



Labour and Employment Communiqué

February 8, 2013

Ontario Court of Appeal Clarifies Employers' Duty to Report Fatalities and Critical Injuries at a Workplace

J. Bruce McMeekin, Markham

In June, 2011 we reported on the decision of the Divisional Court in *Blue Mountain Resort v. Ontario* in which the Court found that the drowning death of a guest of the resort was a fatality that should have been reported to the Ministry of Labour pursuant to subsection 51(1) of the *Occupational Health and Safety Act*. On appeal on February 7, the Court of Appeal reversed this decision on the basis that the lower court's interpretation of subsection 51(1) was unreasonable.

This decision is one that should be welcomed employers who, as part of their operations, are frequented in their workplaces by members of the public who are not their employees.

In *Blue Mountain*, the guest died in the unsupervised resort swimming pool. Initially, the resort thought the cause of death was a heart attack, but it was subsequently determined that the guest had drowned. The resort believed that because the deceased was a guest and not a worker, there was no need for it to report the fatality to the Ministry of Labour for purposes of subsection 51(1) of the *Occupational Health and Safety Act*.

Where a person is killed or critically injured from any cause at a workplace, the constructor, if any, and 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.

The inspector who attended at the resort some months later concluded that "person" included a guest and that the pool was a "workplace" and issued an order to the Resort requiring compliance with the reporting requirement. The resort exercised its statutory right to appeal the order to the Ontario Labour Relations Board, and the Ontario Labour Relations Board upheld the order. The resort sought judicial review of that decision before the Divisional Court. In its decision released on May 18, 2011, the Divisional Court upheld the Ontario Labour Relations Board's decision.

The Divisional Court found the Board's interpretation of "person" to include non-workers was reasonable and consistent with the purpose of the legislation to promote workplace safety and minimize the risk of injuries:

Conditions and hazards that result in the death or critical injury of a non-worker have the potential to cause similar harm to workers. The reporting obligation serves to enhance the protection of workers by bringing hazards to the attention of the Ministry whereas an absence of a reporting obligation would lead to a diminished oversight and potentially less worker safety.

The Divisional Court disagreed with the resort's argument that a "workplace" requires the physical presence of a worker at a place where a worker works at the time at which an occurrence with a guest or other person takes place. In the Court's opinion, it was sufficient that the place is one where one or more workers work. The resort had conceded that the pool is a place where one or more workers work. As the Divisional Court noted, the "absence of a worker at the swimming pool premises at the time of the occurrence [did] not

diminish the fact that it is a workplace.”

The Court of Appeal disagreed with this reasoning. Although the literal wording of subsection 51(1) would suggest the broad interpretation adopted by the Divisional Court, it nevertheless would lead to a wide range of outcomes outside of the intended purpose of the legislation – to protect the health and safety of workers – and therefore absurd. This was particularly true of a resort like Blue Mountain, which on any given day might see a number of injuries to guest skiers that could be classified as critical injuries. Not only would these injuries have to be reported, but under subsection 51(2) the injury sites would have to be preserved until inspected and released by the responding inspector. The same would be true in circumstances where a customer suffers a fatal heart attack in a store or a worshipper falls unconscious during a Sunday church service - all situations which might fit the literal wording of subsection 51(1) but which have no connection with the purpose of the legislation.

Instead, the Court of Appeal favoured a more restrictive interpretation of subsection 51(1) anchored to the purpose of the *Occupational Health and Safety Act*, requiring reports to the Ministry of Labour when:

- a. a worker or non-worker (“any person”) is killed or critically injured;
- b. 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
- c. there is some reasonable nexus or connection between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace (“from any cause”).

This principled interpretation should be welcomed by employers. Paragraph (c), in particular, offers the clarification required to prevent overreach by the Ministry of Labour in its administration of the *Occupational Health and Safety Act*. In the facts of *Blue Mountain*, had the guest been electrocuted on entry into the pool because of a faulty light, most would agree that subsection 51(1) was engaged, precisely because of the risk the pool posed to the safety of those workers responsible for its maintenance.

A full copy of the Court of Appeal decision is available here: <http://www.ontariocourts.ca/decisions/2013/2013ONCA0075.htm>

[Back to top](#)

© Miller Thomson LLP, 2013. All Rights Reserved. All Intellectual Property Rights including copyright in this publication are owned by Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the Editor(s).

This publication is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and readers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.

Miller Thomson LLP uses your contact information to send you information on legal topics and firm events that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules. If you do not wish Miller Thomson to use your contact information in this manner, please notify us at newsletters@millerthomson.com and include "Privacy Request" in the subject line.

© Miller Thomson LLP 2014. All Rights Reserved.