CITATION: Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board), 2011 ONSC 3057
DIVISIONAL COURT FILE NO.: 373/09
DATE: 20110518

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. WILSON, SWINTON AND LOW JJ.

BETWEEN:	
BLUE MOUNTAIN RESORTS LIMITED Applicant	*John Olah*, for the applicant
– and –	
RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE ONTARIO LABOUR RELATIONS BOARD, Respondents	*David McCaskill* and *Kikee Malik*, for the Respondents Richard Den Bok and the Ministry of Labour *Leonard Marvy*, for the Respondent Ontario Labour Relations Board
– and –	
CONSERVATION ONTARIO Intervenor	*Krista Stout*, for the Intervenor, Conservation Ontario
	HEARD at Toronto: April 20, 2011

LOW J.

[1] The applicant operates a resort comprising ski runs, an inn and other recreational facilities. The property covers some 750 acres. The business employs about 1,750 workers in peak season. It seeks judicial review of a decision of the Ontario Labour Relations Board ("the Board") dated March 23, 2009 which upheld, on appeal, an order of the respondent Richard Den Bok in his capacity as an inspector under the *Occupational Health and Safety Act*, *1990*, R.S.O. c. O.1, as amended ("the Act").

[2] The order related to an occurrence at the applicant's premises in which a guest drowned on December 24, 2007, in the unsupervised swimming pool at the resort. The order was made pursuant to s. 51(1) of the Act and arose out of a field visit to the applicant's premises on March 27, 2008.

[3] Subsection 51(1) of the Act provides:

> 51. (1) 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.

[4] The inspector concluded that a "person" included a guest, and that a "workplace" included an unsupervised swimming pool. The inspector's order was as follows (at para. 3):

> 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, telegram 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 EMPLOYER FAILED TO NOTIFY AN INSPECTOR OF THE FATAL INJURY TO A PERSON WHICH OCCURRED AT THE BLUE MOUNTAIN INN ON DECEMBER 24, 2007. COMPLY FORTHWITH.

[5] The applicant believed initially that the guest had suffered a heart attack but it subsequently learned that the guest had drowned. The applicant did not notify an inspector of the occurrence pursuant to s. 51(1) of the Act and did not send to the Director a written report of the circumstances of the occurrence. It was of the view that because the person who drowned was not a worker, the provisions of s. 51(1) of the Act did not apply.

[6] The Board upheld the inspector's order.

[7] The two issues before the Board in deciding the applicant's appeal were whether the word "person" in s. 51(1) means "worker" and whether the unsupervised swimming pool in which the guest drowned was a "workplace" within the meaning of the Act.

[8] "Person" is not defined in the Act.

[9] "Workplace" is defined in s. 1 as follows:

> "workplace" means any land, premises, location or thing at, upon, in or near which a worker works. ("lieu de travail")

[10] The Board considered the legislative context, the purposes of the Act as set out in *R. v. Timminco Ltd.*, [2001] O.J. No. 1443; 54 O.R. (3d) 21 (C.A.) and *Ontario (Ministry of Labour) v. Hamilton (City)*,[2002] O.J. No. 283; 58 O.R. (3d) 37 (C.A.) and the uses of the words "person" and "worker" in different parts of the Act. The Board concluded that the word "person" in s. 51(1) is to be construed in its ordinary meaning and not as synonymous with the word "worker", which is defined in s. 1 of the legislation as

> a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program.

[11] With respect to whether the guest drowned in a **"**workplace**"**, the Board found the following:

> 75. Blue Mountain is a fixed workplace. There is a fixed location to which employees regularly report. There is a defined area that encompasses a ski hill, buildings, parking lots, a swimming pool etc. from which Blue Mountain operates its resort. Employees of Blue Mountain move about performing work functions within all or a part of this area on a daily basis. The area of the resort where the Blue Mountain employees perform their work functions is a "workplace" for the purposes of section 51(1) of the Act. The fact that an employee is not physically present within a section of that "workplace" does not mean that that particular section is not part of the "workplace" during the period when no employees are present.
>
> 76. I heard no evidence as to the work done by employees of Blue Mountain within the enclosed area of the indoor swimming pool where the guest drowned. I heard no evidence as to how regularly employees go into this area, what they do in the area or how many employees enter this area. However, Blue Mountain did not contest the Ministry's assertion that Blue Mountain employees enter the pool area and did not suggest that persons who were not Blue Mountain employees looked after the pool. Based on general and common knowledge I infer that at least one and perhaps more Blue Mountain employees must enter the enclosed area of the indoor swimming pool in order to clean the pool and check the water at least once, and likely more times, each day. The swimming pool thus comprises a part of at least one Blue Mountain employee's workplace. It does not cease to be a "workplace" because the employee in question moves from that area of his or her workplace to another area of the same workplace.

> 77. Blue Mountain did not argue that the guest who drowned in the swimming pool had not suffered a critical injury. Although Blue Mountain initially believed the guest had died of natural causes, it subsequently learned that the guest had drowned.
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> 78. For the reasons set out above, I find that the drowning of a guest in the Blue Mountain swimming pool on December 24, 2007 triggered the reporting obligation under subsection 51(1) of the Act, as it involved a "person" who was killed from any cause at a "workplace" ….

[12] The standard of review on this application is one of reasonableness. The Board is an expert tribunal exercising its powers of decision in the administration of a statute within its area of responsibility (and see also *Lennox Drum Ltd. v. Ah-Home*, 2010 ONSC 4424 (Div. Ct.)).

[13] As to the Board's construction of the word "person", the applicant does not challenge the Board's determination that the word is to be given its plain, ordinary and inclusive meaning. The intervenor, Conservation Ontario, argued that the word "person" should be construed as meaning "worker".

[14] The applicant and the intervenor raise concerns about the practical application of the reporting requirement flowing from the interpretation of the meaning of "workplace" to include all 750 acres of the entire resort.

[15] The obligation created by s. 51(1) upon employers to report when a person is killed or critically injured is driven by result rather than by causation. Hence on a plain reading of the subsection, any event resulting in death or critical injury, even if occurring in circumstances having no potential nexus with worker safety, is reportable so long as they occur in a workplace. For purposes of triggering the reporting obligation and ensuring a sufficient reach to deal with incidents having a possibility of genesis in working conditions, the subsection as interpreted by the Board has a potential to reach beyond the ambit of the purposes of the statute.

[16] The intention to cast a very wide net to ensure that all circumstances resulting in death or critical injury at a workplace are brought to the Ministry's attention is apparent elsewhere in the Act. For example, s. 8(14) provides:

> (14) Where a person is killed or critically injured at a workplace <u>from any cause</u>, the health and safety representative may, subject to subsection 51(2), inspect the place where the accident occurred and any machine, device or thing, and shall report his or her findings in writing to a Director. [Emphasis added.]

[17] The applicant did not challenge in argument the Board's construction of the word "person" as unreasonable. We are of the view that the Board's logic in arriving at that conclusion was transparent, intelligible and justified in light of the total context of the legislation's purposes and the language used to implement those purposes. Nor does it lead to a result that is absurd. 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.

[18] The focus of this application for judicial review is the meaning of "workplace". The manner in which the word "workplace" is to be construed in s. 1 and s. 51(1) raises the same question of the extent of the Act's reach.

[19] The applicant's position is that the construction of the word "workplace" adopted by the Board leads to an absurd result. The Board held, at paragraph 75, that Blue Mountain is a fixed workplace. Blue Mountain is both a place where some 1,750 individuals work at its peak season and a place of recreation for many thousands of holiday makers, including skiers in winter and mountain bikers at other times of the year.

[20] The applicant is concerned with the potential for serious disruption to its operations if "person" is construed in its ordinary meaning and "workplace" is defined as the whole of the resort. "Critical injuries" are defined broadly in the regulations to include the fracture of an arm or leg (R.R.O. 1990, Reg. 834, s.1). Because the very nature of skiing is such that injuries, some of them critical as defined in the Act, are an expected and not-infrequent by-product of the activity, a definition of workplace as comprising all of Blue Mountain would, it is argued, result in serious disruption of the resort's operations by reason of the language of s. 51(2) which provides:

> (2) Where a person is killed or is critically injured at a workplace, no person shall, except for the purpose of,
>
> (a) saving life or relieving human suffering;
>
> (b) maintaining an essential public utility service or a public transportation system; or
>
> (c) preventing unnecessary damage to equipment or other property,
>
> interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission so to do has been given by an inspector. [Emphasis added.]

[21] The applicant argues that s. 51(2) requires preservation of the scene of the occurrence and that mischief will ensue because doing so may cause perils to other users of the premises while awaiting permission from the Ministry and because there will be significant disruption to the operation of the recreational facility.

[22] The applicant argues as well, based on the Board's statement at paragraph 75 of the decision, that subject to the statutory exceptions in the Act and premises covered by other legislation, virtually all places are "workplaces" with the result that the Ministry of Labour will

have expanded its reach to realms of activity that are completely unrelated to worker health and safety.

[23] Accordingly, it is argued that such a result does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as described in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47.

[24] More specifically, the applicant argues that the Board ought to have given recognition to the fact that the applicant's facilities are dual use premises – they are both recreational premises and a workplace and the use may change depending on the circumstances. A guest may experience a critical injury or be killed while engaged in a recreational activity on the premises in circumstances which do not pose a risk to a worker.

[25] The applicant's position as to the proper construction of the term "workplace" is one which 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. More specifically, in the instant case, it is the applicant's position that the swimming pool would have been a workplace had an employee of the applicant been on site going about his work at the time of the guest drowning, but no employee being present and working at the time, the swimming pool was not a workplace when the occurrence took place. Therefore, the applicant argues, there was no reporting obligation in the facts of this case.

[26] There are significant logical flaws in the applicant's argument. The focus is entirely temporal and does not take into account the causative nexus between prevailing conditions and the resulting harm. For example, had the swimmer been critically injured by a structural fault in the pool area, it could hardly be argued that the circumstances ought not to attract the attention of the Ministry and thus the reporting obligation. Workers and guests are vulnerable to the same hazards. The purposes and intents of the legislation would be undermined if a physical hazard with potential to harm workers and non-workers alike was not subject to reporting and oversight.

[27] We are of the view that the language of the definition of "workplace" does not reasonably admit the construction proposed by the applicant. In our view, had the Legislature intended the construction advanced by the applicant, the definition of workplace would not be "any land, premises, location or thing at, upon, in or near which a worker works" but rather "any land…at, upon, in or near which a worker is working". [Emphasis added.]

[28] In our view, the applicant's suggested construction is neither consonant with the language of the definition nor with the purposes of the legislation.

[29] That said, we are not persuaded that the Board reasonably concluded that the whole of the Blue Mountain Resort is a workplace. Such a finding conflates, in our view, the proprietary interests of the applicant in the 750 acres of property with the statutory definition of "workplace" and it goes significantly farther than was necessary for purposes of disposing of the appeal. Each case must be determined on its own facts.

[30] In this case, the guest drowned in the resort swimming pool. It is common ground that the swimming pool is a place where one or more workers work. For these reasons, the absence of a worker at the swimming pool premises at the time of the occurrence does not diminish the fact that it is a workplace, and we are not persuaded that the conclusion reached by the Board was unreasonable.

[31] Argument was directed to the spectre of disruption of the applicant's operations and of services provided to the public by members of the intervenor if this court were to uphold the Board's holding that "person" means person and "workplace" does not import physical presence of a worker at the time of an occurrence of death or critical injury. Such disruption is said to flow from an obligation under s. 51(2) to preserve the scene of the occurrence. It is suggested that there will be great disruption because the properties operated by the applicant and the intervenor are recreational in nature and attract vast numbers of users who are not workers and who suffer critical injuries in their recreational use of the properties. It is argued that a reporting obligation of such injuries does not advance the purposes of the Act and overexpands the reach of the Ministry of Labour.

[32] There was no issue before the Board as to whether there had been a failure to comply with s. 51(2) and, in our view, the Board correctly declined to deal with this issue.

[33] We are of the view that the Board's decision with respect to the obligation to report the swimming pool death was not unreasonable and accordingly dismiss the application.

[34] The parties are agreed that as this application raises a novel issue, there should be no costs.

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Low J.

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J. Wilson J.

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Swinton J.

Released:

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Intervenor

REASONS FOR JUDGMENT

Low J.

Released: May 18, 2011