

DUE DILIGENCE DEFENCE AVAILABLE TO EMPLOYERS WHOSE EMPLOYEES HIT GAS LINES IN ONTARIO

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On June 28, 2016¹, the Ontario Provincial Offences Court found Coco Paving Inc. ("CPI") not guilty of a s.14(1) *Environmental Protection Act* ("EPA") charge that was laid by the Ministry of Environment and Climate Change ("MOECC") in response to a gas line that was struck by a CPI employee. This was the first case in which an Ontario trial court has had the opportunity to consider a defendant's evidence of due diligence in an MOECC prosecution resulting from a gas line strike. The decision should be of interest to all contractors involved with excavations in the vicinity of underground utilities.

The strike occurred on March 11, 2013, at the intersection leading to the entrance to the Detroit-bound tunnel in Windsor. Ultimately \$222.34 escaped into the atmosphere, the Detroit-bound tunnel was closed to traffic for approximately 3 hours, resulting in lost revenue of approximately \$10,000 to the tunnel corporation and the Duty-Free Shop and 178 customers went without gas service for approximately 4.5 hours while the gas company fixed the line. On this basis, the Court found that CPI was responsible for causing adverse effects consisting of the loss of enjoyment of normal use of property and interference with the normal conduct of business.

However, CPI provided the Court with extensive evidence of due diligence sufficient for CPI to meet its burden of establishing both branches of the defence on a balance of probabilities. Firstly, the Court found that the CPI employee that hit the line had been properly trained for excavation near utilities, and as such, it would not be reasonable for CPI to be held responsible for the employee's error. On this basis the court found that CPI established that it reasonably believed in a mistaken set of facts which, if true, would render its act or omission innocent.

Secondly, the court found that CPI established that it took all reasonable steps to avoid the gas line strike. These steps included ongoing education and training consisting of a comprehensive Health and Safety Manual that is updated regularly, an Employee Health and Safety Handbook, two annual paid safety training sessions for employees including one that was held on March 8, 2013, daily huddle meetings, tailgate talks and safety bulletins during the construction season. The court also accepted CPI's evidence of measures taken to avoid the specific incident of March 11, 2013, which included project planning the week before, a March 8, 2013 safety seminar, a huddle report from the morning of March 11, 2013, the distribution of valid locates on March 11, 2013 and supervision which observed employees hand-digging for utilities on March 11, 2013.

The Common Ground Alliance reported 4,836 incidents of damage to underground utilities in Ontario in 2013². In addition to the catastrophic damage that may occur as a result of a gas line strike, companies found guilty of a s.14(1) EPA offence may face minimum fines of \$100,000/day to a maximum of \$10,000,000/day, and company employees may face minimum fines of up to \$20,000/day to a maximum of \$6,000,000/day under the EPA. It is in everyone's best interest to ensure that all involved in excavations near underground utilities exercise due diligence to both avoid underground utility strikes and/or these potential fines. Also, if a gas line is struck, the EPA requires forthwith reporting to the MOECC's Spills Action Centre by calling 416-325-3000, 1-800-268-6060 (toll-free), or 1-855-515-2759 (TTY). Failure to do so may attract the same fine amounts as a s.14(1) EPA conviction.

Nina Peretto and Albert Engel of Fogler, Rubinoff LLP, acted for CPI in defence of the charge discussed in this article.

¹ *R. v. Coco Paving Inc.* - as of the date of this newsletter article, the decision has not yet been reported.

² <http://www.orgca.com/Portals/0/Publications%20and%20Resources/Documents/National%20Report%202012-13-14%20english%20Final.pdf> (viewed June 29, 2016).



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