EXPERIENCE RATING IN THE QUÉBEC WORKERS’ COMPENSATION SYSTEM

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Presentation outline

1. Portrait of prevention incentives in Québec
   - Fines under OHS legislation
   - Experience rating mechanisms
     - Categories of experience rated employers
     - Principles
     - Exceptions

2. Practices associated with experience rating
   - Contestation and appeals
   - Cost transfers to general fund

3. Take home messages
   - Experience rating as a motor for the contestation industry
   - Role of litigators and private insurers in the context of legislative reform
   - Fault is back in a no-fault system
1. Portrait of prevention incentives in Québec
Fines that could be imposed on a corporation for failing to comply with inspector’s order

Québec fines tripled in 2010…

<table>
<thead>
<tr>
<th>Maximum Fine</th>
<th>Québec</th>
<th>Ontario</th>
<th>Alberta</th>
<th>B.C.</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3,000$</td>
<td>500,000$</td>
<td>500,000$ - 1,000,000$ Depending on nature of notice</td>
<td>618,730+</td>
<td>1,000,000$</td>
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<tr>
<td></td>
<td>2nd +</td>
<td></td>
<td>2nd + offence: 1,237,461+</td>
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<td></td>
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<tr>
<td></td>
<td>6,000$</td>
<td></td>
<td></td>
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<td>/</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>12,000$</td>
<td></td>
<td></td>
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</tbody>
</table>

Marcel Simard, 2000 updated, Lippel, 2011
Publicly available judgements of the CLP

![Bar chart showing claim acceptance, financing, and inspection claims over the years 2004-2012. The chart indicates a significant increase in claim acceptance in 2004-2005, followed by a decrease in subsequent years.]
Experience rating mechanisms

- Categories of experience rated employers
  - Retrospective adjustments ($400,000 + assessments)
  - Personalized adjustments ($7000 - $400,000 assessments)
  - "Mutuelles de prévention" : private contract between groups of employers and the CSST 284.2 AIAOD

- Principle: costs of all claims are imputed to individual employers
  - Affects individual employers who are experience rated
  - Affects class of establishments to which they belong if they are not experience rated

  (s. 326 AIAOD)
Who benefits from experience rating?

- 88% of assessments are experience rated
- 71% of employers are not experience rated
  - CPQ, Camiré
- 25% of costs not imputed to an employer’s account because of cost transfers:
  Larouche, 2007
- Costs transferred to general fund or employer’s funding unit
- The more costs transferred, the more small employers must pay (general fund shared by all)
Which costs?

- Costs included in experience rating
  - Health care related to an occupational injury or disease
    - If injury judged to be healed health care provided for the injury afterwards is not imputed to the employer (source of litigation)
  - Benefits:
    - Includes all benefits including costs of rehabilitation programme, travel costs, survivor benefits
    - Impact varies incrementally for revenue replacement benefits by quarter years (significant drive for medical contestations)

- Early return to work
  - If worker is paid by employer for early return to work salary replacement benefits are not payable and therefore not experience rated
Exceptions

- Employers who are experience rated can avoid imputation of costs to their accounts:
  - If a third party is responsible for the injury (s.326(2) AIAOD)
  - If the employer would be «unduly burdened» were the costs to be imputed to its file
  - If the worker is «handicapped» at the time of the injury (s. 329 AIAOD)

- Special rules apply for occupational disease (s. 328 AIAOD)
Injuries attributable to third parties
(326(2) IAIOD)

- Violence:
  - Are the incentives appropriately applied?
  - Bank robberies
  - Health care sector
  - Violence between colleagues (debate)

- Tripartite relationships
  - When client employers and temporary employment agencies are involved both categories of employers can externalize the costs to the unit or the general fund if the accident is attributable to the behaviour of the other
  - Lippel et Laflamme, 2011
Unduly burdened employers

• Increase in allegations that workers abused the system by not declaring pre-existing injury.
  (s. 27 or 326 AIAOD)

• Workers suffering from other health problems preventing reassignment
  • Pregnancy
  • Cancer
  • Worker died (employer’s petition denied)

Entrepriess Scorpio LB inc., 2012
Handicapped workers

- Incentive to obtain medical records for all previous health problems to prove vulnerability
  - Is personality a handicap?
- Smoking is a handicap
  - Increases healing time for fractures
  - Allows asbestos mines to obtain cost relief for lung cancer claims
  - Up to 92% of costs transferred to the general fund

MINE JEFFREY INC c. CLP, 2009 QCCS 981; 2009 QCCLP 4666
Able to work... But retroactively handicapped
2. Practices associated with experience rating
## Ratio of Claims and Appeals: 1999-2010

<table>
<thead>
<tr>
<th>Year</th>
<th>Claims (CSST)</th>
<th>Accepted claims(CSST)/ % acceptance</th>
<th>Appeals (CLP) / % claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999-2000</td>
<td>164890</td>
<td>143517 (87%)</td>
<td>20922 (13%)</td>
</tr>
<tr>
<td>2004-2005</td>
<td>152799</td>
<td>132906 (87%)</td>
<td>27141 (18%)</td>
</tr>
<tr>
<td>2009-2010</td>
<td>115720</td>
<td>95597 (83%)</td>
<td>32393 (28%)</td>
</tr>
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</table>

Lippel, AJIM, 2012
Distribution of appeals to the CLP

• Appeals on issues of financing
  • Only employers can participate in the appeal

<table>
<thead>
<tr>
<th>Year</th>
<th>Financing/total</th>
<th>% total appeals</th>
</tr>
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<tbody>
<tr>
<td>2006-2007</td>
<td>2829/26396</td>
<td>11%</td>
</tr>
<tr>
<td>2007-2008</td>
<td>3541/27933</td>
<td>13%</td>
</tr>
<tr>
<td>2008-2009</td>
<td>4744/28355</td>
<td>17%</td>
</tr>
<tr>
<td>2009-2010</td>
<td>5057/32393</td>
<td>16%</td>
</tr>
<tr>
<td>2010-2011</td>
<td>4322/27976</td>
<td>15%</td>
</tr>
<tr>
<td>2011-2012</td>
<td>4503/32246</td>
<td>14%</td>
</tr>
</tbody>
</table>

Source: CLP, Letter, 14/9/2012
CLP April 2011 - February 29th 2012

Withdrawals, 15365

Settlements approved, 3915

Appeals Heard 8965

Employer appeals heard, 3803

Worker appeals heard, 5162
3. Take home messages
Litigation industry thrives

- Experience rating as a motor for the contestation industry
  - OHS legal consultants to employers proliferate
  - «les multi-nationales de la contestation médico-légale»
  - Employers preempted by the *mutuelles*

- Camiré committee for legislative reform:
  - 3 employer representatives
  - A law firm
  - AON - an important «mutuelle de prévention»
  - A third employer
What has happened to the no-fault system?

• Looking to blame workers for failing to declare pre-existing injuries at time of hire
• Looking for those responsible for the accident
  • Workers themselves
  • Employees of the employer or others
  • Third party employers
  • Other third parties
• But not the employer...

• Yet asbestos mines are protected from costs because workers who smoke are handicapped.
• They are also protected from lawsuits for asbestos related disease suffered by their employees.
Thank you

http://www.droitcivil.uottawa.ca/chaireendroitsst