Employment Standards TRIBUNAL

An appeal

- by -

Suncoast Health Corp., formerly known as 0955323 B.C. Ltd.
("Suncoast")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2015A/182

DATE OF DECISION: December 21, 2016

DECISION

SUBMISSIONS

Ian Kennedy	counsel for Suncoast Health Corp.
Zack Anthony	on his own behalf
Michael Hug	on his own behalf
Sukh Kaila	on behalf of the Director of Employment Standards
Mark Witten	counsel for the Attorney General of British Columbia
Liliane Bantourakis	counsel for the Attorney General of Canada

INTRODUCTION

1. This is an appeal filed under subsection 112(1)(a) of the *Employment Standards Act* (the "*Act*") by Suncoast Health Corp., formerly known as 0955323 B.C. Ltd. ("Suncoast"), and it concerns a Determination issued against it on September 30, 2015. These reasons for decision should be read in conjunction with my earlier reasons issued on March 23, 2016 (BC EST # D058/16) with respect to this appeal.

2. On March 23, 2016, I issued the following orders: 1. Suncoast's application to extend the appeal period was allowed; 2. The two complaints filed by the respondents Zack Anthony ("Anthony") and Michael Hug ("Hug") were referred back to the Director for further investigation; and 3. The Director was directed to hear from the parties and then file a report with the Tribunal. In particular, the Director was directed to consider whether the two complainants were "farm workers" as defined in section 34.1 of the *Employment Standards Regulation* (the "*Regulation*") and whether the *Act* governed the two complainants' employment.

3. On July 21, 2016, a delegate of the Director of Employment Standards (not the delegate who issued the Determination) filed a report with the Tribunal. This report was disclosed to the parties who were invited to file further submissions with respect to the report. Suncoast and Messrs. Anthony and Hug all filed submissions and the Director filed a final reply.

4. After the parties had filed their submissions, I realized that Suncoast – who was arguing, among other things, that federal rather than provincial employment standards legislation governed the employment of the two complaints – had not served notices on the federal and provincial attorneys general as mandated by section 8 of the *Constitutional Question Act*. Accordingly, and by letter dated September 20, 2016, the Tribunal advised Suncoast's legal counsel to comply with this latter statutory obligation. The requisite notices were delivered on October 3, 2016. By letter dated October 27, 2016, counsel for the Attorney General of Canada advised "that [the A.G. of Canada] will not be intervening in response to the Notice of Constitutional Question and accordingly will not be providing written submissions". On October 28, 2016, legal counsel for the British Columbia Attorney General filed an extensive submission that was subsequently provided to Suncoast and to the two complainants and they were each given an opportunity to file a final reply. Both

complainants filed short replies but neither submission addressed the constitutional issue. Suncoast's legal counsel advised that he would not be filing any further reply submission.

5. With all of the parties' submissions having been filed, I am now issuing my final reasons for decision in this appeal.

BACKGROUND FACTS

6. Suncoast operates a medical marijuana production facility in Sechelt, B.C. On November 19, 2013, Mr. Anthony filed an unpaid wage complaint against Mr. Thomas Ross Brown (Suncoast's sole principal; "Brown") under section 74 of the *Act*. On November 22, 2013, Mr. Hug also filed an unpaid wage complaint naming Mr. Brown as his employer. Although both complaints named Mr. Brown personally as the "employer", it seems clear from the record before me that Suncoast was the actual employer of the two complainants, the delegate did not address this issue in her written reasons accompanying the Determination (the "delegate's reasons"). The delegate incorrectly stated in her written reasons that the complaints were filed against Suncoast.

7. The subsection 112(5) record before me includes a "Designated Person Production Licence" issued by the federal government under section 40 of the *Marihuana Medical Access Regulations* authorizing Mr. Brown to possess 487 plants (indoors) and to store not more than 21,915 grams of dried marijuana on site. This licence was issued on August 12, 2013, and expired March 31, 2014. Mr. Anthony is recorded as the "Holder" of the licence and Mr. Brown is described as the "Authorized Person" under the licence.

8. In his complaint, Mr. Anthony stated he worked for Mr. Brown from March 7 to September 20, 2013, and claimed nearly $93,000 in unpaid wages. Mr. Anthony stated that he worked as a "skilled labourer" and "construction site manager". Mr. Anthony appended a 1-page "Employment Agreement" to his complaint that identified "0955323 BC LTD" as the employer and this agreement obliges the employer to pay Mr. Anthony "$40.00/Hourly" for "services rendered by the employee". In his complaint, Mr. Hug stated that he worked for Mr. Brown from August 1 to September 20, 2013 as a "labourer/contractor" and he sought approximately $8,500 in unpaid wages based on a $15 per hour wage rate.

9. These two complaints were the subject of an investigation conducted by a delegate of the Director of Employment Standards (the "delegate"). For the most part, Suncoast did not actively participate in the delegate's investigation. The delegate's written reasons recount her various, mostly fruitless, efforts to engage Mr. Brown in the investigation. Ultimately, the delegate issued a Determination against Suncoast, in the total amount $50,759.97. This Determination is the subject matter of the present appeal proceedings.

10. By way of the Determination, the delegate ordered Suncoast to pay Mr. Anthony the total sum of $38,827.72 on account of unpaid wages and section 88 interest. The delegate determined that Mr. Anthony was paid his regular wages for all hours worked but had a valid overtime pay claim ($32,943.76) and had not been paid some earned statutory holiday pay ($1,481.25) or any earned vacation pay ($2,217.00).

11. The delegate awarded Mr. Hug $8,932.25 on account of unpaid wages and interest. This latter sum included regular wages ($3,028.00), overtime pay ($4,818.00), statutory holiday pay ($240.00) and vacation pay ($343.44).

12. Further, and also by way of the Determination, the delegate levied six separate $500 monetary penalties against Suncoast (see section 98 of the *Act*) based on its contraventions of sections 17 (semimonthly payment of wages), 18 (payment of wages on termination of employment), 40 (overtime pay), 45 (statutory holiday pay) and 46 (premium pay for working on a statutory holiday) of the *Act*, and section 46 of the *Regulation* (failure to produce employment records as demanded). As noted above, the total amount of the Determination is $50,759.97.

SUNCOAST'S REASONS FOR APPEAL

13. In its original appeal documents, Suncoast's legal counsel argued that the Determination should be varied because the delegate erred in law. More particularly, counsel asserted that the complainants' unpaid wage awards on account of overtime pay and statutory holiday pay (which comprise a significant portion of the total unpaid wage award) could not stand since both complainants were "farm workers" and thus excluded from Part 4 (except section 39) and Part 5 of the *Act*.

14. A "farm worker" is defined in subsection 1(1) of the *Regulation* as follows:

> "**farm worker**" means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of
>
> (a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,
>
> (b) clearing, draining, irrigating or cultivating land,
>
> (c) operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b), or
>
> (d) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product,
>
> but does not include any of the following:
>
> (e) a person employed to process the products of a farming, ranching, orchard or agricultural operation other than to do the initial washing, cleaning, sorting, grading or packing of
>
> (i) an unprocessed product of the operation during the normal harvest cycle for that product, or
>
> (ii) during the same harvest cycle referred to in subparagraph (i), the same or a similar unprocessed product purchased by the operation from another farming, ranching, orchard or agricultural operation;
>
> (f) a landscape gardener or a person employed in a retail nursery;
>
> (g) a person employed in aquaculture...

15. Section 34.1 of the *Regulation* states: "Part 4, except section 39, and Part 5 of the Act do not apply to farm workers". Thus, "farm workers" are not entitled to overtime pay and statutory holiday pay otherwise payable under the Act. Section 34.1 only applies insofar as farm workers' *statutory* entitlement is concerned; farm workers can independently negotiate a *contractual* right to overtime pay and statutory overtime pay.

16. On appeal, Suncoast argued that it was "exclusively in the business of producing medical marihuana, which it is properly licenced to produce" and that "the Complainants [were hired] to cultivate marihuana, and that is the work they performed".

17. The facts of this case raise two questions: first, there is the "farm worker" issue and, second, there is the question of whether the two complaints should have been filed under federal, rather than provincial, employment standards legislation. The delegate did not address the "farm worker" issue in her reasons. Although this issue was not addressed in the Determination, in my earlier decision I held that this issue could be raised on appeal since the Determination was issued following an investigation rather than an oral hearing. I held that the delegate should have turned her mind to this issue as well the matter of whether Suncoast's operations fell under the ambit of the *Act*.

18. In light of the fact that the delegate did not address either issue in her reasons, I referred these issues back to the Director for further investigation. I ordered the Director to submit a report to the Tribunal following the conclusion of the further investigation.

THE DIRECTOR'S REPORT

19. On July 21, 2016, and after seeking submissions from the parties, the Director (through one of her delegates – not the delegate who issued the Determination) filed a 1 ½ -page report with the Tribunal addressing the two issues that were the subject of my earlier "referral back" order, namely: i) whether Suncoast's operations, either in whole or in part, fell under federal jurisdiction, and ii) the "farm worker" issue. The Director's delegate's ultimate conclusions were as follows:

> …Suncoast is not a licensed producer of medical marihuana and therefore there is no federal oversight or participation. In addition, the Employer has not met the burden of proof required to satisfy me the Complainants' principal duties were consistent with the definition of "farm worker". I respectfully request the Tribunal to confirm the original decision in whole as the matter is within the delegate's statutory authority.

20. The Director's delegate, rejecting Suncoast's counsel's position, submitted that Suncoast's operations were not governed by federal law because it was never properly licensed to produce medical marijuana for commercial purposes:

> With respect to the issue of Jurisdiction, Suncoast…claims it holds a license to produce and sell medical marihuana pursuant to the Marihuana for Medical Purposes Regulation [*sic*] ('MMPR'). However, examination of the Health Canada website and its list of authorized licensed producers does not list Suncoast as an authorized licensed producer.
>
> In its submission, Suncoast relies on two documents.
>
> 1. the Designated Person Production License Dried Marihuana for Medical Purposes (the "License") which allows an individual to grow medical marihuana on behalf of another person. An individual can hold either a Personal-Use Production Licence and a Designated Person Production License or two Designated Person Production Licences.
>
> 2. the Authorization to Possess Dried Medical Marihuana for Medical Purposes (the "Authorization") allows an individual to possess marihuana for personal use only.
>
> Thomas Ross Brown, the sole Director of Suncoast is the Holder of the Authorization and License. Neither document references Suncoast. Review of information provided on Heath Canada's website indicates such licenses are strictly for personal use and cannot be utilized to

> produce dried marihuana for commercial purposes. Accordingly, Suncoast's assertion that it is federally licensed to produce dried medical marihuana is without merit.

21. With respect to the "farm worker" issue, the Director's delegate argued that the regulatory definition of "farm worker", bearing in mind that section 34.1 of the *Regulation* excludes farm workers from the overtime and statutory holiday provisions of the *Act*, should be narrowly interpreted "because [it] take[s] away benefits and protection conferred by the Act" and that an individual must meet "all employment conditions, as described in the definition…to qualify as a farm worker". In this latter regard, the Director's delegate argued:

> In this case, Suncoast claims the Complainants' primary responsibilities were to grow, cultivate and harvest marihuana and thus they are "farm workers" pursuant to the Regulation. The Complainants contest this assertion and claim the majority of their work involved construction-related tasks.
>
> The licenses cited by Suncoast consist of the License and the Authorization. Both of these documents reference "Dried Marihuana" and this was the invariable product of production and sale. Suncoast states in its submission: the Complainants trimmed and dried the buds [*sic*]. This process alters the agricultural product from its original state. The definition of "farm worker", specifically subsection E [*sic*], states a person employed to process the products of a farming, ranching, orchard or agricultural operation is **not** a farm worker [**boldface** in original text]. In other words, a person employed to process agricultural products to an altered or different state is **not** a farm worker [**boldface** in original text]. An example of this would be a person employed to do things such as drying herbs. The Regulation does not require the function of "processing" be a principal duty, only that the function be performed in order not to be deemed a farm worker.
>
> In the alternative, examining the issue specifically from the definition of "farm worker" as outlined in subsection A [*sic*] of the Regulation requires an analysis of "principal employment responsibilities". It is clear from the evidence the Complainants performed a wide array of duties ranging from construction, growing, harvesting and even security. The Employer did not keep payroll records or track how much time was spent by the Complainants performing the various tasks. Without this information, I cannot analyze what proportion of time was allocated to any specific task in order to determine principal employment responsibilities. Accordingly, I cannot conclude all employment conditions, as described in the definition, have been met in order to qualify as a "farm worker".

THE PARTIES' SUBMISSIONS REGARDING THE DIRECTOR'S REPORT

22. Counsel for Suncoast says that the Director's focus on whether Suncoast actually held, or was otherwise in compliance with, a federally-issued licence to produce marijuana is wholly irrelevant to the question of whether, based on Suncoast's core functions, it is a federal jurisdiction employer and, in any event, licence compliance "is a question that the Director is not empowered to decide, or with respect, qualified to decide". Counsel also notes that the Director, in his report, erroneously examined the *Marihuana for Medical Purposes Regulations* (SOR/2013-119; "*MMPR*") when, in fact, a different regulation, namely, the *Medical Marihuana Access Regulations* (SOR/2001-227; "*MMAR*"), was the regulatory regime in effect during the course of Messrs. Anthony's and Hug's employment. Counsel submits:

> …the Director's Report fails to engage with the critical question of whether medical marihuana production is under the jurisdiction of the federal government or the provincial government. Instead, the Director investigates whether [Suncoast] acted beyond the scope of the federally-issued marihuana production licences that its representatives held. This investigation is

> irrelevant to whether [Suncoast's] employees are governed by federal legislation or provincial legislation. Even if [Suncoast] acted outside the scope of the federal licences its representatives held (which it strong [*sic*] contests), its employees were nevertheless producing medical marihuana, which is an area of federal jurisdiction for all the reasons described above. Neither the Director nor any other party disputes that [Suncoast] is exclusively in the business of producing medical marihuana.

23. Suncoast's counsel says that the firm "is exclusively in the business of producing and selling medical marihuana"; that the firm "has no other function or purpose"; and that "this evidence is not contested by the Complainants or the Director".

24. Suncoast's position with respect to the "farm worker" issue is that Messrs. Anthony and Hug fall squarely within the subsection (a) and (c) definitions set out in subsection 1(1) of the *Regulation* – Suncoast says that each was "a person employed in a farming…or agricultural operation and whose principal employment responsibilities consist(ed) of…growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation" and "operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b)".

25. Suncoast, relying in part on the Tribunal's decision in *Falcon Farms Ltd.*, BC EST # D069/02, and, more directly, on the Ontario Labour Relations Board's decision in *U.F.C.W. v. MedReleaf Corp.*, 2015 CanLII 85534 (application for reconsideration dismissed: 2016 CanLII 2641), says that Suncoast's marijuana production facility was a farming or agricultural operation. Suncoast further says that Messrs. Anthony's and Hug's principal employment responsibilities "consisted of growing, cultivating and harvesting marijuana" and their only other duties "involved operating equipment and using materials for the purposes of growing, cultivating and harvesting marihuana".

26. Suncoast says that the subsection 1(1)(e) regulatory exclusion ("a person employed to process the products of a farming, ranching, orchard or agricultural operation" etc.) does not apply because the two complainants were not employed solely to process agricultural products. Suncoast notes that the Director relies on the subsection 1(1)(e) regulatory exclusion because the complainants would trim and dry marijuana buds. Suncoast says that this minor aspect of their work does not constitute "processing" and is, if anything, "equivalent to washing, cleaning, sorting, grading or packing of an unprocessed product of the operation during the normal harvest cycle for that product" (underlining in original text) and thus would take the complainants outside the subsection 1(1)(e) "farm worker" exception. Further, counsel submits that neither complainant was specifically employed to process marijuana and:

> The evidence of all parties is that drying marihuana was merely one small task in the long series of tasks performed in [*sic*] the Complainants in the course of growing marihuana. It cannot be that employees who grow an agricultural product from seed and then harvest that agricultural product, and who would otherwise fall squarely within the farm worker definition, escape the farm worker definition because, as a last step after months of labour, they put the agricultural product out to dry. Such a finding would undermine the purpose of the farm worker exclusion in the [*Act*].

27. Finally, and in response to the Director's position that the absence of records does not allow the Director to make any sort of decision regarding what proportion of the complainants' work was "farm work", to be contrasted with construction-related work or other duties, Suncoast says that all of the work undertaken by the complainants fell within the "farm worker" definition and that any

work undertaken "that was not directly with the marihuana plants was unskilled labour work to improve the Facility so as to facilitate the production of marihuana plants".

28. Both Messrs. Anthony and Hug filed very brief submissions in response to the Director's report. Neither submission speaks, in any fashion, to the two critical questions of whether Suncoast is a federally regulated employer or whether the complainants are "farm workers". Both complainants simply ask that Suncoast's submission be "dismissed" and that the original Determination be confirmed.

29. The Director filed a brief reply to Suncoast's submissions. The Director, and without specifically addressing Suncoast's submissions, maintains that Suncoast "has failed to produce any evidence it was federally regulated to produce and sell dried [medical] marihuana" and that "all that can be established is that [Suncoast] was in the business of producing dried marihuana but not dried marihuana for which you need specific federal licences and follow strict protocol". The Director simply reiterated the previously espoused position that the complainants were not "farm workers" since they fell within the subsection (1)(1)(e) exclusion: "The complainants were actively involved in altering the state of marijuana to medical grade dried marihuana".

THE B.C. ATTORNEY GENERAL'S SUBMISSIONS REGARDING THE CONSTITUTIONAL QUESTION

30. The British Columbia Attorney General ("BC-AG") submits that Suncoast is subject to provincial, not federal, employment standards legislation. The AG-BC says that although the federal government, under its criminal law power (subsection 91(27), *Constitution Act, 1867*), can lawfully prohibit the cultivation, sale and possession of marijuana, the federal government does not have the regulatory authority to manage the marijuana industry. The AG-BC further asserts: "Industries formed around exemptions to the criminal law remain subject to provincial jurisdiction over industry, business, and employment standards under s. 92(13) of the *Constitution*" [property and civil rights].

31. The AG-BC notes that "*all* businesses are subject to federal criminal prohibitions, but labour law jurisdiction is presumptively provincial" (*italics* in original text). With respect to businesses that are subject to federal employment standards legislation – such as airlines, banks, telecommunication companies and nuclear energy production facilities – the AG-BC says these sorts of businesses "are subject to federal labour law *because they fall within the exclusive regulatory competence of the federal government*" (*italics* in original text). Although the AG-BC concedes "that marijuana producers cannot operate without a federal license exempting them from criminal laws" this, in turn, "does not give the federal government jurisdiction to regulate industries that form around those exemptions". Counsel says that if the fact Suncoast's operations are predicated on a regulatory exemption to federal criminal narcotics legislation was a springboard to federal jurisdiction over its employment relations, "this would transform the criminal law power into a general regulatory power that would encroach upon provincial jurisdiction over business and industry, fundamentally altering the balance of Canadian federalism".

ANALYSIS AND FINDINGS

32. The threshold question is whether or not Suncoast is a federally regulated employer and, as such, I shall first address this issue.

Does the Act apply to Suncoast?

33. I reject the Director's position that whether Suncoast is federally or provincially regulated turns on whether or not Suncoast was authorized, or otherwise complied with, the licences that were issued by Health Canada under the Marihuana Medical Access Program. The key question is whether the pith and substance of Suncoast's business operations fell within direct federal regulatory authority. As directed by the Supreme Court of Canada in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, [2012] 2 S.C.R. 3, while provincial jurisdiction over employment and labour relations is the presumptive norm, employment relationships may be governed by federal jurisdiction "when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction" (para. 17).

34. In *Tessier*, the Supreme Court observed (para. 15): "a level of government cannot have exclusive authority to manage a work or undertaking without having the analogous power to regulate its labour relations" and the court also provided some guidance regarding how the inquiry should proceed (paras. 18 – 19):

> In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature…
>
> In this functional inquiry, the court analyzes the enterprise as a going concern and considers only its ongoing character…The exceptional aspects of an enterprise do not determine its essential operational nature. A small number of exceptional extra-provincial voyages which are not part of the local transportation company's regular operations, for example, do not determine the nature of a maritime transportation operation…nor does one contract determine the nature of a construction undertaking…Nor will a small amount of local activity overwhelm the nature of an undertaking that is otherwise an integral part of the postal service (case citations omitted).

35. Thus, the essential nature of Suncoast's business operations must be examined, and not the technical details concerning the firm's operating permits or licences. In this latter regard, for example, if the nuclear power generation facilities in question in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 were being operated contrary to Ontario Hydro's operating licences issued under the federal *Atomic Energy Control Act*, that fact would not, in any fashion, undermine the federal government's jurisdiction to regulate labour relations in those facilities.

36. Turning to the essential nature of Suncoast's operations, the evidence is absolutely unequivocal that the firm was engaged "in the business of producing and selling medical marihuana under licences issued by the federal government" (Thomas Brown affidavit, para. 2). In his affidavit, Mr. Brown described the development of the marijuana production facility as follows (paras. 3 – 4 and 15):

> In late 2012, I purchased a property on behalf of [Suncoast] located at [address omitted], Sechelt, B.C. (the "Property"). There was a freestanding building on the Property (the "Facility").
>
> In the first half of 2013, I hired a number of specialized tradespersons to work on the Facility to ready it for housing medical marijuana plants. These tradespersons were independent contractors and not employees of [Suncoast]. They included a mechanical contractor for plumbing and installing a sprinkler system, a drywaller, several carpenters, and two electrical contractors (one for service to the building and another for the remainder of the electrical work).

> The Facility is not used by Suncoast for any purpose other than producing marihuana. All improvements undertaken on the Facility between March and September 2013 were to facilitate the production of marihuana.

37. The delegate, at page R7 of her reasons, accepted that Suncoast's business was as stated by Brown in his affidavit: "[Suncoast] built and operated a medical marihuana warehouse in Sechelt, BC which is licenced to produce dried marihuana".

38. I should note that Mr. Brown's affidavit was submitted to the Director as part of the "referral back" investigation and, later, provided to both complainants. None of Mr. Anthony, Mr. Hug or the Director has contested the assertions contained in that affidavit.

39. The delegate held that Mr. Hug worked for Suncoast from August 1 to September 20, 2013, and summarized Mr. Hug's evidence regarding his work for Suncoast as follows (page R11):

> [Hug] was initially hired to pot and transplant marijuana plants. Later, his job duties included assisting the electrical contractors, laying out parts for each room and performing daily clean up duties while the site was under construction. Once the warehouse construction was complete he assisted with the interior design and construction of 21 growing rooms. This included poly wrapping the walls, installing plug covers, mounting a multitude of lights and fans, installing doors and taping holes to eliminate any outside light. Once the inside construction phase was completed his duties returned to caring for the plants which consisted of watering every other day, transplanting plants, mixing nutrients and general daily maintenance of the plants. He states Mr. Brown had an account at Sunshine Coast Hydroponics which he used to purchase soil, bamboo sticks and other related materials as required.

40. In his affidavit, Mr. Brown states (para. 9): "On or around August 1, 2013, I hired Michael Hug to assist [another individual] and Mr. Anthony with growing, cultivating and harvesting the marihuana plants. By August, the plants had grown considerably and required more work."

41. With respect to Mr. Anthony, who worked for Suncoast from March 7 to September 20, 2013, the delegate summarized his evidence regarding his duties as follows (page R15):

> Mr. Anthony states he was hired on March 7, 2013 as a skilled labourer/construction site manager...His job duties included: opening and closing the construction site each day, assisting the construction trades with related activities and purchasing supplies from the local hardware store. He was also required to maintain the marijuana crop which included: picking up plant supplies, watering, fertilizing, spraying insect repellent, picking leaves, trimming buds, rotating, transplant, caging and potting plants. He also performed hourly checks of the light, temperature, humidity, CO2 levels in all 19 rooms and the grow site. In addition he provided overnight security, which required him to monitor the site every two hours and called Mr. Brown daily to update him on the progress and status of the construction site and the plants.

42. Mr. Anthony, in his complaint, identified Mr. Brown as his "employer" and stated that the "type of business" was "medical marijuanna [*sic*] production". Similarly, in his complaint, Mr. Hug named Mr. Brown as his employer but Mr. Hug did not provide any details regarding the "type of business".

43. Mr. Brown, in his affidavit, described Mr. Anthony's employment duties as follows (paras. 5 – 8 and 10):

> In early March 2013, I hired [another individual] and Zack Anthony as employees of [Suncoast] to work on a full-time, indefinite basis to cultivate marihuana at the Facility. At that time, the Facility was not yet ready to cultivate marihuana. I agreed they could start work immediately as unskilled labour assisting in preparing the Facility for producing marihuana.
>
> I now understand that Mr. Anthony holds a Certificate of Completion for a Special Program for Welding Inspectors, Level 1. I did not hire Mr. Anthony for this reason. Mr. Anthony did not work as a Welding Inspector on the Facility. I did not require the services of a welder or a welding inspector at the Facility.
>
> During March and April 2013, [another employee] and Mr. Anthony would meet with contractors, give them my directions, and provide them access to the Facility. During March and April 2013, [another employee] and Mr. Anthony would also perform non-skilled labour to assist in readying the Facility to produce marihuana.
>
> In approximately early May 2013, the Facility was ready for marihuana production and [another employee] and Mr. Anthony started growing between 400 and 500 marihuana plants from seed. Some construction work continued on the Facility after this time.
>
> …
>
> In August 2013, I requested that Mr. Anthony apply to Health Canada for a "Designated Person Production Licence Dried Marihuana for Medical Purposes" to grow 497 medical marihuana plants. Health Canada issued this licence to Mr. Anthony on August 12, 2013.

44. At paras. 11 – 14 of his affidavit, Mr. Brown summarized both complainants' duties from May through September (the complainants' employment ended on September 20, 2013 when both quit):

> Between May and September 2013, when the first crop of marihuana plants were planted and harvested, respectively, [another employee], Mr. Anthony, and Mr. Hug were the only people working directly with the marihuana plants at the Facility between March and September 2013.
>
> [Another employee] and Mr. Anthony, and later Mr. Hug, planted seeds, watered plants, prepared soil with nutrients, transplanted plants several times as they grew larger, pruned plants so as to maximize light exposure, and performed regular checks of temperature, light, humidity and carbon dioxide levels. When the plants were ready for harvest, [another employee], Mr. Anthony and Mr. Hug trimmed and dried the buds.
>
> The principle [*sic*] employment responsibilities of [another employee], Mr. Anthony and Mr. Hug during their employment with [Suncoast] were to grow, cultivate and harvest marihuana plants.
>
> All work done by [another employee], Mr. Anthony and Mr. Hug for [Suncoast] that was not directly with marihuana plants was unskilled labour work to improve the Facility so as to facilitate the production of marihuana plants.

45. At all times material to this dispute, marijuana was a controlled substance listed in Schedule II of the federal *Controlled Drugs and Substances Act*. The latter statute was enacted in accordance with the federal government's exclusive jurisdiction over criminal law. In *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, the Supreme Court of Canada held that the prohibition of the production, sale and

distribution of marijuana was a valid exercise of the federal government's constitutional authority over criminal law as set out in subsection 91(27) of the *Constitution Act, 1867* (see also *R. v. Clay*, [2003] 3 S.C.R. 735).

46. In 2001, the federal government first introduced the *Marihuana Medical Access Regulations* (SOR/2001-227; "*MMAR*") and these regulations, modified from time to time, were in effect during most of the period of the complainants' employment with Suncoast. The *MMAR* were repealed on March 31, 2014 (see Supreme Court of Canada leave application file no. 36927 and SOR/2013-119). The Director incorrectly stated in the July 21, 2016 "referral back" report that Suncoast was licensed only under the *Marihuana for Medical Purposes Regulation* (SOR/2013-119; "*MMPR*"). This latter regulatory regime was introduced in in June 2013.

47. In *R. v. Smith*, [2015] 2 S.C.R. 602, the Supreme Court of Canada summarized the medical marijuana regulatory regime as follows (paras. 3 – 4):

> The *CDSA* [*Controlled Drugs and Substances Act*] prohibits the possession, production, and distribution of cannabis, its active compounds, and its derivatives. In recognition of the fact that controlled substances may have beneficial uses, the *CDSA* empowers the government to create exemptions by regulation for medical, scientific or industrial purposes (s. 55). The *Marihuana Medical Access Regulations*, SOR/2001-227 ("*MMARs*"), created such an exemption for people who could demonstrate a medical need for cannabis. Applicants had to provide a declaration from a medical practitioner certifying that conventional treatments were ineffective or medically inappropriate for treatment of their medical condition. Once they had met all the regulatory requirements, patients were legally authorized to possess "dried marihuana", defined as "harvested marihuana that has been subjected to any drying process" (s. 1). Some patients were authorized to grow their own marihuana, under a personal-use production licence (s. 24), while others obtained the drug from a designated licensed producer (s. 34).
>
> The *MMARs* were replaced in 2013 with the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 ("*MMPRs*"). The new regime replaces the marihuana production scheme in the *MMARs* with a system of government-licensed producers. For the purposes of this appeal, however, the situation remains unchanged: for medical marihuana patients, the exemption from the *CDSA* offence is still confined to dried marihuana.

48. The only licences contained in the record before me are licences that were issued under the *MMAR*, not the *MMPR*. The first is a "Designated Person Production Licence" issued to Mr. Brown, as "holder" on February 26, 2013 with a February 26, 2014 expiration date. A specific female person is named as the "authorized person" in this licence. The second is a "Designated Person Production Licence" issued to Mr. Anthony as the "holder", and to Mr. Brown as the "authorized person", on August 12, 2013 (expiry date: March 31, 2014). The third is an "Authorization to Possess" issued on August 12, 2013 to Mr. Brown with an expiration date of March 31, 2014.

49. The Director, in the July 21, 2016 "referral back" report, noted that none of the licences submitted by Suncoast during the course of the investigation was actually issued to Suncoast. The Director thus concluded: "Suncoast's assertion that it is federally licensed to produce dried medical marihuana is without merit". While it is undoubtedly accurate to say that Suncoast did not itself hold any licences issued under the *MMAR*, I fail to appreciate how that fact, standing alone, determines the federal/provincial jurisdiction question. As noted above, the evidence unequivocally demonstrates that Suncoast was in the medical marijuana production business – no party disputes that fact. Further, Suncoast could only lawfully carry on this activity under the protection of licences issued in accordance with the *MMAR* and appropriate licences were issued with respect to Suncoast's business

premises. Finally, Suncoast's legal authority to operate a medical marijuana production facility stemmed from the licences that were issued, in accordance with the federal government's exclusive constitutional authority over "criminal law" under subsection 91(27) of the *Constitution Act, 1867*, in order to exempt the licence holders from criminal prosecution providing they were in full compliance with the terms of the licences.

50. A Designated Person Production Licence, issued under section 34 of the *MMAR*, could only be issued to an individual who was at least 18 years old and met certain other criteria (see section 35). An Authorization to Possess could only be issued to an individual ordinarily resident in Canada (section 3) who otherwise met certain additional criteria. Suncoast, as a business corporation, could not obtain either a Designated Person Production Licence or an Authorization to Possess. However, Suncoast's business address is the location identified in the licences, and the evidence before me clearly shows that the business operations relating to the production of medical marijuana undertaken at that location were carried on by Suncoast, and not by any other individual in their personal capacity. Suncoast was the employer. Of course, certain licences were issued to individuals employed by Suncoast (and to Mr. Brown who is Suncoast's principal). However, I liken this situation to one where professional licences are issued to named individuals (say, accountants or engineers) but the firm that employs those professionals is the entity that actually carries on the accounting or engineering business.

51. During the entire time frame relevant to this appeal (and, so far as I can determine, this remains the situation), the province of British Columbia did not have any legal authority to authorize a provincial corporation to operate a medical marijuana production facility. Suncoast was only able to legally operate its medical marijuana business because certain of its officials and/or employees held the appropriate licences that were issued by the federal government. However, it does not necessarily follow that simply because certain Suncoast principals and/or employees held federal licences authorizing them to produce medical marijuana, Suncoast was a federal jurisdiction employer.

52. The prohibition of the production and sale of marijuana is a matter that falls within the federal government's exclusive constitutional jurisdiction over criminal law. The key question in this case, however, is whether the *lawful* production of medical marijuana renders the producer subject to federal or provincial employment standards legislation.

53. The cultivation and sale of tobacco may present a situation that is broadly analogous to the present case. The regulation of the production and sale of tobacco falls within the federal government's criminal law jurisdiction (see, for example, *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188). Nevertheless, as stated in *Rothmans* (para. 19):

> As the criminal law power is essentially prohibitory in character, provisions enacted pursuant to it, such as s. 30 of the *Tobacco Act*, do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament. This limited reach of s. 91(27) is well understood: see, for example, *O'Grady v. Sparling*, 1960 CanLII 70 (SCC), [1960] S.C.R. 804; *Ross v. Registrar of Motor Vehicles*, 1973 CanLII 176 (SCC), [1975] 1 S.C.R. 5; and *Spraytech*.

Accordingly, in *Rothmans*, provincial legislation placing certain restrictions on the sale and marketing of tobacco products was held to be constitutionally valid provincial legislation.

54. In a similar vein, while "gun control" legislation is a matter of federal jurisdiction under its criminal law power, the provinces nonetheless retain the constitutional authority to enact "regulations dealing

with hunting, discharge within municipal boundaries, and other aspects of firearm use" (*Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783 at para. 51). More recently, the Supreme Court of Canada held that the provinces could lawfully enact legislation imposing sanctions on impaired drivers despite the fact that "drunk driving" is specifically prohibited in the *Criminal Code* (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 S.C.R. 250).

55. In *Goodwin*, *supra*, the court also noted (at para. 33): "It is also of some import that the Attorney General of Canada intervenes to argue that this law is within provincial legislative authority…Where an Attorney General has intervened to support the exercise of jurisdiction of another legislature, this 'invite[s] the Court to exercise caution before it finds that the impugned provisions of the Act are *ultra vires* the province'". In the instant case, the Attorney General of Canada has not intervened to support the argument that the *Act* applies to Suncoast's operations but, at the same time, it has not intervened to argue that federal employment standards legislation governs Suncoast's employment relations. Certainly, there is nothing in the record before me from the federal attorney general to the effect that it considers the cultivation and sale of medical marijuana to be a matter exclusively within the federal government's constitutional authority and that employees of such businesses are subject to federal, not provincial, employment standards laws.

56. I do not consider the present case to be analogous to *Ontario Hydro*, *supra*, where the employer's operations – atomic energy plants – were inherently federal in nature. In *Ontario Hydro*, the nuclear plants in question were strictly under federal regulatory authority having been declared to be for the "general advantage of Canada" under subsection 92(10)(c) of the *Constitution Act, 1867*. All bargaining unit employees in the atomic energy plants fell under the *Canada Labour Code* regardless of whether their duties specifically involved nuclear energy generation (for example, clerical and administrative employees) since they were all employees of a federal jurisdiction firm.

57. The federal licencing regime that enables Suncoast to operate a medical marijuana production facility was not enacted in an effort by the federal government to regulate marijuana production in the same way that it regulates the production of nuclear energy. Rather, the licensing regime reflects an effort by the federal government to "create…an exemption [from the criminal law] for people who could demonstrate a medical need for cannabis" (*R. v. Smith*, [2015] 2 S.C.R. 602 at para. 3). Similarly, I do not consider Suncoast's business operations to inherently fall within federal jurisdiction as is the case for airlines, banks and telecommunication companies where the core activities of the business are subject to federal regulation.

58. Before leaving this section of my analysis, I should refer to the Canadian Industrial Relations Board's June 1, 2016, decision in *U.F.C.W. and MedReleaf* (2016 CIRB 829). This decision addressed a union's application for certification filed under the *Canada Labour Code* (the union filed parallel applications for certification under both the *Canada Labour Code* and the *Ontario Labour Relations Act*). The CIRB dismissed the union's application on jurisdictional grounds accepting the employer's argument "that MedReleaf was not a federal undertaking" (para. 2).

59. The CIRB held that MedReleaf's "operation [is] commercial in nature for the purpose of growing, harvesting, selling and distributing a licensed product, namely cannabis" and "while the license to operate [the] business comes with strict conditions and operating parameters, it does not change the nature of those daily operations" (para. 28). The CIRB seemingly accepted MedReleaf's submission that its operations were "akin to any company that produces pharmaceuticals or to a pharmacy who distributes them under a prescription and whose labour relations are provincially regulated."

60. I prefer the analysis of the Ontario Labour Relations Board's decision in *U.F.C.W. and MedReleaf* (2015 CanLII 85534) where the identical argument (although advanced by the union in this case) was affirmatively rejected (para. 37):

> Although the Union argued that medical marijuana is akin to a pharmaceutical – it is not. It is not manufactured. It is still a plant that is grown and harvested – albeit inside a building with cutting edge technology. As MedReleaf pointed out, it is not a prescription drug under the *Food and Drugs Act* which requires all drugs to have a Drug Information Number ("DIN"). Medical marijuana has no DIN. In fact, the Heath Canada Information Sheet on the Medical Use of Marijuana specifically states (in bold and in a box for emphasis):
>
> > "**Dried marijuana is not an approved drug or medicine in Canada.** The Government of Canada does not endorse the use of marijuana, but the courts have required reasonable access to a legal source of marijuana when authorized by a heathcare practitioner."

61. While I accept that the production of medical marijuana is not akin to a pharmaceutical production factory, I am persuaded that Suncoast's medical marijuana production operation *is* akin to an agricultural production facility. In my view, in its fundamental operation, Suncoast's facility is not markedly dissimilar from, say, a greenhouse vegetable growing facility. This is the same conclusion, namely, that the production of medical marijuana is an agricultural activity, that the Ontario Labour Relations Board reached in the *MedReleaf* decision. Agriculture is a matter that falls within provincial constitutional jurisdiction (see, for example, *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536).

62. In finding that medical marijuana production is, fundamentally, a matter of agriculture, I am mindful that the provincial government does not apparently recognize medical marijuana production to be a "farming" activity for purposes of receiving preferred property taxation status under the *Assessment Act* (see *Classification of Land as a Farm Regulation*, B.C. Reg. 411/95, Schedule, subsection 2(f)). However, whether or not the provincial government chooses to grant "farm" status to land associated with medical marijuana production facilities does not, in my view, have any bearing whatsoever on the constitutional issue now before me.

63. In light of the foregoing, I reject Suncoast's position that "the medical marijuana industry is exclusively under federal legislative jurisdiction".

64. I find that Suncoast's business operations are subject to provincial regulation, as being fundamentally agricultural in nature, and that its employees are protected by the *Act*.

65. Although I have found that Suncoast is, fundamentally, an agricultural operation subject to the *Act*, and, by extension, that its employees are "agricultural" employees (or, at the least, they were employed in an agricultural operation), it does not inevitably follow from that conclusion that the two complainants were "farm workers" as defined in subsection 1(1) of the *Regulation*. I now turn to this issue.

The "Farm Worker" Issue

66. The Director's position is that the regulatory definition should be narrowly construed since "farm workers", by reason of section 34.1 of the *Regulation*, are denied the benefit of the minimum statutory standards concerning overtime and statutory holiday pay. While I accept the Director's position as accurately reflecting the Tribunal's approach to regulatory exclusions in general, the plain and

ordinary meaning of the regulatory definition must nonetheless be applied (see, for example, *Falcon Farms*, *supra*).

67. For ease of reference, I have reproduced the regulatory definition, once again, below:

> "**farm worker**" means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of
>
> (a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,
>
> (b) clearing, draining, irrigating or cultivating land,
>
> (c) operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b), or
>
> (d) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product,
>
> but does not include any of the following:
>
> (e) a person employed to process the products of a farming, ranching, orchard or agricultural operation other than to do the initial washing, cleaning, sorting, grading or packing of
>
> (i) an unprocessed product of the operation during the normal harvest cycle for that product, or
>
> (ii) during the same harvest cycle referred to in subparagraph (i), the same or a similar unprocessed product purchased by the operation from another farming, ranching, orchard or agricultural operation;
>
> (f) a landscape gardener or a person employed in a retail nursery;
>
> (g) a person employed in aquaculture...

68. In considering the "farm worker" definition in the case at hand, I first note the obvious point that Messrs. Anthony and Hug are "persons". The more difficult question is whether they were employed in a "farming…or agricultural operation". Suncoast principally relies on the Ontario Labour Relations Board decision in *MedReleaf*, *supra*, to support its position that the two complainants were employed in a farming or agricultural operation. In *MedReleaf*, a union filed parallel applications (with the Ontario Labour Relations Board and with the Canadian Industrial Relations Board under the *Canada Labour Code*) for certification to represent the non-exempt employees of a medical marijuana production facility.

69. The Ontario Board did not hear or decide a "division of powers" issue (although the C.I.R.B did address the constitutional issued holding that MedReleaf was a provincial jurisdiction firm engaged in "a commercial operation of a local nature that produces and sells a medical product" – see 2016 CIRB 829 at para. 33; the C.I.R.B. also held that MedReleaf's facility was a "farm-type environment"). The issue before the Ontario L.R.B. was whether the Ontario *Labour Relations Act*, or the *Agricultural Employees Protection Act* (see *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3) was the governing statute. The Board held that the latter statute applied and thus dismissed the union's application for certification on jurisdictional grounds. The union's application for reconsideration was refused.

70. MedReleaf's operations, as described by the Ontario L.R.B. are remarkably similar to those of Suncoast albeit much larger (55,000 square foot facility) and with far more employees (69 employees in total): "The product that MedReleaf sells to patients is essentially a dried version of the cannabis plant. It is not artificially altered or chemically manipulated. It is not manufactured." (para. 6). The *AEPA* defines "agriculture" as including "the production, cultivation, growing and harvesting of agricultural commodities" including such things as eggs, mushrooms and tobacco. Complementary provisions in the two statutory schemes provided that the *LRA* did not apply to agricultural employees.

71. The Board observed that "the interpretation of agriculture does not in any way exclude purpose built indoor facilities that more resemble a factory than anyone's picturesque view of a farm" (para. 30) and that is was "not persuaded that cannabis is not an 'agricultural commodity' – certainly in no less a sense than 'tobacco' which is explicitly listed in the definition of agriculture" (para. 34). Further, while the Board accepted that there is a highly regulated regime governing the production, distribution and use of medical marijuana, that "does not change the fact that cannabis is still a plant and that it is grown, and that is what MedReleaf does – grow, harvest and sell plants regardless of their use" (para. 35). The Board ultimately concluded (paras. 46 – 47):

> …the employees of MedReleaf are 'in agriculture' and are excluded from the *LRA*, and this application and the other related applications must be dismissed…
>
> …there is no dispute that MedReleaf cultivates, grows and harvests plants. That is clearly within the definition of agriculture, and the Legislature has enacted the *AEPA* (and not the *LRA*) to govern the representational and organizing rights of agricultural workers, and the Supreme Court of Canada has said that the *AEPA* complies with the *Charter*.

72. As I noted above in my discussion with respect to the "division of powers" constitutional issue, I consider the production of medical marijuana to be an agricultural endeavour rather than an industrial operation similar to pharmaceutical manufacturing. I thus accept that MedReleaf's operations are accurately characterized as a farm or agricultural operation. Although it appears to be the case that one or both of the complainants undertook some duties not directly related to marijuana cultivation, on balance, the evidence before me demonstrates that from May 2013 until the end of his employment in September 2013, Mr. Anthony's "principal employment responsibilities" related to marijuana cultivation. As for Mr. Hug, he was not hired until August 1, 2013, and his principal employment responsibilities were to attend to the marijuana plants. I am of the view that Mr. Anthony, at least as and from May 1, 2013, and Mr. Hug for the entire duration of his employment, met the subsection (a) definition of a "farm worker".

73. The Director submits that neither complainant was a "farm worker" because they fell within the subsection (e) exception because they "were actively involved in altering the state of marihuana to medical grade dried marihuana". However, the "drying" of the marijuana was but one minor aspect of the complainants' overall employment duties. They were not hired to "process" marijuana; rather they were hired principally to "grow" marijuana and, as such, the subsection (e) exception is inapplicable here. The subsection (e) exception is designed to address the employment of a person who, for example, is hired by a fruit or vegetable processing facility that converts raw agricultural products into canned goods that are subsequently sold in that state to the ultimate consumers, or a person employed in a brewery or a distillery.

74. I am unable to determine, based on the information in the record before me, the precise wage entitlements of each complainant on the basis that they were "farm workers". Thus, I would refer

this matter back to the Director to recalculate Mr. Anthony's unpaid wage entitlement on the basis that he was a "farm worker" as and from May 1, 2013, and to recalculate Mr. Hug's unpaid wage entitlement on the basis that he was a "farm worker" throughout his entire employment with Suncoast.

ORDERS

75. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is varied to reflect a finding that Mr. Anthony was a "farm worker" as and from May 1, 2013, to the end of his employment with Suncoast and that Mr. Hug was a "farm worker" throughout his entire employment with Suncoast. It follows that the Determination must also be varied to cancel the $500 monetary penalty with respect to Suncoast's failure to pay statutory holiday pay.

76. In all other respects, the Determination is confirmed as issued.

77. Pursuant to subsection 115(1)(b) of the *Act*, Mr. Anthony's and Mr. Hug's individual unpaid wage entitlements are referred back to the Director for purposes of recalculation (including section 88 interest) in accordance with these reasons for decision.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal