



## OHS & Workers' Compensation Advisor

# Safety Failures: Hidden Costs and Consequences

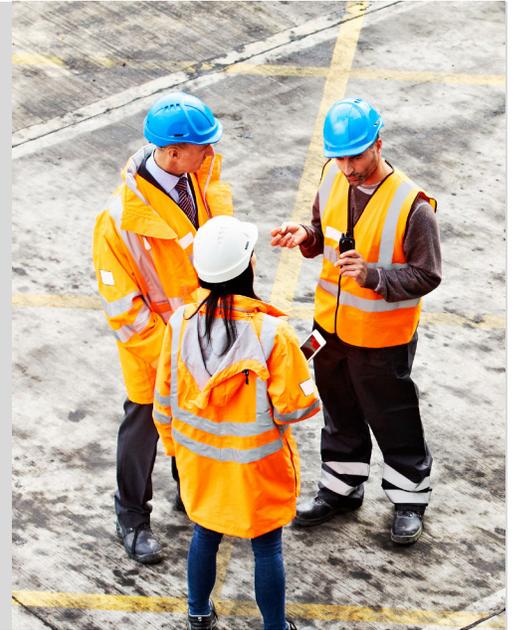
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OHS lawyers who advise, and represent, companies and management frequently sound alarms about the rising tide of OHS penalties across Canada. Less frequently addressed are the sometimes unintended, unexpected and largely hidden costs and consequences of accidents and OHS violations. Corporate and individual failures to follow or learn OHS laws and requirements, and apply them to the due diligence standards required by our courts, can lead to much more significant consequences. This can include significant, possibly devastating, business losses; losing the opportunity to bid on large projects; losing a corporate safety certification; the loss of reputation and resulting stock or share value implications; and, for an individual, the loss of a professional designation and reputation.

This article will not discuss rising administrative monetary penalties and fines. Rather, it explores a variety of business-related and personal consequences from the failure to ensure workplace safety – which can far exceed the cost of penalties imposed by OHS regulators.

### Negative Publicity for OHS Violations

Imagine that after dealing with the emotional aftermath of a serious accident involving a valued worker and assessing and making post-incident changes to workplace equipment, procedures and training, the business is prosecuted under OHS laws. Further imagine that the business receives a significant penalty, years after the incident, and that penalty is publicized by the OHS regulator. All details of the incident and injuries, the violations committed by the company and management,

and identities are published in a news release. The news release goes out on CN Newswire to the media and the same details are published on the regulator's website.

As a result of the news release, the same details are repeated in local and, possibly, national newspapers. Further, every OHS publication in Canada, as well as those of numerous consultants, publish the same details. Then, a customer (or potential customer) enters the business' name into a search engine. Multiple results return the news release. Also it is then discovered that the news release will remain on the regulator's website - and searchable - for several years into the future.

While such negative publicity is not the predominant reason to ensure a safe workplace and compliance with OHS legislation, the consequence of significant, ongoing negative publicity after an OHS penalty, has become more frequent. Publicity is a deliberate strategy of OHS regulators. Government news releases detailing serious violations have become commonplace. They are reputational consequences that follow penalties intended to hit the corporate pocketbook hard. Depending upon reactions, this consequence can result in an even harder hit to the corporate pocketbook – which may be greater and longer-lasting than the OHS penalty.

In addition, the personal impact on a manager, supervisor or director named in a news release, after a penalty, is equally damaging and may be personally devastating. The names of the business and individuals involved in the quadruple fatality in

Toronto on Christmas Eve 2009, is a prime example. The involved corporation, its president (who received a \$90,000 OHS fine) and project manager (who received a 3 ½ year jail term under the *Criminal Code*) had their names, photographs and details repeatedly published. Even in less high profile cases, the naming and shaming of corporations and their leadership in such news releases have wide-ranging and long lasting impacts amongst the community, friends and family.

### **Negative Career or Professional Consequences for Individuals**

Professionals such as architects and engineers have specific legal obligations under some Canadian OHS statutes and may act as supervisors with the OHS responsibilities of that role. As such, professionals from time to time may face OHS (or even *Criminal Code*) charges. Where any professional is charged or faces a penalty under OHS legislation or the *Criminal Code*, the professional may be subject to disciplinary proceedings, for professional misconduct, by the profession's regulator. In the authors' view and experience, a serious allegation (and definitely a court finding) that a professional has committed an OHS violation, can trigger a "professional misconduct" investigation or be used in professional misconduct proceedings.

Failing to meet professional obligations and facing professional disciplinary proceedings, likely means facing serious, career-ending consequences. Disciplinary bodies have the authority to impose consequences such as the temporary or permanent suspension of the ability to practice a profession or the loss of professional status. Such potential consequences should be carefully considered by any professional engaged in a front line supervisory or managerial role or professionals who may be directly involved in reviewing safety-related aspects of equipment or structures.

Professionals have faced both OHS and *Criminal Code* prosecution in Canada. A recent example of criminal and OHS charges against a professional engineer, arose from the collapse of the Algo Centre Mall in Elliot Lake, Ontario. The engineer had been involved in the inspection of the mall prior to its collapse. Allegations against the engineer related to the deterioration of the mall's roof structure due to extensive water infiltration resulting in the death of two members of the community. Although, the engineer was ultimately found not guilty of criminal negligence, the matter was career-ending.

### **Negative Impact of Violations on COR Certification**

The certificate of recognition (COR) program initiated in Alberta over 20 years ago has become a nationally recognized and increasingly expected independent safety accreditation required

for successfully bidding on construction projects. Municipalities, provincial infrastructure bodies and governments, transit authorities, airports and other owners of construction projects routinely require this certification at the stage of pre-qualification or bidding on high value contracts across Canada. While COR certification is discretionary it has become recognized as an audited program which, when in place, provides greater assurance of the health and safety management systems of a certified business. Bidding on large or government projects in particular may be closed to organizations who lack COR certification.

Effective quite recently, in at least one Canadian jurisdiction, it appears that OHS violations have the potential to result in the loss of COR certification status. Following any serious OHS incident or accident, OHS Alberta will now assess whether to permit an organization to retain its COR certification. A response to a notice of review must be submitted to OHS Alberta following an incident or accident setting out how the organization is meeting COR elements, and corrective action plans acceptable to OHS Alberta. A failure to prove that the essential elements of the program are being met and that the program meets the quality required, could result in loss of COR certification. COR certification is increasingly relied on as a required accreditation for oil and gas projects and large construction projects. Loss of such certification, due to a serious accident, conviction or penalty and failure to satisfy the issuing body, could have a devastating business impact.

### **Pre-qualification & Bidding Consequences**

Even in the absence of a requirement for COR certification, pre-qualification of contractors is a long-standing and well-recognized practice engaged in by owners contracting for work. This process, as part of a Contractor Management Program, has become a best practice for those engaging contractors or tendering work.

Generally, organizations seeking completion of a pre-qualification questionnaire ask for details of relevant health and safety programs, supervisor competency, worker training, and health and safety rules. Pre-qualification also frequently asks about safety records. Disclosure of past incidents involving serious or fatal injury or prior charges or convictions under OHS laws will likely be required to bid. Penalties, charges, and convictions could result in an unsuccessful bid or the loss of the opportunity to bid.

A recent Ontario case presents a stark example of the potential consequences. In *Interpaving Limited v. The City of Greater Sudbury*, 2018 ONSC 3005 (CanLII), the municipality barred a paving business from bidding on municipal contracts for a

period of four years. Amongst the reasons for the debarment was the business' OHS record. This was, mainly, based on an incident in which a pedestrian was killed after being struck by a reversing road grader at a construction project in Sudbury. OHS charges were laid against the City and business. The business was convicted of an OHS violation – though this was about two years after the debarment. In addition to this incident, there were also additional concerns alleged about the business' compliance with OHS requirements.

According to the court decision, the value of municipal contracts potentially lost by the business was up to \$19 million annually. A municipal by-law permitted the City to prevent the contractor from bidding where, amongst other reasons, documented evidence of poor performance, non-performance, or default with respect to the contract existed.

The business applied to court to challenge the municipality's decision. In dismissing the application, the Court found nothing unreasonable about the City considering the accident and other OHS concerns when assessing the quality of the business' performance and deciding to ban bids.

The City of Greater Sudbury matter arose because the City had direct knowledge of OHS issues. However, in most jurisdictions, the OHS compliance history of a business is not publicly available. The exception is Alberta and BC who have online search tools allowing anyone to look up the complete compliance history, including monetary penalties and convictions, for a particular business. This may result in even greater potential damage to reputation and risks related to bidding on large projects.

### **What Can Be Done?**

The most direct means of minimizing these risks is through the implementation of a sound and vigorous safety management program. However, in light of these risks, should an incident occur, businesses may need to consider and adopt a more strategic approach to addressing orders, charges and penalties. This may include proactively addressing orders, directions, charges or penalties before they are issued. However, where they are issued, businesses may need to consider creative approaches or, where necessary, resort to litigation. Ultimately, businesses will need to consider these potential consequences as part of the overall approach to OHS compliance.

While this article has outlined lesser-known out-of-court consequences of a serious workplace accident, there are significant other devastating consequences. Co-workers (including owners), families and communities can forever be negatively impacted, which, provides compelling reasons to

develop and implement a meaningful health and safety program.

## **Upcoming & Archived OHS Related Educational Webinars:**

**You've Had a Workplace Accident! Managing the OHS Risk – Coast to Coast**

**OHS In Canada: The Year in Review 2018**

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