

# Workers' compensation for asbestos related disease in Canada



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Research funded by CPAC and OHCOW

Vancouver, May 14<sup>th</sup>, 2010

# Outline

- -Project objectives and methods
- -Cross cutting issues
  - Common approaches
  - Divergent approaches
  - Specific issues in B.C.
- Concerns and challenges
- Next steps for research and policy

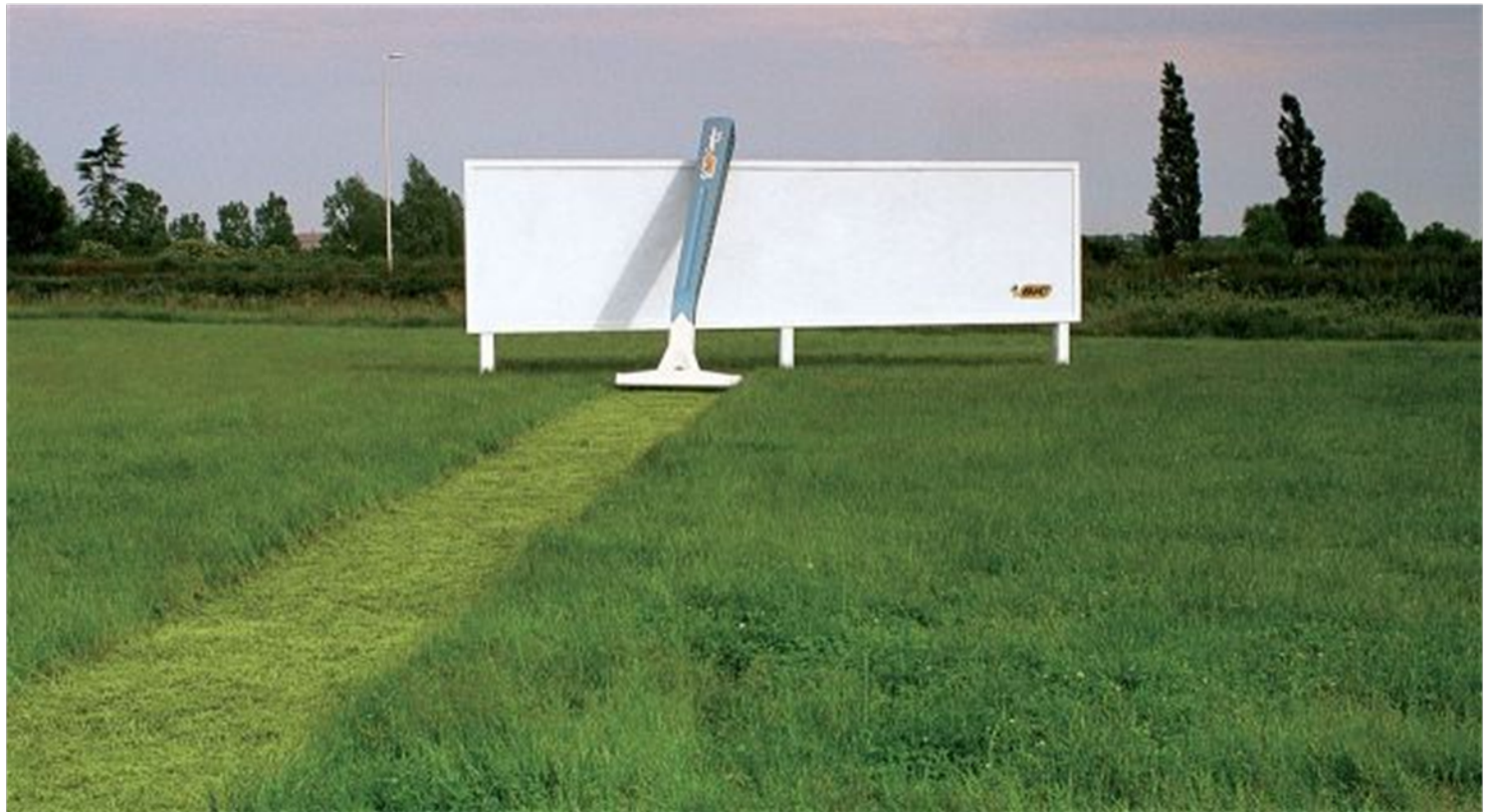
# Overview of objectives and methods

- Describe legislation, policy and case law regarding compensation for work-related illness attributable to asbestos exposure
- Classic legal analysis
  - Current law and policy
  - Case law: 2000-2009
    - Key words: asbestos/amiante
    - Entitlement issues only
- Consultations with key informants
- Data from AWCBC
  - 1998-2008

# Overview of objectives and methods

- Alberta
- British Columbia
- Newfoundland
- Ontario
- Québec
  - Legislation but no official policy
  - Particular medical screening and evaluation

# Cross-cutting issues



# Preponderance of evidence, not scientific certainty

- Determination of work-relatedness requires that the preponderance of evidence support the conclusion that asbestos exposure at work was a significant contributing factor in the onset of disease
- All jurisdictions give the benefit of the doubt to the worker
- Legislative presumptions facilitate the recognition of a claim if the associated criteria in law or policy are proven to apply in the worker's case

# Diseases presumed to be related to asbestos

	Asbestosis	Mesothelioma	Lung cancer	G.I. Cancer	Cancer of Larynx/pharynx
Al.	x				
B.C.	x	x	x	x	x
Nfld.	<b>X</b>	x	x	X (policy only)	X (policy only)
Ont.	<b>X</b>	<b>X</b>	X (policy only)	X (policy only)	X (policy only)
Qc.	x	x	x		Case law only

**X: irrefutable presumption if conditions apply**

# Territorial requirements

- All provinces require some evidence that exposure occurred within the province, but there is significant variation in what this means
- B.C. s. 6(10): worker must have been free from pneumoconiosis before first exposure in B.C.
  - -resident of B.C. for 3 years preceding disablement or at least 2/3 of the worker's exposure in B.C.; at least 3 years exposure in B.C. unless not exposed elsewhere.
- Ontario: at least two years exposure in Ontario, for asbestosis but not for mesothelioma



# Temporal requirements : work in the industry

- Some provinces require activity in the industry in the province at the time of disablement or in the 12 months preceding disablement
- **Example: asbestosis**
  - Alberta
  - B.C.
  - Newfoundland

# Temporal requirements : Exposure and latency

- Exposure and latency requirements vary between provinces for the same disease
- **Example: lung cancer**
  - Ont: 10 years exposure, 10 years latency
  - Nfld: 5 years exposure, 10 years latency

# Lung cancer: policy and practice

- Lung cancer is presumed to be related to asbestos exposure if
  - B.C.: asbestosis or fibrosis
  - Nfld: 5 years exposure, 10 years latency
  - Ontario: 10 years exposure, 10 years latency
  - Québec: no explicit policy
- Practice: non smokers
  - Claims by non-smokers will be accepted despite absence of asbestosis
  - If asbestosis and smokers
    - Claims will be accepted when criteria are met or almost met
  - No asbestosis in smokers
    - claims have been accepted in Ontario and Québec, if there is evidence of very significant and intense exposure

# Specific issues in B.C.

- Legislative/policy provisions favouring access to compensation
  - Broad range of scheduled diseases
  - Employment has to be of causative significance; not necessarily the predominant cause
  - Workers do not bear the burden of proof (26.22 pol.)
  - If the weight of the evidence is roughly equally balanced, causation will be acknowledged.
  - Evidence of disability unnecessary for acceptance of claim for asbestosis/pneumoconiosis (29.40 pol.)

- Legislative/policy provisions less favourable to access to compensation
  - Presumptions apply when active in industry (pneumoconiosis/asbestosis) s. 6(3)W.C.A., thus vast majority of accepted claims adjudicated under s. 6(1)
  - B.C. in province exposure requirements more stringent than those applied elsewhere, although the consequences may be mitigated by the Inter-jurisdictional agreement on workers' compensation
  - B. C. lung cancer presumption distinct from that in other provinces

# If the criteria are not met

- Compensation is available on the basis of the individual merit of each case
- Decision makers in those provinces with stringent criteria in policy are often reticent to accept claims that don't meet policy requirements
- Preponderant evidence of exposure and medical evidence regarding diagnosis and disability is required for a claim to be accepted

# B.C. in province exposure requirements: asbestosis (s.6(10) WCA)

- ➔ When a worker has sustained pulmonary injury by a disabling form of pneumoconiosis as a result of exposure to dust conditions that are deemed by the Board to have contributed to the development of the disease in employment in the Province in an industry in which that disease is an occupational disease under this Part, **the worker or the worker's dependants is or are entitled to compensation**
- ➔ only if the worker was free from pneumoconiosis and tuberculosis before being first exposed to those dust conditions in the Province, and
- ➔ the worker has been a resident of the Province for a period of at least 3 years last preceding the disablement, or unless at least 2/3 of the worker's exposure to dust containing [asbestos] was in the Province;

## B.C. in province exposure requirements: Policy #112.31

- If the exposure within the province is not significant, the Board will not accept responsibility for the claim, subject to the terms of any inter-jurisdictional agreement. If the exposure within the province is significant, the Board will accept responsibility of the whole of the worker's problem. There will, in general, be no apportionment of liability. The worker may, however, be required to elect to claim in this province under section 9(1). Where the Board is accepting full responsibility for the condition, the worker cannot claim in both this province and another province or country.

# Ontario in-province exposure requirements

## For irrefutable presumption to apply

Asbestosis in workers exposed to asbestos dust in Ontario employment is an occupational disease as peculiar to and characteristic of a process, trade or occupation involving exposure to asbestos.

If the worker was employed in Ontario in any mining, milling, manufacturing, assembling, construction, repair, alteration, maintenance or demolition process involving the generation of airborne asbestos fibers for **at least 2 years before the date of diagnosis** of asbestosis, the asbestosis is conclusively deemed to have been due to the nature of the employment.

## Without presumptions

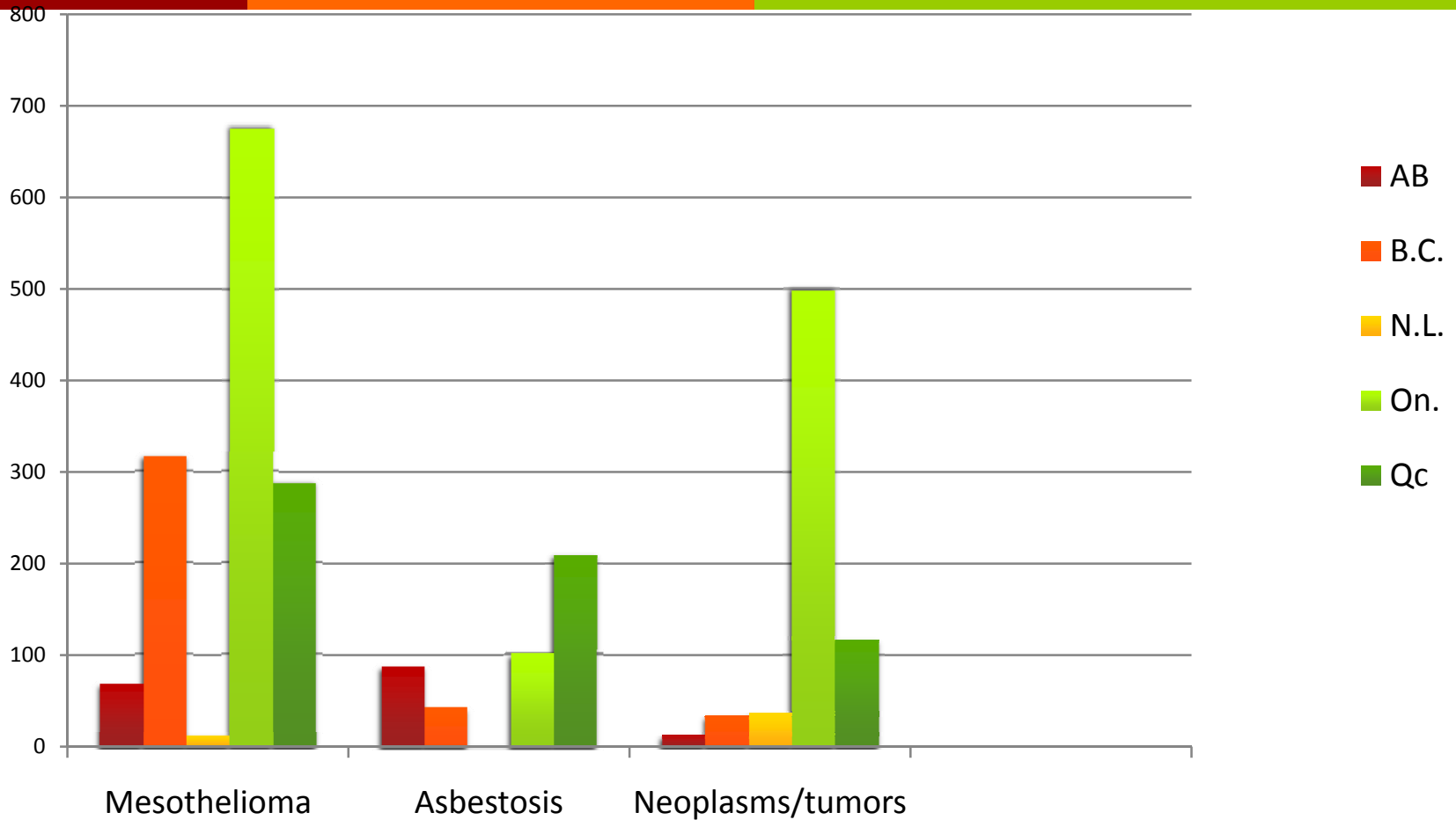
Exposure in Ontario must be a significant contributing factor:

Out-of-province exposure can be seen in some cases as something that makes a worker more susceptible to development of lung cancer as a result of exposure in Ontario. However, that argument is premised on the worker being further exposed in Ontario and on the Ontario exposure being a significant contributing factor to the occupational disease.

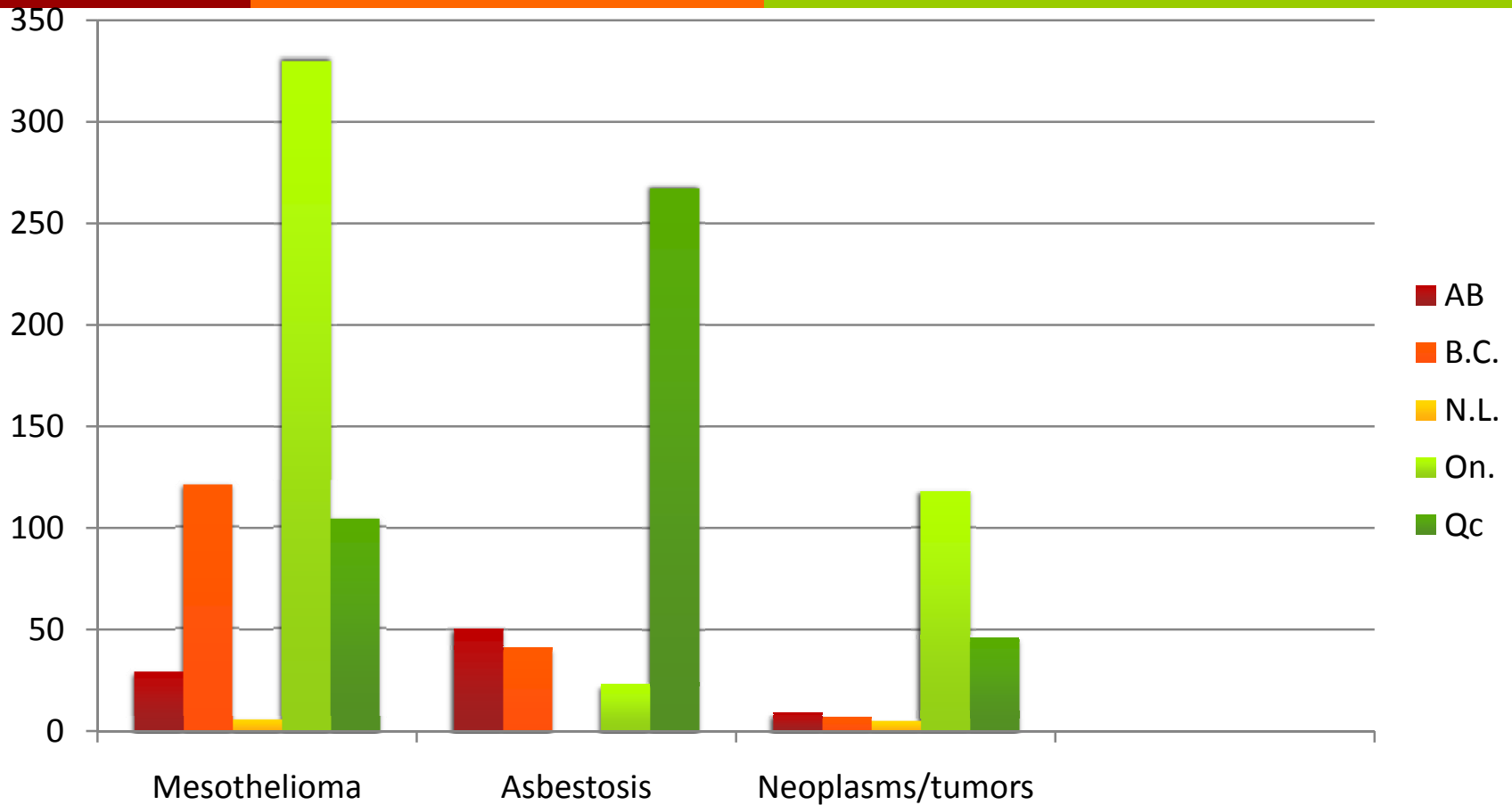
If Ontario exposure alone is insufficient to meet usual exposure requirements, prior non-Ontario exposure will be considered to allow the claim.



# Fatality compensation : AWCBC 1998-2008



# Injury compensation: AWCBC 1998-2008



# Equity related concerns



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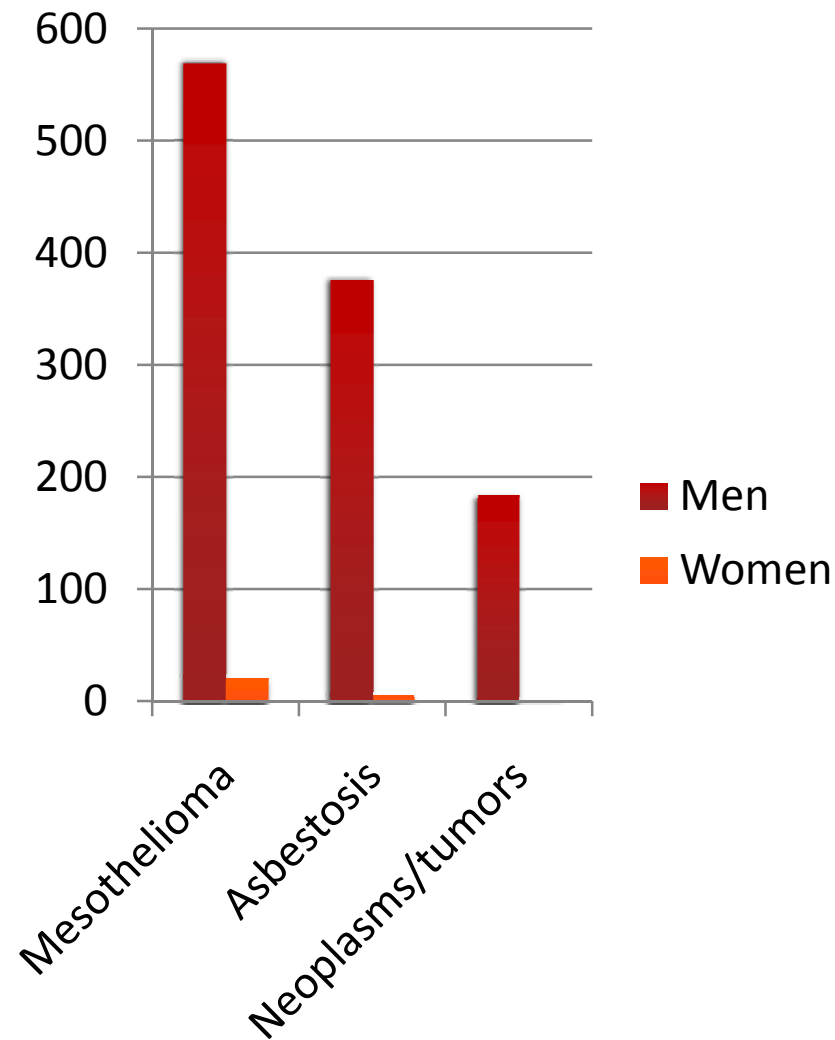
- Policy seems to be predicated on scientific certainty with regard to exposure and latency requirements and with regard to diagnostic requirements.
- Yet workers should be compensated if it's more likely than not that asbestos caused their disease
- Free access to several specialists who can provide accurate diagnoses and analyses is not available in all provinces.

# Gender issues

Compensation for injuries in all  
5 jurisdictions

1998-2008

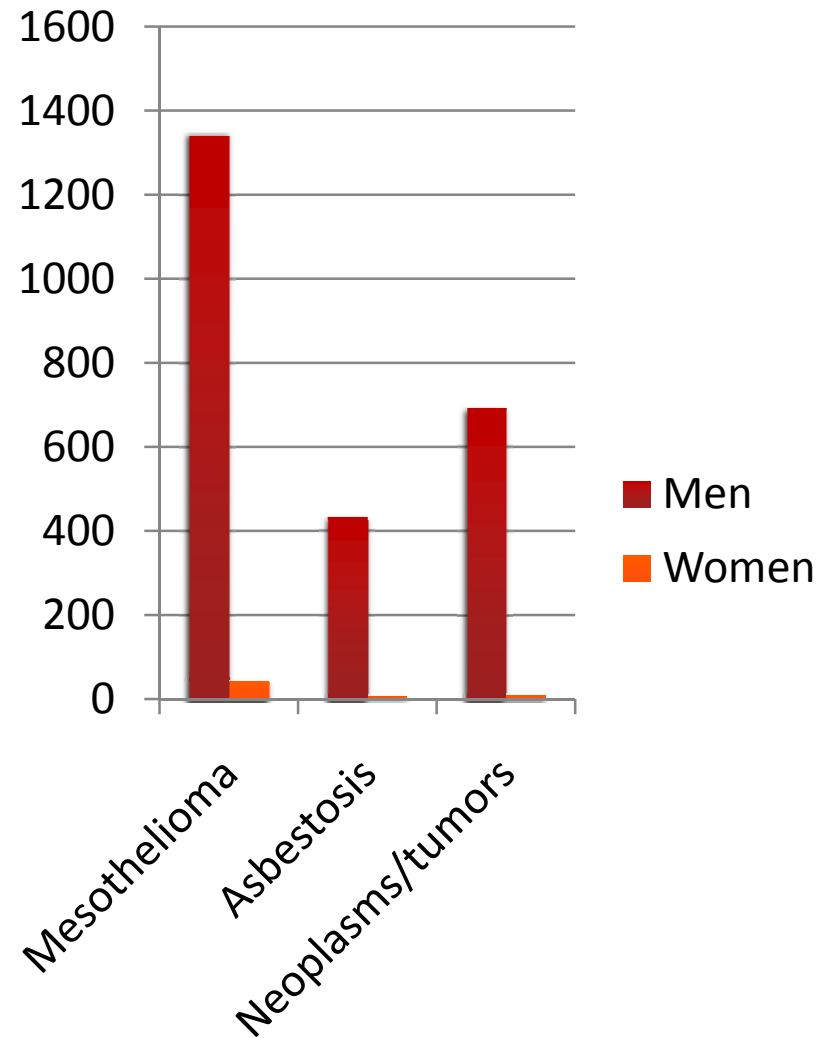
Source: AWCBC, January 2010



# Gender issues

Compensation for fatalities in all 5 jurisdictions

1998-2008



Source: AWCBC, January 2010

# Politically related concerns

## Chrysotile arguments

- Employer counsel and expert witnesses have (unsuccessfully) drawn attention to the type of asbestos in order to question workers' claims
- Chrysotile asbestos is less bio-persistent, which the tribunal uses as an explanation for the low number of fibres in the worker's lung tissue (claim accepted)
- Chrysotile asbestos is discussed in the Helsinki criteria, and those criteria are being applied by several decision makers.

# Study limitations

- Team composed of jurists
- No analysis of the legitimacy of the medical or scientific discourse reflected in the decisions
- Methods used explain why little information on the day-to-day application of the legislation by the Boards themselves is provided in the study



# Issues for further study

- This study does not address under-reporting and claim denial at the level of the adjudicator.
- The Helsinki criteria are discussed in case law and may provide an interesting avenue for modernisation of policy requirements.
- Asbestos registries do not exist in many of the provinces studied, an impediment to documentation of worker exposure to asbestos