

Workers' Compensation for Occupational Disease: Medicolegal Challenges

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Presentation outline

- Learning objectives
- Overview of workers' compensation systems
- Provisions specific to compensation for occupational disease
- Level of evidence required for compensation
 - According to law
 - To be included in a policy?
- Challenges moving forward

I cannot identify any conflict of interest

Learning objectives

- Understand the differences between a scientific question and a question to be answered by a tribunal in a medicolegal context
- Understand the role of regulatory provisions relating to recognition of occupational disease in the context of workers' compensation claims
- Understand some of the rules applicable to adjudication of occupational disease claims in workers' compensation legislation in some Canadian jurisdictions and elements of the history leading up to the adoption of those rules

Workers' compensation commonalities: The «Historic compromise»

- Roots of workers' compensation systems
 - Bismarck and beyond
 - No-Fault workers' compensation systems
 - Funded exclusively by employers
 - Employers receive broad protection from law suits brought by their employees and other workers
 - Similar definitions of compensable accidents
 - Variations in compensable diseases
 - Access to health care paid by compensation fund
 - Capped benefits
 - Rehabilitation and return to work mechanisms
 - Benefits to survivors in cases of fatalities

Legal framework governing workers' compensation for occupational disease

- Workers' compensation characteristics
 - Exclusive jurisdiction of administrative body (WSIB/WSBC/CNESST) and specialized tribunals in appeal (WSIAT/WCAT/TAT)
 - Experience rating rules differ in each jurisdiction
 - Interpreted in favour of the claimant (benefit of the doubt)

Law and science: un dialogue de sourds

Law

- The Court is obliged to decide
- Preponderance of evidence is sufficient in civil cases (50%+1, or more likely than not).
- Scientific studies are not the only source of evidence
- Legal decisions apply to the individual and not to a population

Science

- Abstention is possible
- Conclusions are based on statistically significant results (.05 or .01).
 - Alpha errors reported
 - Beta errors not often reported
- Evidence required to fail to conclude on the existence of relationship is less than that required to find the relationship
- Conclusions apply to populations, not to individuals

Preponderance of evidence, not scientific certainty

- Determination of work-relatedness requires that the preponderance of evidence support the conclusion that exposure at work was a **significant contributing factor** in the onset of the worker's disease.
- 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.

Benefit of the doubt to the claimant

- In **Ontario**, s. 119 (2) of the WSIA states that: If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue should be resolved in favour of the person claiming benefits.
- In **B.C.** cited in Fraser Health: Where the evidence leads to a draw, the finding must favour the worker. This extends to deciding whether the occupational disease is “due to” the nature of employment — that is, to the issue of causation: “. . . if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker” (*RSCM II*, Chapter 4, policy item #26.22).

The legislative presumption in Quebec (AIAOD, s. 29)

- The diseases listed in Schedule 1 are characteristic of the work appearing opposite each of such diseases on the schedule and are directly related to the risks peculiar to that work.
- A worker having contracted a disease contemplated in Schedule 1 is presumed to have contracted an occupational disease if he has done work corresponding to that disease according to the Schedule.

Musculo-skeletal disorders presumed to be work related: Schedule 1, AIAOD

Disease

- Musculoskeletal lesions manifested by objective signs
- (bursitis, tendonitis, tenosynovitis)

Type of Work

- Any work involving repeated movements or pressures over an extended period of time

Diseases related to asbestos: Schedule 1, AIAOD

- Asbestosis, lung cancer or mesothelioma **caused by asbestos**
- any work involving exposure to asbestos fibre

Basis for legislative presumption

- "Particularly when it comes to occupational disease, because of the variability in the available medical knowledge regarding the true causes of some diseases, it often happens that sick workers do not succeed in their claims because they can not demonstrate the causal link between their working conditions and the disease from which they are suffering, even though the frequency of that disease is notorious in their field of work. It is desirable that the legal and medical approach to these issues be made more flexible, or even specifically adapted to the circumstances." [our translation]
 - Livre Blanc sur la Santé et sécurité au travail, 1978

Law and uncertainty

- «Is it more aberrant to imagine that, in some cases, the employer be called upon to pay compensation for a disease for which he should not be liable, than to conceive that a worker be deprived of compensation he was justly entitled to, because of the complexity of a scientific controversy? In the context of social legislation, I don't think so. In any case, it's a policy choice and not a choice to be made by the judiciary.»
 - *Succession Guillemette v. JM Asbestos*, SCC, 1998
 - Approving this opinion of dissenting justice Forget in QCA:[1996] C.A.L.P. 1342 [our translation]

When no presumption applies

- «A worker having contracted a disease not listed in Schedule I out of or in the course of employment and not as a result of an industrial accident or of an injury or disease caused by such an accident is considered to have contracted an occupational disease if he satisfies the Commission that his disease is **characteristic of work** he has done or is **directly related to the risks peculiar to that work.**»

– S. 30, AIAOD

Legal causation

- Burden of proof: preponderance of evidence
 - Is it more likely than not that workplace exposure was a significant contributing factor to the development of the worker's illness?
- Claimant's burden of proof in civil cases: 50%+1
 - Snell v. Farrell, [1990] 2 SCR 311 – 330
 - Laferrière v. Lawson, [1991] 1 SCR 541
- Lower in workers' compensation cases where the worker has the benefit of the doubt...

British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 CSC 25 p.32

- The expert reports concluding in their inability “to reach scientific conclusions” [...] to support the causal association between workplace conditions and the workers’ breast cancers, or to “find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer spoke *not* to the burden imposed upon the workers by s. 250(4), nor even to the burden imposed upon plaintiffs in a civil tort claim [...], but to a standard of scientific certainty. [...] In my respectful view, therefore, in relying upon the inconclusive quality of the OHSAH reports’ findings as determinative of whether a causal link was established between the workers’ breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law. »

Supreme Court of Canada, 2016

- "The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation [...]. It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. [...] causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence. [...] par. 38

Supreme Court of Canada, 2016

- [...]This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact — in this case, with the Tribunal.”
- British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 CSC 25

Ville de Québec et Morissette (succession), 2010

QCCA 1093

- Firefighter's brain cancer found to be an occupational disease based on evidence that is admittedly inconclusive.
- Court of appeal refuses to overturn CLP decision acknowledging the potential distortion in importing epidemiological studies
- «Considérant que toutes les études ont ces limites méthodologiques qui tendent à diminuer la relation, le tribunal retient l'opinion du docteur Guidotti selon laquelle il faut accorder plus de poids aux résultats démontrant une augmentation de l'incidence de la maladie qu'aux résultats ne la démontrant pas.» CLP 189

Workers' compensation for asbestos related disease in Canada, 2010

- A study funded by the Canadian Partnership Against Cancer (CPAC) and Occupational Health Clinics for Ontario Workers (OHCOW)
- <http://ssrn.com/abstract=1663408>



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

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	X	X	X	X (policy only)	X (policy only)
Ont	X	X	X (policy only)	X (policy only)	X (policy only)
Qc.	X	X	X		Case law only

X: irrefutable presumption if conditions apply



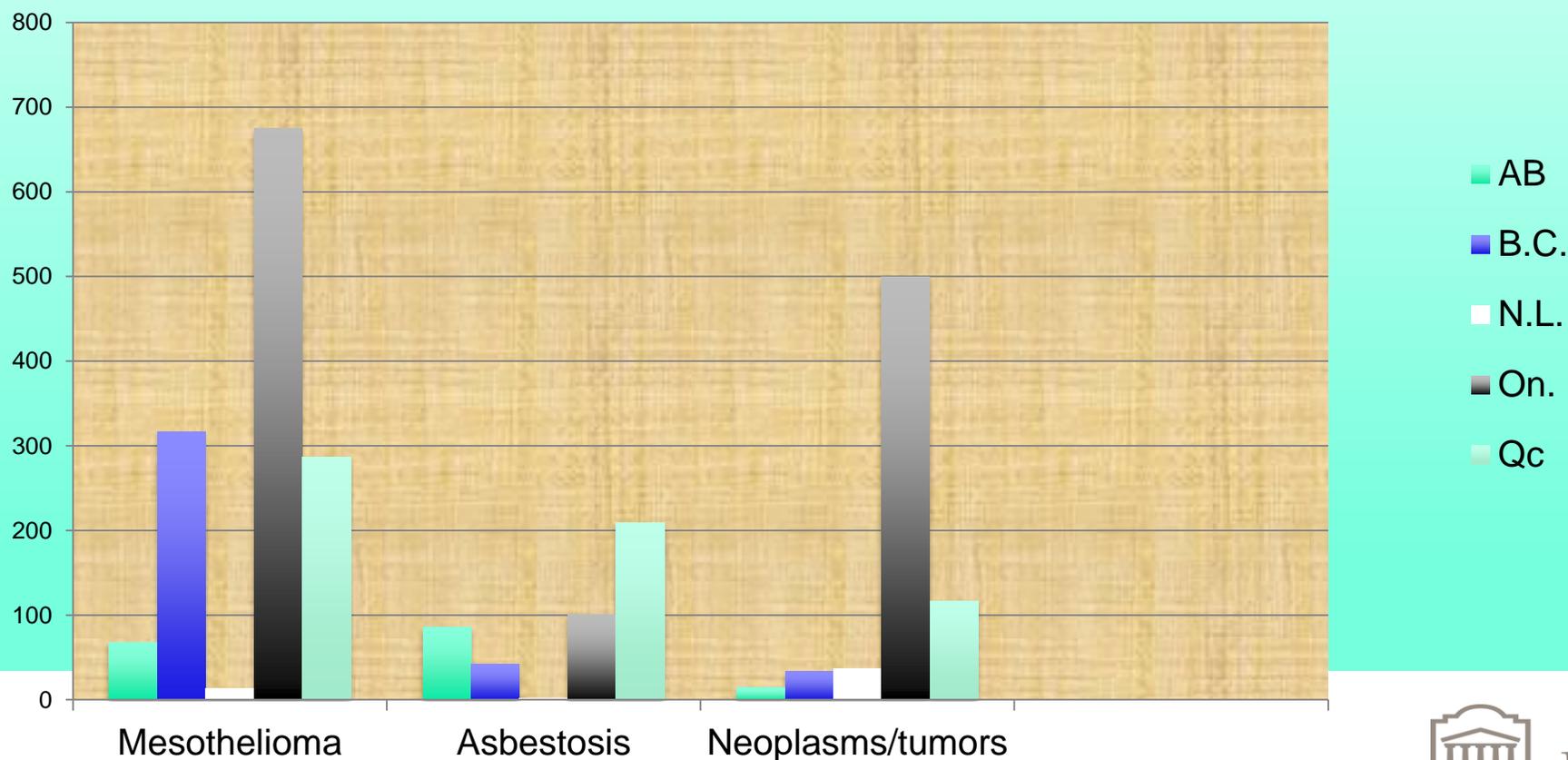
Temporal requirements : Exposure and latency

- 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

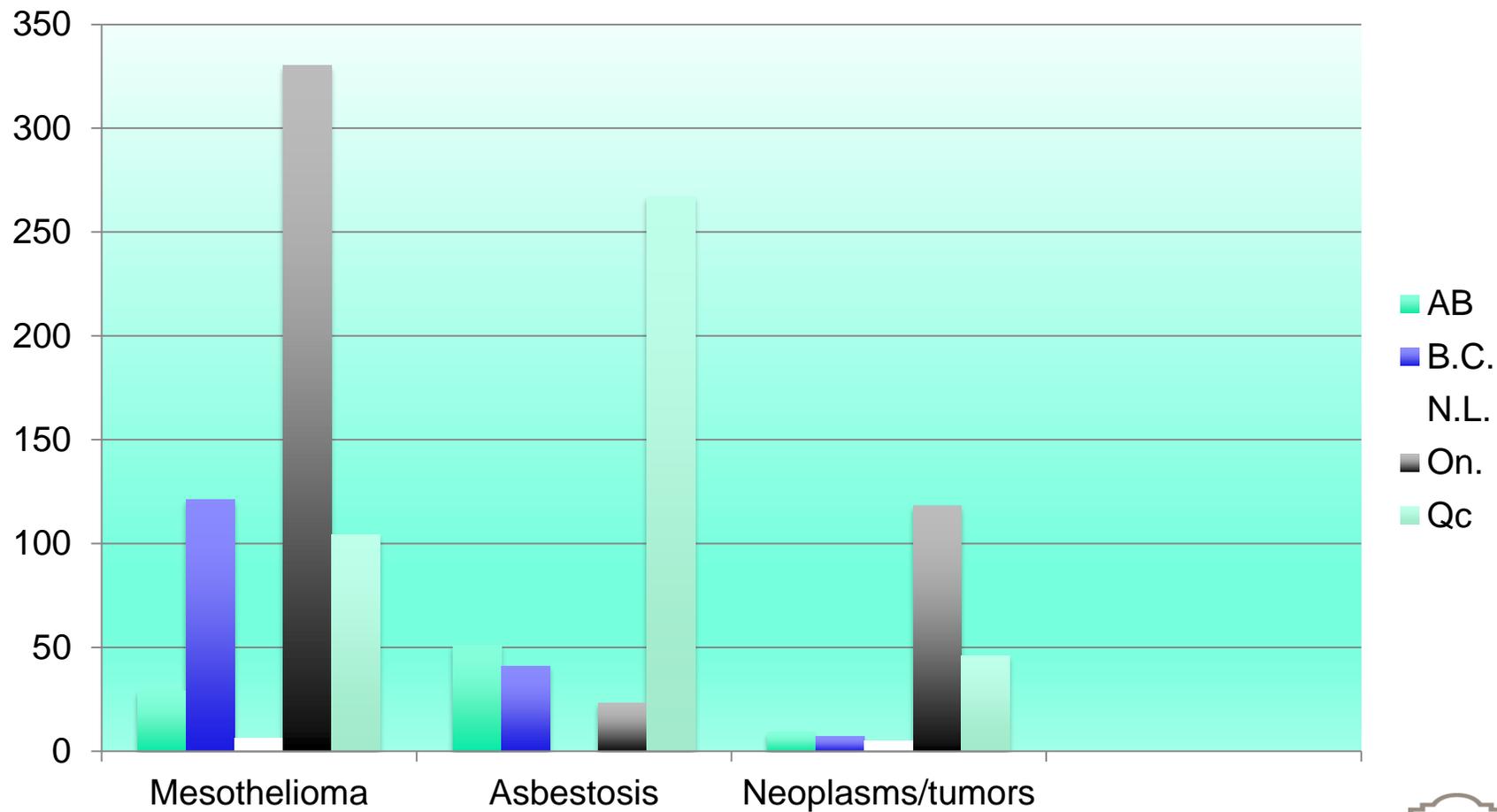
Lung cancer: policy and practice

- 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

Fatality compensation : AWCBC 1998-2008



Injury compensation: AWCBC 1998-2008



Equity related concerns

- Policy and Scheduling of diseases seem 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 exposure analyses is not available in all provinces.

If the criteria are not met

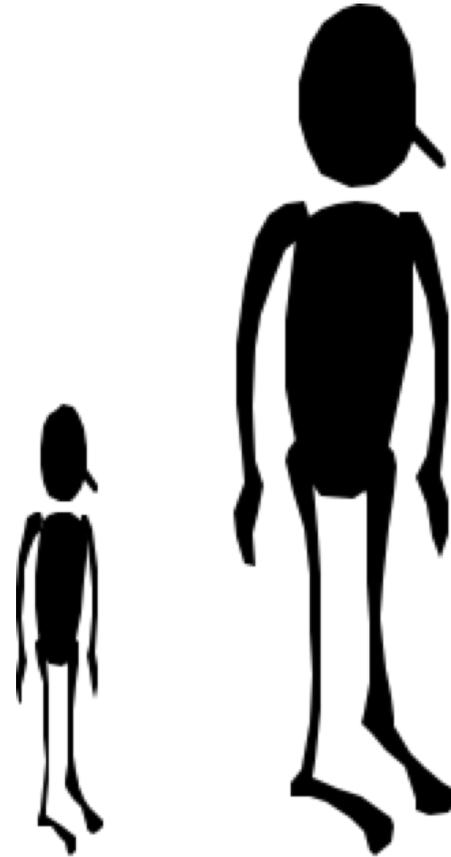
- Compensation is available on the basis of the individual merit of each case
- Decision makers in those provinces with stringent criteria in policy are often reticent to accept claims that don't meet policy requirements
- Preponderant evidence of exposure and medical evidence regarding diagnosis and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

Experience rating and Incentives to contest

- Ontario: long latency occupational diseases are not experience rated
 - Employers can contest claim but have no economic incentive to do so
- Québec: all claims, including long latency diseases, are experience rated
 - All previous employers can be experience rated and can contest claim and experience rating
- France: occupational diseases are experience rated only in relation to the most recent employer
 - Employers can contest experience rating but not the acceptance of a claim

Structural imbalance

- Misinformation is sometimes introduced by expert witnesses and lawyers.
- Structural imbalance fails to guarantee that misinformation will be corrected.



Rio Tinto et Ville de Saguenay et Simard

- The Tribunal administratif du travail recently concluded that chrysotile asbestos is not associated with mesothelioma unless there is evidence of very heavy and intense exposure, despite the silence of the presumption with regard to exposure measures. Confirmed by Superior Court of Quebec in 2019.
- 2017 QCTAT 2009
- Requête en révision pour cause rejetée: *Rio Tinto Alcan (Arvida) et Simard* , 2018 QCTAT 2360
- Requête en contrôle judiciaire rejetée, *Simard v. TAT*, 2019 QCCS 2003

New scientific evidence...

- Based on testimony of an expert witness, who cited new scientific literature produced in the US by a research firm named in Doubt is their product by David Michaels
- «Le Tribunal retient donc l'opinion du Dr. Renzi, laquelle lui paraît prépondérante, étant notamment **fondée sur la littérature médicale récente** ainsi que sur les constats objectifs apparaissant aux examens radiologiques [absence de plaques pleurales]...L'on doit aussi constater qu'aucune preuve médicale ne permet de contredire l'opinion du pneumologue Renzi. [...il a aussi] établi que **l'exposition à laquelle sont soumis des mécaniciens d'automobiles n'est pas de nature à engendrer un mésothéliome**».
- The new scientific studies cited:
 - J.S. PIERCE *et al.*, « An Evaluation of Reported No-Effect Chrysotile Asbestos Exposures for Lung Cancer and Mesothelioma », (2008) 38 *Critical Reviews in Toxicology*, pp. 191-214.
 - J.S. PIERCE *et al.*, « An Updated Evaluation of Reported No-observed Adverse Effect for Chrysotile Asbestos for Lung Cancer and Mesothelioma », (2016) 38 *Critical Reviews in Toxicology*, on line March 30 : 1-26.
 - *Author affiliation: ChemRisk inc. & Cardno ChemRisk*

Limited presumptions in regulatory frameworks

- Québec
 - Lists have not been changed since 1985
 - Appeal tribunal has been very proactive in allowing appeals for cancer claims
 - Reform promised in 2019: but will it introduce scientific certainty as a criteria?
- Ontario
 - More diseases listed
 - Irrefutable presumptions
 - Appeal tribunal appears to be very reticent to intervene

Challenges moving forward

- How can we ensure equitable access to exposure measures and occupational physicians
- How can we intelligently address incentives to contest claims in Canadian jurisdictions?
- How can we improve the list of illnesses presumed to be work-related in regulatory frameworks and policies?
- How can policy and practice address synergies in exposures to carcinogens?

Conclusions

- The purpose of WC law is not to find the accurate scientific answer to a question raised by a worker's claim, such as causation
- Structural imbalance must be addressed if tribunals are to be effective and fair.
- Policy should be designed to compensate for the structural imbalance by preventing the misuse of scientific data.
- Policy makers, decision makers, advocates and researchers must be made aware of the perils arising from the misinterpretation and misuse of scientific evidence.
- Access to support in tracing exposures and gathering the medical evidence should be provided to all workers

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Pour en savoir plus

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