

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Agro Harvesting Ltd.
("Agro")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/618

DATES OF HEARING: October 2, 1998 &
October 15, 1998

DATE OF DECISION: November 6, 1998

DECISION

APPEARANCES

Robert W. Grant on behalf of Agro Harvesting Ltd.

Adele J. Adamic on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Agro Harvesting Ltd. (“Agro”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determinations which were issued on September 24, 1998 by a delegate of the Director of Employment Standards (the “Director”). In one Determination the Director cancelled the Farm Labour Contractor Licence (#90579) which had been issued to Agro. The other imposed a penalty of \$750.00 for Agro’s failure to have a farm labour contractor licence.

Agro submits that the Determinations should be cancelled and has requested that the cancellation of its licence be “postponed”, that is suspended under Section 113 of the *Act*, pending a Decision by the Tribunal. There are several grounds for this appeal. At Agro’s request, its appeal was heard on an expedited basis and a hearing commenced at the Tribunal’s offices on October 2, 1998. At the request of counsel for Agro, the first hearing day dealt only with certain matters:

- Did the Director satisfy a duty of fairness to which Agro is entitled under the *Act* and the principles of natural justice; and
- Was the Determination to cancel Agro’s licence “... unfair, unreasonable and disproportionate to the seriousness of the violation...?”

At the end of the first hearing day, counsel agreed to make written submissions on these two issues. Counsel for Agro agreed to provide his submissions to the Tribunal and to the Director by October 7, 1998 and counsel for the Director agreed to reply by October 13, 1998.

At the request of counsel for Agro, I provided a brief written decision on October 5, 1998 concerning its request to suspend the effect of the Determination, as follows:

In my view, [Section 113] of the *Act* contemplates that under normal circumstances an appellant is required to deposit with the Director the total amount payable under the Determination but, in the special circumstances of a particular appeal, a smaller amount may be deposited. That is, Section 113 of the *Act* is intended, in my view, to address a situation in which a

monetary penalty has been imposed by the Director under Section 98 of the *Act* or where there has been a finding that wages are owed to employees. It does not, in my view, contemplate that the Tribunal may suspend the effect of a determination in which the Director has decided to revoke or cancel a farm labour contractor's licence.

In other words, the conditions precedent which Section 113(2) requires are not applicable and make no sense when the determination under appeal is, as in this case, the cancellation of a farm labour contractor's licence.

I have decided that Section 113 of the *Act* does not allow me to order that the effect of the Determination under appeal be suspended.

In a written submission dated October 7, 1998 counsel for Chai-Na-Ta Farms Ltd. sought "interested party" or "intervenor" status in this appeal to allow it " ... the right to make submissions related to remedial consideration in matters before (the Tribunal) ..." Counsel explained, further:

We wish to be clear about the status we seek in this matter. Chai-Na-Ta does not seek to participate in the "merits" of these appeals. Rather, we seek limited standing as an "interested party" or "intervenor" to bring to your attention matters which, in our respectful submission, are relevant to the exercise of your remedial authority pursuant to the *Employment Standards Act* ("Act").

Counsel also submitted that Chai-Na-Ta's exposure to potential harm makes it a person "affected by the outcome" of the Tribunal's Decision and, therefore, entitled to a limited form of standing.

The Director opposed the application by Chai-Na-Ta on the ground that it " ... possesses no relevant information or evidence which would properly or logically bear on ... the delegate's exercise of discretion in canceling Agro's farm labour contractor licence". Agro took no position vis-à-vis the application.

I note that counsel for Chai-Na-Ta did not cite any authorities in support of its request for "interested party" or "intervenor" status.

I find, on a careful review of the law and the parties' submissions, that I must deny Chai-Na-Ta's application for standing before the Tribunal. I make that finding because there is no evidence to establish that Chai-Na-Ta's legal rights are at risk and it has not been established that this Decision could impose legal obligations on Chai-Na-Ta [*Guadagini v. Workers Compensation Board of British Columbia* (1988) 30 B.C.L.R. (2d)259 (B.C.C.A.)]. While I accept that there is both a contractual and a commercial relationship between Agro and Chai-Na-Ta, I am not satisfied that the relationship *per se* establishes Chai-Na-Ta's direct interest in the issues to be decided in this appeal. Also, it has not been established that any submissions or evidence which Chai-Na-Ta may wish to tender

would be relevant to or would assist in examining and deciding the question of whether the Director erred in the exercise of her discretion to cancel Agro's licence. In short, I am not satisfied that Chai-Na-Ta's interests are affected in a direct and legally material way by this appeal or by the remedy which the Tribunal may order.

The hearing continued on October 15, 1998 at which time counsel made full submissions on the merits of the appeal.

FACTS

The basis upon which the Director decided to cancel Agro's licence was set out in the relevant Determination, as follows:

On June 12, 1998 Agro Harvesting Ltd. was issued a 1998 Farm Labour Contractor Licence for 10 employees.

On July 7, 1998, J.V. Walton, Industrial Relations Officer, issued and served a Determination in the amount of \$0.00 as Agro Harvesting Ltd. had contravened section 13(1) of the *Employment Standards Act* as they were operating as a Farm Labour Contractor with 15 employees while only being bonded for 10 employees. This determination was not appealed.

On August 28, 1998 Agro Harvesting Ltd. increased their bonded number of employees from 10 employees to 50 employees.

On September 10, 1998 I found Agro Harvesting Ltd. was again in contravention of section 13(1) of the *Employment Standards Act*. Agro Harvesting Ltd. had 55 employees working at Chai-Na-Ta Farm Ltd. ginseng field in Ashcroft while only having a licence bonded for 50 employees. And in accordance with the *Act* and regulations I have issued a subsequent determination on this contravention.

Having regard to all the facts surrounding the issuance of the Farm Labour Contractor licence and subsequent failure to comply with the provisions of the *Act* and regulations (as detailed below), I have determined pursuant to Section 7(c) of the Employment Standards Regulation that the Farm Labour Contractor licence of Agro Harvesting Ltd. be cancelled.

| Date | Section | |
|--------------------|--------------------------------------|--|
| July 7, 1998 | 13(1) Employment Standards Act | Failure to have Farm Labour Contractor Licence |
| August 24, 1998 | 28 Employment Standards Act | Failure to keep proper payroll records |
| September 18, 1998 | 6(1) Employment Standards Regulation | Duties of a Farm Labour Contractor |

| | | |
|-----------------------|-----------------------------------|---|
| September 24, 1998 | 13(1) Employment Standards Act | Failure to have a Farm Labour Contractor Licence |
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(reproduced as written)

The Director's decision to impose a penalty of \$750.00 was based on a finding that on September 10, 1998 Agro "... was working with more than 50 employees on Chai-Na-Ta Farms Ltd. in Ashcroft, B.C. Therefore, (Agro) is in contradiction with Section 13(1) of the *Employment Standards Act*" (sic). The Director also determined that because KNN and Agro "are associated they will be treated as one." The Director found that Agro had contravened Section 13(1) of the *Act* "... in that they were functioning as a Farm Labour Contractor with 55 employees while only being licenced for 50 on September 10, 1998."

The \$750.00 penalty was imposed against Agro under authority of Section 98 of the *Act* and Section 29 of the *Regulation*.

Another licenced farm labour contractor, Sukhanand Enterprises Ltd., had also provided farm workers to Chai-Na-Ta Farms on September 10, 1998.

During an inspection of Chai-Na-Ta Farms on September 10, 1998 the Director's delegates identified three farm workers who were employed but whose names did not appear on either Agro's or Sukhanand's daily log, a document which every farm labour contractor is required to keep (Section 6(4) of the *Regulation*). Upon returning to the field to verify the identity of the three farm workers, they were able to find only one, Mr. Harminder Gill. He was asked, in Punjabi, by whom he was employed and identified Akash Nijjer as his employer. Mr. Gill also recognized the names of the other two farm workers and confirmed that they had been picking with him. He called out for Amarjit Manhas, but there was no response.

On July 7, 1998 the Director issued a Determination to KNN in which it was found to have contravened Section 13(1) of the *Act* as it was operating without a farm labour contractor licence on July 2, 1998 in Abbotsford, B.C. That Determination was not appealed.

Akash Nijjer is the President of Agro Harvesting Ltd. He is also the President of KNN Distribution Ltd. ("KNN"). Agro and KNN have the same officers and directors - Akash Nijjer and his brother, Navdeep Nijjer. Prior to becoming President of Agro, Akash Nijjer was employed as a supervisor by Coastview Fruit Packers Ltd. ("Coastview"), a company owned by his father, Rajinder Nijjer. Coastview had been licenced as a farm labour contractor for many years prior to ceasing operations when Rajinder Nijjer retired in 1997.

During the early Fall of 1997, Akash Nijjer was served with determinations in which Coastview was found to have contravened certain sections of the *Act* and *Regulations*. When he applied for a licence on behalf of Agro in June, 1998 the Director's delegate informed Akash Nijjer that Agro and Coastview could potentially be found to be associated corporations due to the fact that vehicles used to transport Agro's employees were registered and operated by Coastview.

KNN has been an operating entity for approximately one year.

Akash Nijjer made the application for the farm labour contractor licence on behalf of Agro and, as part of that process, provided to the Director the vehicle registration data which is required under Section 6(1)(f) of the *Employment Standards Regulation* (B.C. Reg. #396/95).

KNN operates several leased vehicles to deliver agricultural products from producers to retailers. It also transports farm workers to and from locations where Agro's employees are harvesting producers' crops. Agro does not operate vehicles to transport its employees but relies on KNN to provide that service. Thus, the four drivers who transported Agro's employees to Chai-Na-Ta Farms on September 10, 1998 were KNN employees.

Agro's farm labour contractor licence was cancelled by the Director on August 24, 1998 as a result of its failure to keep payroll records as required by Section 28 of the *Act*. After it paid the penalty imposed it was issued another licence on the same date. At that time, the Director's delegate explained to Akash Nijjer the consequences of a further contravention of the *Act* or *Regulation* could include an on-going cancellation of its Farm Labour Contractor Licence.

During his visit to the Chai-Na-Ta Farm property on September 10th, the Director's delegate was advised by Harbinder Pannu that Agro intended to increase the number of employees for which it was licenced as a farm labour contractor. As a result, he contacted the Employment Standards Branch office in Burnaby to determine whether Agro's licence had been amended and was advised that a representative of Agro was scheduled to make an application on September 11, 1998.

Akash Nijjer, on behalf of Agro, applied for and received an amended Farm Labour Contractor Licence on September 11, 1998 which permitted Agro to employ a maximum of 60 employees. (On September 10, 1998, he had made an appointment to attend at the Employment Standards Branch office in Burnaby on the following day so as to produce the documents which were required to amend the company's farm labour contractor licence.)

On September 18, 1998 Akash Nijjer, Surdeep Guriwal (Receptionist/Bookkeeper) and Harbhinder Pannu (Supervisor) attended a meeting with two delegates of the Director at the Employment Standards Branch office in Abbotsford. One purpose of that meeting was to discuss three issues:

- (i) "Vehicle Registration" – *Regulation* Sec. 6(1)(f);
- (ii) "Piece Rate Notices" – *Regulation* Sec. 18(2); and
- (iii) "Exceeding bond number" – *Act* Sec. 13(1)

The other purpose was to give Agro an opportunity to respond to the Director's investigation and to explain its position on the matter. One of the Director's delegates conversed with Agro's representatives in Punjabi to ensure that the information exchanged

was understood clearly. The meeting took place between 10:25 a.m. and 12:05 p.m. (noon). Akash Nijjer testified that he did not provide any new information to the Director's delegates during the meeting. However, he agreed, under cross examination, that he was asked to explain the relationship between KNN and Agro and provided to the Director a list of both companies' employees. He also acknowledged that he was required to provide complete information about the vehicles used to transport farm workers.

During the September 18th meeting, the Director's delegate discussed with and explained to Agro's representatives the statutory requirements placed on a farm labour contractor by Section 6(4) of the *Regulation* - the requirement to maintain at each work site a daily log of workers' names and other relevant information. The Director's delegate noted that Agro's log did not include the names of three workers who were working at Chai-Na-Ta Farms on September 10, 1998.

Another meeting between Agro and the Director's delegates took place on September 24, 1998. Akash Nijjer was the only representative of Agro to attend that meeting which took place between 10:30 a.m. and 11:10 a.m. One of the purposes of this second meeting was to provide an opportunity for Agro to submit any additional information to the Director. The Director's delegate advised Mr. Nijjer of several decisions during the meeting:

- (i) KNN and Agro were found to be associated;
- (ii) Agro's farm labour contractor licence was to be cancelled; and
- (iii) A penalty of \$750.00 was to be imposed on Agro.

There was also a discussion concerning three of the farm workers, including Harminder Gill, who had confirmed that he was employed by Agro while working at Chai-Na-Ta Farms on September 10, 1998. The Director's delegate noted that during their meeting on September 18, 1998 he had requested Akash Nijjer to provide any additional information and had received none. The Director's delegate did not make any further attempts to locate the other three individuals who had been working at Chai-Na-Ta Farms on September 10th.

One of the Director's delegates, Jim Walton, testified that the Determinations under appeal may not have been issued on September 24th if Agro had provided additional information that would have been persuasive. He also testified that he advised Akash Nijjer of Agro's right under the *Act* to appeal the Determinations and of the consequences of continuing to operate without a licence.

The September 24th meeting concluded with the Director's delegate explaining the various factors which would support cancellation of Agro's licence:

- the September 10th incident was the second occasion on which Agro had contravened Section 13(1) of the *Act* by employing more farm workers than the number for which it was "bonded" under Section 5 of the *Regulation*;
- Agro's licence had been suspended on a previous occasion (August 24, 1998);

- the Director had issued three other determinations which had cited contraventions of the *Act* and *Regulation* by Agro;
- in the interests of fairness and consistency, the Director has adopted a policy of canceling any farm labour contractor's licence when a suspension had been imposed previously; and
- the number of Sukhanand's employees who were working at Chai-Na-Ta Farms on September 10th was considerably below the number for which it was "bonded"

The two Determinations under appeal were issued by a delegate of the Director who had not been involved in the conduct of the investigation which led to the issuance of the Determinations. They were issued after the delegate who conducted the investigation provided a "full briefing" and "verbal overview of the file" to the delegate who issued them. Akash Nijjer was not given an opportunity to make any submissions to the Director's delegate who signed the Determinations which are the subject of this appeal.

ANALYSIS

Statutory Framework

The starting point of my analysis is the various sections of the *Act* and *Regulation* which are relevant only to farm labour contractors and farm workers.

A “farm labour contractor” is defined in Section 1 of the *Act* as meaning:

“an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product”

A “farm worker” is defined in Section 1 of the *Regulation* as meaning:

“a person employed in a farming, ranching, orchard or agricultural operation,
but does not include

- (a) a person employed to process the products of a farming, ranching, orchard or agricultural operation,
- (b) a landscape gardener or a person employed in a retail nursery, or
- (c) a person employed in aquaculture;

A farm labour contractor must be licenced, under Section 13 of the *Act*:

- 13 (1) A person must not act as a farm labour contractor unless the person is licenced under this Act.
- (2) A person who engages the services of an unlicenced farm labour contractor is deemed for the purposes of this Act to be the employer of the farm labour contractor's employees.

The process by which the Director may licence a farm labour contractor and the requirements which an applicant must meet in order to be licenced are set out in Section 5 of the *Regulation*:

- 5.(1) An application for a licence to act as a farm labour contractor must
 - (a) be made to the director, and
 - (b) be accompanied by a fee of \$150.
- (2) The director may issue a licence only if the applicant has
 - (a) completed a written application in a form required by the director,
 - (b) paid the licence fee,
 - (c) satisfied the director by an oral or written examination, or both, of the applicant's knowledge of the Act and this regulation, and
 - (d) posted security in accordance with subsection (3).

- (3) The security must
 - (a) be posted under the Bonding Act,
 - (b) be of a type that is listed in section 8 of the Bonding Regulations and is acceptable to the director, and
 - (c) equal the amount obtained by multiplying the minimum hourly wage by 120 hours and multiplying the result by the number of employees specified in the licence.
- (4) The director may include in a licence issued to a farm labour contractor any condition the director considers appropriate for the purposes of the Act.
- (5) The director may refuse to issue a licence to an applicant who has had a previous licence cancelled.

Sections 6 through 12 of the *Regulation* contain the various regulatory requirements that are applicable only to farm labour contractors (e.g. duties of farm labour contractors; the circumstances under which a farm labour contractor licence may be cancelled or suspended; and various other rules about licences). In particular, Section 7 provides as follows:

7. The director may cancel or suspend a farm labour contractor's licence in any of the following circumstances:
 - (a) the farm labour contractor made a false or misleading statement in an application for a licence;
 - (b) the farm labour contractor is in breach of a condition of the licence;
 - (c) the farm labour contractor or an agent of the farm labour contractor contravenes the Act or this regulation.

Under Section 9 of the *Regulation*, all licences expire on December 31 each year and are not transferable or assignable. Section 10 of the *Regulation* requires the Director to issue a determination which includes her reasons for refusing to issue, cancel or suspend a farm labour contractor licence.

Various other statutory provisions, which pertain to all employers and employees, are also relevant to this appeal. They include Section 77 of the *Act*, which states:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Section 117 of the *Act* sets out the Director's power to delegate her functions, duties or powers:

- 117(1) Subject to subsection (2), the director may delegate to any person any of the director's functions, duties or powers under this Act, except the power to delegate under this section.
- (2) The director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to that matter.
- (3) If the director personally investigates a matter under section 76, the director must delegate the director's power to impose penalties in relation to that matter.

Before turning to the lengthy and very able submissions of both Counsel for Agro and Counsel for the Director, I should note that I find the following passage from Mr. Justice Cory's reasons in *R. v. Wholesale Travel Group Inc.* to be particularly relevant and apt (in the sense that it is keenly suited to our purposes):

... Those who chose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of the responsibility. **This so-called licensing concept means that those who engage in a regulated activity are deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an understanding that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.** Persons who enter a regulated field are in the best position, moreover, to control the harm which may result and they should, therefore, be held responsible for it. ... As a result of choosing to enter a regulated field of activity known to be regulated, the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct of being allowed to engage in the regulated activity.

(emphasis added)

(1991) 84 D.L.R. (4th) 161 at p.162

That is, by being licenced as a farm labour contractor, Agro must be "taken to be aware of and to have accepted the imposition of..." the various statutory and regulatory requirements which are imposed on it by the *Act* and *Regulation*.

In the specific context of farm labour contractors operating under the *Act* and *Regulation*, the Tribunal has expressed the following views about the Director's discretionary powers and authority:

Taken together, the *Act* and the *Regulation* grant the Director broad discretionary authority to ensure compliance with the *Act* and to ensure that

employers and workers observe standards in the *Act*. Part 2 of the *Regulation* contains a comprehensive framework for the regulation and licensing of farm labour contractors. These provisions, in our view, reflect the Legislature's intent to ensure that the Director has the authority to regulate the employment relationship of employees, farm labour contractors and growers in this industry.

Sidson Farms Ltd., BC EST #D325/98 at p.10

The Tribunal has also expressed its views about the significance of the fact that the issuance and cancellation of a farm labour contractor's licence fall within the Director's discretion:

... the issuance of a FLCL and the subsequent cancellation of that FLCL are both matters within the *discretion* of the Director. The appeal now before me is very different from the typical sort of appeal to the Tribunal that follows the Director's investigation and adjudication of a dispute between an employer and an employee (say, for example, concerning the employee's entitlement to overtime pay or compensation for length of service). In such appeals, the Tribunal reviews a decision made by the Director in her capacity as the arbiter of the parties' (employer and employee) respective rights and obligations under the *Act*. As a general rule, if the Director's determination is not "correct", the appeal will succeed.

However, in the case of a licence cancellation, the Director is the *principal* respondent party rather than a neutral adjudicator who determines disputes under the *Act* between an employer and an employee. When issuing or cancelling FLCLs, the Director is exercising a power more akin to an administrative rather than an adjudicative function.

Ludhiana Contractors Ltd., BC EST #D361/98 at p.4

Furthermore, the Tribunal, relying on *Glover v. Plastover et al* [Victoria Registry No. V02973, February 27, 1998 (B.C.C.A.)], concluded that the correct approach to be taken when reviewing a decision by the Director to cancel a farm labour contractor's licence is:

"...the Tribunal ought not to interfere with the Director's exercise of her discretionary power unless it can be shown that the Director failed to act in good faith or took into account irrelevant considerations."

Ludhiana Contractors Ltd., BC EST #D361/98 at p.5

The Tribunal went on to find that:

Good faith may be presumed where the Director has cancelled the FLCL based on one or more of the three criteria set out in section 7 of the

Regulation. A lack of good faith may be implied where the Director has cancelled the FLCL based on some other extraneous consideration or where there is evidence that the Director acted in a discriminatory fashion toward the licence. In an appeal to this Tribunal, the onus rests on the contractor to show that its FLCL was improperly cancelled.

Ludhiana Contractors Ltd., supra at p. 5

Procedural Fairness

In this appeal, Agro submits that the Determinations should be set aside on the basis that they were made "... in a manner which violated Agro's right to natural justice and procedural fairness." Counsel for Agro acknowledges, in his oral submissions, that he does not allege that Agro was denied an opportunity to discuss the allegations made by the Director and the consequences of those allegations if established as a fact. However, he submits, this ground of appeal arises out of the requirements of Section 117 and Section 77 of the *Act* as well as the procedures adopted by the Director's delegates in making the Determinations.

Agro submits, correctly in my view, that Section 117(2) of the *Act* requires that the Director not delegate to the same person the authority to investigate a matter and to impose a penalty related to that matter. However, it is important to note that Section 117(2) says nothing about how she must delegate her powers in respect of issuing or cancelling a farm labour contractor licence. Of course, the cancellation of a licence under Section 10 of the *Regulation* is an entirely different matter than the imposition of a penalty under Section 98 of the *Act*. Section 117(2) speaks only to the delegation of power to impose a penalty.

Counsel for Agro acknowledges that Section 117(2) applies only to the imposition of penalties but submits, nevertheless, that the Director has adopted a practice of separating the investigative process from the decision to cancel the licence by delegating each function to a different delegate. This practice, he submits, is consistent with the principle that where a person's livelihood is affected, he or she is entitled to "the full range of procedural protections required by natural justice and fairness."

[see, for example, *Baiton Enterprises Ltd.* (1985) 1 WWR 186 (Sask. Q.B.)]

Accordingly, counsel submits, the requirements of Section 117 are "... not simply technical or formal requirements." Rather, they require that the Director's delegate "... exercise independent judgment and conduct an independent assessment of the circumstances prior to exercising the power to impose a penalty." On that basis, the Determinations should be cancelled because, counsel submits, the Director's delegate who issued the two Determinations did nothing more than endorse a determination made and drafted by the Director's delegate who conducted the investigation on September 10th.

In addition to those statutory requirements, counsel submits that one of the fundamental principles of administrative law and natural justice is that "... the person who decides a

matter must also be the person who hears and considers the evidence and representatives bearing upon the decision.” On the facts of this case, counsel submits, because Agro did not have an opportunity to submit any evidence or make any representations to the Director’s delegate who issued the Determinations, there was a denial of fairness and the Determinations should be set aside.

In my opinion, both the Tribunal and the Director have more latitude than Counsel for Agro would allow in how, and to what extent, the principles of natural justice apply to the manner in which a determination may be made and an appeal of that determination may be heard:

There are no rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case. The purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure. The presentation of this case suffered from the initial misconception that the right to know and to reply required a full scale hearing. This is not so. ***The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied.***

(page 310; emphasis added)

Dowing v. Graydon, (1978) 21 O.R. (2d) 292 (C.A.)

I agree with Counsel for the Director that if I were to adopt Agro’s analysis it would place the Director in a “procedural straight-jacket” in the administration of the *Act*. In doing so, I also rely on the reasons given by the Supreme Court of Canada in *Consolidated Bathurst Packaging Ltd. -and- International Woodworkers of America Local 2-69* [(1990) 68 D.L.R. (4th) 524], where the Court noted, at page 534:

“The rules of natural justice should in their application reconcile the characteristics and exigencies of decisions by specialized Tribunals with the procedural rights of the parties.”

At page 554, the Court also noted:

“The rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unreasonable to expect administrative tribunals such as the Board to abide strictly by rules applicable to courts of law. In fact it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the institutional constraints it faces”

Similarly, in *Kane v. Board of the University of British Columbia* [(1980) 110 D.L.R. (3rd) 311] the Court concluded, at page 322:

“In any particular case the rules of natural justice will depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with...”

This view has been adopted by this Tribunal in a recent decision - *Insulpro Industries Inc.* (BC EST #D405/98) at page 10:

“... the Director exercises functions which, if being characterized would include legislative, investigative and judicial decision-making processes. In that context there is no specific or set level of procedural protection that must accompany a function of the Director. The decision of *Martineau v. Matsqui Disciplinary Board*, (1980) 1 S.C.R. 602 stresses that attributes of natural justice that apply in a given context will vary according to the character of the decision made... While the function of the Director conducting an investigation under the Act does contain a judicial element, the function is predominantly investigative or administrative and would not compel the Director to be placed in an administrative straight-jacket.”

I do not agree with Agro’s submission that Section 117 requires the Director to hold a formal hearing after conducting an investigation and before making a determination. In my view, a better reading of the Legislature’s intention in respect of procedural fairness is Section 77 (where the Director “... must make reasonable efforts to give a person under investigation an opportunity to respond”) together with Section 86 (which gives the Director the power to reconsider and then vary or cancel a determination) and, of course, Section 112 (by which any person served with a determination may appeal it to the Tribunal).

On the facts of this appeal, there is no dispute that the Director gave Agro every opportunity to respond during the investigation which was conducted between September 10 and September 24, 1998. Given that fact, I cannot see how the procedure which the Director adopted was unfair nor how it deprived Agro of a fair hearing. Implicit in Agro’s submissions on this point is the notion that Agro may have had something further to say or some further evidence to submit to the Director after the investigation was completed. However, Agro has not established in this appeal that the Director failed to consider any relevant evidence or that she failed to give it an opportunity to respond before she made the Determinations which are the subject of this appeal.

Was the imposition of a penalty and the cancellation of Agro’s farm labour contractor licence an improper exercise of the Director’s discretion?

This ground of Agro’s appeal requires that each of the two Determinations be looked at separately because the Director’s authority to cancel a farm contractor’s licence arises

from Section 7 of the *Regulation* whereas her authority to impose a penalty is found in Section 98 of the *Act*.

Section 7 of the *Regulation* allows the Director to cancel or suspend a farm contractor's licence in any one of three circumstances (misleading statement in an application; breach of a licencing condition; and contravention of the *Act* or *Regulation*). The Director's authority to cancel or suspend a licence is a discretionary authority and, therefore, the Tribunal will not interfere with that discretion: "...unless it can be shown that the director failed to act in good faith or took into account irrelevant considerations.": *Ludhiana Contractors Ltd., supra*.

In addition, Section 117 (2) of the *Act* has no relevance to a determination in which a farm labour licence is cancelled or suspended. Section 117(2) is relevant only to the imposition of a penalty which, as noted above, may be made under Section 98 of the *Act*.

Counsel for Agro placed a great deal of emphasis on two particular points in his submission and argument. One of those points was that if Agro contravened the *Act* or *Regulation*, it was merely a "technical breach" which did not warrant the imposition of a penalty and the cancellation of its licence. The second point was that Agro imposed no "harm and hardship" on any of its employees and, therefore, the imposition of a penalty and cancellation of its licence was improper. I can find no basis in law for relying on either the "mere technical breach" or the "harm and hardship" tests on which Agro seeks to rely. Furthermore, as this is an appeal and Agro is the appellant, Agro bears the onus of establishing that the Director exercised her statutory authority improperly.

Counsel for Agro submits that the cancellation of its farm labour contractor licence was "...an unreasonable and unjustified exercise of the Director's discretion" and offers the following grounds for that submission:

- the Determination which cancelled the licence relied on four other determinations as the basis for cancelling the licence
 - July 7, 1998 (failure to have farm labour contractor licence)
 - August 24, 1998 (\$500.00 penalty for failure to keep proper payroll records and licence cancellation)
 - September 18, 1998 (duties of farm labour contractor contravened)
 - September 24, 1998 (failure to have farm labour contractor licence, \$750.00 penalty);
- the contraventions set out in those four determinations are the only grounds on which the Director can properly rely to cancel Agro's licence;
- Agro did not appeal and does not controvert the findings of fact which were made in the July 7th and August 24th determinations;

- none of the contraventions show that Agro failed to provide its employees with the minimum conditions of employment which the *Act* establishes and, therefore, there was “...no harm or hardship to any employee” and they should thus be considered to be “technical violations” of the *Act*;
- the significance of the August 24th Determination must be considered in the context of the fact that Agro did not appeal the Determination because it made a business decision to pay the \$500.00 fine so as to ensure that it would be re-issued a licence immediately and, thereby, be permitted to continue operating its business legally;
- the Determination which cancelled Agro’s licence on September 24th relied on a finding that it had 55 employees working at Chai-Na-Ta farms while having a licence and a bond for 50 employees.
- Four of those five employees were actually employees of KNN Distribution Inc. who were employed solely as drivers and did not harvest any crops;
- the finding that the four drivers who were employees of KNN should be considered to be employees of Agro for purposes of determining that Agro’s licence should be cancelled is not a proper interpretation of the *Act* and if the Director’s interpretation is correct, it “... should be regarded as a highly technical violation of the *Act* based on a genuine misunderstanding of the possible implications of Section 195 ... (and) ... could not therefore justify the imposition of the serious sanction of cancellation of a licence.”
- If the four drivers cannot properly be considered to be employees of Agro, then the number of farm workers at Chai-Na-Ta Farm who could be said to be employees of Agro would be fifty-one. Such a circumstance would be “...an exceedingly minor and technical violation of the *Act* which should not warrant the cancellation of (Agro’s) licence.”
- the Director cannot rely on Section 95 of the *Act* to “transform” the employees of KNN into being employees of Agro and, further, the “...fact that two companies may be under the control or direction of a common person does not in any way suggest that the employees of one company are not properly the employees of that company and should be characterized as the employees of another related company.”

Counsel for Agro also made an extensive submission on the point that Section 95 of the *Act* cannot be relied on to transform one “class” of employer into another “class” of employer. That is, KNN could only be associated with Agro if the Director were first to make a finding that KNN is a farm labour contractor. Further, Agro submits, I must construe the meaning of Section 95 strictly [*Vencorp Enterprises Corp. v. British Columbia (Director of Employment Standards)* (1998) B.C.J. No. 2311 (B.C.S.C.)]

However, I note that Counsel for the Director submitted that the Determination does not seek to associate Agro and KNN under Section 95 of the *Act*.

The Director submits that Agro's appeal of the Determinations is a "cry of wolf":

Although the corporate appellant is new, the human agents involved in her operation are not. Akash Nijjer, his family and associates, on their own evidence, are sophisticated, knowledgeable farm labour contractors of long standing...(who are) ... not handicapped by custom, language or inexperience from operating their business well within the bounds of the statute. Despite ongoing involvement with the Employment Standards Branch (the "Branch") the appellant made a conscious decision to operate their business in a way which contravened statutory provisions. The delegate exercised his discretion to cancel the appellant's farm labour contractor licence for proper purposes, with full notice to the appellant and full opportunity to respond. It should not be disturbed.

She also submits that Mr. Nijjer is a "sophisticated, knowledgeable farm labour contractor".

The Director submits, further, that the association between Agro and KNN which supports the Determination to cancel Agro's licence should be viewed in the following context:

Pickers must be driven from producer to producer. It is not logical to suggest that drivers of these vehicles, who may be required to move pickers several times a day, are not employees of the contractor and therefore not entitled to the protection of the *Act*. It is novel to suggest they are not protected. The *Act* has set up a scheme whereby statutory minimums for compensation, transport and conditions of work are set out for the farm labour industry. Akash Nijjer, as operations supervisor of Coastview and latterly as president of the appellant, was aware of this. He elected to disregard that knowledge.

Earlier, at pages 9 to 11, I set out the definition of a "farm labour contractor" and the statutory framework within which they are licenced and are required to be bonded. The statutory purpose of the requirement to be bonded must surely be to ensure that farm workers receive the wages to which they are entitled under the *Act*. The requirement to register vehicles used for the transportation of farm workers must be to ensure that they are transported safely. The overall purpose of Part 2 of the *Regulation* must be to assist the Director in enforcing the *Act* and *Regulation*.

The definition of "farm worker" in Section 1 of the *Regulation* is not restricted to a person who harvests a crop. Rather, "farm worker" has a broader meaning: "... a person employed in a farming, ranching, orchard or agricultural operation..." but does not include a person employed in aquaculture, landscape gardening, retail nursery, or a person employed to process aquaculture products. Thus, a person employed to transport farm

workers is not excluded from the definition in the *Regulation*. In addition, the definition of “employee” includes:

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee”

Also, the definition of “employer” includes a person:

“(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee.”

I agree with the finding made in the Determinations that, under those statutory definitions, the four drivers who were identified as employees of KNN were, for purposes of the *Act*, employees of Agro. In making this finding I have attempted to prevent a carefully developed corporate structure from distracting me from the reality that the drivers were “part and parcel” of Agro’s business as farm labour contractor. Therefore, I agree with the Director that a “fair, broad and liberal” interpretation of the *Act* and *Regulation* would allow for KNN’s driver/employees to fall within the definition of “farm worker.” A purposive approach to interpreting the *Act* and *Regulation* would also yield that same result. As noted by the Tribunal in *Project Headstart Marketing Ltd.*, (BC EST #D164/98): the *Act* “...casts a somewhat wider net than does the common law in terms of defining an ‘employee’ and an ‘employer’.”

The Determination of September 24th in which the Director imposed a \$750.00 penalty sets out the basis for associating KNN and Agro in the following manner:

Having given regard to all aspects of this matter we have concluded that Agro Harvesting Ltd. was operating over their bond number by at least five employees. Harminder Gill confirmed he was employed by Akash Nijjer. Furthermore the four drivers, Jagdip Sidhu, Sadhu Brar, Gurcharan Gill, and Jaskaran Sandhu are also employed by Akash Nijjer who provided their direction and control. Because KNN Distribution Inc. and Agro Harvesting Ltd. are associated they will be treated as one.

The Determination does not refer to Section 95 of the *Act* and the style of cause is “Agro Harvesting Ltd.” rather than “Agro Harvesting Ltd. and KNN Distribution Inc.” which one would have expected if the Director were invoking Section 95 of the *Act*. Despite the submissions to the contrary by Counsel for the Director, I find that the Director’s delegate did invoke Section 95 of the *Act* and did associate Agro and KNN under that Section. However, I find nothing improper in that as I agree with the conclusion that KNN’s drivers were an integral part of Agro’s operations as a farm labour contractor and the Director’s delegate was doing nothing more than “piercing the corporate veil” with which Agro was attempting to clothe itself.

It is important, in my view, to be cognizant of the many findings of fact which led the Director to determine that she should impose a penalty and cancel Agro's licence. The facts are not quite as Counsel for Agro would cast them with respect to the number of employees who were found in the field at Chai-Na-Ta Farm on September 10th. The Determination sets out the following factual context as the Director found it:

After obtaining the daily logs of employees Industrial Relations Officers Prab Dhaliwal and Pavi Toor spoke to all of the workers in the field. The officers spoke to 64 people who were harvesting Ginseng seeds and obtained all of their names. Every employee on the daily logs was accounted for, however, there were three people on the field who did not appear on the logs. (A reference to the fact that employees of both Agro and Sukhanand Enterprises were working at Chai-Na-Tai on that day.)

Pavi Toor was able to speak with Harminder Gill again, and Mr. Gill confirmed that he was employed by Akash Nijjer of Agro Harvesting Ltd. Further inquiries were made to determine which company was employing Naran Gill and Amarjit Minhas. While Prab Dhaliwal and Pavi Toor were trying to find these two people, other employees of Agro Harvesting Ltd. acknowledged that they knew Amarjit Minhas and that she was present somewhere in the field. However the officers were unable to locate either of the two pickers to confirm their employer.

Employees of Agro Harvesting Ltd. and Sukhanand Enterprises Ltd. were using picking cards to record the amount of seeds harvested, Kevin Hughes, a Chai-na-Tai employee at the weigh in scale, stated to Industrial Relations Officer J.V. Walton, that each employee is given a picking card each morning. Mr. Hughes stated that on that morning he had handed out between 63 and 65 picking cards. He also stated that some employees pair up and pick on one picking card.

On September 11, 1998 the Agriculture Compliance Team returned to Chai-Na-Ta Farms Ltd. in Ashcroft, BC. to obtain copies of the picking cards for the September 10, 1998 harvest. 59 picking cards were turned in on September 10, 1998. These picking cards were all in sequential numerical order and it was determined from these picking card numbers that 64 picking cards had been given out and therefore 5 were not turned in. The 64 picking cards given out corresponds to the number of workers that the officers contacted in the field. Picking cards were not turned in on September 10, 1998 for Amarjit Minhas, Harminder Gill and Naran Gill.

On September 11, 1998 Pavi Toor and Prab Dhaliwal also spoke with a Jagdip Sidhu. Mr. Sidhu is a driver that Akash Nijjer employed to drive the employees to the wok site. This driver acknowledged knowing Amarjit Minhas. He stated that Amarjit Minhas had performed work for KNN

Distribution Inc. in July of 1998. KNN Distribution Inc. is a company associated with Agro Harvesting Ltd. Furthermore Mr. Sidhu provided the names of the other drivers in Ashcroft: Gurcharan Gill, Sadhu Brar, Jaskaran Sandhu. He stated that all of the drivers are employed by KNN Distribution Inc.

This excerpt from the Determination makes it abundantly clear that the Director gave Agro “every benefit of the doubt” in making the finding that it was operating as a farm labour contractor with 55 employees while being licenced for only 50 employees on September 10, 1998.” It was not, as Agro submits, a mere “technical violation” of the *Act* which resulted in the cancellation of its licence.

In reviewing the evidence given by Ms. Dhaliwal and Mr. Toor, Counsel for Agro submits that the “significant discrepancy” in their evidence should lead me to prefer the evidence given by Mr. Nijjer on the question of whether Mr. Gill was or was not an employee of Agro.

Counsel also submits that it would be contrary to natural justice to allow hearsay evidence to “overcome” the direct *viva voce* evidence given by Mr. Nijjer. Furthermore, Counsel submits, I should not rely on hearsay to establish a crucial or central fact.

Section 107 of the *Act* allows the Tribunal to conduct an appeal “... in a manner it considers necessary.” This provision is sufficiently broad to allow the Tribunal to accept such evidence as it considers proper and relevant, whether or not that evidence would be admissible in a court, when the circumstances make it appropriate and to weigh it accordingly: *Code Distribution Systems Ltd.. v. G.T.D.H.U., Local 31* [1980] B.C.J. No. 511 (B.C.C.A.), Vancouver Registry CA005854.

I do not find that there was any discrepancy in the evidence given by Ms. Dhaliwal and Mr. Toor. I find that Agro has not established on the balance of probabilities that the Director erred in finding that Mr. Gill was employed by Agro as a farm worker at Chai-na-Tai Farms on September 10, 1998. The fact that there were at least 51 farm workers employed by Agro on September 10th is a sufficient ground for the Director to exercise her discretion to cancel Agro’s farm labour contractor licence under Section 7 of the *Regulations*. As noted above in *R. v Wholesale Travel Group Inc.*, Agro is deemed to have accepted the terms and conditions which are applicable to it under the *Act* and *Regulation*. Section 7 (b) of the *Regulation* allows the Director to cancel Agro’s licence if it breaches a condition of its licence. Agro breached Section 5 of the *Regulation* by employing more farm workers than the number for which it had posted security (i.e. for which it was bonded). That, in and of itself, was a sufficient ground for the Director to cancel Agro’s licence given Agro’s earlier contraventions as set out in the Determinations. However, I found earlier that the Director had not erred in determining that the four drivers (Jagdip Sidhu, Sadhu Brar, Gurcharan Gill and Jaskaran Sandhu) were employees of Agro for the purposes of the *Act*. That finding means, *a fortiori*, that the Determinations were not unreasonable.

Summary

For all of the reasons set out above, I find that Agro has not met the burden, placed on it as an appellant, to establish on the balance of probabilities that the Determinations ought to be varied or cancelled.

ORDER

I order, under Section 115 of the *Act*, that the Determinations be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GCS/sm.