

Legal protections governing the occupational safety and health and workers' compensation of temporary employment agency workers in Canada: reflections on regulatory effectiveness

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Abstract

This paper examines the effectiveness of occupational safety and health and workers' compensation legislation in Ontario and Québec when temporary employment agencies (TEAs) are involved in the employment relationship. Relying on a comparative approach using classic legal analysis and interview data, the paper identifies specific mechanisms by which the legislation succeeds or fails to protect temporary employment agency employees.

Issues of importance with regard to workers' compensation stem in large part from the nature of the triangular employment relationship, but are also attributable to the specificities of working on-call in a variety of locations and the vulnerability of workers hired through temporary employment agencies. Accidents may be more likely to go unreported for a variety of reasons, while the cost of compensation may be lower because benefits depend solely on pre-injury earnings rather than on the impact of the injury on earning capacity. This, in turn, affects incentives for employer participation in return-to-work programmes and undermines the rationale for 'experience rating'.

The primary challenges regarding the prevention of injury and disease affecting workers placed by temporary employment agencies arise because of disorganisation associated with triangular and cascading employment relationships, which makes it difficult to ensure the adequate training of workers, the provision of appropriate safety equipment and adequate representation in joint health and safety committees. At best, temporary agencies inspect workplaces before placing workers, yet they are ill equipped to identify hazards and have little control over the work required of the worker.

The use of temporary agency workers is attractive to client employers because they thus avoid the costs of compensation and the unpleasantness associated with the aggressive contesting of claims. In Ontario, prevention strategies are still required of client employers because both the client and the agency may be liable for occupational health and safety violations. This is less clear in Québec, although client employers may sometimes be held accountable through experience rating. The Ontario occupational safety and health legislative framework, as applied by the regulators and the courts, is more likely than the Québec framework to meet at least some of the occupational safety and health needs of workers employed by temporary employment agencies. However, the Québec workers' compensation framework meets more of

the workers' compensation needs of temporary employment agency workers than that of Ontario. In both provinces, legislative reform could improve the scope and effectiveness of the legislation, and this paper includes detailed recommendations in this regard.

Key words

Canada, legislation, occupational safety and health, Ontario, Québec, regulatory effectiveness, temporary employment agencies, workers' compensation

Introduction

This paper examines issues to be considered in the determination of regulatory effectiveness of occupational safety and health (OSH) and workers' compensation (WC) legislation when applied to situations involving temporary employment agencies (TEAs). To illustrate, we have chosen to analyse the situation in Ontario and Québec, the two largest Canadian provinces. Work involving TEAs presents important challenges for regulators of OSH, both because it is associated with increased exposure to hazards and because, by its very nature, it renders more difficult the implementation of existing regulatory frameworks. In this introduction, we will first examine the literature on TEAs and OSH, including both international and Canadian sources, and then describe the Canadian regulatory context.

Review of the literature

International overview

A significant body of literature has examined health and safety issues in relation to temporary work.* For the most part, studies have identified an increased exposure to hazards and increased negative health outcomes for temporary workers,²⁻⁵ although when seniority in the job is controlled for, some of these effects have been found to disappear.⁶ Several studies have now refined analyses to underline the importance of the specific type of temporary work that is studied,⁷⁻⁹ and particular attention has been paid to temporary work involving triangular employment relationships in which TEAs place workers with client employers.

Researchers in France,^{10,11} Italy,¹² Spain,⁶ the USA¹³ and Australia¹⁴ have documented that temporary workers and subcontractors are more likely to be exposed to dangerous working conditions than the core employees of an industry. For example, Thébaud-Mony¹⁵ has shown how the nuclear industry prefers to recruit external workers (subcontractors or TEA workers) to do the hazardous work, so that when the worker has been exposed to the maximum cumulative level of exposure to radiation, the industry can simply put an end to the temporary assignment, thus circumventing protective legislation designed to ensure workers maintain income when required to stay home until the radiation in the worker's body has returned to an acceptable level.

Studies have also shown that temporary workers are more likely to suffer from adverse health effects than those in permanent positions, and while it is important to distinguish between different types of temporary work,⁶ work done by employees of TEAs has been shown to lead to a higher prevalence of work-related injury,^{12,16,17} even when comparing temporary workers to workers in the same industry doing more permanent work.¹³

* Temporary work includes fixed term, casual, agency and seasonal employment.¹

Several issues related to the regulatory failure of OSH legislation have been identified in the literature. In terms of prevention, because of job insecurity and greater vulnerability, temporary workers are less likely to speak up when confronted with OSH hazards^{2,18-20} and traditional mechanisms designed to provide workers with a voice fail to capture employees of TEAs.^{18,20,21}

The placement, by the TEA, of a worker ill equipped to fulfil the mission required by the client is a common source of vulnerability,^{19,22} as is the practice by the client of changing the requirements of the assignment once the worker has shown up for work. In both cases, the responsibility for these conditions is unclear in many jurisdictions, and this lack of clear accountability associated with triangular employment relationships often allows those responsible to escape liability. As reported in several of these studies, TEAs complain about the difficulties they face in inspecting client employers to ensure compliance with regulatory standards.² Sometimes employers themselves are confused about their obligations, as in the British example cited by Johnstone & Quinlan, who noted that 80 per cent of the TEAs studied by the HSE wrongly believed that OSH was the responsibility of the client employer.²

Traditional legal frameworks designed to protect workers from exposure to toxic substances have been found to be ineffective in the case of temporary employees²⁰ and employees of subcontractors.¹⁵ Furthermore, tracing the occupational exposures of these workers, when diseases of potentially occupational origin are diagnosed decades later, is often illusory.¹⁰ A notable exception to this portrait is the Giscop 93 project, which reconstitutes work exposures for patients suffering from certain potentially occupational-related cancers in three hospital services in Paris. This project sheds light on the challenges faced by employees of subcontractors and temporary agencies when they seek to identify occupational exposures that may be linked to their disease. These workers are subjected to multiple exposures in a very large number of work sites and have little information about the substances they have been exposed to. Few mechanisms are available to document exposures to workers because of the transience of their presence in the workplaces where they were exposed.²³

In terms of WC, TEA workers are less likely to claim compensation, either because they are unaware of their rights or because of fear of reprisal.^{2,19,20} If they do file a claim, they are more likely to have their claim contested.^{13,24} The delay between lodging a claim and the payment of compensation is longer for employees of TEAs and the compensation paid is lower, even though the duration of claims is longer.¹³ TEAs have been found to more easily escape the enforcement of regulatory obligations – the authors of an Australian study have suggested that this is due, in part, to the ability of TEAs to “disappear” when threatened with prosecution.^{2,25}

OSH inspectors find it particularly difficult to enforce legislation when TEAs are involved. An Australian study, one of few empirical studies of labour inspectors called on to enforce OSH legislation in the context of precarious employment relationships, found that triangular employment relationships presented significant challenges.²⁶ The authors report that employees of TEAs are poorly trained in OSH issues and that, in the context of triangular relationships, client employers and TEAs attempt to elude responsibility by blaming the other party for the events leading to the injury. The Spanish labour inspectorate, among other European inspectorates,²¹ has developed protocols specific to inspections of workplaces where workers placed by temporary employment agencies are found. Such protocols address issues including training, the appropriateness of placement given the capacities of the worker, risk assessments, accident reporting by the client employer to the TEA, and the production of accident reports by the client employer and the TEA.²⁷

Canadian studies

The employment services industry, and TEAs in particular, play a significant role in the Canadian economy, where there are more than 700,000 temporary workers and over 1,000 TEAs,²⁸ 57 per cent of the national industry is in Ontario.²⁹ Despite their economic significance, the conditions of workers employed by TEAs are increasingly difficult to study in Canada. This is due to the fact that Statistics Canada reduced the number of temporary worker categories in their most recent analyses of temporary work, thereby making it difficult to document working conditions specific to workers employed by TEAs.* In turn, this affects OSH indicators, as it is impossible to determine the denominator (total equivalent full-time hours of TEA employees) to which injury rates can be compared. Earlier studies by the Québec research institute that gathers data on occupational injury (Institut de recherche Robert-Sauvé en santé et en sécurité du travail, or IRSST) determined that the highest prevalence of compensated injury was found in TEAs, as compared to all industries.¹⁶ Such comparisons are no longer possible, although the compensation board in Québec ranks all industries according to risk levels, and the risk level of TEAs is high.³² Less is known about injury rates in Ontario.

There are several studies on working conditions of employees of TEAs in Canada,¹ but there are few studies that examine OSH issues for this population. TEA employees were included in a broader study of precarious employment in Ontario, a study that found gaps in OSH protection, notably with regard to OSH training in general and receiving information regarding toxic substances in particular. The same study also determined that workers anticipated that speaking up about OSH concerns or filing a WC claim would have negative consequences for future employment.²⁰ In Québec, Cloutier and colleagues³³ have studied the OSH conditions of nurses working for TEAs, a relatively privileged category of temporary agency worker because of the acute shortage of nurses in Québec. Even with these more advantaged TEA employees, the authors identified gaps in health and safety training and prevention activities, as well as dysfunctional work organisation factors they felt were critical for OSH.

The OSH regulatory context in Canada

OSH legislation falls under provincial jurisdiction in Canada, except with regard to federally regulated workers, who represent about 10 per cent of employees. WC legislation also falls under provincial jurisdiction. Those who fall under federal jurisdiction for OSH purposes essentially see their claims for compensation governed by provincial legislation for a variety of technical legal reasons.³⁴ There are thus 14 different jurisdictions to be considered in a study of OSH and WC legislation in Canada; each province is sovereign and many regulatory models exist.

WC in all Canadian provinces is predicated on the so-called 'historic compromise': workers covered by the regime are eligible for benefits regardless of fault (their own or that of the employer), but are precluded from exercising common law or civil law recourse. Employers are thus largely protected from civil liability, regardless of the circumstances leading to the occupational injury or disease.³⁵ Public compensation boards collect premiums from employers based on the risk level of the category of employment, but also based on the individual employer's record, a system known as 'experience rating'.³⁶ Some provinces, such as Québec, have a very highly sensitive experience rating system, where almost every dollar spent on an injured worker has an impact on future employer premiums;^{32,37} other provinces, including

* Statistics Canada's 2005 report on temporary employment³⁰ provided separate data for workers employed by TEAs, and other workers with fixed-term contracts. However, the 2010 report³¹ aggregated the data for TEA workers and those on fixed-term contracts, so information specific to TEA workers is no longer available.

Ontario,^{38,39} are more selective in the type of expense considered for the purpose of experience rating.

While public agencies are responsible for the implementation of the legislation both federally and in all provinces and territories, an important distinction to be considered in the context of the evaluation of regulatory effectiveness is whether or not the same agency is called on to implement both OSH and WC legislation in a given jurisdiction. As we shall see, this may affect the use of compensation rules to promote the prevention of injury, disease and work disability, as well as the focus of regulators on sanction strategies for non-compliant employers. In Ontario, separate agencies are responsible for implementing the Occupational Health and Safety Act (Ministry of Labour, or MOL) and WC legislation (Workers' Safety and Insurance Board, or WSIB). In Québec, a single agency, the Commission de la santé et de la sécurité du travail (Occupational Health and Safety Commission, or CSST) is mandated to apply legislation governing both OSH and WC.

Little regulatory attention has been paid to the working conditions of temporary workers in Canada.⁴⁰ As Bartkiw describes, there have been recent initiatives with regard to the Employment Standards Act* in Ontario, legislation whose effectiveness has been questioned,⁴¹ and the Bernier report made recommendations in this regard in 2003, which have yet to give rise to legislative reform in Québec.⁴² Under Manitoba's Worker Recruitment and Protection Act, TEAs must be licensed, directors can be held liable for offences, and TEAs must provide evidence of compliance with legislation in order to renew their licence. While the 2010 Dean Report reviewing OSH protections in Ontario identified TEA workers as part of a broader target group of 'vulnerable workers',⁴³ this did not translate into substantive recommendations leading to regulatory action specific to TEAs. In Québec, the Camiré Working Group⁴⁴ tabled recommendations regarding the reform of OSH and WC legislation in that province, also in December 2010. No explicit mention was made of TEA workers or, for that matter, of any of the precariously employed, although, as we shall discuss later, one recommendation in the report, designed to eliminate minimum levels of compensation, would lead to a reduction in benefits for many categories of precariously employed workers, including those working for TEAs.

While employment standards have received some scholarly attention in Québec^{45,46} and Ontario,^{40,41} aside from the work of the committees previously mentioned, few studies have examined regulatory effectiveness of OSH legislation or WC legislation in these provinces with regard to TEA workers. Some studies examined precarious employment more generally and OSH/WC regulatory effectiveness,^{42,47-49} while there are case studies that have identified issues of concern from the perspective of regulatory effectiveness, noting that TEA workers were reticent to declare work injuries.^{20,33,50}

Few studies,^{19,22,32,51} and none on Ontario, have examined the actual mechanisms by which OSH and WC regulatory frameworks either fail to protect, or succeed in adequately protecting, workers placed by TEAs. This paper aims to fill this gap by analysing the legislative frameworks and their application to work involving TEAs in Québec and Ontario.

Methods

Two methodological approaches are used to support the findings reported in this paper. A classic legal analysis of the legislative frameworks, policy and administrative tribunal decisions in the

* S.O. 2000, chapter 41, Part XVIII.1

two provinces serves to document the legislation and its application, and thus provides not only information on legal rules but illustrations of unintended consequences that arise in their implementation. A comparative labour law approach is used to tease out the system effects specific to local rules. Detailed legal analysis of the situation in Québec was published in early 2011,³² and conclusions of that study are referred to throughout this paper. Data are also drawn from a previous study in Québec⁵² that sought to document the experience of injured workers in the compensation system, and which included subjects working for TEAs. In Ontario, the legal analysis described above is enhanced by information drawn from an ongoing qualitative study of work involving TEAs.⁵³ The latter study uses qualitative research methods to better understand everyday experiences and processes, including social and power relationships. Four kinds of interview data were gathered in 2010–2011, involving a total of 62 study participants:

- focus groups with workers employed by TEAs – 19 workers participated, including mostly low-skilled and some medium-skilled workers doing a variety of occupations, including white collar work (such as office work) and manual labour (such as warehouse work and truck driving)
- focus groups/interviews with employers who use labour from TEAs – 12 individuals from 11 client employers participated, covering a variety of industries and occupational sectors, including transportation, beverage manufacturing, property management, laboratory work, charity work, restaurant, waste management and general warehousing
- in-depth interviews with TEA managers who interact with workers and clients across a representative range of Ontario industries – 22 individuals participated, representing 17 TEAs providing labour in the following sectors: food/beverage, hospitality, logistics, not for profit, property management, restaurant, healthcare, transportation
- interviews with key informants who have a detailed understanding of OSH and WC legislation that applies to the TEA sector – nine individuals participated (three WC experts, three OSH experts, two industry experts and one OSH inspector); this group of interviewees worked for OSH or WC regulators, other public institutions or the private sector.

Results

The involvement of a TEA in the employment relationship raises challenges to the efficacy of the legislative frameworks for both the compensation and prevention of workplace injury in Ontario and Québec. Sometimes these challenges are common to both provinces, although this is not always the case. We will first examine WC and then OSH.

Workers' compensation

Issues of importance with regard to WC stem in large part from both the nature of the triangular employment relationship intrinsic to involvement of TEAs, as well as the specifics of casual work or working on-call in different locations for a variety of client employers that contribute to the vulnerability of workers hired through TEAs.

Consequences of the triangular employment relationship for regulatory effectiveness

In both provinces, triangular employment relationships affect the efficacy of premium collection by the compensation boards, experience rating and the exclusive remedy provisions. This type of relationship also poses practical problems affecting the ease with which claims are filed and disputes resolved.

Although 'triangular employment relationship' is a frequently used label in the discussion of TEAs, cascading subcontracting involving several subcontractors or TEAs is not uncommon. A key informant from Ontario described the problem in these terms:

... they're all related, right? And one contracted with the other, contracted with the other and it's... your brother and your father, and you've all got companies and workers [who] don't know who they're working for. (Arthur, WC regulator)

Even when there are simply three parties involved in the employment relationship, collecting premiums is a challenge for both compensation boards.

Premium collection

In Québec, the issue as to the identity of the 'true employer' gives rise to much litigation. The current consensus of the appeal tribunal (Commission des lésions professionnelles, or CLP) is that each case must be examined on its own merit to determine whether the client employer or the TEA is the 'true employer' liable for premiums. While the TEA is usually found to be the 'true employer', this is not always the case, as it is the employer seen to exercise the greater control over the worker who is attributed that role. As a result, it is not uncommon for lawyers to warn client employers to abstain from interacting with TEA employees so as to avoid any eventual liability for CSST premiums.³² An explicit legislative provision in Québec holds contractors liable for unpaid premiums of subcontractors (s. 316 of the Act Respecting Industrial Accidents and Occupational Diseases, or AIAOD). Client employers are encouraged to obtain a certificate from the CSST confirming that their subcontractors, including TEAs, are up to date in their premium payments. When they fail to do so, these provisions have been used to collect unpaid premiums owed by TEAs from client employers, although it is far less clear whether this provides the CSST with a remedy against clients who have obtained certificates in cases where premiums based on inaccurate payroll declarations underestimate the true obligations of the TEA.³²

Similar possibilities exist under s. 141 of the Workers' Safety and Insurance Act (WSIA) in Ontario, although the issue of unpaid premiums by TEAs is seen to be of the utmost importance by key informants, who indicated that a disproportionate amount of WSIB resources are directed at employer investigations concerning TEAs. While in Ontario the TEA is consistently considered to be the employer under the WSIA, this does not seem to solve the challenges for the WSIB, as chronic under-reporting of the very existence of the TEA, or of the true value of its payroll, appears to be particularly problematic. Some employers are hard to track because they are very small and intentionally seek to fall below the radar of WSIB. And with those employers who do report their existence to the WSIB, it is difficult for the Board to determine the true extent of their payroll because the employees are, by definition, outside of the employer's premises.

Experience rating

Experience rating makes dealings with a TEA attractive to client employers. If premiums depend on the frequency and the level of compensation paid by the employer, it makes good economic sense to externalise those jobs that are more likely to lead to compensable claims, all the more so if the TEA premiums are based on a lower rate than the premium rates for the client industry, which happens in some cases. When a compensation system considers the TEA to be the true employer in a triangular relationship, the cost of a compensable injury for the client employer no longer shows up in its records, but in theory, it will show up on the records of the TEA. If the TEA is small or under-declares payroll, experience rating rules may differ, and the cost of the work accident may have fewer repercussions for the TEA, which may also reduce WC costs by paying workers less than they would be paid by a client employer offering the same job.

The prevention incentives intrinsic to experience rating are undermined in a variety of ways. First, the exposure to hazards is in the control of the client employer, but it is not the client

employer who incurs the cost of the worker's injury, so economic incentives provided by experience rating are imposed on the 'employer' who has little control over the working conditions. The ensuing frustration of TEAs is illustrated by Vaughn's story:

We were providing... warehouse labour to a client. The client was receiving a WSIB award for best health and safety practices. That day I had two people... rolled out the back door to an ambulance. The client kept his health and safety record up high because he outsourced to staffing companies all the risky jobs. All the heaviest lifting, all the jobs that required any type of dangerous work, went to a staffing agency. (Vaughn, Temp Agency 7)

Second, the very nature of TEAs makes it easier to reinvent the organisation if it is weighed down by unforeseen liabilities. As a key informant explained, this can be done far more easily by a TEA than by a client employer:

I mean you can run... a temporary agency with a BlackBerry, right? I mean it's pretty easy to open and close, right? But you're sucking that, that accident cost with you, right? So, the frequency and the healthcare costs are not attached to the workplace where they should be... and so when you're experience rating the employer who owns the workplace – let's just say it's [a large, well-known company] – and they have a warehouse... full of temporary people working in their warehouse, right? Well, if somebody gets seriously hurt in the warehouse, they belong to ABC company. ABC company becomes DEF tomorrow, who's going to become ABC again, the... rating for [the large, well-known company] changes not. (Arthur, WC regulator)

In particularly egregious cases, legal mechanisms exist in both Ontario and Québec that allow the TEA to request that the costs of compensation for a work injury caused by a third party be transferred out of the employer's account. In Ontario, interview data confirm that TEAs are not likely to do so if they want to keep the client's business, but will do so if the transfer request makes good economic sense, either because they no longer want a business relationship with that client by virtue of the dangerous working conditions, or because the penalties associated with the costs of the accident are significant enough to provide an incentive to transfer the costs. In Ontario, a petition for cost transfer, if allowed by the WSIB, may lead to the transfer of costs to the client employer, or the funding unit in which it is categorised (s. 84 WSIA). However, in Québec, the provisions only allow the transfer from the TEA employer's file to either the general fund, or the funding unit of which the client is a member.³² Given that administrative case law clearly states that employees of the client employer, as well as the client employer, are third parties when a TEA is injured, the current mechanisms allow both the client employer and the TEA to transfer costs away from their own account towards accounts of other businesses if either the TEA or the client employer, or their respective employees, are responsible for the accident. It is impossible to transfer costs to the account of the employer responsible for the accident. As it currently stands, providing this mechanism to TEAs and clients in Québec actually offers a competitive edge over employers with standard employment relationships, as they have no equivalent mechanism to transfer costs away from their accounts. Québec law, in this regard, unlike Ontario law, actually provides an incentive to use TEAs.

The exclusive remedy provisions and the triangular employment relationship Canadian WC schemes have precluded tort-based lawsuits by workers against their

employers since the early 20th century and protection extends to all employers covered by a scheme, although exceptions exist in Québec and Ontario legislation when the liable party is an employer other than the employer of record. Contrary to many Australian and US WC schemes, the use of common law tort-based recourse by Canadian workers against their employers is almost unheard of. However, third party employers may sometimes be held liable. In Ontario, Schedule 1 employers (the majority of employers covered under the WSIA, those whose premiums are mutualised) have broader protection from lawsuits brought by employees of other Schedule 1 employers.⁵⁴ By contrast, in Québec, in the context of a triangular employment relationship, the client employer and their employees are third parties in relation to the employee of the TEA, and thus injuries attributable to the tortious behaviour of either may give rise to tort liability. For the first time in many decades, such suits are being filed,⁵⁵ and it is expected that these new developments will force employers (both TEAs and client employers) to subscribe to private insurance over and above WC insurance in order to protect themselves from lawsuits by employees of the other parties involved in the triangular employment relationship. Increased litigation and liability of this type, and the ensuing expenses, are likely to put pressure on WC systems to reduce premiums, given employers may be called on to pay more for private insurance because of the increased opportunity to use loopholes in the exclusive remedy provisions.

Practical problems intrinsic to triangular employment relations

Confusion as to responsibilities of the client employer and the TEA has been well documented in other jurisdictions,² particularly with regard to OSH requirements. The same manifestations of disorganisation also serve to undermine the efficacy of WC legislation, as illustrated in the following examples.

In the context of a triangular employment relationship, workers who believe they are not eligible for WC will fail to claim, and confusion as to eligibility occurs in a variety of circumstances when TEAs are involved. As one worker explained to us, according to her understanding of the law, an injury suffered by a colleague went unreported because the person injured believed he was not working as an employee on the day of the accident:

I mean he... wanted to file a claim. He couldn't file a claim because, of course, the temporary agency got him the job and then they kept him, *hired him on as a subcontractor so he wasn't dealing with the temporary agency any more*. He was getting paid a subcontracting fee with no taxes taken off or anything. So, he couldn't file [for] workman's compensation because there's nothing they can do. (Jillian, Worker FG City 1)

This interpretation of the law is inaccurate, and the injured worker would most probably have been eligible for coverage under the circumstances described. Certainly, the issue as to whether premiums were paid for the work done that day is not relevant to coverage, yet if the worker believes himself to be ineligible, the fact that the legislation actually protects him is of little solace. Other informants also raised this issue, and saw it as one of many ways in which under-reporting was widespread in the TEA sector:

... [some agencies] under-report their payroll, they keep two sets of books, they pay their workers cash... They coerce the workers not to report accidents... They claim that their employees are *independent operators*. (Anna, WC regulator)

This problem appears to be sufficiently pervasive for the largest TEA lobby group to

proactively and publicly discourage their members from such practices.*† One key informant, Jacob, an OSH legal adviser, explained how legal services designed to ensure contractual language that was protective of TEAs and which placed workers as ‘independent contractors’ were more costly than the general advisory services provided by counsel, and that TEAs often sought out such services only after having been sanctioned.

The specific vulnerability of workers who are likely to be employed by TEAs because they have no other choice also affects the likelihood they will report an injury, as underlined by a key informant:

They tell the kid before he ever gets to the hospital: ‘If you tell them it was a workplace injury you’re fired, don’t ever come back here.’ I mean these kids they’re, they’re vulnerable workers. If they’re not kids, they’re from another country and are not here legally, right? And they’re just preyed upon by this, this type of industry... (Arthur, WC regulator)

Even when workers believe they are covered, case law shows that they often report the injury to the ‘wrong’ employer, which delays access to compensation. In one Québec case, the remedy for this delayed declaration was to reopen a worker’s file 18 months after the initial claim, to ensure that the ‘true’ employer had the opportunity to contest his claim.⁵⁷ One worker interviewed in Québec, a truck driver, suffered an accident hundreds of kilometres from home. The client employer, who owned the truck, sent someone to fetch the truck, but neither the TEA nor the client employer was willing to pay for the worker’s transport from the clinic to his home. Eventually his wife picked him up, illustrating how costs absorbed by employers for a century, by reason of explicit legislative requirements of the ‘employer’, are now being transferred back to workers and their families because of the ambiguity as to the identity of the accountable employer.⁵⁸

In a federal system such as that governing WC in Canada, workers can more easily fall between the cracks if TEAs are involved. In a case that was resolved in favour of the worker almost four years after the injury, a worker residing in Québec, employed by a TEA that had its place of business in Ontario, was assigned to work at the federal government of Canada, on the Québec side of the border, where he was injured. Both WC boards declined jurisdiction, with Québec maintaining that the employer had no place of business in Québec, and Ontario maintaining the injury occurred in Québec and affected a Québec resident. After filing repeated claims in both jurisdictions, and seeing his claim jeopardised because of the delays in claiming that occurred as a result of the confusion, the worker was found to have coverage in the final appeal decision rendered in Québec. The tribunal concluded that under the exceptional circumstances of the case, the client employer (the federal government) was the employer of record, and that the accident was thus compensable under the provisions governing federal employees.⁵⁹ Given that the federal government pays, annually, over C\$300,000,000 to TEAs for temporary employment services,⁶⁰ this illustration is perhaps the tip of the iceberg with regard to regulatory failure for these employees.

* See Association of Canadian Search, Employment and Staffing Services (Employer of Record).⁵⁶

† Perhaps an increase in such practices could explain why the market share of TEAs is down in recent years, while the market share of agencies supplying contract labour is on the increase.²⁹

Challenges for WC regulatory effectiveness intrinsic to casual on-call work for a variety of client employers

Not all problematic situations involving TEA workers are attributable to the triangular employment relationship. Some arise because of the very nature of temporary employment, others because workers work in many workplaces for a variety of clients. Three examples illustrate this point: accidents while workers are in transit; the calculation of benefits for temporary employees; and effectiveness of rehabilitation and RTW mechanisms.

Unlike the legal situation in many countries, including France,⁶¹ injuries incurred by workers on their way to and from work are not usually compensable under Canadian law.^{62,63} Exceptions will be made if the nature of the work requires specific transit modalities, as would be the case for home care nurses whose job requires continual transit from one home to the next. Accidents occurring while the TEA employee is travelling to or from a placement, or between the TEA office and the placement, may or may not be covered, depending on the circumstances. These cases fall within a grey zone both in Québec and Ontario, where similar rules apply. Litigation is often required to determine whether the accident arose in the course of employment. If the TEA provides transport, an accident occurring while workers are being transported to the client firm will be compensable.⁶⁴ Equally, if the activity pursued by the worker at the time of the accident is clearly related to the employment relationship, such as reporting to the TEA to get a pay slip, the injury incurred during the activity will also be compensable.⁶⁵ However, an accident occurring between the worker's home and their placement will not be covered.⁶⁶

A second issue of great significance for injured workers is the determination of benefits payable when a WC claim is accepted. The issue is of importance as both WC systems purport to compensate for lost earning capacity and not simply for lost wages, and an inappropriate determination of pre-injury earning capacity can have negative repercussions, in particular for those workers who are permanently disabled because of their work injury. In Québec,⁶⁷ benefits are usually determined on the basis of earnings stipulated in the current contract of the worker, unless the worker can demonstrate that their earnings in the previous 12 months were superior to those deemed to be earned based on the contract in force on the day of the injury. Thus, workers in the standard employment relationship are better protected, because the CSST will determine their wage base by applying the result most favourable to the worker, either on the basis of previous earnings or projected earnings based on the contract in force at the time of the injury. However, less leeway is available in determining the wages of fixed-term employees, and this can adversely affect them. For example, if the worker in a standard employment relationship has just started a new full-time job that pays C\$20 per hour, annual wages will be projected on the basis of that hourly wage and full-time employment for the coming year. However, if the worker is on-call or temporary, the CSST will consider the earnings in the previous 12 months, but will not project the wages earned on the day of the accident to an annual wage. Thus, a temporary worker earning C\$20 an hour on the day of the accident will not be deemed to earn C\$800 a week for the coming year; rather, if the work contract is temporary, actual earnings in the previous 12 months will be used as a basis for calculation. Similar disparities between the level of benefits paid to full-time employees and temporary employees exist in Ontario, although the calculation rules are slightly different and also depend on the duration of disability.⁶³

One important distinction between the two jurisdictions, however, lies in the fact that under Québec legislation (AIAOD, s. 6 and s. 65), annual earnings presumed to reflect any worker's

earning capacity cannot be less than minimum wage for a full-time job occupied all year. Thus, in Québec in 2011, the minimum annual presumed earnings of a worker are C\$19,813, even if actual earnings in the previous 12 months were lower. This provision provides greater protection for the precariously employed, including temporary workers. It is based on the premise that compensation is paid for lost earning capacity, and workers are presumed to be capable of working full-time in Québec, regardless of their current contractual situation. No such minimum exists in Ontario, and several decisions, applying WSIB policy, conclude that a totally disabled worker's benefits should be based on a gross income that falls far below the annual minimum wage.^{68,69}

Although the recent report of the Québec working group called on to reform OSH and WC legislation⁴⁴ recommended reducing the protections of the precariously employed with regard to minimum benefits, unions have resisted this recommendation, which has not been acted on to date.

The third issue of import is that of vocational rehabilitation and RTW. As is the case in other jurisdictions,^{19,22} the situation is problematic for TEA workers for a variety of reasons. If the worker is deemed capable of returning to pre-injury employment within a year (or two, if the employer is larger), the employer in Québec is required to take the worker back. A similar right exists in Ontario if there are at least 20 employees in the workplace and the worker has been employed for a year or more. Ontario policy specifies that TEA employees on the roster for at least one year are eligible for re-employment rights. The TEA is obliged to offer comparable employment to the employee judged fit for pre-injury jobs, and to offer suitable employment for those unable to return to pre-injury jobs. The TEA meets its re-employment obligation under this policy from the moment it adds the name of the worker to the employment placement roster.⁷⁰

The TEA, either in the context of modified work offered before recovery or during a vocational rehabilitation process, may well offer new placements to an injured worker that the worker can no longer turn down with impunity, as would have been possible prior to injury. The factual situations described in the case law show that, after work injury, workers may be sent to work sites far from their homes⁷¹ or offered placements inappropriate to their skill sets. If they decline the offer, they can be sanctioned for failure to co-operate in the RTW process. Issues also arise with workers who have permanent disabilities or functional limitations as a result of their work injury. Québec decisions underline the vulnerability of these workers who are ill equipped to negotiate with different client employers from day to day to arrange working conditions that are compatible with their functional limitations. While the case law is supportive of workers in this regard,^{72,73} it is likely that most workers do not contest the employment proposed in the rehabilitation process. Thus, it becomes easy to end workers' benefits: they will be deemed capable of occupying a full-time job proposed to them, and their initial benefits are based on pre-injury earnings, although there is at least some protection based on minimum benefits as previously discussed. No such protection exists in Ontario, and workers deemed capable of occupying any new job will see the full-time equivalent salary associated with that job subtracted from their benefits, regardless of whether they actually occupy that job. These mechanisms are designed to encourage employers to cut costs by bringing their employees back to work, thus avoiding experience rated benefits. If the employees don't actually go back to gainful employment, but instead are deemed capable of doing so because they return to the TEA roster, the experience rated incentives fail to ensure workers actually return to gainful employment. Finally, because they are on-call, and because the client employer has no obligation to the worker, it is easier for TEAs to justify failure to

reintegrate an injured employee on the basis of client resistance.⁷⁴ A client employer could not refuse to bring back their own employee injured on the job, but they owe no duty to those of the TEA. In turn, the TEA can invoke market forces as a justification if they are called to task for not providing assignments to the injured TEA employee.⁷⁵

In summary, many of the factors discussed in the literature that increase TEA employee vulnerability are illustrated in the case law and interview data with regard to WC. Workers are isolated, do not know their rights, and are more easily targeted for reprisals because they are non-unionised and work on-call. Failure to call a worker back is hard to litigate as a discriminatory practice in a non-unionised context, and Canadian TEAs are very rarely covered by union protections. Some workers clearly feel expendable and uneasy about exercising their rights. When injured, their loss of earning capacity is under-valued, which leads not only to minimal compensation benefits, but also to an underestimation of the worker's needs for occupational rehabilitation, the only requirement being support to help the worker attain pre-injury earnings. As we shall see in the next section, this vulnerability also serves to undermine the effectiveness of prevention mechanisms.

Occupational safety and health legislation

As discussed in the introductory section of this paper, regulatory effectiveness of OSH legislation has been shown to be wanting when applied to TEAs, and our study confirms the gaps in protection in both Québec and Ontario. The situations in each province with regard to OSH differ, and will be described separately. We will thus explore challenges under Québec legislation and then turn to the situation in Ontario.

Québec OSH legislation

OSH legislation in Québec is, in many aspects, weak compared to that in force in other regimes in North America.⁷⁶ In part, this is because the prevention incentives in the province are closely linked to experience rating and WC, and little attention has been paid to OSH legislation in recent years. Despite recommendations for changes in light of the challenges presented by precarious employment,^{42,48} Québec OSH legislation has essentially remained unchanged since 1979. Even with regard to workers in standard employment relationships, much of the legislation is obsolete. Fines, which tripled in 2010, represent a small percentage of maximum fines in other Canadian jurisdictions for the same offences, as can be seen in Table 1.

Furthermore, joint health and safety committees are not mandatory in the vast majority of workplaces, and other prevention mechanisms provided for in the legislation are still not in

Québec	Ontario	Alberta	British Columbia	Federal
C\$3,000	C\$500,000	C\$500,000– C\$1,000,000	C\$618,730	C\$1,000,000

Table 1
Maximum fine in 2011 for corporate non-compliance with an inspector's order (first offence)*

* Québec: Occupational Health and Safety Act, s.236 and 237.1; Ontario: Occupational Health and Safety Act, RSO 1990 c. 0.1, s. 66(2); Alberta: Occupational Health and Safety Act, RSA 2000, c. 0.2, s. 41(1); British Columbia: Workers' Compensation Act RSBC 1996, c. 492, Part 3: Occupational Health and Safety, s. 217; Federal: Canada Labour Code part II, s. 148 (1).

force in most workplaces, even though they were enacted 30 years ago. It is thus not surprising to find that the legislation is ill suited to protecting workers in triangular employment relationships. And, with a few exceptions, the case law suggests that client employers will not be held liable for safety violations involving workers other than their own.* In any case, fines are so low that there are not many prosecutions and no case law was found that specifically examined situations involving TEAs. Results for Ontario, on the other hand, suggest a more proactive inspectorate is trying to use the tools available, which are stronger than those in Québec, to address some of the OSH challenges that arise when TEAs are involved.

Ontario OSH legislation

Unlike the situation in Québec, it is clear in case law and from the interviews that both the TEA and the client employer can be fined for non-compliance with OSH legislation in Ontario.

Problems identified were less often associated with the actual legislative framework, but rather with the practicalities of imposing responsibilities on employers (the TEAs) who have little control over the working conditions. As one key informant suggested:

I don't think they [the client employers] got into this [...] 'replace permanent labour with temporary labour' game to side-step health and safety, I think they did it so that everybody could save a buck but the, the inevitable by-product of having an employer who is not responsible for a workplace is serious health and safety concerns. (Arthur, WC regulator)

The TEA can inspect premises before selling services to the client but cannot control management of the worker thereafter, as illustrated by the concerns expressed by a TEA employer:

I am not out with my 140 people that are out working right now and I can't see what they're being exposed to today and I can't tell you that the person who was hired to put screws in a bag isn't today operating a punch press machine with no guards on it... The customer told me in good faith that we're going to use these folks to put screws in a bag... And... the guy operating the... lathe isn't here today, so Bruce come over here. (Bruce, Temp Agency 12)

An Ontario ethnographic study has shown that multiple constraints limit the ability of workers in a standard employment relationship to exercise their rights to refuse dangerous work.⁷⁷ Gray underlines that 'if someone has difficulty articulating his or her safety concerns, then that person faces a real possibility of not being adequately protected from discipline when they do refuse'.⁷⁸ It is easy to imagine how these challenges are exacerbated for a worker placed in a client's workplace by a TEA. TEAs rely on workers to complain about safety, but complaining can mean unemployment, and the vulnerability of TEA workers is clear:

We have to carry the heavy boxes... Eventually our agency said... next time... let us know... because you're paid only for lighter things. But in that situation you don't want to offend the... agency and also the employer both. (Renshu, Worker FG City 1)

* The Québec Court of Appeal has accepted to hear an appeal on this issue, given the ambiguity of the current legal situation as documented in Lippel & Laflamme³² – see *Sobeys Québec v CSST*, 2011 QCCA 1527.

Joint health and safety committees provide opportunities for workers to have a voice, although these mechanisms do not apply easily to TEA workers, because it is unlikely they will sit on such a committee in a client's workplace, given their transient situation, and also because of the way the legislative requirements are applied. In Ontario, joint health and safety committees are mandatory in workplaces where at least 20 workers are regularly employed,* and recent case law from the Ontario Court of Appeal⁷⁹ has construed the legislation broadly to include independent operators in the calculation of the number of workers in a workplace. This is a positive development as it implicitly suggests that TEA workers in a client's workplace would be counted as workers, even if they were not employees of the client. Arlette, a key informant from the OSH regulator, confirmed this interpretation. However, she also noted that in calculating the number of employees 'regularly employed', the inspectorate does not look to the number of individuals involved, but to the number of positions, and it is unclear how an unfilled position is accounted for. Furthermore if six TEAs consecutively occupy the same position, even in a short period of time, that position counts as that of one employee. A further problem arises in the interpretation of the term 'regularly employed', because of the temporary nature of the placement. As Arlette pointed out: 'If they're coming in on a regularly recurring schedule for a period of three months or more we consider them to be regularly employed.'

Thus, in practice, many individuals can be exposed to the same hazard but yet count as only one person, or perhaps not count at all, for the purpose of evaluating the requirements regarding the creation of a joint health and safety committee. Employees have protections against reprisals, protections that have just recently been strengthened under Bill 160[†] in the light of recommendations made in the Dean Report.⁴³ Moreover, legal support is available from government-financed legal clinics, and complaints are filed on behalf of workers against client employers and TEAs, who often both contribute to financial settlements that are modest in scope.

One challenge for inspectorates is that inspection of the TEA itself is essentially futile. When asked what could be seen in such an inspection, a WC regulator, Anna, replied: 'You normally don't see anything when you go in there because you're in someone's basement.' What is needed, according to others, is for better inspections of client employers using TEAs. However, interviews with Wendell and Arlette, key informants from the OSH regulator, confirmed that there is no targeted inspection plan focusing on clients known to be important consumers of TEA workers.

Furthermore, Jacob, an OSH legal adviser, underlined that audit instruments developed to help employers improve their records are ill adapted to the realities of TEAs, who have less control over the working conditions and find many of the questions irrelevant to their situations.

Some TEA employees interviewed reported providing their own safety equipment and receiving inadequate training. This is corroborated by the concerns of the TEAs themselves,

* s. 9(2) of the Occupational Health and Safety Act, RSO 1990, c. 0-1. S. 1(1) defines a 'worker' as 'a person who provides work or performs services for monetary compensation'.

[†] An Act to amend the Occupational Health and Safety Act and Workplace Safety and Insurance Act, 1997 with respect to occupational health and safety and other matters, S.O. c. 11, 2011. As at the beginning of December 2011, the amendment is not yet in force.

who express frustration when describing how client employers request workers to do relatively benign jobs, and then assign them to do jobs for which they are not trained. Workplace Hazardous Materials Information System training (which is focused on exposure to toxic substances) should be in the hands of the client, as exposures are site-specific, but according to the interview data, this training did not seem to be provided by client employers.

Illustrations in which client employers externalised the more risky work emerged from the interviews. In one example, a health and safety inspector, Joseph, recounted a case involving a TEA employee who was killed doing work the client employer deemed too dangerous for his own employees. A poorly packed container was shipped to the client, who called a TEA to supply labour, and a migrant worker was provided. When the worker was killed, the TEA attempted to deny any employment relationship, until presented with a pay slip found in the worker's clothes at the time of autopsy. The TEA was eventually fined. It filed for bankruptcy and reopened under a new name just down the hall in the same building.

Some informants described how larger client employers sometimes contracted with TEAs to ensure that the TEA would assume the consequences of any accountability targeting the client. In another example provided by Joseph, the health and safety inspector, one employer pleaded guilty while the other saw charges dropped. The latter then reimbursed the employer for the costs of the fine, thus preserving the latter's reputation and the former's bottom line.

Overall, OSH protections are stronger in Ontario than in Québec, both in general and with regard to triangular employment relationships and TEAs. This said, implementation of those protections is as fragile in the Canadian provinces studied here as it is in other jurisdictions reported on in the literature.

Discussion

The comparative analysis of regulatory effectiveness in WC and OSH contexts in Québec and Ontario shows that each system has strengths and weaknesses when it comes to the protection of TEA employees. Both systems also have characteristics that make the use of TEAs attractive to client employers, thus encouraging increasing precariousness of the labour market. It should be remembered that methods used to study the situation in Québec differed from those used to study Ontario, so that the portrait of the situation in Québec may itself be more limited because it is not informed by material drawn from interviews with key informants or workplace actors.

Strengths and weaknesses in protection

An overview of results suggests that the WC framework in Québec provides better social protections for workers employed by or through TEAs than in Ontario, while the Ontario OSH legislation, although still difficult to apply, is better adapted to regulate TEAs and their clients from an OSH perspective. This finding suggests that each jurisdiction, were it to want to improve protection of these workers, could learn from the more favourable aspects of the regulatory framework of the other.

With regard to WC, attention must be paid to the level of benefits and liability for premiums. Smith and colleagues¹³ found that while TEA employees had a higher number of injuries and claims that lasted longer, their claims cost less. This finding is understandable in light of our analysis of benefit calculations for injured workers. In Québec, where all workers, regardless of their current contract, are deemed to be able to work full-time for the minimum wage, compensation benefits will be considerably higher than in Ontario for an identical situation

involving a TEA employee who has not worked full-time all year. This will affect not only the actual benefits, but also the quality of the vocational rehabilitation programme provided to the worker who remains permanently disabled after injury, and the cost of that programme. They still may be undercompensated in relation to their earning capacity in Québec because their floor-level benefits are based on hourly minimum wage, which may underestimate the equivalent full-time earning capacity of a nurse or a truck driver, but they are nonetheless higher than those payable in Ontario, where no minimum applies. Benefits should be based on a minimum gross salary equal to minimum wage for full-time work to better reflect workers' loss of earning capacity.

In terms of liability for premiums, Québec has legislative provisions allowing the CSST to collect from the client employer if the TEA fails to pay the appropriate premiums, unless the client obtains a certificate from the CSST confirming the TEA is up to date with its premiums. This mechanism exists under the WSIA but, as with Québec, the use of the certification process to encourage clients to identify TEAs they are doing business with does not seem to solve the problem of TEAs' undeclared payroll or underestimated premiums. This makes it easier for TEAs to disappear without paying their premiums, as it is unlikely that clients holding certificates will be held liable in these cases. In Ontario, the WSIA (s. 157) provides for recourse against the directors of companies who intentionally violate the Act, although this does not make them personally liable for unpaid premiums, a liability that has existed in Québec since 2011 by virtue of the AIAOD (s. 323.2 to s. 323.5). No current provision of the WSIA allows for the subsequent prosecution of a related employer, which permits TEAs to go bankrupt and reopen with impunity for the new company and their clients. In that same province, client employers will not be held accountable under WSIA for injuries incurred on their premises by TEA employees, purportedly because the WSIA (s. 72) explicitly identifies the TEA as the employer. Ironically, Québec's AIAOD (s. 5) uses the same language, which has not been interpreted to preclude the client employer from being found to be the 'true employer' in some cases.³²

With regard to OSH legislation, the fact that TEAs and client employers can both be held accountable under Ontario OSH legislation provides a clear incentive to both categories of employers to at least appear to reduce hazards and promote prevention. Given the Dean Report's inclusion of TEA workers in the concept of vulnerable workers,⁴³ it could be hoped that clients of TEAs could be targeted for more intensive inspection, although this does not seem to have taken place to date. In Québec, given that OSH legislation applies only to the 'true employer' in most cases, combined with the fact that WC experience rating rules determine the 'true employer' in light of the degree to which control of the worker is exercised by either the TEA or the client, the current situation actually has a perverse effect, encouraging clients to turn a blind eye to any OSH violation or dangerous behaviour involving a TEA. Similar results were found in a US study.⁸⁰

How current regulatory frameworks drive precariousness

Several findings illustrate how the use of TEAs becomes more attractive to clients because of the current regulatory frameworks. Again, each jurisdiction has strengths and weaknesses in this regard.

Experience rating rules in both provinces make use of TEAs attractive to clients and encourage outsourcing of the riskiest work. In both, the employer who exposes the worker to a hazard is not necessarily the employer whose premiums will be increased by experience rating mechanisms. In Québec, both the TEA and the client can externalise costs to the

general fund because of a gaping loophole in cost transfer mechanisms applicable to accidents attributable to third parties. Undermining experience rating as an incentive is particularly problematic in Québec, given the weakness of the OSH legislation and the very low maximum fines provided for. In Ontario, there is no flexibility in the current system that would allow the WSIB to impute costs to the client employer, unless the TEA itself seeks redress, which they are loathe to do for fear of losing business. As explained, even if costs are attributed to the employer best able to prevent the injury, the costs of hurting a TEA worker are lower than those of hurting a worker in a standard employment relationship, and this is particularly true in Ontario. Current compensation rules encourage the hiring of temporary and part-time workers for the most dangerous work. This behaviour is totally unregulated in both jurisdictions, contrary to the situation in some European countries²¹ such as France, where section D4154-1 of the *Labour Code* identifies 27 substances that temporary workers are not allowed to work with.

The joint liability of client firms and TEAs should be considered for all obligations under both WC and OSH legislation, and the personal liability of directors remains uneven, depending on the nature of unmet obligations of the TEA, and needs to be examined in both jurisdictions with regard to all economic obligations including the payment of premiums and fines. Similar recommendations have been made in Australia²² and joint liability for OSH violations already exists in some Australian and European states.²¹ Several jurisdictions overseas,²¹ as well as the Canadian province of Manitoba, have introduced licensing requirements that may contribute to reduce some of the problems identified in our study, notably with regard to insolvency. Without stronger legal provisions holding accountable those who are responsible, WC and OSH systems in Canada will remain vulnerable to stratagems that undermine their mandates.

Conclusions

Much has been written about the way in which TEAs promote flexibility and allow client employers to preserve a good relationship with their core employees while externalising working conditions and organisational behaviour to which they are reticent to expose core employees.⁸¹⁻⁸³ When TEAs manage claims contestations, core relationships are protected, which may explain why WC contestations are more frequent when TEAs are involved.^{13,24}

For a variety of both sociolegal and technical reasons examined in this paper, workers in temporary employment relationships, as is the case with the newly self-employed and other precariously employed workers, may well be more easily exposed to dangerous working conditions and also bear the costs of injuries that were historically borne by those who use their labour. Is this to say that OSH and WC regulatory frameworks are ineffective? As Bernstein and colleagues have noted, the answer to this question depends on the legislative intent.⁴⁷ Are Canadian lawmakers intentionally and passively allowing *de facto* deregulation to ensure business benefits from greater flexibility and competitiveness, or are they sincerely interested in protecting workers' health and ensuring they receive fair compensation? If the latter is the true intent, then legislative reform is needed.

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