

The Other Due Diligence: When Is 'Mistake of Fact' a Defence to an OHS Violation?



Your company can violate an OHS law and still avoid liability by showing that it exercised due diligence. The usual way to do that is to show that it took all reasonable steps to ensure compliance with the law and prevent the violation. But 'all reasonable steps' isn't the only option. A company can also use the so called 'mistake of fact' branch of due diligence by showing that it reasonably relied on a set of facts that turned out to be wrong but, if they had been true, would have made what the company did (or didn't do) legal. What makes a 'mistake of fact' reasonable? Here are 2 cases in which courts had to rule on this crucial question. Although both cases are from Ontario, courts across Canada use the same factors in determining the reasonableness of a mistake of fact.

MISTAKE IS REASONABLE

WHAT HAPPENED

The walls of a trench collapse killing one of the workers installing water pipe inside. The employer is charged with failing to install an adequate support system in the trench. The employer admits that the trench didn't meet OHS requirements but raises a mistake of fact due diligence defence contending that based on its understanding of the trench's measurements, it believed that a support system was

unnecessary.

DECISION

The Ontario court accepts the employer's mistake of fact defence and tosses the charges.

EXPLANATION

The employer's belief that 'the excavation of this ditch was being conducted in a proper manner, and that no danger was involved' wasn't just sincere but also 'reasonable.' There was no consensus as to the exact measurements of the trench, the court noted. In fact, the employer, MOL and police and fire departments all had different measurements. Thus, the employer's mistaken belief that the trench wasn't deep enough to require a support system was reasonable.

R.v. Graydex Ottawa, [1989] O.J. No. 2722

MISTAKE IS UNREASONABLE

WHAT HAPPENED

The general contractor tells the excavation subcontractor that the area is 'clear,' i.e., free from active utility services. Believing this to be true, the subcontractor's backhoe operator starts digging but stops when he hits concrete. The general contractor orders him to keep digging assuring the crew that the concrete is part of the footing of an old nursing station. So, the backhoe operator resumes the digging and hits a hydro duct encased on the concrete, triggering an explosion. The subcontractor is charged with an OHS violation but claims mistake of fact due diligence.

DECISION

Guilty as charged. The Ontario Court of Appeal finds that it wasn't reasonable for the subcontractor to rely on the general contractor's information.

EXPLANATION

While it might have been honest, the subcontractor's mistaken belief that the general contractor was providing accurate information about the location of active utilities wasn't 'objectively reasonable,' especially its decision to keep digging without further inquiry after hitting concrete the first time in a location that the general contractor had pronounced clear for excavation. After all, if the general contractor had been wrong once, it could be wrong again. So, the subcontractor should have taken additional steps to ensure that it was safe for the backhoe operator to proceed, such as requesting the site plan or ordering a 'hydro locate' for the area.

[R.v. London Excavators & Trucking Ltd.,](#) [1998] CanLII 3479 (ON C.A.)