CITATION: Blue Mountain Resorts Ltd. v. Den Bok, 2011ONSC 1909
DIVISIONAL COURT FILE NO.: 373/09
DATE: 20110328

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: BLUE MOUNTAIN RESORTS LIMITED

Applicant

AND:

RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE ONTARIO LABOUR RELATIONS BOARD

Respondents

AND:

CONSERVATION ONTARIO

Intervenor

AND B E T W E E N:

BLUE MOUNTAIN RESORTS LIMITED

Applicant

AND:

RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE ONTARIO LABOUR RELATIONS BOARD

Respondents

AND:

ONTARIO ASSOCIATION OF THE CHIEFS OF POLICE

Intervenor

APPLICATIONS UNDER the *Judicial Review Procedure Act*, R.S.O. 1990, J. 1 and Rule 68 of the *Rules of Civil Procedure*

BEFORE: Mr. Justice Lederer

COUNSEL: *John A. Olah* & *Robert Betts*, for the Applicant
David McCaskill, for the Respondents, Richard Den Bok & the Ministry of Labour
Krista Stout, for Conservation Ontario
Ian B. Johnstone, for the Ontario Association of Chiefs of Police

HEARD: March 23, 2011

ENDORSEMENT

Background

[1] The Ontario Labour Relations Board ("Board") issued a decision on March 23, 2009. It considered the application of s.51 (1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1. It held that the reference to "a person", which is included in the introductory words to the section, extends beyond employees to include anyone who is "killed or critically injured at a workplace". Thus, the notification requirements, found in s. 51(1), would apply to every circumstance in which someone is critically injured at a workplace. The employer was Blue Mountain Resorts Limited ("Blue Mountain"). As the decision of the Board makes clear, it operates a recreational facility, particularly a ski hill. It seeks judicial review of the decision of the Board. Blue Mountain is concerned that the interpretation of the word "person" is too broad and extends the authority of the Board beyond the jurisdiction that was intended by the legislation. Blue Mountain is of the view that, if allowed to stand, the finding of the Board will have a serious impact on its business and its day-to-day operations.

[2] I am asked to consider two applications for intervenor status in the judicial review. The first is brought by Conservation Ontario. It is described as a non-profit organization comprised of a network of thirty-six conservation authorities within Ontario. The second is brought by the Ontario Association of Chiefs of Police ("OACP"). It is an organization made up of senior officers from various police services across the province. It is described as being committed to fostering closer partnerships with government decision-makers to address concerns over legislative impacts on the effectiveness of policing in Ontario.

[3] The judicial review was commenced on August 11, 2009. The respondents were served with the motion brought on behalf of Conservation Ontario on February 24, 2011 and with the motion made by the OACP on March 20, 2011. The judicial review is scheduled to be heard on April 20, 2011. At this point, there is some urgency to a decision being made as to whether intervenor status will be granted to either or both of the moving parties.

[4] The motions are brought, pursuant to Rule 13.03(1) of the *Rules of Civil Procedure*. The basis upon which a person may be granted leave to intervene as a party is found in Rule 13.01, which states:

> (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

Conservation Ontario

[5] The *Occupational Health and Safety Act* has a broad remedial purpose. The interpretation of s. 51(1), as determined by the Board, could affect a wide array of businesses and other employers across the Province. As matters presently stand, the factual foundation and the legal basis from which submissions will be made on the judicial review come from the perspective of a single employer operating in one location.

[6] The material filed on behalf of Conservation Ontario demonstrates that it is comprised of thirty-six conservation authorities across Ontario. These are local, community-based management agencies. One of the most important components of their mandate has become the use of conservation land for parks and other recreational uses. The four hundred and fifty-one conservation areas play an essential recreational, educational and environmental role within their respective watersheds. The facilities within these conservation areas attract close to 5.1 million visitors each year. They provide year-round facilities and outdoor recreational opportunities for people of all ages including picnicking, boating, camping, swimming, fishing, hunting, trapping, cycling, snow-shooting, horseback riding, cross-country skiing, snowmobiling, golf and more extreme recreational opportunities such as downhill skiing, snowboarding, rock climbing, ice climbing, mountain biking, water tubing, water slides and wave action pools.

[7] In carrying out their programs, conservation authorities employ approximately 1,556 full-time staff and approximately 1,970 contract, seasonal and part-time staff. Conservation authorities derive the funds to operate their programs from a variety of sources, including grants from the provincial and federal governments, levies from the municipalities and revenues raised through services and through recreational and educational programs. Of the approximately $212,270,000 in funds raised for the normal operating programs, $103,000,000 is derived from self-generated revenues. Over $48,700,000 of this comes directly from recreation and education programs and land management.

[8] Counsel for Conservation Ontario submitted that its members have a direct interest in the proper interpretation of section 51(1) of the *Occupational Health and Safety Act.* Counsel went on to say that, if the application is denied and the Board's interpretation of the employer's reporting obligation is adopted, Conservation Ontario faces a direct and significant risk that its day-to-day operations and its revenue stream will be disrupted. Counsel suggested that, as public agencies operating across the province offering many varied programs which assist in funding their overall operations, conservation authorities, through Conservation Ontario, could make a distinctive and useful contribution to this judicial review. Finally, counsel for Conservation Ontario said that it did not require the filing of further material and could and would rely on the record already before the court. It would not delay or in any other way prejudice the respondents to the judicial review.

[9] On this basis, counsel submitted that Conservation Ontario satisfies all the requirements to intervene.

[10] Counsel for the respondents takes the position that Conservation Ontario will add nothing to the proceeding. It is an operator of recreational facilities and, for the purposes of this judicial review, is indistinguishable from Blue Mountain.

[11] The cases referred to in the various facta filed, and by counsel, suggest that the contribution of an intervenor need not be unique or distinct from the existing parties (see: *Van Breda v. Village Resorts* (6 August 2009), Toronto, M37820 (C49188), (C49632) at para. 16). The contribution may "overlap" with those of the parties (see: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Limited* (1990), 74 O.R. (2d) 164 (C.A.) at paras 7 and 8). Where the prospective intervenor is generally aligned with the position of one side, it can still make a useful contribution to the argument of the issues before the court (see: *Childs v. Desomeux* (2003), 67 O.R. (3d) 385 (C.A.) at para. 16).

[12] Conservation Ontario will provide a broader context from which the court can evaluate the purpose of the legislation and interpret the provision being considered. This should assist the court in having a more comprehensive appreciation of the different interpretations it will be asked to consider.

[13] An order will go recognizing Conservation Ontario as an intervenor in this judicial review.

OACP

[14] The OACP is concerned that the interpretation of s. 51(1) of the *Occupational Health and Safety Act* enunciated by the Board will have a significant impact on police services across Ontario. The affidavit filed in support of its motion suggests that the interpretation of the Board will lead to a "broader negative impact of the public's use of highways and roadways, particularly where a roadway or portion of a highway may have to be closed down until released by a Ministry of Labour inspector…". The affidavit says that "if the Court upholds the Board's

decision, it will result in police officers [*sic*] and police chief's inability to fulfill their duties as outlined in the *Police Services Act*...." and that such a decision would have "…the unintended consequence of negatively affecting the cost of providing police services throughout municipalities of Ontario and for the Province of Ontario". No information is provided in support of these statements. There is no factual record that would speak to these concerns.

[15] Counsel for the respondents observed that these statements are an addition to the "factual matrix" that was placed before the Board. He pointed out that, in *Bedford v. Canada (Attorney-General)* 2011 ONCA 209, the prospective intervenor, in an appeal, proposed to raise an issue which was new to the litigation. It sought to introduce an entirely new ground on which to challenge the legislation at issue. The application to intervene was refused, in part, because the record, as it existed, did not deal with or provide a foundation from which to argue the new issue. The parties had framed the issues and developed the record as they thought best. The Court of Appeal found that it would do a disservice to the parties and to the court to allow the new issue to be litigated.

[16] Among the concerns of the court, in *Bedford*, was timing. The appeal was scheduled. Tight timelines had been applied. The parties were anxious to proceed. The court found that introducing a new ground on which to challenge the legislation would necessitate delay. In the case I am asked to decide, counsel for Blue Mountain indicated a willingness to see the judicial review adjourned, if necessary, to allow for the record to be completed. Counsel for the respondents made clear he would want to cross-examine representatives of the OACP.

[17] To my mind, this has been going on for long enough. In any event, it is not appropriate to introduce an entirely new component that was not before the Board and is not part of the record.

[18] The application of the OACP is dismissed.

Costs

[19] No submissions were made as to costs. The results on the two motions were different. I observe that the issues were important and that those involved, with the exception of Blue Mountain, represent public interests. Perhaps this is a matter where there should be no costs.

[20] If the parties are unable to agree as to costs, I may be spoken to.

LEDERER J.

Date: 20110328