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## Blue Mountain Resorts

By Malcolm MacKillop and Justin Tetreault, Student-at-Law

The obligation to report serious workplace injuries to the Ministry of Labour (“MOL”) is an important requirement of the *Occupational Health and Safety Act* (“OHS”). Section 51 of the *OHS* requires that where a person is killed or critically injured from any cause at a workplace, the employer must: (1) report the incident immediately to a MOL Inspector and to other workplace parties; (2) file a written report of the circumstances of the incident with the MOL within 48 hours; and (3) preserve the scene of the incident.

Last month in *Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board)*, 2011 ONSC 3057, the Divisional Court confirmed that an employer’s Section 51 obligations may be triggered where a non-worker, such as a customer or other member of the public, suffers serious injury or death.

### Background

In December 2007, a guest at Blue Mountain Resort (“Blue Mountain”) died in an unsupervised swimming pool. There were no workers present at the time. Originally Blue Mountain believed that the guest had suffered a heart attack but it was subsequently determined that the guest had drowned. Blue Mountain did not report the incident to the MOL.

During an unrelated field visit in March 2008, an MOL Inspector learned about the drowning. The Inspector concluded that a “person” included a guest and that a “workplace” included the unsupervised swimming pool and ordered Blue Mountain to comply with the *OHS* by reporting the incident.

Blue Mountain appealed the order to the Ontario Labour Relations Board (the “Board”). The Board upheld the order agreeing with the Inspector that the term “person” includes all persons and is not restricted to workers. The Board also held that not only was the swimming pool a “workplace” but that all 750 acres of the resort were a workplace under the *OHS*.

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### The Divisional Court

The Divisional Court upheld the Board's decision that the guest's death triggered Blue Mountain's obligations under Section 51 of the *OHSA*.

The court upheld the broad definition of the term "persons" opining that conditions and hazards that result in the death or critical injury of a non-worker have the potential to cause similar harm to workers. Requiring employers to report the injuries of all persons enhances the protection of workers by bringing such hazards to the attention of the MOL.

With respect to the definition of a "workplace", Blue Mountain argued that the swimming pool did not qualify as a "workplace" within the meaning of the *OHSA* at the time of the incident. Blue Mountain argued for an interpretation of "workplace" that required the physical presence of a worker at the time that the serious injury or death occurred. The Court rejected Blue Mountain's argument finding that workers and guests are vulnerable to the same dangers. If, for example, the swimmer had been injured by a structural fault in the pool area, the fact that the injured person was not a worker, or that there were no workers present at the time, should not prevent the danger from coming to the attention of the MOL. Low J. opined, at paragraph 26, that:

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.

Blue Mountain also raised concerns regarding the impact of the Board's finding that the whole of Blue Mountain's 750 acre resort constitutes a "workplace". Blue Mountain is a popular resort where thousands of people visit each year and take part in activities such as swimming, skiing, and mountain biking. Blue Mountain argued that if the entire resort is found to be a "workplace", Blue Mountain would be required to report injuries to the MOL that were completely unrelated to worker health and safety, such as broken legs suffered by guests while skiing. Furthermore, under section 51(2) of *OHSA*, Blue Mountain would be required to preserve the area of all such accidents until permission was given by an MOL Inspector. Blue Mountain argued that this was an unreasonable result that went beyond the intent of the *OHSA*.

The Court agreed that it was not reasonable for the Board to have decided that the entire Blue Mountain Resort constituted a "workplace". Blue Mountain's ownership of the

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entire resort's property was not sufficient to bring it within the statutory definition of the term "workplace". Each case must be determined on its own facts. On the facts of this case, the swimming pool did constitute a "workplace" because Blue Mountain employees regularly worked in the swimming pool area to clean the pool and check the water.

### **Impact on Employers**

The Court's decision affects employers with premises that are open or accessible to members of the public. An incident on an employer's premises that results in a critical injury or fatality to a member of the public may trigger reporting obligations under *OHS*A. The Court's finding that what constitutes a "workplace" must be determined on the facts of each case means that the exact implications of the decision remain unclear. Whether a reporting obligation exists will depend on whether the risk or hazard that caused a serious injury or death also poses a risk to the health and safety of workers.

In the wake of the Court's decision, the cautious approach will be to notify the MOL of any critical injury or death to a non-worker. When notifying the MOL, employers should clearly explain the circumstances of the incident and the cause of the critical injury or death and should ask the MOL whether they will be investigating the incident. In addition, employers must be sensitive to the requirement to preserve the scene of a critical injury or death until an MOL Inspector has given permission to do so. When notifying the MOL of an incident, employers should ask whether the MOL will provide such permission.

Finally, employers should be aware that failure to comply with the notification and preservation obligations under section 51 of *OHS*A can result in a fine of up to \$500,000 for a corporation, or a fine of up to \$25,000 and/or imprisonment for up to 12 months for an individual.

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