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**** HIGHLIGHTS ****

* The British Columbia Court of Appeal has refused to overturn decisions of the British Columbia Supreme Court, and the British Columbia Labour Relations Board, which concluded that state immunity did not prevent the British Columbia Labour Relations Board from hearing evidence from former employees at Mexico's Vancouver Consular office, with respect to whether Mexico had improperly interfered with a decertification application with respect to Mexican workers who worked at a B.C. nursery pursuant to the Federal Seasonal Agricultural Workers Program. The Court of Appeal observed that Mexico was not a party to the decertification application. The decision of the Board did not affect Mexico's legal interests. The Court refused to expand the concept of state immunity to include "indirect impleading" so as to prevent the Board from considering this evidence. (United Mexican States v. British Columbia (Labour Relations Board), CALN/2015-003, [2015] B.C.J. No. 144, British Columbia Court of Appeal)

* A Justice of the Supreme Court of Nova Scotia has concluded that a decision of Inspectors acting under the Nova Scotia Animal Protection Act to seize and remove cattle was unlawful, because the Inspectors failed to take steps to obtain the owner's cooperation to relieve the distress of the cattle. The Court also found that the Deputy Minister of Agriculture, who has the authority to hear appeals from Inspector's decisions, must conduct an independent review of all the facts before deciding whether or not a decision to remove seized animals can be upheld, rather than restricting the appeal to an assessment of the report submitted by the Inspector. (Millett v. Nova Scotia (Minister of Agriculture), CALN/2015-004, [2015] N.S.J. No. 29, Nova Scotia Supreme Court)

**** NEW CASE LAW ****

United Mexican States v. British Columbia (Labour Relations Board); CALN/2015-003, Full text: [2015] B.C.J. No. 144; 2015 BCCA 32, British Columbia Court of Appeal, H. Groberman, D.C. Harris and P.M. Willcock JJ.A., January 30, 2015.

Seasonal Agricultural Workers Program -- Union Decertification Applications -- Interference by Foreign Governments -- State Immunity.

The United Mexican States and the Consul General of Mexico in Vancouver ("Mexico") appealed to the British Columbia Court of Appeal from a judgment of the British Columbia Supreme Court which dismissed Mexico's application for judicial review from a decision of the British Columbia Labour Relations Board (the "Board") that the State Immunity Act, R.S.C. 1985, c. S-18 (the "State Immunity Act") barred the Board from making a finding of whether or not Mexico engaged in "improper interference" of Mexican agricultural workers.

The Commercial Workers International Union (the "Union") was the certified bargaining agent for workers employed by Sidhu & Sons Nursery Ltd. (the "Nursery"), an agricultural nursery and farming business in British Columbia.

The Nursery hires its workers through the Federal Government's Seasonal Agricultural Workers Program ("SAWP"), a program based on bilateral agreements between Canada and a number of foreign governments including Mexico.

Under SAWP, Mexico is responsible for selecting and approving the workers who will participate in the program. Mexico may repatriate its citizens or terminate their participation in SAWP at any time. The Nursery hired Mexican workers, but not all of the members of the Union were Mexican.

On April 11, 2011, a number of employees in the Union applied to the Board to decertify the Union pursuant to s. 33(2) of the Labour Relations Code, R.S.B.C. 1996, c. 244 (the "Labour Code").

On April 19, 2011, the Union filed a complaint against Mexico, the Nursery and the employees in question, seeking the dismissal of the certification application on the basis that Mexico had engaged in unfair labour practices, contrary to s. 6 and 9 of the Labour Code, and "improper interference" within the meaning of s. 33(6)(b) of the Labour Code, such that the decertification vote was unlikely to reflect the true wishes of the employees in the Union.

Mexico raised a preliminary objection before the Board claiming that state immunity from the Board's jurisdiction under s. 3(1) of the State Immunity Act. The Board concluded that it lacked jurisdiction to require Mexico to participate as a party in the proceedings, but that it could consider Mexico's conduct insofar as any improper interference by Mexico affected the exercise of its discretion to cancel or refuse to cancel the certification.

On February 23, 2012, the Board concluded that it could hear the evidence of former Consular employees if provided voluntarily, and the Board started the decertification application during which the former employees testified.

After the decertification hearing, but before a decision was rendered, Mexico argued that the Board was barred by state immunity from enquiring into Mexico's conduct for the

purpose of an "improper interference" analysis under s. 33(6)(b) of the Board, and from making any legal or factual findings in relation to Mexico's conduct.

On March 7, 2013, the Board decided that it was not precluded from hearing the testimony of former Consular employees, and was not precluded from making findings in relation to whether or not Mexico's conduct amounted to improper interference.

Mexico applied for judicial review of this decision.

Madam Justice Warren of the British Columbia Supreme Court concluded that the State Immunity Act did not preclude the Board from enquiring into, and making factual findings in relation to Mexico's conduct for the purpose of whether it had engaged in improper interference. [2014 BCSC 54 (CanLII); CALN/2014-005].

Section 3(1) of the State Immunity Act provides:

> "3.(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada."

Sections 6 and 9 of the Labour Code provide as follows:

> "6.(1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial support to it.
>
> ...
>
> 9. A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union."

Decision: Harris, J.A. [at para. 51], dismissed the appeal. Groberman and Willcock, JJ.A. concurred.

Harris, J.A. referred [at para. 34] to s. 6(3)(d) of the Labour Code, which was of particular relevance. This section provides that an employer or person acting on behalf of an employer must not:

> "(d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union[.]"

Harris, J.A. further observed [at para. 35] that s. 33(6)(d) did not expressly prohibit conduct amounting to "improper interference":

> "...It seems to me that the purpose of a finding of improper interference by a person is simply a basis on which the Board can conclude that the vote does not disclose the true wishes of the employees. No orders of any kind can be issued against such a person, whose only connection to the proceeding is the conduct found to constitute improper interference. And because no orders may issue against them, there is no requirement on the Board to give the person notice of the proceedings. The finding has no legal effect and, in my view, does not affect their legal interests."

Mexico, however, argued that although it was not a party to the proceedings, it had been "indirectly impleaded" in the Board proceedings. Harris, J.A., relying on the decision of the Court of Appeal in England in Belhaj v. Straw, [2014] EWCA Civ 1394 in which the Court of Appeal observed that:

> "[45] ..."[p]roceedings will not be barred on grounds of state immunity simply because they will require the court to rule on the legality of the conduct of a foreign state."

Harris, J.A. rejected Mexico's argument that the principle of indirect impleading should be adopted, concluding, at para. 49:

> "[49] For the reasons already given, I would reject that submission. I do not agree that the Board exercised jurisdiction over Mexico when it considered whether Mexico's conduct amounted to improper interference with the employees of the Union for the purpose of exercising its discretion to refuse to cancel the Union's certification. The Board made no orders in relation to property in the ownership, possession or control of Mexico. It did not affect Mexico's legal interests. In my view, that conclusion is sufficient to dispose of this appeal."

Millett v. Nova Scotia (Minister of Agriculture); CALN/2015-004, Full text: [2015] N.S.J. No. 29; 2015 NSSC 21, Nova Scotia Supreme Court, G.R.P. Moir J., January 21, 2015.

Seizure and Removal of Animals Under Distress in Nova Scotia -- Unlawful Seizure and Removal -- Requirement to Cooperate with Livestock Owners -- Minister's Obligation to Conduct an Independent Appeal.

Nelson Millett, carrying on business as Rocky Top Farm ("Millett") brought an application for the judicial review of a decision made by the Deputy Minister of Agriculture for the Province of Nova Scotia. The Deputy Minister had refused Millett's appeal to overturn a decision made by a Department of Agriculture Inspectors who had decided to seize, and not return Millett's cattle.

The cattle were seized following receipt of complaints and an inspection by a Department of Agriculture inspector. The inspector who attended to the farm observed signs of malnutrition, dehydration and parasitic infection in a number of the cattle at the Millett farm.

Section 3(1) of the Animal Protection Act (Nova Scotia) (the "Act") limits the power of seizure. Section 23(2) of the Act provides:

> "Before taking action pursuant to subsection (1), an inspector or peace officer shall take reasonable steps to find the owner or person in charge of the animal and, where the owner is found, shall endeavour to obtain the owner's co-operation to relieve the animal's distress."

The inspector's reports did not disclose any steps being taken by the inspectors to find out whether Millett would cooperate to relieve the distress of the cattle.

Following the seizure, veterinarians examined and tested the animals. None of them showed signs of disease or illness. All were responsive. Some were thin or very thin. The only conclusion was that the herd was underweight and exhibited significant ill thrift [at para. 23].

Subsection 26(7)(b) of the Animal Protection Act permits the owner of seized animals to request a review by the Minister of a decision of an inspector that an animal will not be returned.

The Deputy Minister concluded that the cattle were not receiving proper care, that they were in distress, and that the only way to relieve the distress was to take the herd into custody [at para. 32]. The Deputy Minister also found that the inspector attempted to find the owner and to obtain the owner's cooperation in relieving the distress of the herd but that the herd owner did not cooperate, and that this failure to cooperate contributed to the action taken by the inspector [at para. 32 to 35].

Decision: Moir, J. concluded that the seizure was unlawful [at para. 126], that the Deputy Minister failed to correctly interpret the Animal Protection Act, and that all sale proceeds belonged to Millett, not the Government [at para. 126 to 130].

Moir, J. did an extensive analysis of the standard of review [at para. 40 to 100], before concluding [at para. 101 to 103] that the correctness standard should be applied:

> "[101] In conclusion, the statute has two general purposes: prevention of cruelty to animals and relief of distress. Within the latter is another purpose: to balance the interests of the owner with the relief of distress.
>
> [102] The prevention of cruelty and alleviation of distress purposes tend towards a reasonableness standard of review. Let the legislated system freely run its course so that animals do not suffer. However, the apparent purposes of also protecting the owner's interests and of balancing the two

> may tend towards correctness.
>
> [103] In my opinion, the four considerations lead to a correctness standard for the Minister's determination of what may be called the standard for the Minister's review of the inspector's decision, but what I would prefer to call the Minister's role on statutory review of the inspector's decision."

Moir, J. concluded that the legislation required the Minister to do more than determine whether the inspector's decision was reasonable, and that the Deputy Minister did nothing more than review the inspector's reasons, without "an independent, fresh assessment of whether to keep the seized animals." [at para. 106].

Moir, J. concluded [at para. 114 to 116]:

> "[114] I conclude that the Deputy Minister was required by the legislature to consider the inspector's decision, the information before the inspector, and new information given to the Deputy Minister. His obligation was to decide, on old and new evidence, whether Rocky Top Farm is a fit person to care for the cattle.
>
> [115] The Deputy Minister decided only that the inspector's decision was reasonable. He was entitled to take that into consideration, but limiting his review to that subject misinterpreted what the legislation required him to do. Rocky Top Farm was entitled to the Minister's independent judgment about whether it was fit to care for the cattle. Instead, it only got the Deputy Minister's appraisal of the lead inspector's judgment.
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> [116] The Deputy Minister misconstrued his statutory role. His decision must be set aside. In light of the sale, the only remedy available under Rule 7.11 is an order to turn over the sale proceeds to the owner of the sold animals."

Moir, J. concluded [at para. 121] that the record showed "unequivocally" that the inspector never sought cooperation from Millett and that the seizure was unlawful, stating, at para. 126:

> "[126] The seizure was unlawful. The finding to the contrary is untenable. While the obligation belonged to the inspector, not the Minister, what was the Minister to do when confronted with a review of a decision not to return animals illegally seized? At least, he might have given explicit consideration to Mr. Millett's evidence about how Rocky Top Farm could improve conditions."

** CREDITS **

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