



## Labour and Employment Communiqué

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### Workplace Safety: The Workplace May Be Larger Than You Think

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Your organization owns and operates a number of malls. Employees ensure that the mall parking lots are well lit and the lighting regularly maintained. In the winter months, they diligently plough and salt the lots to provide safe and easy access for customers. Tragically, one afternoon a pedestrian shopper walking in one of the mall lots is struck and killed by another shopper driving far too fast. Emergency services and the police are called and attend almost immediately. After an investigation, the police charge the driver with dangerous driving causing death. You think the matter is closed, until a few months later when one of your staff calls you to say an inspector from the Ministry of Labour (MOL) is at the mall asking why the customer fatality was never reported to the MOL. Well...because the deceased was a customer....and it was in the parking lot....so there was no need to call the labour folks....right?

Blue Mountain Resort found itself in a comparable position in 2007. A guest died in the unsupervised resort swimming pool. Initially, the Resort thought the cause 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 MOL in compliance with section 51 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, which upheld the order. The Resort sought judicial review of that decision before the Superior (Divisional) Court. In its decision released on May 18 (*Blue Mountain Resorts Limited v. Ontario*) it upheld the 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 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. 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.”

It is noteworthy that the Court specifically refused to find that the Resort's ski hills were a workplace maintained by Resort staff requiring that skiers' critical injuries be reported to the MOL. To so decide would confuse the Resort's "proprietary" interests, (such as its ski hills), with the statutory definition of "workplace" and would go significantly farther than necessary to dispose of the matter. The Court stated that each case must be decided on its own facts.

Despite this limitation, this decision should cause property managers, retailers and those in the hospitality industry to revisit their workplace safety policies to ensure that fact situations like that at Blue Mountain are included as reportable incidents to the MOL. No organization wants to needlessly engage the MOL, particularly when the incident has been reported to other regulators or law enforcement agencies. But in borderline situations, the better exercise of judgement may be to err on the side of reporting.

A copy of the decision can be found [here](#). The Resort has brought an application in the Court of Appeal seeking leave or permission to appeal the decision of the Divisional Court.

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