to reduce accidents and disability by increasing their premiums if they have bad claims records.

Who is the targeted employer?

Does that employer control the working conditions?



Temp agency as employer

Normally the costs of injury to an employee of a temp agency are attributed to the temp agency account.

The client of the temp agency has an incentive to reserve the riskiest jobs for temp agency workers so as to avoid the attribution of accident costs to his compensation account, even when those accidents are attributable to risks intrinsic to his operations.

This practice neutralizes incentives for prevention.



Who is the «third party» for the purpose of determining cost attribution?

When an injury is caused by the behaviour of a colleague employed by a separate agency or the client, costs of injury may be transferred to the general fund as injury is attributable to a «third party».

Interim Aide Hunt Personnel, CLP 2004



Where's the incentive for prevention?

When neither the temp agency nor the client is charged for the costs of the injury, experience rating as an incentive for prevention of injury and disability fails.

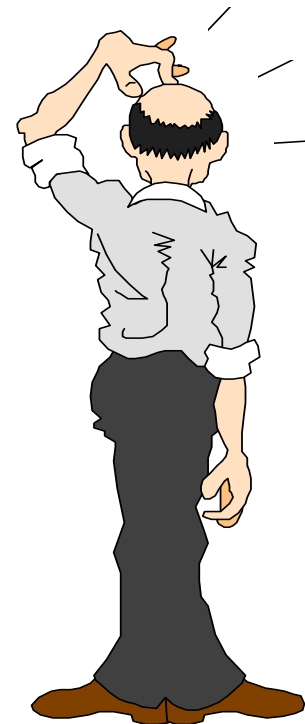
Workers' compensation assessments are not payroll taxes, they are insurance premiums associated with exposure to risk. Avoiding premiums is not tax avoidance.



Occupational Illness

When the worker holds several jobs, is sometimes self-employed or obtains employment through temporary employment agencies, how can employment exposure to contaminants be determined?

What happens to comp claims in these cases?



Wage-loss systems of compensation

- Many Canadian compensation systems determine benefits by measuring the loss of earning capacity of a claimant.
- What happens to precariously employed workers?
- Do rules accurately compensate for reduction in ability to earn a wage?



Crystallised precariousness

A 19 year old worker has an accident that leaves him paralysed for life.

He was earning minimum wage for 14 hours per week.

How does your province calculate his future pension?

Is there a minimum pension provided for in legislation?



Multiple job holders lose out

A nurse holding two jobs each for 25 hours per week will be compensated as if she worked 40h.

article 71 A.I.A.O.D.

A worker working 50 hours per week for the same employer will be compensated for all his hours, including over-time.

article 67 A.I.A.O.D.



Who really bears the costs of dangerous work?

Sub-contracted work is often the most dangerous.

Labour market changes allow for de-mutualisation of social protections without legislative intervention.



Effects on statistics

Artificial reduction in compensation costs

- Lower number of claims
- Lower amount of compensation
- Lower access to rehabilitation mechanisms
- Lower chance of success of claim
- Systemic exclusion of certain types of work and certain types of health problems



Parallel research: Bernier report

Our preliminary findings on OHS and workers' compensation were provided to the authors of the Bernier report, who reported to the government in 2003 with a series of recommendations:

Social protection needs of individuals in non-standard work situations

Bernier, Vallée, Jobin, 2003.

http://www.travail.gouv.qc.ca/actualite/travail_non_traditionnel/Bernier2003/RapportFinal.html



Final Report

46 recommendations to improve protection of workers in non-standard employment

Recommendations required

- Legislative changes
- Innovative approaches in case law
- New research agenda in OHS

«Travail atypique»: Protection légale des conditions minimales d'emploi et de la santé

Lippel, Bernstein, Messing 2004

<http://www.fqrsc.gouv.qc.ca/recherche/index1.html>



Knowledge transfer

To our research partners, community groups
To the ministries who ordered the initial study
To the legal community specialized in
occupational health and safety law
To the scientific community (hygienists, social
scientists, labour relations specialists)



What's happened since?

Legislative change?...

Evolution of the case law governing compensation

- On salary replacement issues, decisions show greater awareness of plight of part-time and on-call workers and that of multiple job holders.
- Little change regarding term contract workers
- Continued broad interpretation of concept of «worker», some inclusion of non-documented workers

Creation of a committee to look at temporary employment agencies and working conditions

- No union representation on the committee



How can these findings apply in other jurisdictions?

Each issue identified in the Québec study can be integrated in a check-list to look at your own jurisdiction.

Maybe your jurisdiction has problems, or solutions, that were not raised in the Québec situation.

Wouldn't it be useful to have a portrait of problems and solutions for the whole of Canada?



Possible strategies: need for a clearinghouse?

Is there a need for a clearinghouse which could collect information provided by federal and provincial regulators and collate information as to responsibilities for OHS and workers' compensation in each jurisdiction?



Possible strategies: need for a clearinghouse

Various types of rules are of interest:

- employers' obligations to workers under Workers' compensation and OHS legislation...
- rules governing access to compensation...

Various types of precarious employment are of interest:

- work via temporary employment agencies
- on-call work
- telework and home based work
- subcontracting
- self-employment
- seasonal employment...



Conclusion

Policy makers and agencies need to address these issues before they are faced with a «fait accompli»:

- that the labour market has deregulated itself without any political intervention.



Thank You

For further information contact:



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