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## "Sometimes a Swimming Pool is just a Swimming Pool"

**By David Elmaleh, Associate Lawyer at McCague Borlack LLP**

On February 7, 2013, the Court of Appeal for Ontario released its decision in *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75. This case involved the unfortunate death of a guest while swimming in an unattended indoor pool at Blue Mountain Resorts on Christmas Eve, 2007.

The primary issue on appeal was whether Blue Mountain was required to report the death to the Ministry of Labour on the basis that it was a "death or critical injury incurred by a person at a workplace". Blue Mountain took the position that it was not required to report the death because the recreational facility, particularly the swimming pool, was not predominantly a workplace and a worker was not present at the site when the death occurred. In contrast, the respondent, an inspector under the *Occupational Health and Safety Act* (the "OHSA"), took the position that reporting the death was required under the OHSA.

Section 51(1) provides that where a person is killed or critically injured from any cause at a workplace, the employer, *inter alia*, shall immediately notify an inspector of the occurrence and send a written report of the circumstances within 48 hours.

The inspector under the OHSA issued an order that Blue Mountain was required to report, along with related orders. The Ontario Labour Relations Board upheld the order.

The Divisional Court subsequently dismissed Blue Mountain's application for judicial review, finding that the Board's determination that the swimming pool was a "workplace" was reasonable. The Board's decision turned on an inference drawn that the employees of Blue Mountain must have been present at other times in the pool area in order to check and maintain it. By the same token, the Divisional Court found it to be common ground that the swimming pool was "a place where one or more workers work."

However, the Court of Appeal set aside the decisions of the Divisional Court and the Board, noting that such a broad interpretation of the OHSA would make virtually *every place* in the province of Ontario a "workplace", including any and all commercial, industrial, private or domestic places because at some point, a worker may be at that place. The Court of

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Appeal concluded that such an interpretation was absurd and would lead to the conclusion that every death or critical injury to anyone, anywhere, would have to be reported.

Consequently, the Court of Appeal interpreted the OHSA as requiring that there must 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 was no such nexus in the case at bar.

This case is significant, not only for those practicing employment law or those who advise employers of best practice risk-management strategies, but for all workplace parties across the province. This case is a pronunciation by high judicial authority that not all sites where workers may attend are considered "workplaces" under the OHSA which require reporting of death or critical injuries. Rather, a reasonable nexus must exist between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the site of the incident.

The OHSA's main purpose is to protect workers from health and safety hazards while on the job. It sets out the duties of various workplace parties (employers, supervisors, etc.), establishes procedures for dealing with workplace hazards, and contains enforcement provisions in the event compliance is not voluntarily achieved.

However, this case confirms that the reporting requirements under the OHSA are not engaged every time there is a critical injury or death occuring at a place where a worker might reasonably be expected to carry out certain duties in the ordinary course of his or her work.

As the Court noted at paragraph 6 of this decision, "sometimes a swimming pool is just a swimming pool".

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## *Franchisor Advisory Councils*[1]

**by David Kornhauser (MBA, LLB), Corporate Counsel**
**MacDonald Sager Manis, LLP**

Franchising as a preferred business model in Canada has grown immeasurably. The marketplace in which franchised businesses operate has matured considerably over the time. Competition is fierce. In this environment, franchisors and franchisees must continuously improve their respective businesses in order to grow, or even maintain, their profitability.

Historically, franchisees were deterred from reaching out for support in dealing with common issues. Over time however, franchisees and franchisors have become increasingly more sophisticated. Franchisees are much more knowledgeable about franchising in general and the industries in which they operate. They have come to appreciate that the success of the brand is dependent upon their individual success. Franchisors with a more nuanced appreciation of the evolution of the franchise business model have taken the initiative to create their own form of intermediary entity, the franchisor advisory council[2]("FAC"), a form of organization in which their interests are fully represented and protected. This series of articles will discuss the nature and purposes of an FAC, how it should be

structured and how it can most effectively be operated and managed. It will also touch upon the main distinctions between an FAC and a franchisee association and the advantages and disadvantages of each.

**A. The Nature and Purposes of an FAC**

The FAC is an organization created and managed by the franchisor and which is generally comprised of senior executives and a representative group of franchisees. The defining characteristic of the FAC is franchisor control. Although an FAC allows for an element of franchisee participation, it is the franchisor which initiates the establishment of an FAC and dictates how the FAC will be structured and governed, including the level of franchisee participation in key decision making processes.

The overarching aim of an FAC is to promote franchisor-franchisee communication on issues that affect the system as a whole and strengthening the essential element of mutual trust in the franchisor-franchisee relationship.

An FAC offers franchisors the opportunity and a venue to market themselves and their strategic visions to their franchisees. More specifically, it is an effective vehicle for introducing franchisees to new products or services, changes to operating systems and protocols, advances in, and adoption of, new technologies and other changes that the franchisor envisages for the system. System changes have a significant impact on a franchisee's business and franchisees are often resistant to change, particularly when they perceive that the changes are being imposed without due consideration to franchisees' profitability or operating procedure.

From a franchisee's point of view, an FAC represents an officially sanctioned channel through which concerns can be freely expressed without fear of unwarranted attention or retribution. Again, franchisees represent the system in the marketplace. They know firsthand how consumers react to the system's products and services, and in real time. They are possessed of a wealth of information that can be harnessed to more effectively implement the franchisor's policies.

Franchisor advisory councils, at their best, function as an ongoing medium not only for the exchange of information and knowledge between franchisor and franchisee but among the franchisees themselves. Many franchisors openly solicit input from franchisees for suggestions as to how to improve operations. The perception of inclusivity and empowerment that an FAC can engender is highly motivating. Franchisees will begin to feel that they have a real stake in the future of the system with the result that they will more likely take the steps necessary to ensure that their businesses are efficiently and effectively operated.

In order for an FAC to maximize its potential as a positive force, the FAC should be comprised of motivated franchisor executives and franchisees representing all levels of operational sophistication and each geographical region in the system. The franchisees selected to sit on the council must reflect the varied conditions and market realities of the various locations and forms of operating unit that represent the brand.

FACs must also remain active. Franchisees need to know that their concerns are being taken seriously. If a franchisor representative makes a promise, franchisees must be confident that those promises will be fulfilled. Franchisees must see results. In addition, franchisee members must be held accountable to the other franchisees in the system. They must also make themselves available to the franchisees they represent to discuss their concerns and to advocate on their behalf at council.

Franchisor advisory councils, like franchise systems, evolve over time. A

franchisor must re-evaluate and reconstitute its FAC to ensure that it continues to reflect the make-up of the franchisees in the system and to meet new challenges. It is the responsibility of the franchisor to ensure that the FAC remains a positive and vital force. Failure to do so will likely be viewed by the franchisees as proof that the council was never really intended to work for them.

Next time we will discuss Structure and Management of an FAC.

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[1]Franchisor advisory councils are often referred to as "franchise advisory councils". The author has adopted the former terminology because it is a more accurate description of the nature of this type of organization. As will be discussed below, FACs, unlike franchisee associations, are franchisor controlled and franchisor driven. This is not to suggest that FAC's are inherently or structurally incapable of advancing the interests of franchisees. In the authors' experience, when managed and operated properly, FAC's benefit the system as a whole and thus all of the players within it. However, franchisor control is the hallmark of an FAC and is the essential factor that distinguishes it from a franchisee association.

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## No Privilege for Accountants' Tax Advice: A Contest of (Un)equals

**By Pooja Samtani & Justin Kutyan, Osler Hoskin & Harcourt LLP**

Tax authorities, both in Canada and across the globe, have wide-ranging powers to compel the disclosure of taxpayer information. These powers, although broadly exercised, are still subject to common law principles and statutory provisions that protect privileged information from disclosure. When it comes to asserting these protections, the accounting profession has long perceived itself as being at a competitive disadvantage vis-à-vis the legal profession. This is of particular concern in the tax realm, where clients routinely seek advice from both accountants and lawyers.

The prospect of extending privilege to accountants' tax advice has previously been considered and rejected in Canada.[1]In the United Kingdom, the Supreme Court recently came to the same conclusion in *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax*.[2] In its decision, the Supreme Court confirmed by a five-two majority that solicitor-client privilege (or "legal advice privilege" as it called in the UK) attaches only to advice provided by members of the legal profession.

The narrow issue before the Court was whether, in responding to a demand by the UK tax authority for information, a taxpayer was entitled to resist disclosure on the ground that the information was privileged, notwithstanding that it had been prepared by accountants. The taxpayer argued that, in the tax context, it is illogical to distinguish between advice given by lawyers and accountants, and that this distinction does

not reflect the reality that such advice is often identical in content. In effect, the taxpayer emphasized the nature of the advice, and not the status of the advisor.

Given this emphasis, the broader question raised by the appeal was whether legal advice privilege extends, or should be extended, to cover advice given by professionals other than lawyers. This question proved to be divisive, eliciting six sets of reasons from the seven-member panel. Moreover, all of the presiding justices accepted the position that, from a purely logical perspective, the privilege should be extended to advice given by anyone whose profession ordinarily includes the giving of legal advice. Yet the majority declined to do so principally for three reasons:

- First, extending the privilege would lead to uncertainty and inconsistency. For instance, would the privilege extend to advice given by other non-lawyers, such as planning consultants and actuaries? If so, what elements of such advice would be privileged?

- Second, the question of whether the privilege should be extended raised questions of policy that were better left to Parliament. In other words, the consequences of extending privilege should be considered through the legislative process.

- Third, Parliament had previously legislated in this area on a number of occasions and had done so on the assumption that privilege only applies to advice given by lawyers. In these circumstances, the majority concluded, it would be inappropriate for the Court to extend the law.

The minority offered a more purposive analysis. Lord Sumption underscored the functional approach historically taken with respect to legal advice privilege. The availability of this privilege, he said, depends on the character of the advice sought and the circumstances in which it is given, rather than the status of the advisor, provided that the advice is given in a professional context. Lord Clarke, who concurred with Lord Sumption, likewise concluded that legal advice privilege is a creature of the common law and as such it should be capable of redefinition.

In the leading judgment for the majority, Lord Neuberger acknowledged that the argument for allowing the appeal was a strong one, at least in principle. Legal advice privilege exists to ensure that a person can freely seek and obtain legal advice. The privilege is conferred for the benefit of the person seeking advice; it does not serve to protect the legal profession. As such, the majority recognized the difficulty with concluding, as a matter of pure logic, that privilege should be restricted to communications with advisors who happen to be lawyers, as opposed to communications with other qualified professionals who are equipped to give expert legal advice in a particular field. Nevertheless, Lord Neuberger explained that to allow the appeal would not merely extend the privilege, but extend it considerably, given that accountants are only a subset, albeit an important subset, of a larger group of professionals who might also then be covered. Accordingly, while it may have been logical to extend legal advice privilege in the manner contended by the taxpayer, the majority refused to do so, noting that the life of the common law has not been logic.

This case offered the UK Supreme Court an opportunity to consider afresh the scope of legal advice privilege. From the perspective of the legal profession, the status quo remains. The Court clearly recognized, as most lawyers would have hoped, that any uncertainty surrounding the scope of this privilege could impact its practical utility. What is refreshing about this decision, however, and is consistent with the approach taken in Canada, is that the Supreme Court has confirmed the importance, and the absolute nature, of solicitor-client privilege. The fact that the taxpayer was unsuccessful in this case does not necessarily end the debate, but it

does signal that the courts are reluctant to extend the scope of this privilege in the absence of statutory intervention. Needless to say, taxpayers should be aware when seeking tax advice from accountants and other non-lawyers that such information may not then be protected from disclosure.

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[1] *Tower v. MNR* , 2003 FCA 307.
[2] [2013] UKSC 1 (Prudential).

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## Motions[2] - Recent Decisions Throw Cold Water on Motions to Strike Motions for Summary Judgement

**By Adam Hirsh, Osler Hoskin & Harcourt LLP**

In several recent decisions,[1] courts in Ontario have clarified when a party may bring a motion to strike or stay a motion for summary judgment. Historically these "motions to strike motions" were a rare occurrence;[2] however, they had become increasingly prevalent following the Court of Appeal's decision in *Combined Air Mechanical Services Inc. v. Flesch*,[3]wherein the Court's noted that:

> A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal rule of discovery.

A trio of recent cases from the Ontario Superior Court suggest that these types of motions may once again become a procedural anomaly, as the courts have imposed a high threshold in an effort to discourage litigants from seeking this form of relief.

In *Combined Air* - the leading decision on the new summary judgment rule (Rule 20) introduced as part of the package of amendments to the Ontario *Rules of Civil Procedure* in 2010 - the Court of Appeal adopted a "fresh approach" to summary judgment. Under the new rule, the motions judge is expressly empowered to weigh evidence, draw inferences and evaluate credibility. The Court's fresh approach, described as the "full appreciate test", requires the motion judge to first conclude that he or she can fully appreciate the evidence and issues in the case (not simply the motion) on the basis of the motion record, as supplemented by limited oral evidence, before disposing of the action on the merits by way of summary judgment. Where the motion judge determines that the attributes and advantages of the trial process are necessary to effect a full and fair appreciation of the dispute, the motion judge should direct the matter to proceed to trial.

The Court of Appeal described a number of scenarios that are likely to meet the full appreciation test - for example, where there are limited factual issues in dispute, where the case is predominantly focussed on the documents, or where the discovery process is complete or would not be

necessary to permit a fair and just resolution of the dispute - but also recognized that there may be cases where the summary judgment motion is premature. The Court noted that in these cases, the responding party should have the option of moving to stay or dismiss the motion for summary judgment. The Court did not, however, articulate a test for determining when a summary judgement motion should be stayed, nor did it specify if the issue of prematurity should be raised independently by way of a separate motion or in the context of responding to the motion for summary judgment (for example, as a basis for arguing that the full appreciate test cannot been satisfied).

Following *Combined Air*, a number of litigants who were facing pending summary judgment motions moved, by way of separate motion, to strike or stay the summary judgment motion. The response of the lower courts to these motions has been unanimously unfavourable to the moving parties.

In *Ghaffari*, the first case to deal with the issue following *Combined Air*, Justice Ferguson found that a three part test must be met in order to obtain a stay:

> (i) first, the court should consider whether there is a reasonable chance of success on the motion for summary judgment, with regard to whether there is a genuine issue requiring a trial and whether the matter is too complicated for the motion judge to ascertain the full appreciation of the case;
>
> (ii) second, the court should determine whether the matter is complicated, what the issues are, the nature of the evidence and law to determine the issues and whether the case can be determined without the necessity of a full trial; and
>
> (iii) third, the court should only impose a stay in the clearest of cases.[4]

In *George Weston*, Justice Brown considered the issue in the context of two Commercial List actions. Brown J. favoured a "case management" approach, finding that a motion to strike a motion for summary judgment may only be brought with leave of the Commercial List case management judge, following an attendance at a 9:30 appointment or case conference. Justice Brown noted that any review of the appropriateness of a pending summary judgment motion should not require the court to engage in a detailed review of the merits of the proposed motion. A motions court should consider whether the proposed summary judgment motion is a good or appropriate candidate for summary disposition because the "right fit" exists between on the one hand, the nature of the issues raised on the motion and the quality of the record which the motion will generate and, on the other hand, the summary judgment procedure available under Rule 20.[5]

Most recently, in *Stever*, Justice Goldstein affirmed that a motion to strike a summary judgment motion should only be granted "in the clearest of cases", noting the inherent tension that arises from the motion judge having to review the record to determine if it is sufficient for the summary judgment judge to obtain a full appreciation of the evidence - the same consideration the summary judgment judge will need to undertake on the summary judgment motion itself. As Justice Goldstein explains, motions to strike motions result in a waste of judicial resources and give rise to a risk of inconsistent findings. Goldstein J. held that these motions ought to be strongly discouraged, and that cost sanctions should be employed where appropriate.[6]

The reaction of the courts to these motions to strike is not surprising, given the scarce judicial resources in Ontario, the ability for parties

(particularly those with deep pockets) to use these motions for purely tactical reasons, and the increased cost and delay that these motions can produce. It remains to be seen whether the Court of Appeal will endorse this approach when it next has an opportunity to revisit the issue.

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[1]*Ghaffari v. Asiyaban*, 2012 ONSC 2724 ("*Ghaffari*"); *George Weston Limited v. Domtar Inc.*, 2012 ONSC 5001 ("*George Weston*"); *Stever v. Rainbow International Carpet Dyeing & Cleaning Co. et al.*, 2013 ONSC 241 ("*Stever*").

[2] See for example *Millgate Financial Corp. v. BF Realty Holdings Ltd.*, [2003] O.J. No. 1309 (S.C.J.) and *Meditrust Healthcare Inc. v. Shoppers Drugmart*, [2000] O.J. No. 3762 (S.C.J.), where the court held that a motion to strike a motion for summary judgment will only be granted where the summary judgment motion is found to be an abuse of process.

[3]2011 ONCA 764 ("*Combined Air*").

[4] *Ghaffari*, *supra* note 1, at para. 14.

[5] *George Weston*, *supra* note 1, at paras. 7, 47-49.

[6] *Stever*, *supra* note 1, at paras. 12-13.

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