Sometimes a Swimming Pool is Just a Swimming Pool: Ontario Court of Appeal Grants Blue Mountain Appeal

By Julie-Anne Cardinal, Jeremy Warning and Cheryl A. Edwards

On February 7, 2013, the Ontario Court of Appeal handed down its highly anticipated decision in ***Blue Mountain Resorts Limited v. Ontario (Ministry of Labour and Ontario Labour Relations Board),* 2013 ONCA 75**. It found that Ontario's *Occupational Health and Safety Act* ("OHSA")[1] does not require employers to report every fatal or critical injury to any person at a workplace. Rather, the OHSA only requires employers to report critical injuries or deaths that occur at a workplace which have a reasonable nexus to a realistic risk to worker safety.

Facts

On Christmas Eve 2007, a guest of the Blue Mountain Resort drowned in the Resort's unsupervised swimming pool. No workers were present at the time of the incident. Blue Mountain did not report the fatality to the Ministry of Labour. It reasoned that the incident did not involve a worker and had not occurred in a "workplace" *per se*, given that no employees of the Resort were present.

The following March, a Ministry of Labour Inspector conducting a routine visit to the Resort learned of the drowning and issued an order to Blue Mountain, citing it for failing to report the fatality under the OHSA. In making the order, the Inspector determined that subsection 51(1) required an employer to report critical injuries to both persons who were not workers, as well as workers. Section 51(1) OHSA states:

> Where a person is killed or critically injured from any cause at a workplace, the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.

OLRB and Previous Court Rulings

The Resort appealed the order to the Ontario Labour Relations Board ("OLRB"). The OLRB upheld the order, concurring with the Ministry of Labour's submission that the OHSA requires reporting of all critical injuries and fatalities to any "person" in a "workplace".[2] Importantly, at the OLRB, the Resort had also argued that if reporting of critical injuries or fatalities to all persons was required, it would also be required to preserve the accident scene which would create tremendous disruption to the Resort. The OLRB declined to comment on that argument because, in its view, the order issued to the Resort only cited it for failing to report the fatality. Blue Mountain had the OLRB's decision judicially reviewed.

On judicial review, the Ontario Divisional Court found the OLRB's decision to be reasonable.[3] Both the OLRB and Divisional Court concluded that, because the OHSA refers to both "workers" and "persons" in various provisions, the legislature must not have intended them to be synonymous.

The Divisional Court also reasoned that hazards resulting in injuries to non-workers or "persons" could also affect workers, meaning it was within the powers of the Ministry of Labour to investigate to determine if there was a risk to the health and safety of workers.

1 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, section 51(1).

2 *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2009 CanLII 13609.

3 *Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board)*, 2011 ONSC 3057.

The Ontario Court of Appeal Rules: Reporting Must Have Nexus to Worker Safety

Five parties participated in the hearing before the Ontario Court of Appeal: Blue Mountain Resort, the Ontario Ministry of Labour, the OLRB, and intervenors Conservation Ontario and the Tourism Industry Association of Ontario ("Tourism Ontario"). The Resort, Conservation Ontario and Tourism Ontario all asserted that the OLRB's interpretation of the statute had significant practical implications for employers (with just about every "place" in Ontario being a "workplace" for purposes of OHSA). The Ministry of Labour argued that, in keeping with the strict and clear wording of the OHSA, all fatal or critical injuries in Ontario workplaces ought to be reported, and that it was the Ministry's role – as regulator – to determine which incidents ought to be investigated. The Court of Appeal rejected the Ministry of Labour's position.

The Court of Appeal succinctly set out its findings, writing:

> The interpretations [the Divisional Court and OLRB] gave to s. 51(1) of the [OHSA] would make virtually every place in the province of Ontario (commercial, industrial, private or domestic) a "workplace" because a worker may, at some time, be at that place. This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported. Such an interpretation goes well beyond the proper reach of the [OHSA] and the reviewing role of the Ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace. It is therefore unreasonable and cannot stand.[4]

The Court of Appeal ruled that "a proper interpretation of the Act requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that site."[5]

Through this decision, the Court of Appeal limited an employer's reporting and notification obligations to situations where:

1. a worker or non-worker ("any person") is killed or critically injured;
2. the death or critical injury occurs at a place where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) a place where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work ("workplace"); **and**
3. there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace ("from any cause"). [emphasis added]

What the Decision Means for Employers and Constructors

Until now, employers and constructors may have been abiding by the OLRB and Divisional Court decisions and reporting all fatal or critical injuries to the Ministry of Labour. With the release of its decision, the Court of Appeal has now interpreted subsection 51(1) of the OHSA and provided the three-pronged test, described above, by which an employer or constructor is to determine whether an injury is reportable.

On its face, the test provided by the Court of Appeal appears fairly straightforward. Indeed, there is likely to be little dispute or confusion about the application of the first prong of the test, that a critical injury or death to any person has occurred. Similarly, in respect of the second prong of the test, there is likely to be little confusion as to whether the injury has occurred at a place where a worker is carrying out the duties of their position. As well, in many workplaces, the fact that a worker is not in the immediate vicinity at the time of the injury is not likely to make it difficult to determine whether the location is one in which a worker could reasonably be expected to be in the course of their duties. Nevertheless, determining if the second prong of the test applies could be challenging in some circumstances. Those might include where the injury has occurred in a publicly accessible location, such as a park, that may be infrequently or accessed on a limited basis by workers in the course of their duties. The Court of Appeal's decision does not indicate how one is to determine what would make it reasonable to expect that a worker would access the location in the course of their work. This may well turn on factors such as the frequency with which workers access the location and the types of tasks that workers typically carry out while at the location, but the criteria will need to be established over time.

The biggest challenge presented by the test crafted by the Court of Appeal is likely in the application of the third prong: A reasonable nexus between the hazard causing the injury and a realistic risk to worker safety. The Court did not expand on the intended meaning of this element of the test in order to guide employers as to what circumstances would fall

4 *Blue Mountain Resorts Limited v. Ontario (Ministry of Labour and Ontario Labour Relations Board)*, 2013 ONCA 75 at para. 4.
5 *Ibid.*, at para. 5.

within or outside it. As such, employers have been left to determine how this element of the test will be applied when determining their obligations to report. While each case will turn on its own particular circumstances, one way employers or constructors may choose to approach the issue is to assess the "reasonable nexus" to the "realistic risk to worker safety at that workplace" as one where a fatal or critical injury has arisen from any equipment, machine, device or thing, the physical condition of all or part of the workplace, or an act of workplace violence. Those familiar with the OHSA may recognize this language as that used to define for permissible grounds upon which a worker may refuse work. In our view, the right to refuse work is related to the presence of a possible hazard associated with the work itself and provides an established means to assess whether a particular circumstance may fall within the third prong of the test provided by the Court of Appeal. However, as mentioned above, each situation will turn on its own particular facts and employers would be well advised to seek advice when determining whether to report an injury to a non-worker. Establishing or amending policies and procedures containing guiding principles for reporting accidents to all "persons" would assist supervisors and managers in assessing reporting requirements relating to the circumstances of the employer's workplace or places.

Though it was not directly referred to in the decision, the Court of Appeal decision on the reporting obligation under subsection 51(1) of the OHSA, would equally apply to the obligation to preserve the scene of the injury that exists under subsection 51(2) of the OHSA.

Best Practices for Employers and Constructors

At this time, it is unclear whether the Ministry of Labour will seek leave to appeal the decision to the Supreme Court of Canada, or if there is any intention to amend section 51 of the OHSA. For now, employers and constructors should consider the Court of Appeal decision to be the governing law relating to notification and reporting of injuries occurring in Ontario workplaces. As such, it is advisable that employers and constructors review and, if necessary, revise their reporting policies and train workers and supervisors on how to respond.

Such reporting policies, strategies and procedures should include the following:

- A clear statement of the incident reporting requirements specific to the individual workplace: Who from the workplace should be called; when should they be called; and backup contacts in the case of after-hours emergencies. Usually these contacts should be notified before any regulatory OHS body such as the Ministry of Labour;
- Statements specifying that critical injuries and fatalities involving all persons are potentially reportable and that, where the injury is reportable, accident scenes must be preserved. Employers and Constructors may consider directing workers and supervisors to consult with appropriate human resources, health and safety or management personnel before notifying the Ministry of Labour;
- Directions that, when there is doubt as to whether the notification provisions of the OHSA have been engaged, that legal counsel be contacted before notifying the Ministry of Labour; and
- Standard letters and reporting forms should be available on site for use in the event of a critical injury or fatality to ensure that the minimum statutory notification and written reporting requirements are followed.

Employers Operating in Multiple Canadian Jurisdictions

As a cautionary note, employers operating in multiple jurisdictions should bear in mind that different standards apply in different provinces. In Alberta and Nova Scotia, for example, all deaths that occur at a workplace must be reported including those involving members of the public. However, insofar as critical injuries are concerned, only those incurred by workers are reportable in those provinces. Conversely, both Quebec and British Columbia require only that employers report injuries to workers. Thus, no one standard applies across the country. Further, jurisdictions such as Nova Scotia and Newfoundland and Labrador have reporting obligations that are similarly worded to the obligation in Ontario. As such, the Ontario Court of Appeal decision, although it does not interpret the legislation nor is it binding in either of those jurisdictions, could prove influential. Therefore, employers operating in multiple jurisdictions should carefully consult the applicable statute to determine the specific circumstances in which workplace injuries and events, such as fires, explosions and collapses, are reportable. It is this variation and complexity that makes it important for employers and constructors to ensure that workers and front-line supervisors are given information and instruction on the legislated requirements relating to workplace accidents in order to ensure compliance with the applicable statutory regime.

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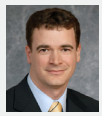

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