Blue Mountain Resorts Limited v. Den Bok et al.
[Indexed as: Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)]

Ontario Reports

Court of Appeal for Ontario,

MacPherson, R.P. Armstrong and Blair JJ.A.

February 7, 2013

114 O.R. (3d) 321 | 2013 ONCA 75

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Case Summary

Employment — Occupational health and safety — "Workplace" — Resort guest dying while swimming in unattended indoor pool — Resort not required to report death to Ministry of Labour on basis that it was death or critical injury incurred by person at workplace as contemplated by s. 51(1) of Occupational Health and Safety Act — Labour Relations Board's finding that swimming pool was "workplace" as resort employees must have been present at other times being unreasonable — Reasonable nexus required between hazard giving rise to death or critical injury and realistic risk to worker safety at that site — No such nexus existing in this case — Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 51(1).

A guest at the applicant's resort died while swimming in an unattended pool. An inspector under the Occupational Health and Safety Act found that the applicant was required to report the death to the Ministry of Labour because it was a death or critical injury incurred by a person at a workplace as contemplated by s. 51(1) of the Act. The inspector issued an order to that effect. The Ontario Labour Relations Board upheld the order on the basis that resort employees must have been present at other times in the pool area to check and maintain it. The Divisional Court dismissed the applicant's application for judicial review, holding that the board's determination that the swimming pool was a "workplace" was reasonable. The applicant appealed.

Held, the appeal should be allowed.

While the Act, as public welfare legislation, must be given a very broad and generous interpretation, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation to avoid absurdity came into play in this case. The interpretation given to s. 51(1) of the Act by the board and the Divisional Court would make virtually every place in Ontario a "workplace" because a worker may, at some time, be at that place. This would lead to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported. This interpretation goes well beyond the proper reach of the Act and the reviewing role of the ministry reasonably necessary to advance the objective of protecting the health and safety of workers in the workplace and, therefore, is unreasonable. 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 the site. There was

no nexus here. There was no evidence that the guest's death was caused by any hazard that could affect the safety of a worker.

Cases referred to

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111, 140 D.L.R. (4th) 463, 203 N.R. 321, [1997] 2 W.W.R. 153, 82 B.C.A.C. 161, 27 B.C.L.R. (3d) 203, 66 A.C.W.S. (3d) 1127, EYB 1996-67134, J.E. 96-2218; [page322] Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, EYB 2008-130674, J.E. 2008-547, [2008] CLLC Â220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Grey v. Pearson (1857), 29 L.T.O.S. 67, [1843-1860] All E.R. Rep. 21 (H.L.); Lennox Drum Ltd. v. Ah-Hone, [2010] O.J. No. 3464, 2010 ONSC 4424, 266 O.A.C. 396, [2010] OLRB Rep. July/August 581 (Div. Ct.); Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62, 125 D.L.R. (4th) 385, 183 N.R. 325, J.E. 95-1497, 82 O.A.C. 243, 99 C.C.C. (3d) 97, 17 C.E.L.R. (N.S.) 129, 41 C.R. (4th) 147, 30 C.R.R. (2d) 252, 27 W.C.B. (2d) 485; Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283, 155 O.A.C. 225, 52 W.C.B. (2d) 484 (C.A.); R. v. Gladue, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, 171 D.L.R. (4th) 385, 238 N.R. 1, J.E. 99-881, 121 B.C.A.C. 161, 133 C.C.C. (3d) 385, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 41 W.C.B. (2d) 402; R. v. Port Colborne (City), [1992] O.J. No. 2555 (C.J.); R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443, 144 O.A.C. 231, 153 C.C.C. (3d) 521, 11 C.C.E.L. (3d) 46, 42 C.R. (5th) 279, 49 W.C.B. (2d) 475 (C.A.); R. v. Wyssen (1992), 10 O.R. (3d) 193, [1992] O.J. No. 1917, 58 O.A.C. 67, 9 C.O.H.S.C. 133, 17 W.C.B. (2d) 223 (C.A.); Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, 76 A.C.W.S. (3d) 894

Statutes referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 1(1) [as am.], 51(1) [as am.], (2), 54(1), (a), (b), (c), (i)

APPEAL from the order of Divisional Court (J. Wilson, Swinton and Low JJ.), [2011] O.J. No. 2256, 2011 ONSC 3057 (Div. Ct.) dismissing an application for judicial review of a decision of the Ontario Labour Relations Board dated March 23, 2009.

John Olah, for appellant.

David McCaskill and Kikee Malik, for respondents Richard Den Bok and the Ministry of Labour.

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Leonard Marvy, for respondent Ontario Labour Relations Board.

John Terry and Sarah Whitmore, for intervenor Conservation Ontario.

Peter Pliszka, Rosalind Cooper and Andrew Baerg, for intervenor Tourism Industry Association of Ontario.

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The judgment of the court was delivered by
BLAIR J.A.: —

Overview

[1] On December 24, 2007, a guest at Blue Mountain Resorts died while swimming in an unattended indoor pool at the resort. The issue on this appeal is whether Blue Mountain was required [page323] to report this "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by s. 51(1) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1.

[2] Blue Mountain takes the position that it is not required to report deaths or critical injuries to guests at its recreational facility because the facility is not predominantly a workplace and a worker was not present at the site when the injury incurred. However, the respondent, Mr. Den Bok -- an inspector under the Act -- took the view that reporting was required, and issued an order to that effect, along with other related orders. The Ontario Labour Relations Board upheld the order.

[3] An application for judicial review from that order was dismissed by the Divisional Court. It found the board's determination that the swimming pool was a "workplace" to be reasonable. The board inferred that employees of Blue Mountain must have been present at other times in the pool area in order to check and maintain it. Similarly, the Divisional Court accepted that "it is common ground that the swimming pool is a place where one or more workers work".

[4] For the reasons that follow, I would set aside the decisions of the Divisional Court and the board. The interpretations they gave to s. 51(1) of the Act 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 Act 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.

[5] In my view, 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. There is no such nexus here.

[6] Sometimes, a swimming pool is just a swimming pool.

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The Legislative Framework

[7] The relevant provisions of the Act are the following:

Definitions

1(1) In this Act,

. . . . . [page324]

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

"worker" means 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;

"workplace" means any land, premises, location or thing at, upon, in or near which a worker works;

. . . . .

Notice of death or injury

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.

Preservation of wreckage

(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.

. . . . .

Powers of inspector

54(1) An inspector may, for the purposes of carrying out his or her duties and powers under this Act and the regulations,

(a) subject to subsection (2), enter in or upon any workplace at any time without warrant or notice;

(b) take up or use any machine, device, article, thing, material or biological, chemical or physical agent or part thereof;

(c) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same;

. . . . . [page325]

(i) require that a workplace or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, investigation or test[.]

[8] The word "person" is not defined in the Act.

Facts

[9] Blue Mountain Resort Limited owns and operates an all-season resort and recreational facility, located on a 750-acre property near Collingwood, Ontario. The resort offers 36 downhill ski runs and other recreational facilities, including mountain biking trails, a golf course and an indoor swimming pool.

[10] When the deceased guest was first found, a defibrillator was used in an attempt to revive him; it showed no electrical signal and Blue Mountain therefore assumed the guest had suffered a heart attack. As it turned out, he had simply drowned while swimming in the pool.

[11] The pool was unsupervised and intended for use by resort guests for recreational purposes. No Blue Mountain employees were working there at the time the drowning occurred.

[12] In her reasons, the board member acknowledged that she had "heard no evidence as to the work done by the employees of Blue Mountain within the enclosed area of the indoor swimming pool where the guest drowned . . . [and no evidence] . . . as to how regularly employees go into this area . . . or how many employees enter this area". "Based on general and common knowledge," however, she inferred "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." She therefore concluded that "[t]he swimming pool thus comprises a part of at least one Blue Mountain employee's workplace", and that "[i]t 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".

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[13] Much evidence before the board -- and much argument here and below -- were dedicated to the broader implications of Mr. Den Bok's reporting order for Blue Mountain's ski operations and for recreational facilities in general in the Province of Ontario. Conservation Ontario was granted leave to intervene below and Tourism Industry Association of Ontario was subsequently granted leave to intervene in this court because of the perspectives they bring to those broader concerns.

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[14] Those broader implications and concerns are instructive for the interpretation to be given to the language used in s. 51(1) because they provide insight into the concerns arising [page326] from the ministry's interpretation of the section. I will outline them briefly.

[15] In peak season, Blue Mountain employs 1,750 staff. In February, it may have as many as 16,000 visitors on a Saturday and another 10,000 on a Sunday. The evidence was that there are approximately 1.5 skiing-related incidents for every 1,000 visitors at Blue Mountain (the industry average is two incidents per 1,000 visitors). It follows that there could be as many as 39 occasions on a February weekend where -- if inspector Den Bok's approach is to be adopted -- Blue Mountain could be required to report to the ministry. As the appellant and the intervenors point out, s. 51(2) of the Act prohibits the employer from disturbing or altering the scene of the occurrence until permission is given by an inspector. Therefore, many ski slopes may have to be closed entirely or in part until released by a ministry inspector.

[16] Mr. Den Bok's evidence was that in most cases, such a release will be provided by telephone but, if not, within a couple of hours if an inspector had to attend the site. However, the evidence was that such closures would create potential hazards for skiers and snowboarders using the runs in winter and for mountain bikers in the summer, as well as disruptions to Blue Mountain's operations generally.

[17] A representative of the Ontario Snow Resorts Association testified before the board. His evidence was that there were approximately 7,000 accidents at ski resorts across Ontario during the 2007-2008 ski season. His concern was that ski patrollers do not have the training to diagnose whether an injury is "critical" or not and that, in many cases, there is no way of making that determination at the time of the incident. Failure to report, however, could lead to prosecution under the Act. He repeated the concern that the requirement to preserve the accident scene under s. 51(2) would make ski hills very dangerous and difficult for resorts to operate.

[18] The ministry's requirement that resorts report "guest injuries" is apparently new. Blue Mountain has been subject to the ministry's review for 27 years, but has never before been required to report such injuries. The same is true for other resorts. The ministry explained its shift in policy by saying it was due to a number of resorts appearing in its high-risk category.

[19] Here, the guest injury occurred in a swimming pool, not on the slopes. However, the foregoing factors ground the concerns of the tourism and recreation industries in Ontario with the potential expansion of the ministry's role in the regulation of their affairs. [page327]

Analysis

[20] The Ontario Labour Relations Board is an expert tribunal that was interpreting a statute within its mandate and engaging its specialized expertise. The Divisional Court was therefore

correct in holding that the standard of review of the board's decisions is reasonableness: Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9; and Lennox Drum Ltd. v. Ah-Hone, [2010] O.J. No. 3464, 2010 ONSC 4424, 266 O.A.C. 396 (Div. Ct.), at para. 4.

[21] The concept of reasonableness, for administrative law purposes, was described by the Supreme Court of Canada in Dunsmuir as a deferential standard. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. While tribunals have a "margin of appreciation" within the range of rational outcomes, a reasonable decision is also one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (emphasis added): Dunsmuir, at para. 47.

[22] The appellant and the intervenors argue that the board and the Divisional Court erred in conducting an analysis that focused only on end risks without considering whether there was, in the circumstances, any reasonable connection between what actually happened and a risk to worker safety at the site. Counsel submits this open-ended approach leads to absurd results, rendering the interpretation unreasonable. I agree.

The board's interpretation is unreasonable

[23] The language "where a person is . . . critically injured from any cause at a workplace" in s. 51(1) of the Act is undoubtedly intended to capture a wide range of injury-related occurrences affecting the safety and well-being of workers. As the board member correctly observed, "the Act is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers".

[24] Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443 (C.A.), at para. 22. [page328]

[25] In Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283 (C.A.), at para. 16, Sharpe J.A. reinforced that notion:

> The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[26] This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

[27] One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can

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sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.

[28] Such is the case, in my view, with the interpretation given by the board and the Divisional Court to the language of s. 51(1) in this case.

[29] In these circumstances, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation in order to avoid absurdity may come into play: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62, at pp. 1081-1082 S.C.R.; and Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111, at para. 109, per Iacobucci J.

[30] The central thrust of the board's reasoning is found at paras. 61 and 75 of its reasons:

> [T]he purpose of the Act is to provide protection to workers . . . where workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace, it is not an absurd result for an employer to be required to report when a non-worker suffers a critical injury at a workplace . . . . If the goal is to enhance worker safety by alerting the Ministry to hazards in the workplace that could affect workers, a provision that requires the reporting of critical injuries suffered by non-workers in places where workers work, regardless of whether a worker was present at the time and place of the critical injury, is not absurd.
>
> . . . . .
>
> Blue Mountain is a fixed workplace. There is a fixed location to which employees regularly report . . . . The area of the resort where the Blue [page329] Mountain employees perform their work functions is a "workplace" . . . 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.

[31] There are some attractive aspects to this reasoning, to be sure. I do not quarrel with the proposition that workers may be subject to the same hazards and risks of death or critical injury as non-workers. When this is the case, an employer may be required to report when a non-worker dies or suffers a critical injury at a workplace in order to give effect to the purpose of the Act. The Divisional Court's comment in this regard is particularly instructive [at para. 26]:

> Workers and guests are vulnerable to the same hazards. The purposes and intents of the legislation would be undermined if a physical hazard with the potential to harm workers and non-workers alike was not subject to reporting and oversight.

(Emphasis added)

[32] I do not disagree with that observation. It is anchored in a hazard or risk that has the potential to harm workers. However, the conclusions of the board and the Divisional Court are founded on an analysis that has no such anchor. It simply assumes that because an accident has occurred at a place where a worker may be at some point in time, the accident becomes a

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workplace accident. This is apparent from the following statement in the reasons of the Divisional Court [at para. 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.

(Emphasis added)

[33] Respectfully, I do not agree with that conclusion. The potential results are too far reaching. Indeed, the Divisional Court recognized, at the close of the foregoing passage, that [at para. 15] "the subsection as interpreted by the Board has a potential to reach beyond the ambit of the purposes of the statute". The interpretation is unreasonable for that very reason, in my view.

[34] Why do I say that?

[35] The board's conclusion -- found by the Divisional Court to be reasonable -- is founded on what is, in effect, an entirely location-based analysis. It would trigger s. 51(1) whenever a non-worker dies or is critically injured at or near a place where a worker is working, has passed through or may at some other time work, regardless of the cause of the incident. The ramifications of this interpretation go far beyond what the legislature [page330] could have intended and beyond what is reasonably necessary to give effect to the purpose and objective of the Act or the mandate of the ministry. Therefore, while at one level the decision may exhibit some degree of "justification, transparency and intelligibility", as the Divisional Court concluded, it fails to meet the test of "[falling] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (emphasis added): Dunsmuir, at para. 47.

[36] Section 51(1) must be read in light of the subsection that follows it. Both the board and the Divisional Court erred, in my opinion, in declining to consider the provisions of s. 51(2) in the interpretation context. They appear to have done so because no one alleged that Blue Mountain had failed to comply with that provision. However, interpreting the two provisions together is instructive in showing how an overly broad interpretation of the reporting obligation in s. 51(1) can lead to consequences beyond the purposes of the Act.

[37] Section 51(2) requires that an injury site be preserved -- shut down, in effect -- until released by a ministry inspector. There is evidence to suggest that closures to recreational sites such as ski and bike-riding slopes may create hazards to other skiers, bikers and workers alike. The significantly intrusive effect of s. 51(2), combined with an overly broad interpretation of the notification and reporting requirements of s. 51(1), has the potential to give quite expanded powers to the ministry and its inspectors.

[38] A consideration of some possible outcomes will bear this out. As the Supreme Court of Canada confirmed in Canadian Pacific Ltd., at pp. 1044-1045 S.C.R., the consideration of hypotheticals is useful when interpreting the meaning of legislation.

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[39] Counsel for the ministry conceded before the board that on the ministry's interpretation of the reporting section he could not think of any location in the province of Ontario, except perhaps an abandoned woodlot, that would not be classified as a workplace. In this court, counsel and his client could not think of any examples. That is not a defensible outcome.

[40] Consider the following, as well.

[41] Mr. Den Bok acknowledged that if there were a critical injury to a hockey player or a spectator during a Toronto Maple Leaf hockey game at the Air Canada Centre, it would have to be reported to the ministry. If the injury occurred on the ice, the hockey game would have to be shut down -- televised or not -- until the premises were released by a ministry inspector. He took the same position with respect to a wide variety of other circumstances. For instance, he took the view that reporting to [page331] the ministry would be mandatory in the case of customer injuries at a Canadian Tire store or other retail outlet; in the case of injuries sustained by the public on highways patrolled by police (because the police or other workers may arrive after the accident, or may have passed by on a prior occasion); and in the case of worshippers who may suffer a heart attack or other critical injury at a religious institution (whether the services would have to be halted pending ministry release of the place of worship, was left unsaid).

[42] One can envision endless examples that would be caught by the board's interpretation, all without any causal relationship with a workplace safety issue. Would parents have to report to the ministry if their child were injured at home because they had hired a nanny? Does a roller coaster become a "workplace" when a guest is injured while riding on it? Because hotel employees enter guest rooms, does a hotel room become a "workplace" when a guest dies of a heart attack or a drug overdose, or is murdered?

[43] As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 27; Boma Manufacturing, at para. 109; and Canadian Pacific, at pp. 1081-1082 S.C.R. In Rizzo, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".

[44] The consequences or results of the Divisional Court's and the board's decision are incompatible with the objects of the Act and the enforcement provisions of s. 51(1), in my opinion. Their interpretation extends the scope of the Act and has the potential to give the ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace. The interpretation is therefore unreasonable.

The proper interpretation of s. 51(1)

[45] That being the case, it falls to this court to determine the proper interpretation of s. 51(1). In doing so, we must have regard to the words of that provision in their grammatical and ordinary sense and in their context, read harmoniously with the scheme of the statute as a whole, the purpose of the statute and the intention of the legislature: Rizzo, at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, at para. 25; and Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26. [page332]

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[46] As I noted earlier in these reasons, the provisions of the Act are to be interpreted generously, but a generous approach to the interpretation of public welfare statutes does not justify a limitless interpretation of their provisions.

[47] With that in mind, I would not interpret the language of s. 51(1) of the Act in a way that would give it the almost limitless scope flowing from the interpretation adopted by the board and the Divisional Court. Nor would I give it either the narrow interpretation favoured by the appellant, which would limit the application of the notice and reporting requirements only to situations where a worker is actually present at the scene of the occurrence, or the interpretation that a non-worker can never be a "person" within the meaning of s. 51(1).

[48] "Textually" speaking, taking the language of s. 51(1) of the Act at face value, the guest who died in the swimming pool might be seen as someone who died in a workplace. Blue Mountain has approximately 1,750 employees working at its 750-acre complex, and some of them may be in the pool area at some time during the day to perform maintenance services. The language of s. 51(1), read only in its grammatical and ordinary sense, is very broad.

[49] "Contextually" and "purposively" speaking, however, s. 51(1) is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety issue at the pool or the resort.

[50] This restricted interpretation is consistent with the oft-cited observation of Lord Wensleydale in Grey v. Pearson (1857), 29 L.T.O.S. 67, [1843-1860] All E.R. Rep. 21 (H.L.), at p. 71 L.T.O.S.:

> [I]n construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further.

(Emphasis added)

[51] It is also consistent with the principle that broad language in a statute may be given a somewhat restricted interpretation where necessary in order to avoid absurdity and to give the words their appropriate meaning, having regard to their context, the purpose of the Act and the intention of the legislature. To quote Gonthier J. in Canadian Pacific Ltd., at p. 1082 S.C.R.:

> One method of avoiding absurdity is through the strict interpretation of general words . . . Driedger on the Construction of Statutes (3rd ed. 1994) [page333] states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: "Absurdity is often relied on to justify giving a restricted application to a provision".

[52] It is within this framework, then, that the words "person", "from any cause" and "workplace" in s. 51(1) must be examined. In their submissions, the parties and intervenors focused on the meaning of the words "person" and "workplace". Certainly, the contours of these words, particularly "workplace", need to be drawn. It seems to me, however, that the potentially

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all-embracing expression "from any cause" is the core phrase calling for a restrictive interpretation in order to give the language of s. 51(1) its proper meaning.

[53] I agree with the board and the Divisional Court that the word "person" in s. 51(1) is not synonymous with "worker". Had the legislature intended that to be the case, it would simply have used "worker" instead of "person". I think it is clear that the legislature intended the reporting requirement to extend beyond injuries to workers themselves and to encompass -- as the Divisional Court observed in the passage cited above -- "physical hazards with the potential to harm workers and non-workers alike". That is consistent with the purposes and objectives of the Act.

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[54] But it does not follow that any death or critical injury involving any person at a place frequented, or sometimes frequented, by workers is caught by s. 51(1). To give the words "killed or critically injured from any cause" such an expansive interpretation may well lead to absurd results, as we have seen. That is why a reportable occurrence 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 the site of the incident.

[55] This somewhat limiting interpretation of the words "from any cause" is key to the interpretation of s. 51(1). It is broad enough to capture "worker safety" related incidents and to give effect to the purpose of the Act. Yet it is not so broad as to lead to absurd consequences or to engage the intrusion of the state where that intrusion is unnecessary to achieve that purpose. It grounds the limiting interpretation of s. 51(1) in cause rather than location.

[56] That said, the death or critical injury with the required nexus to worker safety must still occur at a location the Act describes as a "workplace". Once the words "from any cause" have been given their proper meaning, however, the meaning of "workplace", as defined in the Act, becomes clearer. To reiterate, [page334] "workplace" is defined as "any land, premises, location or thing at, upon, in or near which a worker works; ('lieu de travail')".

[57] The board and the Divisional Court concluded that the word "works" in that expression was not confined to a place where a worker is working, but could extend to a place where a worker sometimes worked. I do not disagree that s. 51(1) may be engaged where no worker is present at the time the injury occurs. I would simply say that when the legislature referred to a place where "a worker works", it must have intended that place to be one where a worker is carrying out his or her employment duties at the time the incident occurs, or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of their work.

[58] This is consistent with the view that a "workplace" may not necessarily be a fixed location, but may in some circumstances travel with a worker, a view that makes some sense in today's world of mobility, and which the parties appear to accept: see R. v. Port Colborne (City), [1992] O.J. No. 2555 (C.J.).

[59] In summary, the notification and reporting requirements of s. 51(1) of the Act are engaged where:

(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 between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace ("from any cause").

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[60] The guest drowning in the Blue Mountain swimming pool does not meet the foregoing criteria.

[61] There was no evidence that the Blue Mountain guest's death in the swimming pool was caused by any hazard that could affect the safety of a worker, whether present or passing through. All that is known is that the guest either had a heart attack (the first diagnosis) or drowned while swimming (the final report). The purpose of the Act is to further worker safety; it is not to capture death by natural causes. If there is a need for supervision at the pool to ensure the safety of Blue Mountain's guests, that may raise other issues for Blue Mountain, but it does not give rise to considerations of worker safety. It is highly [page335] unlikely that a Blue Mountain employee is going to drown while swimming in the pool in the course of his or her employment duties.

[62] The interpretation I place on s. 51(1) is consistent with the Act's purpose and objective of protecting the health and safety of workers. It anchors worker safety to a hazard with the potential to harm workers, thereby placing some constraints on the scope of the notification and reporting requirements of the Act. By doing so, it also honours the legislative and external context in which those requirements operate.

[63] Part of the context within which s. 51(1) must be interpreted is reflected in the history of the legislation. The Occupational Health and Safety Act came into effect in 1978. It repealed a number of then-existing pieces of legislation dealing with the protection of workers in factories and mines and on construction sites, and consolidated them into one Act. The history behind the legislation was conveniently summarized by this court in R. v. Wyssen (1992), 10 O.R. (3d) 193, [1992] O.J. No. 1917 (C.A.), at pp. 198-99 O.R.:

> The Act was passed in 1978 . . . . Intense public discussion of industrial safety was stimulated by the 1976 Report of the Royal Commission on the Health and Safety of Workers in Mines (the Ham Report). Bills relating to industrial safety were introduced in the legislature in 1976, 1977 and 1978 when the Act was finally passed. The object of the legislative proposals was to achieve safety in the workplace and their scope greatly expanded before the Act was passed in 1978.
> The statute was described by the Minister of Labour as a "comprehensive omnibus act which would consolidate all existing occupational health and safety legislation": Debates, Legislative Assembly of Ontario, October 18, 1977, p. 856. The Act repealed five statutes and parts of two others dealing with occupational health and safety. The statutes, which the Act replaced, were limited almost completely to the protection of employees with only minimal expansion of protection beyond the common law master and servant relationship.

[64] The legislation that the Act replaced focused on the safety of workers in workplaces such as factories, shops, offices, mines and construction sites. While I think it is evident that the scope of the present Act is not confined to industrial or commercial sites of that nature, it is instructive to keep those roots in mind. In any event, the emphasis of the present Act is clearly on protecting the safety of workers in the workplace, a purpose that was confirmed by this court in R. v. Timminco, at para. 22:

> The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. [page336]

[65] It follows that it is not part of the purpose and objective of the Act to protect non-workers. The focus is on the worker, the employer and the workplace, and injuries that pose a risk in that connection.

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Conclusion and Disposition

[66] For the reasons I have explained, the interpretation given to s. 51(1) of the Act by the board and the Divisional Court was unreasonable. Therefore, it cannot stand. I would interpret s. 51(1) to provide that the ministry must be notified of a death or critical injury at a site, and the requisite report provided, where there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at a workplace. A workplace is where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or (ii) where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work.

[67] It may be that a literal reading of s. 51(1) would suggest a broader interpretation. In spite of that, however, the decisions below would lead to absurd results and accordingly do not "[fall] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": Dunsmuir, at para. 47. The interpretation I adopt conforms to the purpose and objective of the Act and is consistent with the provisions of the Act read as a whole, even if the words of s. 51(1) alone may suggest the alternative interpretation: Boma Manufacturing Ltd., at para. 109.

[68] Accordingly, I would allow the appeal, set aside the decision of the Divisional Court and allow the application for judicial review. In the result, the order of inspector Den Bok requiring Blue Mountain to report to the ministry the death of the Blue Mountain guest in the swimming pool on December 24, 2007 is also set aside.

[69] The appellant is entitled to its costs of the appeal, payable by the respondent Ministry of Labour, and fixed in the amount of $5,000, inclusive of disbursements and all applicable taxes. There will be no costs with respect to the board or the intervenors.

Appeal allowed.

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