

## LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

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### HIGHLIGHTS

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- \* The Ontario Superior Court of Justice Divisional Court has set aside an order of the Ontario Labour Relations Board which required a family farm to pay substantial amounts of overtime at time and a half to hundreds of employees who worked at a stand alone facility at which raw sweet corn grown on its Ontario and US farms was de-husked, graded, cooled and packaged for sale to Ontario consumers. The Court's decision contains an in depth analysis of the "farming exemption" under Regulations passed pursuant to the Ontario Employment Standards Act and related definitions of "farming" and "primary production". The Court's decision is intended to provide guidance to "thousands" of Ontario farmers and their employees. The Court was highly critical of the Board's decision and its failure to adopt an approach which balanced the interests of both farmers and farm workers. (Rouge River Farms Inc. v. Ontario (Director of Employment Standards), [CALN/2019-014](#), [\[2019\] O.J. No. 3008](#), Ontario Superior Court of Justice)

### NEW CASE LAW

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#### Rouge River Farms Inc. v. Ontario (Director of Employment Standards);

Ontario Superior Court of Justice,

F.P. Kiteley, R.G.S. Del Frate and H.A. Rady JJ.,

June 6, 2019.

[CALN/2019-014](#)

[\[2019\] O.J. No. 3008](#) | [2019 ONSC 3498](#)

**Farm Worker Exemption — Overtime — Definition of "farm" and "primary production" in Ontario — Preparing, cooling and packaging raw product for market.**

Rouge River Farms Inc. ("Rouge River") brought an application for judicial review to the Ontario Superior Court of Justice from the March 8, 2017 decision of the Ontario Labour Relations Board (the "Board") which dismissed Rouge River's application to review a Compliance Order (the "Order") issued by the Director of Employment Standards (the "Director").

The Director held that Rouge River was not entitled to rely on the "farm worker exemption" under section 2(2) of Ontario Regulation 285/01 ("Regulation 285"), and that as a result Rouge River was required to comply with a number of minimum standards under the Employment Standards Act, [S.O. 2000, c.41](#) (the "Act") including overtime pay.

Section 22(1) of the Act requires employers to pay overtime of at least 1.5 times the regular rate for each hour of work in excess of 44 hours per week.

Regulation 285 establishes rules with respect to hours of work, overtime, public holiday pay, and vacation pay.

Section 2(2) of Regulation 285 provides that these rules "...do not apply to a person employed on a farm whose employment is directly related to the primary production of ...vegetables...".

Red Rouge is a family owned farm that grows sweet corn for human consumption in the Ontario market from a number of farms located on 1,700 acres of land in Ontario, and 6,300 acres of land in Ohio, Georgia and Florida.

The corn is sold as raw cobs in trays. Packaging, cooling, de-husking, trimming and grading was initially done at the farms, but was eventually relocated to a production facility located in a building at Gormely, Ontario.

The Gormley production facility operates year round. During the Ontario growing season (April to October) Rouge River employs as many as 250 people - 115 of whom work at the Gormley facility and the remainder of whom work on the farms. Employees are rotated through the facility to farms as operational needs arise. In the Ontario off-season, the production facility packages corn from Rouge River's US farms.

The Gormley facility operates around the clock in peak season. Rouge River voluntarily pays its employees vacation pay and public holiday pay. It does not pay overtime pay, however overtime is voluntary. There is a substantial amount of overtime available during the Ontario peak season.

Employees at the Gormley location work approximately 15,000 hours of overtime between July and September, and 15,000 hours of overtime during the remaining 9.5 months of the year.

Employees at the Gormley location also do field work at the various Ontario farms, as well as transporting product.

Rouge River asserted the Gormley location was a farm, and that cleaning, packaging and other operations done at the Gormley location was primary production of sweet corn.

Rouge River called an expert witness at the Board Hearing who described how farming has changed over the last century though diversification and specialization on shrinking and increasingly expensive plots of agricultural land. He explained the roles of greenhouses, honey production, roof-top and indoor production and storage facilities in farming.

Rouge River argued that the definition of farm is not tied to any particular location. The Board rejected this view and held that there must be a nexus between the location where the produce

is grown and the location of the processing facility. The Board held that processing must occur where the product is grown and that the work must involve "immediate hands on" contact with the agricultural product. The Board's approach was to interpret the exemption to exclude as few workers as possible from the protection of the Act.

The Labour Issues Coordinating Committee - an organization which represents Ontario farm employers - was granted intervenor status at the hearing. Its factum addressed a number of factors which create unique constraints on Ontario farms with respect to hours of work.

Decision: The Court granted Rouge River's application for judicial review, set aside the Board's decision, and held that the "farm workers" exemption applied to Rouge River's Gormley location [at para 92-93].

The Court concluded the standard of review was "reasonableness" and that the Board's interpretation of its home statute was entitled to deference [at para 35-37]

The Court considered the following issues:

A. Whether the Gormley Location was a Farm?

The Court held that the Board's decision that this location was not a farm was unreasonable for several reasons [at para 54].

First, the Board without explanation, disregarded the extensive, compelling and unchallenged evidence of Rouge River's expert regarding a broader interpretation of "farm" in that "... Ontario farms commonly operate on non-contiguous tracts of land and that it is common for farms to preserve prime growing land by locating post-production aspects of primary production on non-productive land..." [para 55-59].

Instead the Board accepted the narrow interpretation of the Director before it considered this evidence.

The Board also failed to consider the Ministry of Labour's Policy and Interpretation Manual which states "... So long as all the tracts of land are worked or managed by the same farmer, all of those tracts of land will be considered to be a farm" [at para 61].

Second, the Board's decision was arbitrary and lead to an absurd result. Certain processing steps - such as sorting - take place where the corn is grown. "The failure to interpret an exemption in a way that reflects all aspects of the work of sorting is arbitrary and therefore unreasonable" [at para 62].

Third "... the arbitrariness and absurd result creates uncertainty in an area of law affecting thousands of farm workers and employees..." in an industry in which employees are routinely transferred to do different tasks depending on seasonal operational needs. The Board's decision would require employers to track work done in field growing operations, and work done on processing and packaging operations [at para 63].

B. Whether the Employees at the Gormley Location are involved in Employment "directly related to the primary production" of a Vegetable?

The Court held that the Board's decision that the work what occurred at the Gormley location was not "directly related to primary production" of sweet corn was unreasonable [ at para 64].

The Court observed that the Board had without reasons, disregarded the uncontradicted evidence of Rouge River's expert and owners. The expert testified, among other things, that farming "included post-harvest activities ... integral to preparing products for sale or

consumption...". An Agreed Statement of facts indicated that 99% of "production" involved immediate steps that had to be taken to avoid the risk of loss of the harvest [at para 66 to 70].

The Court was critical of the Board's interpretation and reliance on *Highline Produce v Flieler* [2009] O.L.R.B. 562, in which mushrooms were packed for sale at the farm where they were grown, and in which the packing location was not an issue before the Board. In addition this case defined "primary production" as "...any step in the production or growing process prior to a change in form or state of the product. In other words the processing of a raw vegetable into some other state, such as a liquid or cooked solid would not be part of 'primary' production..."[at para 71 to 75].

The Board also ignored the Ministry's Policy and Interpretation Manual which defined "primary production... as any step in the growing or production of a product prior to a change in the form or state of the product. Primary production ends once employees are engaged in processing, which is a step that transforms the raw produce into a different state (eg: by pureeing, cooking, brining, canning or drying)..."[at para 76].

The Court concluded [at para 85] that a purposive and contextual approach of the Act called for "... a balancing of the interests protected by the [Act] and the farm worker exemption in Regulation 285. The Board did not engage in such balancing, relying instead on the principle that Regulation 285 had to be construed in the narrowest manner possible so as to limit the number of employees caught by the exemption."

The Court held that there was no reason to refer this matter back to the Board and that this was one of those "exceptional circumstances" in which the Court should substitute its decision for the decision of the Board [at para 90].

## CREDITS

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