



# Submission by the Public Service Alliance of Canada to the Newfoundland and Labrador Workplace Health, Safety and Compensation 2020 Statutory Review Committee

October 8, 2020



## Introduction

The Public Service Alliance of Canada represents more than 180,000 workers in every province and territory in Canada and in locations around the world. Our members work for federal government departments and agencies, Crown Corporations, universities, casinos, community services agencies, Aboriginal communities, airports, and the security sector among others. Almost two-thirds of our members are women. PSAC is headquartered in Ottawa with 23 regional offices across Canada.

The Atlantic Region represents almost 20,000 members organized in 206 locals. Our members in Atlantic Canada work in large and small communities throughout the region. Most of our members work for the federal government, agencies, and/or crown corporations and an increasing number work in the private and community services sectors. We preserve Canada's natural and historic heritage, collect statistics for the business community, maintain airport runways and navigation systems, provide public safety, monitor fish stocks, administer pensions and employment insurance, respond to emergencies at airports and at sea, help new Canadians get settled, make sure your food is safe to eat, support veterans and their families, send you your tax refund and provide a safe refuge for abused women and their children. We do all this, and more.

The Atlantic Region is serviced by four Regional Offices located in St. John's, Charlottetown, Moncton and Halifax.

We appreciate this opportunity to provide our views and recommendations to the Newfoundland and Labrador Workplace Health, Safety and Compensation 2020 Statutory Review Committee. PSAC stands in solidarity with the Newfoundland and Labrador Federation of Labour (NLFL) and agrees with the entirety of its submission to the Statutory Review Committee. Like the NLFL, PSAC welcomes the pro-active prevention efforts from Workplace NL (WPNL), aimed at making workplaces as safe as they can be for all workers. Success stories should be publicly shared as widely as possible. And when we don't succeed, we expect prevention efforts to penalize rigorously any negligent employers for failing to ensure their employees' well-being. This too should be public knowledge. Finally, for those workers injured and made ill at work, we expect WPNL to fully and appropriately support them and their families.

In line with the NLFL, PSAC believes the current compensation system needs to improve, so as to better serve those workers who become injured, ill or disabled by their work. Our submission outlines our concerns and provides a series of concrete recommendations covering primary prevention along with suggestions for legislative amendments to improve compensation benefits, programs and supports.

Overall, the PSAC supports the position of the NLFL that the workers' compensation system seems too focused on decreasing the number of compensation claims and employer assessment rates, and less on safer workplaces and healthy workers. WPNL could demonstrate more effectively how workers are better protected and supported,

from prevention through to return to work and - where necessary - longer term disability benefits. We believe this can be achieved through a robust prevention plan that embraces meaningful changes in policies and practices, strong surveillance and rigorous evaluation. The financial sustainability of workers' compensation is best served through effective injury prevention. Safer workplaces and lower injuries will result in a reduce number of claims and a healthier bottom line.

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## General comments

### Putting the squeeze on injured workers

From 1914 to the late 1980s, workers compensation laws and practices continued to improve in each Canadian province. Waiting periods were eliminated. Benefits levels were increased. More occupational diseases were recognized. Inflation indexing of pensions was introduced. Independent appeal systems were established. Formerly secret compensation board policies and decisions were published and both transparency and prevention increased.

Many of these improvements came about because Unions fought for them along side injured workers and their families. Widows camped out on the steps of provincial legislatures; injured workers groups demonstrated repeatedly; newspapers, radio and television carried stories about injustice to workers with disabilities; and unions lobbied for improved benefits. These efforts resulted in ongoing positive improvements to the workers' compensation system.

Thirty years ago, during the 1990s, for the first time in Canadian history, the workers' compensation system came under attack. For Federal Public Sector workers in Newfoundland and Labrador (NL), attacks were extremely evident with the introduction of Provincial Government austerity measures introduced in 1993. NL became the only Province in Canada that denied our Federal Public sector workers 'Top Up' and Collective Agreement benefits. All administrative fees and compensation costs are currently paid for by the Federal Workers Compensation Service. This has meant thirty years of not just hurting injured Federal Public Sector workers, but also hurting provincial businesses and the provincial economy.

### Surplus Allocation

According to Workers' Compensation Acts, the WCBs must set aside all the money needed to pay for future pension costs (the future liability) of disabled workers' claims in the year they occur (or when the pension is calculated). Should the compensation boards fail to set aside the amount required for all such claims, the WCB is said to have an *unfunded liability*. Should the compensation boards set aside too much money, the WCB is said to have a *surplus*, as has been the case in Newfoundland and Labrador. If the right amount of money is set aside, the WCB is said to be *fully funded*.

If assessments rates are set high enough, there is no unfunded liability or, at worst, a temporary small unfunded liability. Unfortunately, some Boards have had their assessment rates set too low for years as employers have successfully lobbied governments and WCBs to keep their assessment rates low.

Although there is clearly no unfunded liability in Newfoundland and Labrador, the current choice to lower premiums during a surplus rather than invest in improved rehabilitation, workers education, increased staffing at the Office of the Worker Advisor, or prevention sends an unfortunate message. Currently, such draconian compensation measures are not found in any other jurisdiction in Canada. But despite the current surplus - rather than improve the lives of injured workers - employer needs are prioritized over those of workers.

**Recommendation No. 1 – Harmonize the benefits levels with every other jurisdiction of Canada and allow injury on duty leave with no cap on insurable earnings and up to 100% top up, as received by PSAC members in every jurisdiction across Canada.**

Top up agreements are found in many collective agreements negotiated by unions, including the one between the PSAC and Treasury Board of Canada. They compel employers to make up the difference between benefits awarded by the provincial workers' compensation acts and the injured worker's full salary.

Section 81.1 of the Workplace Health, Safety & Compensation Act of Newfoundland and Labrador<sup>1</sup> imposes such a prohibition on any agreement between an employer and an injured worker. Accordingly, amendments have been made to the income tax system to change the application of the Newfoundland and Labrador income tax provisions. This situation, exclusive to the Workplace Health, Safety & Compensation Act of Newfoundland and Labrador, creates regional disparities among PSAC members working for the Federal Government.

Injury-on-duty leave provisions found in our collective agreements were achieved by our union by collectively bargaining all our pay, conditions of employment and benefits. We achieved injury-on-duty leave by giving up other possible gains at the collective bargaining table. Our employer agreed that it was the fair thing to do. We gave up other possible gains in pay and benefits to better protect our injured members. This language represents a historical collective bargaining trade-off that we are proud to offer PSAC members employed in the Federal Government.

We strongly recommend that section 81.1 of the Workplace Health, Safety and Compensation Act of Newfoundland and Labrador be repealed to harmonize the benefit levels with every other jurisdiction of Canada and allow injury-on-duty leave with no cap on insurable earnings and up to 100% top up, as received by PSAC members in every jurisdiction across Canada.

**Recommendation No. 2 - Chronic Stress, including vicarious trauma, should be recognized as a Compensable Injury - USJE report and research on Vicarious Trauma**

We believe that the WHSC Act should extend its definition and include specific provisions to ensure that all workers have coverage for chronic stress. All provincial workers' compensation boards recognize post-traumatic stress and we believe that the WHSCA should go beyond this baseline coverage by following the lead of many other jurisdictions in extending their coverage to include chronic stress.

In addition, while the near constant exposure to trauma on frontline workers such as police, paramedics, nurses and firefighters is widely-recognized, public safety and

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<sup>1</sup> [https://www.assembly.nl.ca/Legislation/sr/statutes/w11.htm#81\\_1](https://www.assembly.nl.ca/Legislation/sr/statutes/w11.htm#81_1)

justice workers in Newfoundland and Labrador are disproportionately affected by exposure to second-hand trauma. These include parole officers, teachers and others working in federal prisons, and employees in RCMP detachments, federal courts and the Parole Board of Canada who receive little recognition for their injuries<sup>2</sup>.

Ultimately, the legislation must set out the express conditions that need to be met in order for a worker to be entitled to receive compensation benefits for chronic stress. A fundamental purpose of the system is to compensate all “truly work-caused” claims, so where chronic stress can be proven to be “work-caused” it should be compensated. We strongly recommend that the WHSCA should follow suit with some of the most progressive provinces, notably PEI and Manitoba which recognize PTSD coverage for all, not simply first responders, and extend their coverage to include chronic workplace stress.

### **Recommendation No. 3 – Establish a Newfoundland and Labrador Occupational Health Clinic for Workers**

The proposed Occupational Health Clinics for workers in Newfoundland and Labrador could vastly increase the availability to workers of independent medical assessments, including occupational histories and physical examinations by occupational health specialists, and medical monitoring of workers exposed to hazardous substances. In addition, establishing Occupational Health Clinics for workers in Newfoundland and Labrador will contribute to improved industrial hygiene standards which will protect workers. Furthermore, the clinics themselves serve as sources of data for epidemiological studies to determine the relationship between work hazards and diseases in Newfoundland and Labrador.

Ontario workers have benefited for thirty years from occupational health clinics for workers. Throughout the 1970s and 1980s workers in Ontario became increasingly aware of the toll of injury and disease caused by dangerous and unhealthy working conditions. There was a desperate need for more effective diagnosis of work-related health problems as well as effective prevention strategies. The Occupational Health Clinics for Ontario Workers (OHCOW) was established in 1989 by the Ontario Federation of Labour (OFL) and is funded through the Ontario Ministry of Labour (MOL)<sup>3</sup>. The first clinic opened in 1989 in Hamilton, with subsequent clinics opened in Toronto, Windsor, Sudbury, Sarnia, Thunder Bay and more recently Ottawa and a satellite office in Peterborough.

The Ontario Occupational Health Clinics are lead by an inter-disciplinary team of nurses, hygienists, ergonomists, researchers, client service coordinators and contracted

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<sup>2</sup> <http://www.usje-sesj.com/en/psychological-trauma-widespread-in-federal-public-safety-employees>

<sup>3</sup> <https://www.ohcow.on.ca/about.html>



physicians, each OHCOW clinic provides comprehensive occupational health services and information in five areas<sup>4</sup>:

- An inquiry service to answer work-related health and safety questions;
- Medical diagnostic services for workers who may have work-related health problems;
- Group service for workplace health and safety committees and groups of workers;
- Outreach and education to increase awareness of health and safety issues, and promote prevention strategies, and
- A research service to investigate and report on illnesses and injuries.

**Recommendation No. 4 - Unions representatives must be adequately trained to represent workers – there is a lack of education on appeals training. Ontario has courses under the WHSC to train union staff and members to provide training on representation at all levels of the appeal process. The Office of the Worker Advisor should provide such training to provide proper representation.**

The worker advocates are only doing first level appeals. Lack of education for union representatives to support appeals is a major challenge.

The appeals panel or Workplace Health, Safety and Compensation Review Division (WHSCRD), currently does not have a provision for worker advisors or representatives to represent injured workers at external review hearings. The decision of the WHSCRD is the final level of review provided in the Act. As a quasi-judicial body, the WHSCRD reviews final decisions of Workplace NL for errors in the application of legislation, regulations, and policies under the authority of the Act.

Throughout an injured worker's case, worker advisors and representatives guide injured workers while having an in-depth knowledge of the process, legislation, regulations, and policies under the Act. At the final review process, these workers have to defend themselves or challenge comprehensive legislation, regulations, and policies on their own behalf. Injured worker representation at this final stage is critical to assist with the interpretation of such legislation, regulations, and policies. Employer advisors do not provide employer representation either, but employers have the ability and capacity to obtain legal representation to appear on their behalf. Tipping the scales to a more favourable decision for the employer leaves injured workers in a precarious position without proper representation.

The vast majority of injured workers cannot afford to originate an application to the Supreme Court of Newfoundland and Labrador following a dissatisfied WHSCRD decision.

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<sup>4</sup> <https://www.ohcow.on.ca/about.html>

### **Recommendation No. 5 - Labour Market re-entry can be challenging, particularly in isolated areas**

Return to work programs are meant to facilitate an injured or ill worker's return to their pre-leave employment, with an appropriate transition period, when the worker is ready to return to work. The goal of a return to work process should be to ensure that tasks and duties assigned to the worker are meaningful and productive and have value for the worker and employer. The return to work should have a rehabilitative focus.

If pre-leave employment is not an option, then a hierarchy of return to work options should be respected: (1) same job; (2) modified job; (3) different job-same workplace; (4) similar job-different workplace; (5) different job-different workplace. The objective is to minimize hardship (financial and emotional), as well as respecting the dignity of the person (performing meaningful work).

Unfortunately, in isolated areas of Newfoundland and Labrador, Labour Market re-entry can be challenging. Return to work programs should be seen as transitional and for a fixed duration. Permanent measures to support a worker who has a permanent disability are best framed as accommodation measures, as opposed to return to work measures. These measures need to fall in line with the provincial duty to accommodate provisions, as well as provincial and federal human rights acts.

### **Recommendation No 6 - Presumptive compensation coverage for front line workers exposed to viruses and communicable diseases**

Workers' compensation in Newfoundland and Labrador should include coverage for front-line essential service workers who are exposed to viruses and communicable diseases. It should include coverage for pandemics such as the current unprecedented COVID-19 crisis and could follow a model similar to the PTSD legislation so that the proposed presumptive workplace virus and communicable diseases legislation would need to cover all workers and not solely first responders or grocery store workers, but instead potentially all front-line workers exposed to viruses and communicable diseases.

### **Recommendation No 7 - Firefighter presumptive cancer legislation in line with the Yukon**

On behalf of PSAC, we invite you to take measures to ensure that the presumption clauses for cancer in firefighters in Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act* be expanded to cover the same range of occupational cancers that firefighters receive in the Yukon territory. Currently PSAC federal firefighters are working in a number of provinces and territories and yet they are not evenly compensated. Currently in the Yukon, firefighters presumptive clauses cover

cases of leukemia, non-Hodgkin's lymphoma, bladder cancer, brain cancer, colorectal cancer, esophageal cancer, kidney cancer, lung cancer, testicular cancer, ureter cancer, or any prescribed form of cancer. Meanwhile, in Newfoundland and Labrador, presumptive compensation for firefighters covers brain, breast, bladder, colorectal, esophageal, kidney, lung, testicular and ureter cancers, as well as leukemia and non-Hodgkins lymphoma. It is recommended that the presumptive legislation for firefighters be expanded to include any prescribed form of cancer.

**Recommendation No 8 - ensuring workers compensation calculations assume earning capacity not solely based on pre-injury earnings; specifically calculate using at least full-time minimum wage so injured precarious workers aren't sentenced to poverty.**

It is crucial that non-unionized workers and precarious workers working multiple jobs are not failed by the compensation system. PSAC strongly recommends that Newfoundland and Labrador ensure that workers compensation calculations assume earning capacity not solely based on pre-injury earnings. If a worker works 40 hour per week, divided between five employers and is injured at one of their five jobs, they will receive compensation based on their earnings for only that one employer, no matter how low the level of compensation. These calculations can sentence workers to a lifetime of poverty<sup>5</sup>. Instead, as is the case in Quebec, it is recommended that calculations be based on at least full-time minimum wage hours.

**Recommendation No 9 – Address claim suppression and address employers who are gaming the compensation system.**

The Labour movement has been highlighting for some time the issue of claim suppression - a euphemism for employers gaming the system. We have significant suspicions that some employers in the province suppress injury claims by hiding claims from the start. This type of suppression could be soft and subtle, such as when an employer continues to pay wages to an injured worker who is not working due to a job-related injury; or malicious, such as when employers resort to threatening and bullying employees to deter them from filing time-loss claims or coercing them to withdraw such claims after they have been filed.

Across Canada, many studies point to significant under-reporting of workplace-related injury, illness and death statistics. From a financial perspective, under-reporting means that funding for medical costs that should be paid for by workers' compensation boards are actually paid by the provincial governments. From a preventive medical perspective, employers are not aware of the full cost of injuries and illness that occur in their

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<sup>5</sup> PSAC has prepared a video on this topic and precarious work, which is available here.  
<http://psacunion.ca/these-jobs-can-be-good-jobs>

workplace, and thus they may not invest adequately in preventive health and safety measures.

Employers are guided by injury and illness statistics in designing and implementing workplace health and safety programs, and if employers are not fully aware of the events that occur in their workplace, preventive efforts may become less of a priority. This is particularly important with respect to occupational illnesses, because the timely identification of causal factors for illnesses can have a drastic effect on individual outcomes.

The employer is legally responsible for reporting work-related injuries. However, the incentives for *not* reporting a work-related injury or illness make this avenue potentially unreliable. Thus, it is often up to the employee to file his or her claim. There are many reasons an employee might decide not to file a claim, ranging from fear of reprisal and social stigma to a lack of understanding of the compensation system.

It is recommended that the WCB of Newfoundland and Labrador launch an education and awareness campaign to inform employers and employees about its workers' compensation system and consider implementing the following measures:

- Identifying workers and employers who do not comply;
- Educating workers on navigating the system<sup>6</sup>, as is done in Nova Scotia;
- Issuing substantive fines to employers; and
- Increasing the current administrative penalty.

In jurisdictions across Canada, labour leaders charge that the Experience Rating system is flawed and can do the opposite of what it was mandated to do, which is to prevent accidents and injuries in the workplace and help injured workers. Instead, the current rate model operates on an incentive system based on the number of claims submitted: the fewer claims, the cheaper the rate.

Consequently, a segment of employers suppresses claims, even though the practice is illegal. Some do so through direct threats and coercion, while others adopt a lighter touch by offering gift cards and free pizza lunches to their staff if they meet established time periods in which no time is lost due to workplace injuries.

Suppressing injury claims has adverse repercussions on both injured workers and workplaces. A worker might experience a seemingly innocuous injury that has a delayed side effect, but if the initial injury was never reported, he or she runs the risk of not being eligible for compensation if the injury worsens and becomes critical.

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<sup>6</sup> Understanding the system, how to complete claim forms, how to file an appeal, how to support a worker throughout the appeals process, destigmatizing workers' compensation.

Further, an unreported injury means that the underlying cause that triggered the incident resulting in the injury was never addressed and rectified, thereby putting other employees at risk. Finally, claim suppression is not fair to employers who play by the rules and end up paying more than those who beat the system.

## Conclusion

We appreciate this opportunity to provide our views and recommendations to the Newfoundland and Labrador Workplace Health, Safety and Compensation 2020 Statutory Review Committee.

PSAC stands in solidarity with the Newfoundland and Labrador Federation of Labour and agrees with the entirety of the NLFL submission to the Statutory Review Committee, *Fairness, Transparency and Accountability*.

In addition, due to the practical limitations associated with the current pandemic, we would be more than happy to arrange a virtual meeting or conference call at the Committee's convenience.