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Employment Update

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"…the Court of Appeal recognized the broad remedial purpose of the Act, but determined that absurd and unintended consequences would result if the interpretation of the Board and the Divisional Court was to be followed."

"SOMETIMES A SWIMMING POOL IS JUST A SWIMMING POOL": COURT OF APPEAL FOR ONTARIO RELEASES MUCH ANTICIPATED BLUE MOUNTAIN DECISION

Melanie I. Francis

On December 24, 2007, a guest at Blue Mountain Resort in Collingwood, Ontario died while swimming in an unsupervised indoor pool at the resort. Following this incident, a Ministry of Labour Inspector made an order that, pursuant to s. 51(1) of the *Occupational Health and Safety Act*, Blue Mountain was required to report this "guest injury" to the Ministry of Labour. This order was unsuccessfully appealed to the Ontario Labour Relations Board and a subsequent application for judicial review was dismissed by the Divisional Court, paving the way for the case to be heard at the Court of Appeal for Ontario. Yesterday, the Court of Appeal released its decision, overturning the lower level rulings and setting aside the Inspector's order.

Section 51(1) of the Act states:

> 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 Ministry Inspector determined that the guest drowning was captured by this section and that a report was therefore required. The Board agreed, reaching the conclusion that the swimming pool was in fact a "workplace" because employees of the resort would have been present at various times in order to check and maintain the pool area. The Divisional Court, in turn, found the Board's determination to be reasonable.

These decisions raised significant concerns for employers. Their result was to establish an entirely *location*-based analysis, requiring reporting to the Ministry whenever anyone died or was critically injured at a location where someone worked or might work regardless of the cause of the incident.

In its decision, the Court of Appeal recognized the broad remedial purpose of the Act, but determined that absurd and unintended

EMPLOYMENT UPDATE

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Melanie practices in all areas of employment, labour and human rights law, and has been involved in matters before the Superior Court of Justice, the Court of Appeal for Ontario, the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board and boards of arbitration. Melanie has also been involved in a number of occupational health and safety matters before the Ontario Court of Justice.

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consequences would result if the interpretation of the Board and the Divisional Court was to be followed. The Court of Appeal was concerned that such a broad interpretation would lead to the conclusion that "every death or critical injury to anyone, anywhere, *whatever the cause*, must be reported."

The Court of Appeal provided a number of practical illustrations as to why such a result was problematic. For example, if there was a critical injury to a hockey player or a fan at a Toronto Maple Leafs game, it would have to be reported to the Ministry. By extension, the site of the incident would have to be preserved, essentially shutting it down, until released by a Ministry Inspector.

Instead of agreeing with such a broad, all-encompassing approach, the Court of Appeal has established the following criteria for when the reporting requirement under s.51(1) will be triggered:

1. any person is killed or critically injured;
2. the death or critical injury occurs at a place where i) a worker is carrying out his or her employment duties at the time of the incident; 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; and
3. 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.

It is the third criteria that is critically important in terms of limiting the scope of the reporting requirement. Applied to the guest drowning at the resort, there was no evidence that the death was caused by any hazard that could affect the safety of a worker, whether present or passing through. As the court stated "it is highly unlikely that a Blue Mountain employee is going to drown while swimming in the pool in the course of his or her employment duties." The required reasonable nexus simply was not there. As such, in this case, a swimming pool really is just a swimming pool. ■

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