August 31st, 2009

Who is a Farm Worker? And Why Does it Matter?

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Cases Considered:

R. v. Northern Forage Inc., 2009 ABQB 439.

Alberta marked its 5th annual Farm Workers Day on August 20, 2009. As in previous years, the event provided an opportunity to advocate for equal protection for farm workers under Alberta's labour and employment laws. Farm workers are currently excluded from the following laws: (1) protections regarding wages, overtime, holidays, and hours of work (see *Employment Standards Code*, R.S.A. 2000, c.E-9, section 2(4)); (2) mandatory coverage for workers compensation (see *Workers' Compensation Regulation*, Alta. Reg. 325/2002, Schedule A); (3) work-related health and safety protections (see *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, section 1(s)); and (4) protections related to the unionization of workers (see *Labour Relations Code*, R.S.A. 2000, c. L-1, section 4(2)(e)). This makes Alberta one of the most lax provinces in Canada in terms of farm worker protection. Groups such as the Alberta Federation of Labour have called for an end to such exclusions, and a recent inquest into the fatality of agricultural worker Kevan Chandler led Judge Peter Barley to recommend that "paid employees on farms should be covered by the *Occupational Health and Safety Act*…" (at 7). Until the Alberta government amends the relevant legislation, however, questions may arise as to which workers are covered by the exclusions.

This was the issue in *R. v. Northern Forage Inc*., 2009 ABQB 439. Northern Forage, a company based in Nampa, Alberta, produces Timothy hay. In January 2004, Yvon Daniel Poulin, an employee of Northern Forage, was killed working in a facility where the hay was compressed into bales. Northern Forage was charged with an offence under section 2(1)(a) of the *Occupational Health and Safety Act* (*OHSA*), which provides that "every employer shall ensure, as far as it is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer". The company sought to defend itself against the charges on the basis that its operations were a "farming operation" and thus exempted from the *OHSA*. This argument was successful at trial in the Alberta Provincial Court, and the Crown appealed this decision to the Alberta Court of Queen's Bench.

The relevant statutory provisions requiring interpretation are as follows:

> *OHSA*
>
> 1 In this Act,
> ...

(s) “occupation” means every occupation, employment, business, calling or pursuit over which the Legislature has jurisdiction, except

(i) farming or ranching operations specified in the regulations, and …

(bb) "worker" means a person engaged in an occupation;

2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

(a) the health and safety of

(i) workers engaged in the work of that employer ...

Farming and Ranching Exemption Regulation, Alta. Reg. 27/1995 (“Exemption Regulation”)

2. The farming and ranching operations that are excluded are the operations that are directly or indirectly involved in the following:

(a) the production of crops, including fruits and vegetables, through the cultivation of land;

(b) the raising and maintenance of animals or birds;

(c) the keeping of bees.

3. Despite section 2, the following operations are included in the definition of “occupation” under the Act:

(a) operations involved in the processing of food or other products from the operations referred to in section 2;

(b) the operation of greenhouses, mushroom farms, nurseries, or sod farms;

(c) operations involved in landscaping; operations involved in the raising or boarding of pets.

Justice Don Manderscheid described his task as follows: “we must work through the various nested components that determine whether the employment circumstances of a particular agricultural worker are subject to or exempt from the provisions of the Act” (at para. 11). More specifically, it was necessary to determine the following issues sequentially:

(1) the scope of “farming and ranching operations” (Act, s. 1(s), Exemption Regulation, s. 2),

> (2) whether Northern Forage or its workers were engaged in operations "that are directly or indirectly involved ... in the production of crops ... through the cultivation of land" (Exemption Regulation, s. 2(1)),
>
> (3) if so, whether compression of the Timothy hay amounted to "processing of food or other products" (Exemption Regulation, s. 3(a)) (at para. 13).

Dealing first with the scope of "farming and ranching operations", Justice Manderscheid rejected the parties' arguments in respect of different dictionary definitions of the term "operations", noting that this term had to be interpreted in light of the other relevant sections of the Exemption Regulation, the *OHSA* as a whole and the objectives of the legislation. Doing so, Justice Manderscheid found that the term "operations" was not particularly meaningful, rather, it was "an arbitrary term that has been selected by the Legislature to 'label' [the] three exempt categories" (at para. 16). In particular, he rejected the company's argument that "operation" meant "business", such that any entity that conducted one of the three exempted activities would be an exempt operation. Relying on the "legally understood" meaning of "business" ("anything which occupies the time and attention and labour of a man for the purpose of profit" (*Stewart v. Canada*, 2002 SCC 46 (at para. 51)), Justice Manderscheid reasoned that the company's definition would draw a distinction between commercial and non-commercial agricultural activities that was "without obvious policy rationale" (at para. 21). This approach would also run contrary to the intent of the legislation, "that being the protection of the worker" (at para. 22). Accordingly, Justice Manderscheid held that "the deciding factor which determines exempt or non-exempt status under the legislation might be better resolved by evaluating the nature of the tasks conducted by a specific worker rather than the nature of the business or employer organization in question" (*ibid*.).

The next issue was how to determine which worker activities were exempted. Justice Manderscheid noted that the Exemption Regulation exempted worker activities that were both directly and indirectly involved in "the production of crops, including fruits and vegetables, through the cultivation of land" (section 2(a)). Here his analysis becomes rather confusing, as he returns to the notion of a business or enterprise seemingly rejected above: "I fail to see where "the production of crops, including fruits and vegetables, through the cultivation of land" could rarely be restricted to one particular activity but most likely would require several activities, which together would comprise the total sequence of production, which in turn could encompass a business or enterprise" (at para. 25). However, "As I have explained, I do not agree … that an "operation" is a business or enterprise, but do agree that to artificially distinguish and separate worker activities that are directly involved in crop production from worker activities indirectly involved in crop production, would lead to absurd results" (*ibid*.). With respect, this does not seem to add anything to the wording of the Exemption Regulation itself, which clearly includes worker activities that are both directly and indirectly involved in "the production of crops, including fruits and vegetables, through the cultivation of land."

Interpreting this section further, Justice Manderscheid relied on *Nampa (Village) v. Alberta (Municipal Government Board)* 1998 ABQB 478, 236 A.R. 173 as authority for the proposition that a common-sense, logical approach should be taken as to whether a worker's activity is directly or indirectly involved in an aspect (but not necessarily all aspects) of the enumerated exempt categories (at para. 32). Taking this approach, Justice Manderscheid agreed with the trial judge that worker activities occurring in the company's Compression Facility, including the de-stacking and compressing of Timothy hay, "are directly or indirectly involved in the production of [crops] and are therefore exempt from the operation of the Act" (at para. 33).

Justice Manderscheid next had to consider whether the production of crops in question occurred "through the cultivation of land" (Exemption Regulation section 2(a)). The government argued that "cultivation of land" should be interpreted so as to restrict the exemption "to activities which occur on the land or in the field" (at para. 36). Given that "the crop in question was the bailed [sic] Timothy hay and that the production of such a crop was complete once it is removed from the land or the field" (at para. 36), workers in the Compression Facility would not be exempt. Justice Manderscheid disagreed with this argument as follows:

> In my mind, this reasoning is flawed. The crop in question is the Timothy hay. The harvester of such a crop may choose to cut it and stack it on a hay rack and transport it to a storage facility where the harvester, immediately prior to storage, may choose to have the hay transformed into a smaller form by way of a hay bailer. Whether or not the crop of Timothy hay is bailed on the field or in a storage facility is immaterial to production of the crop. The Timothy hay remains the crop, not the bailed Timothy hay. … It is sufficient that the crop was grown via cultivation of land at some point in its overall production process. All worker activities that are directly or indirectly involved in that overall production process are exempt (at para. 37).

It is difficult to find fault with this interpretation. The final interpretive issue was more contentious, however.

The government argued that the company's Compression Facility operations involved "processing" of an agricultural product and were therefore not exempt from the legislation by virtue of Exemption Regulation section 3(a). The Court explained the work that went on in the Compression Facility as follows: "the bales of Timothy hay are … de-stacked, double compressed, re-tied, loaded on a pallet and covered by a plastic wrap. It is the total pallet that is covered by the plastic wrap and not the individual bales" (at para. 40). In terms of whether this amounted to "processing", the legislature did not define this term, and Justice Manderscheid noted that the jurisprudence was not "entirely consistent", as meanings tend to vary with the legislation being interpreted (at para. 43). Nevertheless, the law seemed clear that "activities which involved some form of transformation of the substance or composition of the original crop to an altered state would qualify as a "processing" of the original crop" (at para. 46, relying on *Elcan Forage Inc. v. Weiler* (1992), 102 Sask. R. 197 at 202, 33 A.C.W.S. (3d) 249 (Sask. Q.B.), *Sunshine Coast Regional District (The) v. Matkin and Matkin*, 2004 BCSC 679, and *Canada (ministre du Revenu national - M.R.N.) c. Lomex, Inc.* (1998), 161 F.T.R. 169, 98 D.T.C. 6588 (F.C.T.D.)). Because the Timothy hay was not changed in composition during the compressing process, Justice Manderscheid held that the work in the Compression Facility did not amount to "processing" as contemplated in the case law.

None of these cases, however, deal with a legislative context in which the exclusion of farm workers from health and safety protections was being considered. The Court distinguished other cases where the definition of "processing" was construed more broadly, to include, for example, the packing of a product (*Re The Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 25) and a "change in a product's appearance, quality or some other characteristic from what it was before the processing or the "transformation" took place" (*Notre Dame Seed Plant Ltd. v. Manitoba (Provincial Municipal Assessor)*, 2004 MBCA 161, 190 Man.R. (2d) 149). It is unclear why Justice Manderscheid relied on a narrower definition of "processing", particularly given his earlier statement that the Exemption Regulation should be construed in light of the objectives of the overall legislative scheme – i.e. to protect farm workers.

Justice Manderscheid also cited case law to support the points that "the fact that a farming operation may include a component which is highly mechanized or industrialized should not determine whether or not such farming operation attracts or loses its exempt status as a farming operation" (at para. 55, citing *Spawnline Inc. v. Ontario (Ministry of Labour)*, 1989 CarswellOnt 3597 (O.O.H.S.D.A.), and that "the fact that the farming operation may be conducted on a large scale or enterprise model should also not be conclusive of whether or not such farming operation attracts or loses its exempt status as a farming operation" (at para. 56, citing *Anderson v. Bear Hills Pork Producers Ltd.*, 2000 SKQB 505, 198 Sask.R. 229). He concluded that "the fact that the bales of hay are further handled in the Compression Facility in the manner previously stated does not detract from the fact that the Compression Facility is integral to the farming operations conducted by the Respondent, and it is of no consequence that the crop undergoes further handling at a location other than the field where the initial crop was grown" (at para. 58). Here Justice Manderscheid appears to slip back into a consideration of the location of the activity rather than whether it amounts to "processing", and it is unclear how the notion of "integral to the farming operations" is relevant to this issue.

The government's final argument was that the *OHSA* and Exemption Regulation should be interpreted so as to ensure its constitutionality. This is rather bizarre when one considers that it is the government that decided to exempt farm workers from this legislation in the first place. The government relied on *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 "as authority that legislation which discriminates against farm workers is contrary to s. 15, and an over-broad discrimination that cannot be justified under s. 1" (at para. 62). *Dunmore*, however, considered the exclusion of farm workers from the right to unionize under Ontario's labour relations legislation, and the majority of the Supreme Court decided the case under section 2(d) of the *Charter*, the freedom of association guarantee. In *obiter*, Justice Claire L'Heureux Dube also found that the legislation in question may have violated section 15 of the *Charter*, but none of the other justices concurred with her on this point.

More fatal to the government's position was that it had only raised the *Charter* issue on appeal, and had not led sufficient evidence to support the *Charter* argument. Here, the Court noted that it would have expected to see evidence as to "the required comparator group… the purpose of the legislation, and relevant contextual factors" (at para. 64). The Court cites *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 in support of this point despite the fact that more recent Supreme Court cases – *R. v. Kapp*, 2008 SCC 41 and *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 -- question the continued relevance of *Law* (see The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges).

Also problematic for the government was the Court's finding that the legislation in question did not involve a "genuine ambiguity" (at para. 64). Here it relied on *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, where the Supreme Court differentiated between the interpretation of the common law and legislation using *Charter* values. It is well accepted that "where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*" (*Bell ExpressVu* at para. 61). However:

> when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" …, it must

> be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations (*ibid*. at para. 62, references omitted).

One might have thought that the interpretation of "processing" in section 3(a) of the Exemption Regulation involved a genuine ambiguity, but the Court said that this was a "question of specific contexts, rather than a fundamental lack of clarity in the text of the legislation itself" (at para. 65).

The Court concluded by noting the vast changes in farming operations over the past decades, from the "single family farm, existing on a one quarter section homestead" to "modern farming operations that challenge one's imagination", involving "huge tracts of lands" and the employment of "numerous individuals" (at para. 68). Justice Manderscheid noted that even though some of these operations are comparable to factories, workers may be excluded from health and safety protections, and that "this may not be a desired state of affairs if such situations lend themselves to undermine the intent of workers' safety and health legislation" (at para. 70). However, "the role of the judiciary is to interpret rather than draft the legislation. This latter role is the sole purview of the Legislature" (at para. 71). That being said, if Justice Manderscheid had found an ambiguity in the Exemption Regulation, more specifically with respect to the term "processing", he would still have been acting within his proper role as a judge while strictly interpreting the extent to which farm workers should be excluded from the protections set out in the *OHSA*. Alternatively, perhaps the government can take its arguments in this case to heart and reconsider the exclusion of farm workers from this and other legislation protecting employees.