Reasonable Mistake of Fact Due Diligence

There’s another side of due diligence that can protect your company against OHS liability.

As an OHS coordinator, you probably know what ‘due diligence’ is. You probably also know that to make out a due diligence defence in an OHS prosecution, you must prove that you took all ‘reasonable steps’ to prevent the violation. What you might not know is that there’s also a so-called ‘mistake of fact’ branch of due diligence. Here’s a look at this lesser known brand of due diligence and how it can protect your company from liability.

The Legal Background

In an OHS prosecution, the Crown must prove guilt beyond a reasonable doubt. To meet that burden, the Crown must first prove what’s called the ***‘actus reus,’*** that is, that the defendant actually committed an act that the law prohibits or omitted to do something the law requires. If the *actus reus* is proven, the burden shifts to the defendant to make out a defence by a preponderance of evidence. In an OHS prosecution, due diligence is the most common form of defence. The idea behind due diligence is not to punish those who can prove they meant well and tried to comply but still ran afoul of the law due to no fault of their own.

The most common way to prove due diligence is to show that you

took all reasonable steps to comply with the law and prevent the violation. But mistake of fact is another possibility. **Justification:** It’s unfair to penalize those who thought they were following the law and had no reason to suspect that they were actually putting workers in danger.

How to Prove Mistake of Fact Due Diligence

To win on mistake of fact due diligence, you must show by a preponderance of evidence that you reasonably believed in a set of facts that turned out to be wrong, but had they been right would have made the charged act or omission innocent. In assessing mistake of fact due diligence, courts consider 3 crucial questions:

1. Was There Really a Mistake’

Proving that you actually made a mistake isn’t as simple as it sounds. That’s because the mistake of fact defence covers only a very narrow range of mistakes. Mere ignorance or a false assumption that ‘everything is okay’ isn’t enough. The mistake must involve what an Ontario court has described as a ‘belief that such-and-such was the prevailing state of fact, for evidentially-stated reasons.’

Example: Officers of a construction company charged with not installing required guardrails claimed they had ‘ongoing confidence’ that the company’s OHS program was sound and ‘would result in the use of either guardrails or an alternative fall arrest system.’ But the Ontario court didn’t buy it. Mistake of fact doesn’t cover simply not knowing something is wrong, the court explained [*R. v. Bradisil 1967 Ltd.,* [1994] O.J. No. 837].

2. Was the Mistake One of Fact’

The mistake of fact defence covers mistakes of fact, not law. In other words, employers and other defendants are expected to know the laws that govern their activities. Otherwise, all they’d have to do to avoid liability is claim ignorance or misunderstanding of the law.

Hypothetical: An Alberta mine worker entering a confined space with oxygen content of 18.9% gets stuck and signals for help. But his calls for help go unheard since there’s no tending worker outside the space. The worker dies and the mining company is charged with violating the *OHS Code* provision requiring employers to ensure that there’s a tending worker outside a confined space in which the atmosphere is less than 19.5% by volume.

- **Defence Would Apply:** The employer proves that it reasonably believed that the oxygen content was 25%;
- **Defence Wouldn’t Apply:** The employer knew the oxygen content was 18.9% but thought the Code required posting an attending worker at 18.5%.

3. Was the Mistake Reasonable’

Finally, you must prove that it was ‘reasonable’ in the circumstances for you to believe that the mistaken factual circumstances existed. For example, the Alberta employer in the example above would have to prove that it was reasonable to believe the oxygen content in the confined space was 25% (such as by showing that it tested the atmosphere in the confined space without reason to know that the testing equipment it used had a manufacturing defect that rendered the results inaccurate).

The question of whether a belief in a set of facts is reasonable is based on what lawyers call an objective, rather than a subjective assessment. In other words, courts look at

not what the defendant was actually thinking but what a person in the same situation who knew what the defendant knew should have been thinking. To assess the reasonableness of a belief, courts look at 2 sets of factors:

Foreseeability: A mistake **isn't** reasonable if it was foreseeable that it would lead to a violation or incident. If a mistake happened once, it's not reasonable to make the same mistake again. However, the fact that you've made the same mistake over a period of time and no incidents occurred **could be evidence** that believing in the effectiveness of your precautions was reasonable.

Example: It was reasonable for an ON employer to believe that guarding 3 sides of a machine was enough when there had been no previous incident, the machine guarding was approved by the JHSC and MOL and workers had been instructed to stay away from the back of the machine [*R. v. Timminco, Ltd.*, 2004 ONCJ 344 (CanLII)].

Strategic Pointer: The Duty to Inquire About the Safety Information You Receive

You can't just assume that your OHS measures are adequate. A belief is reasonable only if you have some objective basis to believe it. The same is true of safety-related information provided to you by third parties such as contractors, subcontractors, landowners and even consultants. You can't simply take what they tell you at face value. You must make inquiries about the reliability of the information.

Example: An Ontario general contractor told an excavation subcontractor that there were no underground hydro lines in a dig area. So, when the subcontractor's backhoe operator struck concrete, he assumed it was part of the footing from the old

building and kept digging. Unfortunately, the concrete turned out to be an encased hydro duct and the backhoe caused it to explode. The MOL charged the subcontractor with failing to check for and mark the location of underground services before digging.

The subcontractor argued mistake of fact. ‘I honestly believed the contractor was right when he told me there were no hydro lines,’ he claimed. The court found the subcontractor guilty. The subcontractor shouldn’t have taken the contractor’s assurances at face value, it ruled. It could and should have done a number of things to check for lines, such as checking the ground for service locates or speaking to a hydro representative [*R. v. London Excavators & Trucking Ltd.,* (1998) 37 C.C.E.L. (2d) 25 (Ont. C.A.)].

How far must you go to satisfy the inquiry duty’

Answer: It depends on the severity of the danger involved. Stated simply, the greater the danger, the greater the lengths to which you’ll be expected to go to test the reasonableness of your belief.