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**** HIGHLIGHTS ****

* The Saskatchewan Court of Queen's Bench dismissed an application for judicial review from a decision of the Saskatchewan Agricultural Operations Review Board. The Board refused to hear an application as to whether or not the potential spread of malignant catarrhal fever from a proposed sheep farming operation to a neighbouring bison ranch arose from a "normally accepted agricultural practice". In Saskatchewan, and in many other provinces, farm protection legislation prohibits nuisance actions arising from agricultural operations unless the party first brings an application to a review board to determine whether the agricultural operation is carried on in accordance with normally accepted agricultural practices. In this case, the Board concluded that a person faced with a "future risk of harm" has no standing to bring an application if no "grievance" has yet occurred. This is apparently the first application for judicial review with respect to a decision of the Saskatchewan Review Board. The Court carefully reviewed the standard of review and concluded that the standard is reasonableness. The Court observed there did not appear to be any judicial authority to support the conclusion that a "potential future" injury could give standing and that the expert evidence before the Board did not definitively establish that the bison would become infected or start dying as alleged by the bison farm. (R.J. Farms & Grain Transport Ltd. (c.o.b. RJ Game Farms) v. Agricultural Operations Review Board, CALN/ 2011-017, [2011] S.J. No. 286, Saskatchewan Court of Queen's Bench)

* The Ontario Labour Relations Board has held that a peat processing operation which supplied peat moss to agricultural and horticultural industries was not a "surface mine" within the meaning of the Ontario Mining Regulations. Orders made by an Occupational Health and Safety Inspector which required compliance with employee training programs for surface mines were set aside. (Zephyr Peat Land Harvesting v. James Milne,

CALN/ 2011-018, [2011] O.O.H.S.A.D. No. 38, Ontario Labour Relations Board)

**** NEW CASE LAW ****

R.J. Farms & Grain Transport Ltd. (c.o.b. RJ Game Farms) v. Agricultural Operations Review Board; CALN/2011-017, Full text: [2011] S.J. No. 286; 2011 SKQB 185, Saskatchewan Court of Queen's Bench, J.L. Pritchard J., May 6, 2011.

Right to Farm Legislation -- Saskatchewan Agricultural Operations Act -- Review Board Decisions -- Standard of Judicial Review.

Farm Protection Legislation -- Standing -- Whether Review Boards can Consider Whether a Proposed Practice is a Nornally Accepted Agricultural Practice if a "Disturbance" has not yet Occurred.

RJ Game Farms ("Game Farms") applied for an Order quashing the January 10, 2011 decision of the Agricultural Operations Review Board (the "Review Board") whereby the Review Board declined to hear an application filed by Game Farms for a determination whether a "disturbance" arose from the "normally accepted agricultural practice" of the agricultural operations of a neighbouring farm operated by the Respondents, Teresa and Joanna Walker (the "Walkers").

Since 2004, Game Farms had operated a large bison farm on 13 quarter sections of land near Fairlight, Saskatchewan.

In November, 2010, the Walkers took possession of a section of land located one half mile from Game Farms' operation. The Walkers intended to expand their family sheep farming operations on this section.

The raising of sheep on lands close to its bison operation alarmed Game Farms. Game Farms maintained that the arrival of sheep on Section 15 put its entire bison herd at risk because of the inevitable spread of malignant catarrhal fever virus from the Walkers' sheep to Game Farms' bison. Prior to the Walkers taking possession of Section 15 and placing ewes on the land, Game Farms gave written notice to the Walkers of their concerns regarding the health risk to its bison. From the perspective of Game Farms, the moving of sheep onto Section 15 constituted a private nuisance, and Game Farms advised the Walkers of this position.

Game Farms' application to the Review Board was made under s. 13(2) of the Agricultural Operations Act, SS 1995, c. A-12.1 (the "Act"). This section states:

> "13(2) A person who is aggrieved by a disturbance arising from an agricultural operation may apply in writing to the board for a determination as to whether the disturbance arises from a normally accepted agricultural practice, and if not, what action should be taken to achieve compliance with normally accepted agricultural practices."

In a letter dated June 10, 2010, the Review Board concluded that Game Farms had no standing to bring the claim. The Review Board concluded that the person faced with ".a future risk of harm." is not an "aggrieved" person as no "grievance" has yet occurred.

The Review Board was constituted under the Act to provide a special forum for dealing with disputes relating to agricultural operations and to, in particular, determine whether the operation complained of uses normally accepted agricultural practices [para. 6].

Section 3(1) of the Act limits operators of agricultural operations to claims in nuisance unless the operator has failed to comply with the recommendation of a Review Board:

> "3(1) The owner or operator of any agricultural operation is not liable to any person in nuisance with respect to the carrying on of the agricultural operation, and may not be prevented by injunction or other order of any court from carrying on the agricultural operation on the grounds of nuisance where the owner or operator uses normally accepted agricultural practices with respect to the agricultural operation.
>
> (2) Subsection (1) does not protect a person who fails to comply with a recommendation of the board pursuant to section 17 within the time specified in the recommendation. ."

An application under the Act is a prerequisite to the pursuit of legal remedies. Section 14(1) of the Act precludes any Court proceedings until 90 days after an application has been made to the Review Board under s. 13. Sections 14(1), 17(3) and 18 state:

> "14(1) Notwithstanding any other Act or law, a person may not commence an action in court for nuisance arising from an agricultural operation, or apply for an injunction or other order of a court preventing or restricting the carrying on of the agricultural operation because it causes or creates a nuisance, unless the person has, at least 90 days previously, applied to the board pursuant to section 13.
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> .
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> 17(3) A court shall consider and shall give primary consideration to a decision of the board respecting an agricultural operation in any subsequent action in nuisance respecting that agricultural operation.
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> .
>
> 18 Notwithstanding any other Act or law, when an agricultural operation is the subject of an application, no injunction proceedings may be

> commenced or continued with respect to the agricultural operation until the board has made a decision pursuant to section 17, and, if the board has made a recommendation, the date for compliance with the recommendation has passed."

Decision: Pritchard, J. dismissed Game Farms' application for judicial review [at para. 27].

Pritchard, J. considered the following issues:

> (a) The Standard of Review.

This case is the first consideration of the standard of review to be applied to Review Boards.

Pritchard, J. reviewed, in detail, the principles involved in determining an appropriate standard of review [at para. 10 to 22]. After considering the decision of the Supreme Court of Canada in Dunsmuir v. New Brunswick 2008 SCC 9, [2008] 1 S.C.R. 190; the Saskatchewan Court of Appeal in Prairie North Regional Health Authority v. Kutzner, 2010 CarswellSask. 704, 210 SKCA 132, [2011] 1 W.W.R. 1, 325 D.L.R. (4th), 401; and the Alberta Court of Appeal in Calgry (City) v. Alberta (Municipal Government Board), 2008 ABCA 187, (2008), 46 M.P.L.R. (4th) 161 (Alta. C.A.), Pritchard, J. observed [at para. 17] that the existence of a privative clause is a strong indication that judicial review should be considered on the basis of the reasonableness standard.

Pritchard, J. then considered decisions concerning the standard of review for similar tribunals in other provinces, stating, at para. 18:

> "[18] A more helpful inquiry in this case is a consideration of the nature of the administrative regime and the Board's expertise. Here, the Board, like the tribunal in Kutzner, supra, has a very narrow and specialized mandate. The purpose of the Act is to ensure a "right to farm" where "normally accepted agricultural practices" are utilized. It requires a balancing of the interests of those engaged in farming with the interests of their neighbours who might thereby be impacted."

Pritchard, J. considered the decisions of the Ontario Court of Appeal in Hill and Hill Farms Ltd. v. Bluewater (Municipality), 82 O.R. (3d) 505 (Ont. C.A.), concerning the Ontario Normal Farm Practices Board and the British Columbia Supreme Court in British Columbia Farm Practices Board in Lubchynski v. British Columbia (Farm Practices Board), 2004 BSCS 657 concerning the British Columbia Farm Practices Board. Both decisions considered the expertise of the boards in these jurisdictions and whether they are in a better position than a Court to understand agricultural operations and the activities and practices that occur on agricultural lands. Pritchard, J. observed that s. 10 of the Act entitles the Board to retain specialists and consultants, much like the British Columbia board. The Ontario Court of Appeal and the British Columbia Supreme Court decisions predated Dunsmuir. The Ontario Court of Appeal decision concluded that the applicable standard of review was reasonableness. The British Columbia Supreme Court concluded that the standard of review was patent unreasonableness.

Pritchard, J. concluded that the appropriate standard in Saskatchewan should be reasonableness and set out the issue to be determined as follows [at para. 22]:

> "[22] After considering all of the above, I conclude that the appropriate standard of review in this case is reasonableness. In other words, the issue to be determined in this appeal is whether the Board reasonably concluded that R.J. Game Farms was not "an aggrieved person" under s. 13(2) of the Act because its Application disclosed only a risk of harm with "no grievance" yet having occurred."

(b) Failure to Give Reasons

Pritchard, J. rejected the Game Farms' argument that the Review Board's brief letter was sufficient to determine the basis for its decision. Although the letter did not provide a full discussion of its reasons, extensive reasons are not necessary for a Court to assess reasonableness [at para. 23 and 24].

(c) Reasonableness of the Review Board's Decision

Pritchard, J. considered whether or not Game Farms was an "aggrieved party" and concluded [at para. 25] that none of the case law submitted by Game Farms supported the proposition that a "perspective injury" constituted a "disturbance" as contemplated by the Act. Pritchard, J. also rejected Game Farms' submission that it was inevitable that its bison would start dying from malignant catarrhal fever. The Return filed with the Court, indicated that Game Farms' evidence was not as definitive as it had claimed, and did not support the Game Farms' submission that:

> ".it would be an errror to interpret s. 13(2) of the [sic] Agricultural Operations Act as requiring that our client wait till the bison start dying from malignant catarrhal fever when the expert evidence we have provided to you indicates that it is not a question of if our client's bison will die from MCF but it is simply a matter of when they start dying.
>
> Our client's resulting financial losses would be significant."

Pritchard, J. concluded at para. 27:

> ".In my view, on the evidence before the Board, there was nothing upon which it might reasonably have concluded that R.J. Game Farms had suffered a grievance as a result of the Act complained of, or even, that it would inevitably suffer such a grievance. As a result, I find the Board's Decision reasonable and not subject to further review by this court."

Employment Law -- Occupational Health and Safety -- Whether Peat Moss Processing Operations are "Mines" for Occupational Safety Purposes.

Zephyr Peat Land Harvesting ("Zephyr") which operated an organic sedge-grass processor appealed to the Ontario Labour Relations Board from the decision of an Occupational Health and Safety Inspector who issued orders which required Zephyr to comply with regulations which required implementation of training programs applicable to surface mine operations.

Subsection 11.2(1) of the Mines and Mining Plants, RRO. 1990, Regulation 854 (the "Mining Regulation") defines a "surface mine" as follows:

> "'surface mine' means a pit or quarry where metallic or non-metallic rock, mineral-bearing substance, earth, clay, sand or gravel is being or has been removed by means of an excavation open to the surface to supply material for construction, industrial or manufacturing purposes and includes any work, undertaking or facility used in connection therewith but does not include a cutting for a right of way for a highway or a railroad."

The undisputed evidence established that there was no pit or quarry on Zephyr's property and the vast majority of the peat produced by Zephyr is sold for use as a growing medium in the agricultural and horticultural industries.

Decision: Lee Shouldice, a Vice-Chair of the Ontario Labour Relations Board allowed Zephyr's appeal [at para. 11]. He held [at para. 13] that there was no evidence to establish that Zephyr removed peat from its property in order to supply material for construction, industrial or manufacturing purposes and that [at para. 14] it was evident that Zephyr did not fall within the definition of a "surface mine" under the Mining Regulation.

** CREDITS **

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