

*A national occupational health & safety (OHS) and workers' compensation law newsletter*



**T**ravelling for work is a common experience for many Canadian workers. In this OHSLAW™ Report we review an Alberta Court of Appeal case dealing with Workers' Compensation implications for work related travel and injuries. Employers need to see employee travel as an extension of the workplace, not only from a workers' compensation perspective, but also from a proactive safety prevention perspective.

Other court highlights include a Supreme Court of Canada decision regarding the set off of Workers' Compensation Premiums in the event of a bankruptcy. In Ontario, an individual was given a 30 day jail term for failing to prevent and also covering up a workplace accident.

Finally, an important issue facing health care professionals is discussed in our review of the final report of the SARS Commission in Ontario and the Health Canada alert for hospitals and health care facilities for portable patient lifts. Our newest OHS Consultant, Cathy Chandler, reports on these matters from her considerable experience in a health care sector, prior to joining Gowlings National OHS Practice.

**Norm Keith, B.A., LL.B., CRSP**  
Partner, Gowlings

## Supreme Court Ruling on Set-Off of CSST Dues in Quebec

By Pierre Pilote and Myriane LeFrançois

In a bankruptcy context, can an employer set-off the dues that it pays to the Québec Workers' Compensation Board ("CSST") on behalf of its contractor from the sums still owing to the contractor?

This question was answered by the Supreme Court of Canada ("SCC") within the scope of the LATMP (*Loi sur les accidents du travail et les maladies professionnelles*) and the LFI (*Loi sur la faillite et l'insolvabilité*).

In virtue of section 316 of the LATMP, an employer who retains a contractor's

services could be required to pay the contractor's unpaid CSST dues. This section also provides that this employer can then offset these amounts against the sums it owes to the contractor. However, how would this principle apply when the contractor becomes bankrupt?

In the present case, three employers were required by the CSST to pay a contractor's unpaid dues. None of these employers paid the dues prior the contractor's bankruptcy. When the trustee required the employers to pay the sums owing to the contractor, the employers

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## Alberta Court Considers Work Related Travelling

By David Marchione, B.A.

The Association of Workers' Compensation Boards of Canada has reported that 5,896 lost time accidents were accepted across the country in 2005 that resulted from highway accidents. This number has been relatively consistent since 2003, where 5,864 lost time accidents were accepted. This number of accidents represents significant costs for employers in increased workers' compensation premiums and additional assessments and impacts their experience rating.

The consistent number of accidents also indicates that motor vehicle travel represents a serious hazard to the Canadian workforce.

A recent decision by the Alberta Court of Appeal has raised issues employers should be aware of if their employees are engaged in work related travel. Injuries and fatalities as a result of work related travel can amount to significant physical and emotional costs for workers and their families, in addition to the costs for employers.

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## Supreme Court Ruling on Set-Off of CSST Dues in Quebec

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invoked the unpaid dues and their right to offset these amounts from the sums still owing.

First, the SCC concluded that the employer becomes subrogated in the rights of the CSST against the contractor when it pays the contractor's CSST dues. It is therefore permitted to the employer to claim these amounts from the contractor.

Second, the SCC confirmed that section 316 LATMP allows the employer to deduct the sums paid to the CSST from the amounts owing to the contractor for the work performed. It was determined that this operation constitutes a compensation within the meaning of civil law.

Third, the tribunal had to decide if the right to operate compensation under section 316 LATMP violated the provisions of the LFI. In civil law, compensation cannot be operated if it is prejudicial to third parties. Consequently, it is not permitted to offset such compensation if third parties have already acquired certain rights.

In a bankruptcy context, the creditor who wants to offset compensation must prove that the bankrupt was bound by this obligation prior to his bankruptcy.

The SCC provided direction according to three different scenarios:

1. If the payment by the employer to the CSST is made prior to the bankruptcy, then the LFI is not violated and the compensation is valid.
2. If the payment is made prior to the

bankruptcy, but compensation could not be offset before the bankruptcy because the contractor's debt was not due and payable yet, the employer could offset compensation, subject to the mechanisms provided by the LFI.

3. If the payment is made after the bankruptcy, the employer cannot deduct from the sums owing to the contractor the dues paid to the CSST because it would provide an advantage to the employer, consequently affecting third parties' rights. The employer could only claim the amounts due by the contractor using a proof of claim. In this situation, the employer will be paid in proportion of his claim as an ordinary creditor. ■

### Canadian Emergency Management and Response Manual:

*A Guide to the Law and Practice*

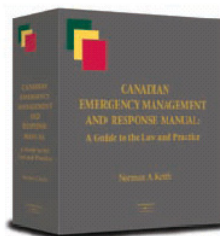
by Norm Keith, B.A., LL.B., CRSP

#### Canadian Emergency Management and Response Manual

is the FIRST Canadian resource that analyzes the legal requirements that pertain to emergency situations and offers clear practical guidelines on how to develop an Emergency Plan.

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- ✓ Outlines the legislative framework that applies in each Canadian jurisdiction
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## Did You Know?

In 2006, a total of 27 workers in Ontario died from injuries on construction projects. Eight were from falls, and five of those involved ladders.

To date in 2007, there have already been 3 workers in Ontario who have died from incidents on construction projects.

1. A 51 year-old worker fell from a basket attached to the forks of a lift truck.
2. A 46 year-old worker at ground level was hit by a guardrail which fell from the 14<sup>th</sup> floor of a high rise.
3. A 17 year-old worker on a roofing repair project fell from the 14<sup>th</sup> floor of a building.

Figures are according to the Construction Safety Association of Ontario (CSAO).

## FAQ Ask the OHS Legal Expert

### Q You asked. We answered.

Does the *Occupational Health and Safety Act* apply to me if I hire a contractor to do work on my home (i.e. replace my roof)?

**A** Read the answer at [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)



## Occupational Health and Safety in the Spotlight



By Adam Neave, B.A.Sc.

Is it just me and my health and safety conscious mind or are workplace accidents garnering a lot more media attention of late? From print stories about workplace fatalities in major daily newspapers to special investigative reports on workplace health and safety issues by major Canadian media companies - workplace health and safety issues have really been in the spotlight recently.

According to the Association of Workers' Compensation Boards of Canada ("AWCBC"), the number of occupational fatalities in Canada has been on an increasing trend since 1993. AWCBC's most recent National Work Injury, Disease and Fatality Statistics Report indicates that in 2005, there were 1097 work-related fatalities in Canada. The sharp spike in work-related fatalities seen in most Canadian jurisdictions, can, for the most part, be attributed to the significant increase in the number of occupational disease fatalities.

It is these statistics that Occupational

Health and Safety ("OHS") Regulators in every Canadian jurisdiction use to measure their level of success in fulfilling their mandate to set, communicate and enforce OHS laws. It is these statistics that have caused government officials in various Canadian jurisdictions, namely Alberta and Ontario, to promise to reduce the number of work-related accidents by significant percentages. The most common approach for OHS Regulators to take, in order to ensure that this commitment is fulfilled, is to strengthen their mandate to enforce OHS laws. Of course, promotion of prevention is another method that OHS Regulators use to satisfy this promise.

The fact is, more government OHS inspectors are being hired and authorized to conduct more workplace inspections and investigations that will eventually lead to more charges under applicable OHS laws. According to what recent sentencing trends indicate, future charges will undoubtedly result in higher fines than what we have become used to in recent years. OHS Regulators in Alberta and Ontario are now operating with "targeted

employer" lists. These lists are based on information received from the respective Workers' Compensation Board, which identifies employers that have unusually high lost-time injury claim rates, claims costs, or fatalities, compared to industry averages. These targeted employers will be subject to routine inspections by OHS inspectors, which could lead to orders and/or prosecutions.

How will the media's sudden interest in workplace health and safety issues affect the OHS Regulator's action plan to ensure that their commitments to reduce the number of workplace accidents succeeds? Canada has yet to see whether or not this type of initiative by OHS Regulators' will reduce the number of work-related accidents.

Alberta Human Resources and Employment publishes detailed statistics regarding enforcement activity that Gowlings' OHS Practice will continue to monitor closely. If the OHS Regulator's promise to reduce a significant percentage of workplace accidents is broken - what next? ■

### Jail Term in Ontario OHS Prosecution

By Kathryn Fisher, B.A.Sc.

A 30-day jail term was recently imposed under Ontario's *Occupational Health and Safety Act* on a partner of Peaks & Valleys Contracting, a roofing contractor, for an injury to a young worker. The partner was charged and convicted as an individual with failing as an employer to ensure that equipment, materials and protective devices provided by the employer, in particular, fall protection, are used as prescribed.

The charge stemmed from a September 2004 incident where a young worker, his first day on the job, climbed onto a roof to start working. Not more than ten minutes later, the worker fell off

the roof, a distance of approximately 27 feet, into a garbage bin. No fall protection was worn at the time. Fortunately, a bruised shin bone was the extent of the injury sustained.

Just before the fall the defendant had instructed the worker to remove the old shingles on the roof. After the fall, not only did the defendant put a fall harness on the worker, he even convinced the worker to tell the Ministry of Labour Inspectors that he was wearing the harness when he was on the roof. The defendant pled guilty to the charge.

What is unique about this charge is that the conviction was against an individual for failing to comply with a duty of an employer. Usually, it is corporations

that are subject to such charges, with liability of up to \$500,000 per count.

In this case, since the partner was charged as an individual, he was personally liable for a fine of up to \$25,000, 12 months in prison, or both. This sends a message that company representatives must comply with the legal duties of employers, not only as an agent of the employer, but as individuals.

Following a trial, the constructor of the project, K.B. Home Insulation Ltd., was found guilty for similar fall protection violations. No information was provided on whether any criminal negligence charges were under consideration. ■

## Alberta Court Considers Work Related Travelling

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Steps should be taken to mitigate risks involved with work related travel.

On February 13, 2002, Derek Sitler left a rig site in Fort St. John, British Columbia with four passengers in his vehicle. Sitler had agreed to transport his passengers in his personal vehicle to their respective homes in Alberta. One of his passengers, Wayne Benoit, was transporting materials for their employer during the trip. When they reached Edmonton, Mr. Benoit left Mr. Sitler's vehicle and took the items with him. Mr. Sitler died in a motor vehicle accident after continuing on his way home.

The Alberta Court of Appeal ruled that Sitler's entire trip was work related as Benoit was involved in a work related activity and that Sitler's vehicle was indispensable to the completion of that task. The court ruled that the trip continued to be work related after Benoit left Sitler's vehicle because "Sitler was diverted from a direct and less time consuming route he would have taken but for Mr. Benoit's work related task."

In coming to their conclusion, the court considered that the employer regularly asked employees to drop off materials to their head office.

Following this decision, a Calgary-based lawyer commented that employers need

to be aware of the way policies of the *Workers' Compensation Board* apply to real life situations, and how tasks that do not seem work related may be compensable, should an accident occur.

Workers' compensation legislation across the country provides that workers will be entitled to benefits if their injury arose out of and in the course of employment. Factors that are considered when determining whether an event occurred in the course of employment include time, place and activity. Common questions asked in this determination include:

- What time did the event occur?
- Was it during "regular working hours"?
- Where did the event occur?
- Was it expected that the worker would be in that location?
- What activity was the worker involved in when they were injured?
- Was the activity part of their regular job, or was it activity that was reasonably expected of the worker, or incidental to their work?

Generally, if a worker was at work, doing work related activity when the incident occurred, they will be entitled to compensation benefits for any resulting injury.

Workers are generally covered by compensation benefits from the time they arrive at work to the time they leave. Where a worker is required to travel for

work, either on a regular basis (i.e. in the case of a salesperson or a community health care worker), or on an infrequent basis (i.e. where an employee is attending a course required by their employer), the associated travel is considered to be work related, as it has become part of the person's job. In Mr. Sitler's case, the court found that his trip home was work related because Mr. Benoit was essentially using Mr. Sitler's vehicle to complete duties required by his employer.

This recent decision highlights the need for employers to consider the type of work related travel that is required by its employees.

Employers who require employees to engage in work related travel on a regular basis should consider providing employees with training in defensive driving techniques. In addition, employers should implement and maintain safe driving policies addressing issues such as telephone usage while driving. Employers and supervisors should reconsider sporadic travel requests made of employees who have not been provided with training and instruction for their protection, as these travel activities, as in the case of Mr. Sitler, may be considered work related, and compensable if a motor vehicle accident should occur. ■

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## Health Canada Alert for Hospitals and Health Care Facilities: Portable Patient Lifts Have Disconnection Risks

By Cathy Chandler, B.A.Sc., CRSP

Health Canada has issued an alert about the risk of disconnection of portable patient lifts from attachment handles, resulting in patient injury. The alert was issued on December 8, 2006 after an incident in which a hook was improperly attached to the attachment handle, resulting in the lift falling on the patient and injuring the patient. Attachment handles are accessories to portable patient lifts that allow the user to attach the portable lift strap to a trolley hanging from a ceiling-mounted track.

Patient lifts are mechanical sling-like devices used to lift and transport patients from one place to another such as from bed to wheelchair or from wheelchair to bath. They are used in hospitals, nursing homes, long term care facilities and private residences. Lifts are used mainly by nurses and personal support workers in the care of the elderly, injured and disabled persons.

In response to the incident, Health Canada's Medical Devices Bureau ("MDB") consulted all known Canadian manufacturers of these devices and took steps to eliminate the risk of disconnection. At Health Canada's request these

manufacturers have recalled their defective devices and are exchanging them for new units. Some are also issuing new labelling that warns of incorrect attachment. For more information on Health Canada's evaluations, actions taken and recommendations as well as a list of defective devices and contact information for manufacturers, refer to the Health Canada Alert, dated 2006-12-08 ([www.hc-sc.gc.ca](http://www.hc-sc.gc.ca)).

To prevent an accidental disconnection in your workplace, take the following preventative steps:

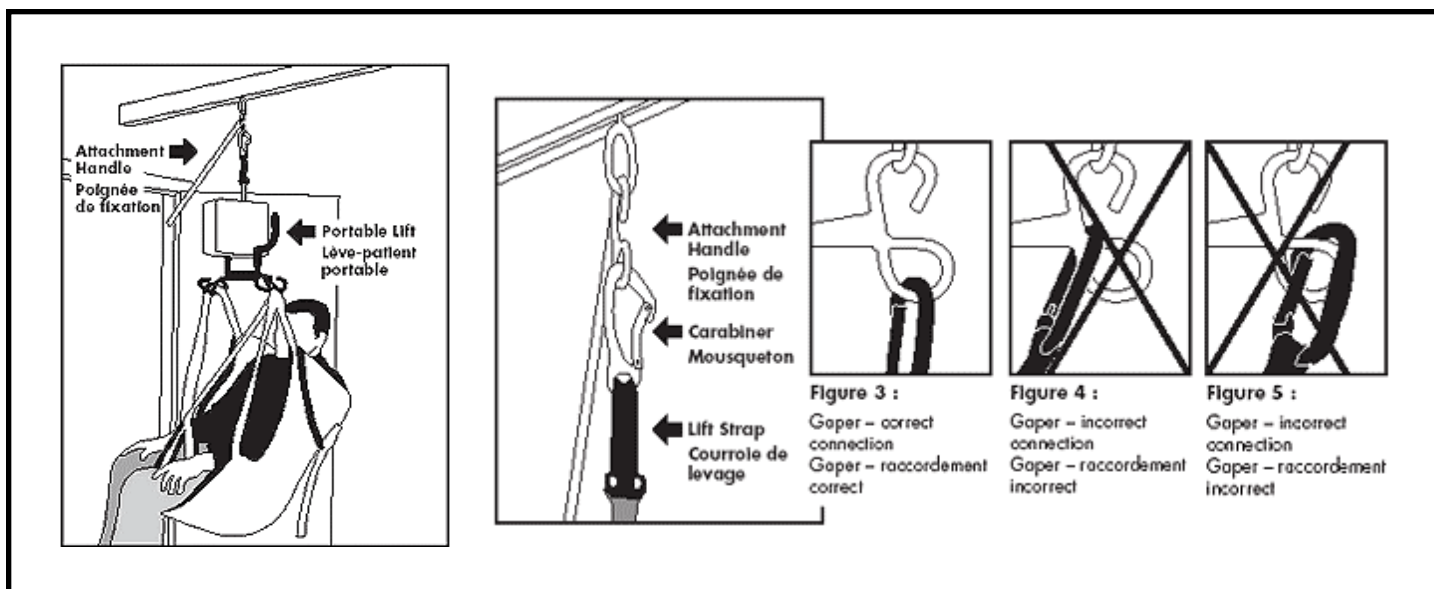
1. Obtain the most recent user manual or instructions for your mechanical lift including the attachment handle.
2. Review these instructions and educate your staff to ensure they understand and follow proper procedure at all times.
3. Ensure all ceiling tracks are properly installed in compliance with relevant safety codes and that your lift is properly load tested.
4. Refer to Table I in the Health Canada Alert which lists manufacturers of attachment handles identified as having disconnection risks. If your device is listed, follow Health Canada's recommendations to eliminate risk of disconnection, listed in Table I.

Should you be aware of defective attachment handles for portable lifts other than those listed in Table I of the Health Canada Alert, please contact the Medical Devices Bureau by e-mail at [mdb\\_enquiries@hc-sc.gc.ca](mailto:mdb_enquiries@hc-sc.gc.ca) or by phone at 613-957-4786.

Organizations should not let this Health Canada Alert deter them from providing mechanical lifts for their workers. Health care workers (personal support workers especially) are exposed to high risks of overexertion injuries due to patient lifts and transfers.

When used correctly, mechanical lifts can greatly reduce the risk of patient handling injuries. It is important that organizations develop procedures to ensure that workers know when to use mechanical lifting devices and how to operate lifting devices correctly. Training should include practical hands-on demonstrations of transfers and lifts using mechanical lift devices and 'on the job' evaluation components.

For more information on how to prevent overexertion injuries in health care workers please contact Cathy Chandler, OHS Consultant at 416-369-7351 or [cathy.chandler@gowlings.com](mailto:cathy.chandler@gowlings.com). ■



## Lessons from the SARS Commission Report

By Cathy Chandler, B.A.Sc., CRSP

The third report of the Independent SARS Commission was released January 9, 2007. According to the report, the Ontario government has made significant progress in improving the health and safety of health care workers since the SARS crisis including an advisory committee under the *Occupational Health and Safety Act* to provide recommendations on the health and safety issues of health care workers.

The report did not find any evidence that one specific individual or group of individuals was responsible for the SARS tragedy. Instead the evidence points to system failures and communication failures. Specifically, that there was a lack of awareness within the health care system of best practices and principles of worker safety and non-adherence to the 'precautionary principle.'

The concept of the precautionary principle is that it is more important to take precautionary steps to protect worker health and safety instead of trying to prove scientific knowledge. Furthermore, management, workers, unions and joint health and safety committees were, according to the report, not fulfilling their roles and responsibilities to identify, eliminate and control workplace hazards, a clear sign that the Internal Responsibility System was non-functioning. In addition, the Ministry of Labour was "not given a role in the SARS response...and was largely sidelined" according to the report, a clear sign that the External Responsibility System was not functioning well either. In short, the report finds there was no evidence of a strong safety culture within the health care sector.

The report outlines eighty-three recommendations, with significant implications for the health care sector, to prevent a

similar tragedy from occurring again. They include:

- Providing Public Health with more resources,
- Developing emergency plans for orderly hospital closure,
- Developing communication plans as an effective means of notifying all workplace parties (including workers, unions, joint health and safety committees) in an efficient and timely manner,
- Implementation of surveillance standards and infection control personnel in all hospitals and health care institutions, and
- Ensuring the Ontario Ministry of Labour plays a lead role in the response to future infectious disease outbreaks in the health care sector to ensure workplace safety is given the highest priority. ■



### Emergency Preparedness & Response Planning

#### Public Course

Developed by Kathryn Fisher, B.A.Sc.,  
and Norm Keith, B.A., LL.B., CRSP

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- Key elements of an Emergency Preparedness and Response Plan
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## Plan Ahead for Safety During Shutdown

By Elizabeth Rankin, B.A.Sc., CRSP

One of the greatest challenges for manufacturers is maintaining plant and facilities while meeting production goals. Many employers have preventative maintenance programs in place and schedule most of the maintenance to occur during annual shutdown periods. Major planning goes into scheduling work that must be done on a particular piece of equipment in a very limited time period, usually one to two weeks.

During these times, a facility that is normally an industrial establishment begins to take on the look and feel of a construction project, with numerous trades people and contractors carrying out a variety of high risk work, including entry into confined spaces and hazardous parts of machinery and equipment, cutting, welding, grinding, work at heights, movement of machinery, electrical work, and more.

The importance of exercising due diligence to protect the health and safety of workers is even more vital during these times. It must be appropriately planned for and then, more importantly, must be carried out.

In our experience, accident prevention during plant shutdown requires great attention to detail. Each job that needs to be done should be thoroughly assessed to ensure that adequate controls are in place. We recommend that a shutdown health and safety plan be in place to ensure that the process is managed well. A good shutdown health and safety plan would include:

- Pre-Start Health and Safety Reviews
- Job Hazard Analysis
- Safe Operating Procedures (i.e. Confined Space Entry, Lock Out, Hot Work, Work at Heights, etc.)
- Appropriate Training and Qualifications
- Contractor Management Program
- Coordination of Activities
- Pre-Job Orientation
- Inspection, Supervision and Progress Reports
- Post-Shutdown Review

Exercising due diligence well before shutdown will help minimize the likelihood of an accident and reduce the risk of legal exposure.

For more information on how to develop a shut-down safety plan, please contact Elizabeth Rankin at 416-862-4409 or elizabeth.rankin@gowlings.com. ■

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