CITATION: Schuyler Farms Limited v. Dr. Nesathurai, 2020 ONSC 4711
DIVISIONAL COURT FILE NO.: CVD-TOR-22-AP
DATE: 20200827

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Favreau JJ.

BETWEEN:	
Dr. Shanker Nesathurai, Medical Officer of Health, Haldimand-Norfolk Health and Social Services Appellant	*Jill Dougherty* and *Lara Kinkartz*, for the Appellant
– **and** –	
Schuyler Farms Limited Respondent	*Andrea Plumb* and *Debbie Boswell*, for the Respondent
– **and** –	
Canadian Lawyers for International Human Rights Intervenor	*Danielle Bisnar* and *Aminah Hanif*, for Intervenor, Canadian Lawyers for International Human Rights
– **and** –	
The Community Legal Clinic-Brant, Haldimand, Norfolk, Industrial Accident Victims Group of Ontario and Justicia for Migrant Workers Intervenor	*Ian Aitken, Dora Chan, Shane Martinez* and *Maleeka Mohamed*, for Intervenor, The Community Legal Clinic-Brant, Haldimand, Norfolk, Industrial Accident Victims Group of Ontario and Justicia for Migrant Workers
	HEARD at Toronto by videoconference on July 29, 2020

BY THE COURT

Nature of Proceeding

[1] Dr. Shanker Nesathurai, Medical Officer of Health for the Haldimand-Norfolk Health Unit, appeals from a decision of the Health Services Appeal and Review Board ("HSARB" or the "Board") to strike out a portion of an order made by Dr. Nesathurai under the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (the "*HPPA*").

[2] As part of the local response to the COVID-19 pandemic, Dr. Nesathurai issued an order to employers of migrant farm workers ("MFWs") in the Haldimand-Norfolk region that required them to take measures to enable MFWs arriving from out-of-county to self-isolate for fourteen days (the "Order"). The Respondent in the present appeal, Schuyler Farms, requested a hearing before the HSARB regarding the appropriateness of the Order's requirement that no single bunkhouse shelter more than three MFWs during the self-isolation period. The HSARB held that this requirement was arbitrary in that, among other things, it did not account for variations in the size and layout of bunkhouse facilities. On this basis, the HSARB struck this requirement from Dr. Nesathurai's Order.

[3] Before the Divisional Court, Dr. Nesathurai requests an order setting aside the HSARB's decision and affirming Dr. Nesathurai's Order in full.

[4] On July 21, 2020, Favreau J. granted two motions for leave to intervene. The first intervener, Canadian Lawyers for International Human Rights ("CLAIHR"), was granted leave to intervene on the basis of its expertise in the area of international human rights instruments and their applicability to the interpretation of relevant provisions of the *HPPA*.[1] The second motion was brought by a group composed of two legal clinics – The Community Legal Clinic (Brant, Haldimand, Norfolk) and Industrial Accident Victims Group of Ontario – and one advocacy organization – Justicia for Migrant Workers (collectively, the "CIJ Intervener Group"). The CIJ Intervener Group was granted leave to intervene on the basis of its members' expertise in issues regarding MFWs.[2] CLAIHR and the CIJ Intervener Group both support Dr. Nesathurai's appeal.

[5] For the reasons that follow we would allow the appeal and restore the impugned section of the Order.

Background

Statutory Framework

[6] The *HPPA* sets out a detailed framework for public health governance in Ontario. At the local level, "boards of health" established pursuant to the *HPPA* have broad responsibilities over sanitation, health promotion, family health services, drinking water safety, and the control of communicable diseases.[3] The geographic areas over which boards of health have jurisdiction are

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[1] *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4454 (Div. Ct.), at paras. 22, 28-29.
[2] *Ibid*, at para. 34.
[3] *HPPA*, s. 5.

referred to as "health units".[4] Pursuant to Regulation 553 under the *HPPA*, the Haldimand-Norfolk Health Unit includes the Corporation of Haldimand County and the Corporation of Norfolk County.[5] Public health services in Haldimand-Norfolk are administratively organized under Haldimand and Norfolk Health and Social Services and the Haldimand-Norfolk Health Unit ("HNHU").

[7] Subsection 62(1) of the *HPPA* requires a board of health to appoint a medical officer of health ("MOH"). Under s. 64, no person is eligible for this office unless they are a physician, possess certain prescribed qualifications, and is approved by the Minister of Health and Long-Term Care. Medical officers of health have broad responsibilities, including the management and direction of staff of the board of health as well as any other person whose service is engaged.[6] Dr. Nesathurai is the MOH for the HNHU.

[8] Among the specific powers granted to a MOH is the power under s. 22(1) of the *HPPA* to make mandatory orders for the purpose of controlling outbreaks of communicable diseases. Subsection 22(2) sets out certain conditions precedent which must be fulfilled before a MOH may make such an order:

> **Condition precedent to order**
>
> 22(2) A medical officer of health may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,
>
> (a) that a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease in the health unit served by the medical officer of health;
>
> (b) that the communicable disease presents a risk to the health of persons in the health unit served by the medical officer of health; and
>
> (c) that the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease.

[9] Subsection 22(4) sets out a non-exhaustive list of specific orders which may be made under s. 22(1) of the *HPPA*. The list includes orders requiring persons who may have a communicable disease to self-isolate; requiring the cleaning or disinfecting of specified premises; and requiring a person to conduct himself or herself in such a manner as not to expose another person to infection.[7]

[10] Under s. 22(5), these orders may be made against a person who resides or is present in the health unit; owns or occupies any premises in the health unit; owns or is in charge of anything in the health unit; or is engaged in or administers an enterprise or activity in the health unit.

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[4] *Ibid*, s. 1(1), "health unit".
[5] *Areas Comprising Health Units*, R.R.O. 1990, Reg. 553, Schedule 9.
[6] *HPPA*, s. 67.
[7] *Ibid*, s. 22(4).

[11] When making an order under s. 22(1) of the *HPPA*, the MOH is required to give reasons for the order. If no reasons are given, then pursuant to s. 22(7), the order will not be effective.

[12] Breach of an order under s. 22(1) is an offence under the *HPPA*.[8] On conviction for the offence, an individual may be punished by a fine of up to $5,000 per day as of the date the order was breached, while a corporation may be punished by a fine of up to $25,000 per day.[9]

[13] Subsection 44(1) of the *HPPA* provides that a person against whom an order is made may require a hearing of the matter before the HSARB. Following a hearing, the HSARB may confirm, alter, or rescind the order and may substitute its findings for those of the officer who made the order.[10]

Factual Background

[14] Haldimand-Norfolk is home to a number of large agricultural operations, including Schuyler Farms. These operations employ significant numbers of MFWs who, for the most part, are employed through the federal Seasonal Agricultural Workers Program ("SAWP"). Haldimand-Norfolk has the highest number of migrant workers *per capita* in Ontario: out of a population of 109,787 across the region, over 4000 are MFWs.[11] Schuyler Farms in particular employs approximately 220 MFWs each year during the growing season.[12]

[15] Beginning in mid-March 2020, international, federal, provincial, and local authorities issued an escalating series of emergency declarations and orders related to the COVID-19 pandemic. The World Health Organization's March 11 declaration that the global outbreak of COVID-19 constituted a "pandemic" was followed by Ontario's declaration of a state of emergency on March 17. Over the next week, the federal cabinet issued four orders-in-council. The first declared COVID-19 to be a severe risk to public health and imposed restrictions on entry to Canada, and the subsequent three revised those entry restrictions. The fourth order-in-council, Guidance for Employers of Temporary Foreign Workers Regarding COVID-19 (the "Federal Government Directive") issued on March 27, 2020, also mandated a 14-day period of isolation for all temporary foreign workers entering Canada. It provided:

> The employer can house workers who are subject to self-isolation together, but the housing must enable them to be two metres apart from each other at all times. For example, beds must be at least two metres apart. Shared facilities (for example bathroom, kitchen, living space) are allowed, provided that there is sufficient space in the accommodations for workers to respect the self-isolation requirements. If this requirement cannot be met, alternate accommodations (for example hotel) may be required. In the best interest of all parties, it is recommended that date-stamped photos be taken of the facilities, including the bedroom, to demonstrate compliance. [13]

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[8] *HPPA*, s. 100(1).
[9] *Ibid*, ss. 101(1), (2).
[10] *Ibid*, ss. 44(1), (4).
[11] Order and Reasons for Decision of the HSARB, June 12, 2020 ("Decision of the HSARB"), Appeal Book and Compendium, Tab 2, at para. 8.
[12] Affidavit of Brent Schuyler, Appeal Book and Compendium, Tab 19, p. 731, at para. 3.
[13] Decision of the HSARB, para.19.

[16] The Federal Government Directive sets out requirements regarding cleaning and disinfecting. It also provides that Service Canada investigators will conduct virtual inspections that will focus on compliance, including within the 14-day isolation period. The Federal Government Directive states that when requested, employers will be asked to provide photos of accommodations that allow for social distancing if more than one worker is in quarantine at the same time (i.e., sleeping quarters with beds two metres apart using a tape measure, dining areas with chairs two metres apart using a tape measure, and kitchen and washroom facilities).[14]

[17] In addition to the Federal Government Directive, provinces across Canada and local municipal authorities have adopted varied approaches to dealing with MFWs, some of which are similar to or more conservative than the s. 22 Order in issue here. The Province of New Brunswick completely banned MFWs until May 29, and British Columbia has implemented a quarantine protocol requiring every MFW to self-isolate individually in a hotel room for 14 days.

[18] The order at issue in this appeal was made on March 24, 2020, the same day that Haldimand and Norfolk Counties declared states of emergency. That day, Dr. Nesathurai, in his capacity as MOH for the HNHU, made a class order under s. 22 of the *HPPA* to "All Employers of Seasonal Workers (Migrant Farm Workers) in Haldimand and Norfolk Counties" (previously defined as the "Order"). The Order mandates that employers of MFWs ensure that any such workers remain on the farm in self-isolation for 14 days after arriving in Canada, and that accommodations be made available to facilitate their self-isolation.

[19] Additionally, the Order prohibits "[a]ny new arrivals of seasonal workers" until the employer provides information to the health unit about the MFWs and their arrivals to Canada, and until "a plan for isolation of the workers has been shared and approved by the health unit."

[20] Many of the specific directions made in the Order mirrored guidance already provided by federal and provincial authorities. However, on either March 25 or March 27, Dr. Nesathurai published a "Self-Isolation Plan Checklist" that included a requirement that employers "[e]nsure only a max of 3 seasonal workers to a bunkhouse".

[21] On March 26, 2020, Schuyler Farms submitted a self-isolation plan to the HNHU for approval, which proposed that it would house between 19 and 25 workers per bunkhouse.[15] The HNHU rejected this plan on the basis that Schuyler Farms had not proposed that there be a maximum of three MFWs per bunkhouse in accordance with the Self-Isolation Plan Checklist.[16] Schuyler Farms submitted a revised self-isolation plan on March 28 which complied with the rule; this revised plan was approved by the HNHU.[17]

[22] On April 7, 2020, counsel for Schuyler Farms wrote to the HSARB to request a hearing regarding Dr. Nesathurai's Order and the three-worker-per-bunkhouse rule.

Decision of the HSARB, June 12, 2020

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[14] *Ibid*, at para.19.
[15] I*bid*, at para. 40; Affidavit of Brent Schuyler, Appeal Book and Compendium, Tab 19, p. 733, para. 15.
[16] Decision of the HSARB, at para. 40.
[17] Affidavit of Brent Schuyler, Appeal Book and Compendium, Tab 19, p. 734, at paras. 18-19.

[23] The HSARB held a videoconference hearing over six days between May 25 and June 1, 2020. Schuyler Farms conceded that the first two conditions precedent for the issuance of an order under s. 22 of the *HPPA* were made out. However, it argued that the third condition precedent in s. 22(2) was not satisfied because Dr. Nesathurai lacked the requisite reasonable and probable grounds on which to base his opinion that the three-worker-per-bunkhouse rule was necessary to decrease or eliminate the health risks presented by COVID-19.

[24] Schuyler Farms argued that the requirement in the Self-Isolation Plan Checklist that there be no more than three MFWs isolating in each bunkhouse was arbitrary. In particular, Schuyler Farms argued that the restriction was ordered without any consideration of the "wide variations in sizes and facilities of farm bunkhouses." The restriction meant that no more than three MFWs were permitted to self-isolate in a 5000 sq. ft. bunkhouse with multiple showers, toilets, and separate and/or curtained-off sleeping areas, while three MFWs would be permitted to self-isolate in a 450 sq. ft. bunkhouse with a single washroom, kitchen and sleeping area.

[25] Further, according to Schuyler Farms, the impugned requirement in the Self-Isolation Plan Checklist failed to recognize the significance of MFWs to Canada's food supply. Schuyler Farms submitted that, because of the "3 workers per bunkhouse" rule, it and other agricultural employers in Haldimand-Norfolk had not been able to bring in as many MFWs as they would ordinarily require, which jeopardized their planting and harvesting plans.

[26] Dr. Nesathurai submitted that the limit of three MFWs per bunkhouse was necessary so as to reduce the risk of viral transmission among MFWs newly arriving in Canada and living in congregate conditions. The limit applied to all bunkhouses, regardless of size, because it would be difficult to maintain physical distancing at all times even in relatively large bunkhouses, especially in areas like washrooms, stairways and entrance/exit points. Dr. Nesathurai submitted that the formulation of the specific directions in the Order, including the three-worker-per-bunkhouse limit, went "to the heart of the practice of medicine and public health practice", and in particular "making judgements that balance competing priorities".

[27] On June 12, 2020, the HSARB issued its decision, agreeing with Schuyler Farms that the limit of three MFWs per bunkhouse was arbitrary. First, the HSARB held that part of the rationale for the three-worker-per-bunkhouse requirement, namely that it was necessary to protect the health of the community at large, was unfounded. According to the HSARB,

> [i]t is only after the self-isolation period that [seasonal workers] are at liberty to interact with the community at large and the Order does not apply to those interactions. The principal risk during the self-isolation period is to the [seasonal workers] themselves and to those who are isolating together. No other contact is allowed during this period.[18]

[28] Second, the HSARB held that it was unreasonable for Dr. Nesathurai to take the position that it is not possible to have more than three MFWs self-isolate in a bunkhouse regardless of its design, size, layout and amenities.[19] While the HSARB accepted Dr. Nesathurai's submission that

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[18] Decision of the HSARB, at para. 47.
[19] *Ibid*, at para. 56.

it was necessary to restrict the number of MFWs isolating in each bunkhouse, it rejected his argument that the blanket rule in the Self-Isolation Plan Checklist was necessary.[20] The HSARB found that the requirement that an employer submit a self-isolation plan for approval by the HNHU provided a mechanism through which public health staff would be able to assess each bunkhouse arrangement and make individual determinations as to whether each plan was adequate.[21] The HSARB also held, however, that the limit was arbitrary in that Dr. Nesathurai had been unable to articulate a convincing reason for choosing the number "three" as the per-bunkhouse limit.[22]

[29] On the basis of these findings, the HSARB concluded that Dr. Nesathurai did not have "reasonable and probable grounds" to believe that the limit was necessary to decrease or eliminate the risk to health presented by COVID-19.[23] Given that reasonable and probable grounds are statutory conditions precedent to a MOH's authority to issue mandatory orders pursuant to s. 22(2) of the *HPPA*, the HSARB struck out the three-per-bunkhouse limit and left the remainder of the Order intact.

[30] Dr. Nesathurai filed his Notice of Appeal with the Divisional Court on June 12, 2020. By operation of s. 25(1) of the *Statutory Powers and Protection Act*, R.S.O. 1990, c.22, the HSARB's decision was stayed pending disposition of the appeal.

Court's Jurisdiction

[31] The Divisional Court has jurisdiction to hear this appeal pursuant to s. 46(1) of the *HPPA*.

[32] Under s. 46(5) of the *HPPA*, an appeal to the Divisional Court may be made on questions of law or fact or both, and the court may confirm, alter, or rescind the decision of the HSARB. The court may also exercise all powers of the HSARB to confirm, alter, or rescind the decision under appeal. In the alternative, the court may remit the matter to the HSARB for rehearing, in whole or in part, in accordance with any directions of the court.

Standard of Review

[33] The parties agree that, pursuant to *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[24] the judicial appellate standards are applicable in this appeal. In accordance with *Housen v. Nikolaisen*, questions of law are reviewed on the standard of correctness.[25] Questions of fact and of mixed fact and law are reviewed on the deferential standard of "palpable and overriding error".[26] Where a question of law can be extricated from a question of mixed fact and law, that legal question will be reviewed on the correctness standard.[27]

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[20] *Ibid*, at paras. 59, 62.
[21] *Ibid*, at para. 57.
[22] *Ibid*, at paras. 57-58.
[23] *Ibid*, at para. 62.
[24] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1.
[25] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235, at para. 8.
[26] *Ibid*, at para. 10.
[27] *Ibid*, at para. 36.

Issues

[34] The following issues are raised in this appeal:

1) Did the HSARB err by applying the wrong test and too high a standard of proof?

2) Did the HSARB err by failing to consider that the Order is a class order?

3) Did the HSARB err when it found that the "3 to a bunkhouse" rule was arbitrary?

4) Did the HSARB err by considering economic arguments?

Analysis

Issue 1: Did the HSARB apply the wrong test and too high a standard of proof?

[35] Dr. Nesathurai submits that the HSARB applied the wrong test in its review of the Order. In its reasons, the HSARB articulated the question before it as:

> whether the three criteria in the condition precedent to the making of an order set out in section 22(2) have been met and, if so, whether the requirement contained in the Self-Isolation Plan Checklist [the 3 to a bunkhouse rule] is reasonably necessary to decrease or eliminate the risk to health presented by COVID 19 to persons living within the jurisdiction…[28]

[36] Dr. Nesathurai submits that it was not the Board's role to decide if the impugned requirement was reasonably necessary; the HSARB's role is not to stand in the place of the MOH and reconsider the exercise of that judgment; it had to determine whether the MOH had reasonable and probable grounds for finding that the requirement was necessary.

[37] Dr. Nesathurai submits that had the HSARB applied the proper standard and exercised its role appropriately, it would have found ample grounds for the three-worker-per-bunkhouse rule, including the evidence before it that minimizing the number of MFWs self-isolating in the same bunkhouse is the safest approach.

[38] We agree with Schuyler Farms that there is support in the *HPPA* and jurisprudence that hearings in respect of s. 22 orders are to proceed *de novo*. The *HPPA* gives the HSARB the right to receive and consider evidence beyond that which was available when the order under review was made and the authority to "substitute its findings for that of the medical officer of health or public health inspector who made the order".[29] We also note the absence of any words like "appeal" or "review" in the HSARB's grant of authority over a s. 22 order. Rather, a person against whom an order under the *HPPA* is made can "requir[e] a hearing" in respect of that order.[30]

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[28] Decision of the HSARB, at para. 31.
[29] *HPPA,* s.44(4).
[30] *Ibid*, s.44(1).

By contrast, the provisions regarding an appeal to the Divisional Court use the word "appeal" and require that the record of the HSARB's decision be filed with the court.[31]

[39] We also agree that the HSARB articulated the correct test of "reasonable and probable grounds" several times in its decision and that the decision should not be parsed and one line seized upon for the purpose of finding errors.

[40] With respect to the correct standard of proof, a long line of Board decisions expresses the general principle that, consistent with the precautionary approach warranted in the public health context, the standard of proof that must be met by a MOH or public health inspector in order to justify an order before the HSARB is significantly less than either the criminal standard of proof or the ordinary civil standard of proof on a balance of probabilities.[32]

[41] The leading case in the HSARB's jurisprudence on the standard of proof to be applied is *481799 Ontario Ltd. v. Waterloo Region of Public Health (Waterloo).*[33] That decision dealt with a health hazard under s. 13 of the *HPPA*, which is worded similarly to s. 22(2).[34] W*aterloo* confirms that the "reasonable and probable grounds" requirement creates a standard of proof that is significantly lower than the civil standard.[35] It held that the purpose of the *HPPA* helps to inform the question of what is reasonable in the circumstances.[36] It accepts that one purpose of the *HPPA*, as its name suggests, is the protection of public health. It held that it is sufficient if the grounds are informed by scientific literature and exercised fairly and suitably under the circumstances.[37]

[42] In this case, as the Board noted, "it is a matter of public knowledge that we are living through the worst pandemic since the 1918 Spanish flu".[38] Both parties agreed, and the Board appeared to accept, that:[39]

- international travel poses an increased risk for transmission of COVID-19;
- congregate living poses an increased risk for transmission of COVID-19;

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[31] Ibid, s. 46(5).
[32] Jane Speakman, Lori Stoltz, & Rod Blake, *Public Health Law and Practice in Ontario: Health Protection and Promotion Act* (Toronto: Thomson Carswell, 2008), at p. 246.
[33] *481799 Ontario Ltd. v. Waterloo (Region) Public Health*, 2005 CarswellOnt 10158 (Ont. HSARB).
[34] Subsection 13(2) of the *HPPA* provides:

> 13(2) A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,
> (a) that a health hazard exists in the health unit served by him or her; and
> (b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard.

[35] *Waterloo*, at para. 35. See also *K.S. v. Elgin St. Thomas Public Health*, 2009 CanLII 91091 (Ont. HSARB), at para. 34. Although on occasion, the Board has applied the "balance of probabilities" standard, it has generally done so without analysis: see e.g., *M.I. v. Ramsay*, 2017 CanLII 15041 (Ont. HSARB), at para. 28.
[36] *Waterloo*, at para. 35.
[37] *Ibid*.
[38] Decision of the HSARB, at para. 35.
[39] *Ibid*, at paras. 58-59; Schuyler testimony, Appeal Book and Compendium, Tab 13, at pp. 466-67; Schuyler Opening Submissions, Appeal Book and Compendium, Tab 11, at pp. 456-57.

- it is necessary to restrict the number of occupants in a bunkhouse during the self-isolation period;

- the number of MFWs who can safely self-isolate in a bunkhouse is far fewer than the number that are allowed to occupy these dwellings under ordinary circumstances; and

- the safest self-isolation situation is for each worker to isolate alone.

[43] The HSARB did not articulate the threshold to be applied when determining whether there were reasonable and probable grounds. Given the existence of a global pandemic, the fact that COVID-19 had already spread to Ontario and the severity of its potential consequences, this is a case in which the severity of the risk should have led the HSARB to consider whether there was a greater likelihood that there were "reasonable and probable grounds" to believe that the "3 to a bunkhouse" rule was necessary.

[44] The HSARB's decision as a whole raises concerns that it did not apply the appropriate threshold of proof. In fact, as explained further below, it is hard to see how the undisputed facts alone do not meet the reasonable and probable grounds standard for imposing a "3 to a bunkhouse" maximum.

[45] The HSARB also found that Dr. Nesathurai failed to provide a concrete reason for why he chose the number "3" per bunkhouse.[40] As expanded upon later in these reasons, this ignored the numerous reasons Dr. Nesathurai provided for his decision, including a focus on prevention and the precautionary approach to public health orders. This too suggests that the HSARB was not applying the proper threshold of proof indicated by the severe nature of the risk of a global pandemic and the imminence of its potential consequences.

[46] Counsel for Schuyler Farms argued that the "3 to a bunkhouse" rule was clearly not necessary because the Federal Government Directive specifically addressed the housing of MFWs in a detailed way, and Service Canada was inspecting bunkhouses and other accommodations to ensure compliance with its rules. Given that other provinces and other health units in Ontario were content to rely on the Federal Government Directive, there was no reason why Haldimand-Norfolk could not do the same.

[47] In contrast to Schuyler Farms's position, both Dr. McGeer and Dr. Nesathurai (the only two witnesses with public health expertise) testified that federal public health guidance tends to be general, given its broad application, and needs to be adapted to the local context.[41] Dr. Nesathurai's evidence was that the *HPPA* contemplates that a MOH for a health unit may make an order that is more restrictive than provincial or federal guidelines and that the purpose of establishing local health units and local MOHs is to allow significant health decisions to be tailored to the realities and experiences at the local level.[42]

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[40] Decision of the HSARB, at para. 58.
[41] McGeer testimony, Appeal Book and Compendium, Tab 16, pp. 718-20; McGeer Report, Appeal Book and Compendium, Tab 10, at p. 309; Nesathurai testimony, Appeal Book and Compendium, Tab 14, at pp. 506-08.
[42] Affidavit of Dr. Nesathurai sworn May 15, 2020 at para.16.

[48] The Federal Government Directive makes it clear that employers must follow public health requirements and guidance issued by the Government of Canada, the provincial government, and local authorities.[43] Provincial guidance similarly urged employers to rely on the local public health unit for advice on isolation requirements.[44] The Federal Government Directive recognized that alternate accommodations like a hotel may be required if the requirement of two metres apart cannot be met.

[49] Further, the Federal Government Directive applies to all temporary foreign workers (e.g., nannies) and not just MFWs, who are recognized as a particularly vulnerable group of foreign workers.

[50] Routine bunkhouse inspections, which were formerly carried out by public health inspectors, are not occurring during the pandemic (the inspectors having been re-assigned to the review and approval of isolation plans).[45] Inspections by Service Canada are virtual only, and by their nature, are not suited to the granular assessment of each bunkhouse required to analyze the individual design and layout to determine if social distancing is possible.

[51] Given this evidence, we reject the argument advanced by Schuyler Farms that there were no reasonable and probable grounds for finding that the "3 to a bunkhouse rule" was necessary because of the existence of the Federal Government Directive and the virtual inspections being carried out by the federal government.

[52] The scheme of the *HPPA* recognizes that different MOHs may take different approaches based on the same set of circumstances. Because s. 22 requires a MOH to have only reasonable and probable grounds for his or her opinion, this suggests that in many cases there are a variety of different approaches that can be justified. There is rarely a single right answer to any public health question - and this is particularly true in the midst of a pandemic involving a novel disease, where knowledge is evolving daily.

[53] For this reason, to succeed on a challenge to a MOH's s. 22 Order, it is not enough for the party challenging the order to argue that there is another approach that someone else has adopted that they would prefer and that, in their opinion, would also address the risk to health.[46]

[54] We conclude that the HSARB applied too high a standard of proof in its review of the Order.

Issue 2: Did the HSARB fail to consider that Dr. Nesathurai's Order was a class order?

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[43] See e.g., Exhibits "K" & "L" to Nesathurai Affidavit, Appeal Book and Compendium, Tab 8C, at p. 165, and Tab 8D, at p. 169.

[44] Schuyler's Grounds for hearing, "Guidance for Employers of Temporary Foreign Workers", available online at <http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019_foreign_workers_guidance.pdf >; Federal & Provincial Inspections on Agricultural Employers & Temporary Foreign Workers During COVID-19, dated May 20, 2020 (excerpt), Appeal Book and Compendium, Tab 22.

[45] Miranda Affidavit, Appeal Book and Compendium, Tab 9, at para. 38.

[46] See e.g., *Chalut v. Sudbury and District Health Unit*, 1986 CarswellOnt 3265 (Ont. HPAB), at paras. 3-4; Speakman et al., *Public Health Law and Practice in Ontario*, at p. 249.

[55] The Appellant argues that the Divisional Court erred in failing to consider and treat the order as a "class order". We agree.

[56] Section 22(5.0.1) of the *HPPA* specifies that an order made by the MOH under that section "may be directed to a class of persons who reside or are present in the health unit served by the medical officer of health".

[57] The power to make a class order came into force during the SARS crisis in response to concerns expressed at the time over the need for public health tools that would allow for rapid and widespread responses to communicable diseases. Following the SARS crisis, the Standing Committee on Justice Policy held public hearings at which the Chief Medical Officer of Health in Ontario at that time, Dr. Sheila Basrur, gave the following evidence about the need for class orders in the context of a public health crisis:

> One of the elements that arose during SARS was our inability to issue orders on anything but a person-by-person, one-at-a-time kind of basis. There was an instance wherein we had an entire group of people who needed to be put in quarantine on a weekend. It was physically and logistically impossible to issue orders person to person on a Saturday afternoon for 350 people who happened to live in three or four health units all at once, each with their own MOH, their own solicitors and so on. So now there is an amendment to the act. Again, that was processed even between phases one and two of the SARS outbreak. So things can happen fast when the will is there, but also when the need is apparent, such that orders can be issued against a class of persons. In a future pandemic or other wide-scale emergency, that will be a very helpful provision so we can issue mass orders if necessary and if warranted under the circumstances.

[58] In this case, the MOH explicitly made a class order. However, the HSARB never refers to the fact that it was dealing with a class order in considering whether the order "was necessary in order to decrease or eliminate the risk to health presented by the communicable disease".

[59] More significantly, the HSARB never considered that the order was a class order in determining that the order was arbitrary. Rather, the Board focused on the impact of the order on individual class members and found that MOH should determine the appropriate number of people per bunkhouse on a case-by-case basis, making the following finding:

> All of the parties and their experts acknowledged and accepted that travel and congregate living pose and increased risk for transmission of communicable diseases. The Board acknowledges the Respondent's position that it is necessary to restrict the number of occupants isolating in a bunkhouse, and that the number of MFWs who can safely self-isolate in a bunkhouse is far fewer than the number that are allowed to occupy these dwellings under ordinary circumstances. The Respondent and the [Public Health Unit] are able to monitor the arrival and isolation of MFWs during the mandatory 14 day self-isolation period by receiving, analyzing, requiring amendments and the approving the self-isolation plan required by the Section 22 Order. **That requirement provides the [Public Health Unit]**

> **with an ability to review the isolation plans submitted by the farmers/employers of MFWs and take into account specific circumstances and characteristics of each bunkhouse to arrive at an approved self-isolation plan which will address the reasons for the Section 22 Order and the protection of the public.** [Emphasis added.][47]

[60] By definition, a class order is a blunt instrument. It is a tool available to the MOH for the purpose of addressing the risks associated with an infectious disease in the context of the urgent circumstances, limited resources and a widespread risk that the disease will spread. Here, the Board gave no consideration to whether a class order was appropriate in the circumstances of this case. Instead, the Board focused on the impact of the order on individual farmers and suggested that a better approach would be to tailor the number of MFWs allowed to self-isolate in a bunkhouse on a case-by-case basis.

[61] In our view, this was an error of law. The Board ought to have had regard to the class nature of the order and the purpose of such an order. Its analysis ought to have led the Board to consider the circumstances in which the order was made in this case and whether these circumstances justified making a class order that would have application throughout the public health unit. In doing so, as reviewed in more detail below, the Board failed to consider the MOH's evidence regarding the scope of the issue it was dealing with and its limited resources. There are over 600 bunkhouses in the health unit. A case-by-case analysis would be unworkable because there are insufficient resources to inspect and assess each bunkhouse for the possibility that more than three MWFs could safely self-isolate. The evidence was that the resources previously allocated to bunkhouse inspections had been redeployed to deal with COVID-19 and its effects on the health unit.[48] This evidence was relevant to the class nature of the order and it ought to have been reviewed and treated accordingly.

[62] The Respondent argues that the Board's approach to the class order was not an error because it properly considered the impact of the order on the individuals affected. The suggestion is that a class order must have a similar impact on all members of the class, otherwise it is not justified. By way of example, the Respondent argues that the Federal Government Directive that requires six-foot distancing at all times has a similar impact on all bunkhouses, but the 3-person-per-bunkhouse rule does not have a similar impact. We do not accept that a class order can only be justified if it has an equal impact on all members of the class. Again, class orders are a tool given to public health officials to deal with urgent and widespread public health risks in the context of limited resources. The applicable test, as reviewed above, includes whether "the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease". There is no basis for finding that, in the case of a class order, the requirements must have an identical impact on each member of the class. By definition, necessity may justify using an approach that has a differentiated impact on different members of the class.

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[47] Decision of the HSARB, para.59.

[48] Miranda Affidavit, Appeal Book and Compendium, Tab 9, para. 38

[63] The Respondent also argues that section 22(5.0.5) of the *HPPA* makes clear that class orders are meant to have a similar impact on all class members. This subsection provides as follows:

> Where a class of persons is the subject of an order under subsection (5.0.1), any member of the class may apply to the Board for the purposes of requiring a hearing under section 44 respecting that member.

[64] That provision makes clear that individuals affected by a class order can seek to challenge an order based on their own circumstances. However, it does not state or support a finding that all persons affected by a class order must be in a similar situation. In this case, the Appellant did not seek to be exempted by the order, but rather challenged the whole order as it applies to all members of the class.

[65] Accordingly, in our view, it was an error of law for the Board to fail to consider that it was dealing with a class order. The Board thereby failed to consider whether the requirement of no more than three people per bunkhouse was necessary on a class basis rather than on an individual basis.

Issue 3: Did the Board Err in Finding that the "3 to a Bunkhouse" Rule is Arbitrary?

The Board's Reasons on this Issue

[66] For ease of reference, the Board's reasons on this issue at paras. 56-58 are reproduced below:

> With respect, the Board finds the Respondent's position that it is not possible to have more than 3 MFWs self-isolate in a bunkhouse regardless of its design, size, layout and amenities to be unreasonable. The explanation given was that there are various points in the bunkhouse which make it difficult to maintain the required social distancing, including the washroom, the stairway and entrance and exit points.
>
> The Board finds that the requirement that a maximum of 3 MFWs per bunkhouse is arbitrary and does not take into account the specifics of each bunkhouse. There was no convincing reason given as to why there is a limit of 3 MFWs to a bunkhouse. …
>
> The Respondent indicated that the limit of a maximum of 3 MFWs per bunkhouse goes to the heart of the practice of medicine and public health practice, making judgements that balance competing priorities being a core skill for a public health physician. The Respondent was, however, unable to provide a concrete reason for why he chose the number "3" per bunkhouse. He suggested variously that it was based on the average size of a household in HNC or on the average number of people returning from a cruise ship.

Summary of Board's Errors

[67] In reaching this conclusion the Board made the following palpable and overriding errors, each of which will be expanded upon below:

1. The Board's finding that Dr. Nesathurai's choice of the number of "3" was arbitrary failed to take into account the meaning of the word "arbitrary" at law and the uncontested evidence before the Board on the connection between the "3 to a Bunkhouse" rule and the goal of the Order, which was to decrease the risk posed by COVID-19 to individuals within the health unit.

2. In making this finding, the Board failed to consider and/or misunderstood key evidence about the rationale for the "3 to a Bunkhouse" rule. In particular, it ignored the following factors that Dr. Nesathurai testified he considered in making the order:

    (a) MFWs are particularly vulnerable during the self-isolation period;

    (b) Limiting the number of workers minimizes the effect of self-isolation on psychological health;

    (c) Public health officials have an obligation to MFWs as a "priority population".

    (d) The need to avoid overwhelming public health resources.

    (e) Capping the number of MFWs prevents large-scale outbreaks during the self-isolation period that might otherwise force an agricultural operation to shut down.

    (f) Dr. Nesathurai's evidence of why it would be difficult for workers to effectively socially distance in a large bunkhouse.

    (g) The need for a precautionary approach to public health orders.

<u>The "3 to a Bunkhouse" Rule is consistent with the Order's purpose and is, therefore, not "arbitrary" as that term is understood in the case law</u>

[68] In *Flora v. Ontario Health Insurance Plan* (2007), 83 O.R. (3d) 721 2007, aff'd 2008 ONCA 538, 91 O.R. (3d) 412, at para. 217, this court dealt with the question of whether a law is arbitrary as follows:

> Whether a law is arbitrary must be assessed in relation to its purpose. So long as the statutory provision is consistent with and connected to the legislative purpose, it is not arbitrary.

[69] This court considered the issue again in its recent decision in *Sprague v. Her Majesty the Queen in Right of Ontario*, 2020 ONSC 2335, at paras. 48-49:

> The Visitor Policy is not arbitrary. An Arbitrary rule is one that is not capable of fulfilling its objective and exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law….
>
> The policy to limit visitors is also not overbroad. An overbroad rule is one that takes away rights in a way that generally supports the object of the rule but goes too far by denying the rights of some individuals in a way that bears no relation to the object. For example, the policy to restrict visitors might be overly broad if it never provided for any consideration of exceptions.

[70] The Respondent submits that both these cases were concerned with s. 7 *Charter* rights and, therefore, the principles enunciated in them are not applicable to a case where s. 7 rights are not being invoked. According to the Respondent, the Board was not using the word "arbitrary" in a legal sense; it was using it to suggest that the number three was one that Dr. Nesathurai had simply "pulled from the air".

[71] We disagree with the Respondent that the case law cited above is not applicable. The issue concerns the rational justification for a legal order. That justification must be assessed by examining the purpose of the statute under which the order was made and deciding whether the order in question is consistent with and rationally connected to that purpose.

[72] Here the goal of the s. 22 Order was to protect public health by decreasing or eliminating the risk posed by COVID-19 within the health unit (which includes the MFWs). This is the objective against which the "3 to a Bunkhouse" rule must be assessed.

[73] The evidence before the Board was clear that international travel and congregate living increase the risk of transmission and that, therefore, it was necessary to restrict the number of MFWs isolating together to a number that is fewer than the number that would usually occupy a bunkhouse. The uncontradicted evidence before the Board was that the best way to eliminate or decrease the risk posed by COVID-19 to MFWs was to have them self-isolate. Even the Respondent's own expert witness agreed that "the ideal circumstances would be to provide each arriving migrant worker private accommodation for 14 days".[49] Again, this is what British Columbia has done.

[74] Given that everyone accepted that the safest self-isolating condition was to house each MFW individually, the "3 to a Bunkhouse" rule is clearly related to the Order's goal of minimizing the risk of transmission. If a maximum of one to a bunkhouse is the best way to achieve that goal, the closer the number chosen is to one, the better the chance of achieving the Order's purpose. By ignoring the evidence that one was the safest number, the Board's entire analysis became skewed.

[75] Dr. Nesathurai testified that, for him, the question then became whether, in order to offer some accommodation to the farmers, it was reasonable to increase the number to three, which was consistent with the risk incurred by other residents in the health unit when they are under quarantine after travel. Dr. Nesathurai testified that eighty percent of households in the health unit contain three or fewer people, and there are no examples of other sectors of the population isolating

[49] Decision of the HSARB, at para. 58.

in groups larger than a household/family unit. When Canadian travellers were repatriated after being stranded on cruise ships, they were self-isolated as a family or travelling unit (i.e., cabin mates); strangers were not assigned to self-isolate together. Thus, the number three was not an arbitrary number; it was a number chosen with health equity considerations in mind.

[76] Moreover, the s. 22 Order provides for exceptions, which courts have recognized indicates that an order is not overbroad. The evidence was that if a farmer "subdivided" a bunkhouse into self-contained units (each with its own bathroom, kitchen, and sleeping facilities, with no ability for workers to pass back and forth between the two units), the health unit would allow three workers to be isolated in each self-contained unit. This allows farmers a degree of flexibility while still upholding the Order's goal – to minimize the risk of spreading COVID-19 both to the general population, but most importantly to MFWs, a vulnerable class of workers.

MFWs are Particularly Vulnerable

[77] As already noted, international travel is one of the factors that increases the risk of COVID-19. The way in which MFWs travel puts them at high risk. They often travel by bus to the airport in their home countries, stay in communal dormitories near the airport, fly together in crowded planes, and travel together from the airport to the farms they are to work on by bus, often with workers from different flights and different countries. This association with other people during their travel exponentially increases their risk of contracting COVID-19.

[78] Upon arrival, MFWs are typically housed in bunkhouses, which are dormitory-type settings with shared bathrooms, kitchens and bedrooms. A large number of MFWs come from Mexico, which has recently had a significant increase in the number of COVID-19 cases. This puts workers coming from Mexico and those with whom they come into contact at higher risk of having and transmitting the disease.

[79] The chance of contracting COVID-19 increases exponentially with each additional worker in a bunkhouse. Dr. Nesathurai presented epidemiological and scientific evidence that the average number of new cases caused by one infected person is 2.5. The average number of days between becoming infected and the onset of symptoms in people who have contact with an infected person is 5.5 to 7 days. The more prolonged the contact a person has with an infected person, the greater their chances of becoming infected. These risks are compounded by the fact that the virus can be spread by someone who is asymptomatic or pre-symptomatic. Thus, the number of cases grows both exponentially and rapidly when the number of workers isolating together is increased.

[80] The Respondent disputes the risks posed to MFWs of contracting COVID-19 in the HNHU. According to the Respondent, the number of MFWs who have contracted cases while in quarantine is small and the only large outbreak (described in further detail below) occurred when the MFWs were no longer in quarantine. The Respondent also claims that because of the shortage of MFWs caused by the Order he and other farmers in the area have had to hire itinerant workers who are not from the community, which in turn poses a risk of COVID 19.

[81] This submission ignores the uncontradicted evidence that this is a worldwide pandemic, which is highly contagious and potentially fatal, and that certain of the MFWs' characteristics (including international travel and congregate living) increase their risk of having and potentially

spreading the disease. The large outbreak that did occur confirms how quickly the disease can become a problem for MFWs. The argument advanced by Schuyler Farms does not suggest that the steps that have been taken by Dr. Nesathurai should be questioned, but that perhaps more steps may be needed to address, for example, the particular situation that led to the large outbreak and to monitor more closely the itinerant workers who are being hired.

Minimizing the Number of Workers Minimizes the Effect on Psychological Health

[82] The uncontradicted evidence before the Board was that quarantining has an adverse effect on psychological health. The longer the quarantine period, the greater the negative effect. The larger the number of people in isolation together during a quarantine period, the greater the risk that at least one person will become infected. If even one person becomes ill in the residence during the quarantine period, the quarantine period is extended for the entire group. This is so even if the symptomatic person tests negative as the test gives a "false negative" 20% of the time. Limiting the number of workers isolating together avoids the prospect of large numbers of workers having to remain in quarantine for extended periods of time, with the associated significant psychological effects.

[83] According to Schuyler Farms, MFWs enjoy quarantining in larger groups. It is isolating alone that causes negative psychological effects. First, this evidence misses the point of Dr. Nesathurai's evidence about the effect of quarantining on psychological health. How a particular group may "prefer" to quarantine is irrelevant, if the preferences of that group run counter to the purpose of the s. 22 Order, which is to minimize or eliminate the spread of a communicable disease. Dr. Nesathurai was not testifying as to the fact that his method of quarantining was the one that MFWs prefer. His evidence was that quarantining is psychologically difficult and that the longer one is forced to quarantine, the more negative the psychological effects. Therefore, it is important to design a quarantining situation that has the best chance of being as short as possible. Second, the evidence as to the preferences of MFWs did not come directly from any MFWs nor from any scientific study about the psychological effects of certain methods of quarantining on MFWs. It was second-hand evidence from the farmers themselves, all of whom have an economic interest in increasing the number of MFWs who can isolate together.

Limiting the Number of Workers is Necessary in Light of the Obligation to Migrant Workers as a "Priority Population" and in Light of Human Rights Obligations

[84] Dr. Nesathurai's evidence is that MFWs are a "priority population". The HSARB failed to take this into consideration in its decision.

[85] Ontario's *Health Equity Guideline, 2018* ("Guideline") requires that public health authorities design "strategies to improve the health of the entire population while decreasing the health inequities experienced by priority populations" (Guideline, Requirement 2 (b)). Priority populations are populations in the health unit with poorer health or economic status. MFWs are one of the significant priority populations in the HNHU.

[86] As the CIJ Intervenor Group Factum outlines, MFWs are exceptionally vulnerable because of their immigration status, race and the precarious employment relationships imposed by the structure of the programs under which they are employed. Most MFWs are employed under the

SAWP. As the Federal Court of Appeal recognized in *Cruz de Jesus v. Canada (Attorney General)*, 2013 FCA 264, 369 D.L.R. (4th) 141, at para. 13:

> The unique disadvantages in the Canadian labour market of agricultural workers as a whole, and migrant workers in particular, are well known: see for example, *Dunmore v. Ontario*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 41 (*per* Bastarache J.); *Ontario (Attorney General v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 at paras. 348-51 (*per* Abella J. dissenting). These disadvantages commonly include: ineligibility and exclusion from many social benefits, including most unemployment insurance benefits; exclusion from many statutory protections of workers (including representation by a union); low educational level, functional illiteracy and lack of knowledge of English or French; social isolation, and lack of access to telephones, computers and urban centres; long and arduous working schedules with little free time; and fear of employer reprisal and deportation.

[87] In *Pearl v. Ontario (Community and Correctional Services)*, 2014 HRTO 611, the Human Rights Tribunal of Ontario ("HRTO") had this to say about the situation of MFWs employed under SAWP:

(i) "[M]ost SAWP participants are nationals in countries with high levels of poverty and political unfreedoms." They need the jobs that SAWP offers. Their income from SAWP is usually their family's only source of income. As a result they will do whatever they can to hold onto these jobs. (paras. 73-74).

(ii) Their work permits are valid only with a single, designated employer. They are "severely limited" in their ability to change employment if they are dissatisfied with their working conditions or treatment. As a result the employers are accorded "disproportionate power in the employment relationship, particularly in relation to the power of these employers to fire and repatriate SAWP workers in their home country." (para. 61).

(iii) SAWP workers get fired and repatriated for "refusing unsafe work, for being injured or ill, for becoming pregnant, for questioning their employer, or for making a telephone call". There is little recourse if this occurs and if it does this may impact on "worker's ability to continue to participate in the SAWP program in subsequent years." (para. 66).

(iv) "Dr. Preibisch [whose evidence the HRTO accepted] testified that the deportation is routinely used in the SAWP as a mechanism of labour control. She testified that the threat of deportation has similarly been used against other temporary migrant workers to discourage them from filing for workers compensation benefits or complaining about wages or working conditions. Dr. Preibisch testified that SAWP workers will do whatever they can to avoid triggering deportation: they may do work they feel to be unsafe, they may work while they are ill or injured, or they may conceal their illness or injuries from their employer because they fear that they will be deported for being ill or injured or for refusing work. **As a result, SAWP workers will acquiesce to unpleasant working or housing conditions to avoid**

triggering their deportability." (para. 67, emphasis added). As part of the SAWP program housing is provided and paid for by the employer.

(v) SAWP workers do not have recall rights. Therefore, in order to keep their job and return in the following year they will put up with unfair employment practices or poor living conditions to curry favour with their employer. "For workers to continue to work in Canada, they have to be re-named [requested by name] by their employer." If they are not, they may be taken out of the SAWP program altogether or have to wait a few years to get back in. (paras. 70-72)

(vi) "Dr. Preibisch testified that housing arrangements also may exacerbate SAWP workers' vulnerability. She testified that employer-provided housing can foster paternalistic relationships if SAWP workers depend heavily on their employer for transportation into town or to access services, including health care. In addition, she testified that research has shown that employer-provided housing can lead to employers extending their control over the workplace into the personal lives of SAWP workers. Further, when SAWP workers living in employer-provided housing lose their jobs, they also lose their accommodations." (para. 74).

(vii) Agricultural work is an industry with numerous health hazards. For SAWP workers those risks are compounded due, among other things, to poverty, substandard living conditions, the powerlessness that comes from their tenuous immigration status, lack of access to health care, language barriers, lack of protective equipment and lack of knowledge about safety protocols. If safety information on safety protocols is provided, language and literacy barriers may prevent MFWs from being able to absorb that information."

[88] Decreasing health inequities as required under the Guideline requires that the number of workers that are allowed to isolate together is such that the risk posed to their health is comparable to that of the rest of the population when they are quarantined. As explained earlier, the uncontradicted evidence is that with increased numbers comes increased risk. The number three keeps the risk as close as possible to the risk posed to other community members required to self-isolate after travel. Allowing larger numbers to isolate together exposes MFWs to a level of risk not tolerated for others in the community, thereby increasing the vulnerability of an already vulnerable group.

[89] The Intervenor, CLAIHR, submits that the Board failed to apply the test under s. 22 of the *HPPA* in a purposive and contextual manner consistent with relevant international human rights principles. Schuyler Farms correctly points out that these submissions were not made to the Board. We agree that courts often decline to hear any new arguments on appeal. However, they retain a discretion to do so when there is a satisfactory record on which to decide the issue and where the party against whom the issue is raised will not be prejudiced (*Shtaif v. Toronto Life Publishing*, 2013 ONCA 405, 306 O.A.C. 155, at para. 46). In this case, the arguments advanced were legal arguments. Further the Respondent had notice of and the opportunity to respond to the CLAIHR submissions. Finally, the human rights principles advanced by CLAIHR are, in essence, the same principles that Dr. Nesathurai took into account when he recognized that MFWs were a priority

population under the Guideline. Therefore, while by no means determinative, we have considered CLAIHR's submissions as they serve to reinforce the points that have already been made.

[90] In *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40, the Supreme Court held:

> As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations. Courts must also interpret legislation in a way that reflects the values and principles of customary and conventional international law. [Citations omitted.]

[91] More recently, in *Vavilov*, the Supreme Court of Canada reaffirmed that the "modern principle" of statutory interpretation requires a purposive and contextual analysis that engages international human rights principles and that international law should inform administrative decision-making where relevant. The court observed the following at para. 114:

> It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is 'presumed to comply with…the values and principles of customary and conventional international law.' Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power. (cites omitted).

[92] The *Universal Declaration of Human Rights* ("UDHR") and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR") were acceded to by Canada on May 19, 1976, and form part of Canada's international legal obligations. Furthermore the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* ("UNDROP") is part of the body of human rights law and norms to which Canadian adjudicators may look in interpreting statutory or common law obligations and in reviewing administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, [1999] 2 S.C.R. 817, at para. 70).

[93] Both ICESCR and UNDROP provide that everyone has a right "to the enjoyment of the highest attainable standard of physical and mental health", which applies regardless of national origin, race, other status or rural employment.[50] This right also extends to the determinants of health, including adequate housing and healthy occupational and environmental conditions. States are expected to respect, protect and fulfil the right to health, including regulating industrial hygiene. In particular, the obligation to protect requires States to prevent third parties from interfering with the right to health, which includes an obligation to adopt and enforce "preventative measures in respect of occupational…diseases"[51] and to minimize, as far as is reasonably practical,

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[50] ICESCR, at art. 12; UNDROP, at art. 23.

[51] *United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights* ("*CESCR*"), *General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health, E/C.12.2000/4*, at paras. 11, 15-16, and 33; UN Committee on Migrant Workers, Joint Guidance on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants (May 26, 2020).

the causes of workplace health hazards. In the context of a pandemic, States have a duty to adopt strategies of infectious disease control. The right to adequate housing includes providing the inhabitants with a space that will protect them from threats to their health and "disease vectors."[52]

[94] The UDHR and ICESCR state that everyone is entitled to the rights and freedoms "without distinction of any kind" on the basis of protected grounds such as race and national or social origin. Migrants and non-citizens are recognized as a class to be protected from discrimination under international law.[53] The *Convention on the Protection of Migrant Workers* and the *Safety and Health in Agriculture Convention* specifically provide that migrant farm workers are entitled to "treatment no less favourable than that which applies to nationals of the State of employment" and "comparable permanent workers in agriculture" in accessing workplace health and safety, housing and social and health services.[54]

[95] In the public health context, these principles require implementing measures that recognize the vulnerability and health inequities experienced by MFWs so as to eliminate the disproportionate impact of COVID-19 on them. These principles are consistent with the purpose of the Guideline, which obligated the MOH, when making an order under s. 22 of *HPPA*, to ensure that the quarantining conditions for MFWs did not expose them to more risk than the risk that would be tolerated among the other members of the health unit when they quarantined. Again, the Board erred by finding that Dr. Nesathurai's Order was arbitrary in the face of the equity concerns that drove his Order and were mandated by both the Health Equity Guideline, 2018 and the need to conform to Canada's international obligations. Dr. Nesathurai was motivated by these concerns when he made the "3 to a Bunkhouse Rule", concerns that the Board failed to take into account in its decision.

The Need to Avoid Overwhelming Public Health Resources

[96] The evidence before the Board was that Haldimand-Norfolk has more MFWs than any other health unit in Ontario. It also has one of the highest fatality rates of COVID-19 in the province.

[97] Dealing with a large bunkhouse outbreak of COVID-19 significantly strains the resources of the health unit staff. By the time of the hearing, the public health unit had investigated five potential outbreaks in self-isolation on farms. In each instance, the workers in self-isolation had their self-isolation period extended by 14 days. However, because there were only three in each residence, it required only a few hours of the health unit's time to investigate and manage each of these potential outbreaks. This is in contrast to the larger outbreak that occurred while the hearing was underway, which resulted in over 160 MFWs testing positive (an outbreak that the Appellant maintains occurred because two MFWs had symptoms during quarantine and did not report them prior to being released from quarantine). Managing this outbreak required 30 public health staff working 14-hour days, for days or weeks at a time.

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[52] *CESCR, General Comment No. 4 (1991) on the Right to Adequate Housing, E/1992/23*, at paras. 8(b) and (d).
[53] UDHR, at art. 2 and 7; ICESCR, at art. 2.
[54] *Safety and Health in Agriculture Convention*, at art. 17, 19; *Convention on Protection of Migrant Workers*, at art. 25, 43.

[98] Dr. Nesathurai also testified that, in his opinion, Haldimand-Norfolk's medical system does not have sufficient resources to manage a large number of COVID-19 cases. There is only one intensive care unit in the health unit, with limited ICU beds and ventilators. Haldimand-Norfolk also has a large number of other vulnerable populations who are statistically more susceptible to infection and are more likely to need medical intervention if they do become ill.

[99] These factors support a concern that if a large outbreak of COVID-19 were to occur among MFWs, this could overwhelm the medical staff and public health resources available in the health unit.

[100] According to the Respondent, there was evidence before the Board to rebut this concern in the form of press announcements from leading health officials that preventative steps had been taken to make sure that adequate resources were available in the health unit and to make arrangements with neighbouring health units for assistance if necessary.

[101] Again, this evidence reinforces rather than undermines the force of Dr. Nesathurai's concern. Too many COVID-19 cases can overwhelm medical resources, thereby putting medical personnel in the position of having to decide who gets access to the resources and who does not. Those who do not get access to proper medical care may die. Any steps that may reduce that risk are not arbitrary – they are logically connected to the purpose of the *HPPA*, which is to "provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario." (*HPPA*, s. 2).

Minimizing the Risk During Self-Isolation Avoids Significant Consequences for Agricultural Enterprises

[102] COVID-19 outbreaks have had significant effects on agricultural operations, often requiring them to shut down for a period of time. Dr. Nesathurai testified about outbreaks in British Columbia, Chatham and Windsor, all of which had this result. Under the Federal regulations MFWs are not permitted to work during the self-isolation period. The more effective the self-isolation period is at preventing disease among MFWs, the more quickly MFWs can begin working and the less likely the risk of an outbreak.

[103] The Board failed to take this evidence into account in its decision.

The Board Misunderstood Dr. Nesathurai's Position about Why Workers Could not Effectively Socially Distance in a Large Bunkhouse

[104] For ease of reference, the Board's reasons on this issue at paras. 55-56 are reproduced below:

> The Appellant's counsel pointed out the wide variations in size and facilities of farm bunkhouses. She questioned why more than 3 MFWs could not maintain social distancing in a bunkhouse that is 5000 sq.ft. with multiple (between 6 and 12) stoves, fridges, showers, toilets and separate and/or curtained off sleeping areas. She noted 3 MFWs can be approved to isolate in a 450 sq. ft. bunkhouse that has

> one washroom, one kitchen, one common area, one exit and one common sleeping area. The Appellant's counsel questioned both Dr. Nesathurai and the Respondent's expert witness, Dr. McGeer, concerning this. They both maintained that this was not possible or would be extremely difficult to maintain physical distancing at all times, even in a large bunkhouse, if there were more than three occupants.
>
> With respect, the Board finds the Respondent's position that it is not possible to have more than 3 MFWs self-isolate in a bunkhouse regardless of its design, size, layout and amenities to be unreasonable. The explanation given was that there are various points in the bunkhouse which make it difficult to maintain the required social distancing, including the washroom, the stairway and entrance and exit points.

[105] The Board's finding that Dr. Nesathurai's position that it was not possible to have more than three MFWs self-isolate in a bunkhouse regardless of its design and layout misstates Dr. Nesathurai's position on the issue. To the contrary, he emphasized that design and layout, not size, were key in determining how many people could effectively socially distance in one location. His position was supported by the only other witness who had expertise in public health, Dr. McGeer. She explained that "it's not about square footage, it's about how much time people are driven to be in proximity to each other…this is about how you effectively separate yourself all of the time from other people, and that's more about the …structure and design than it is about square footage."

[106] Both Dr. Nesathurai and Dr. McGeer viewed the videos Mr. Schuyler provided of one of his larger bunkhouses, of 3,344 square feet. Both testified that it would be extremely difficult to maintain social distancing with a large group of workers because, among other things, there was a large staircase between the bedroom level (which did not contain separate bedrooms, just curtained off areas) and the lower level where the kitchen and bathroom were located; workers would have had to walk through the kitchen to access the bathroom; the bathroom stalls are small with little space between them; and complex scheduling and choreography would be required to ensure workers did not come within two metres of one another at any point.

[107] Because it was misunderstood and because of the Board's failure to appreciate the class nature of the Order (discussed above), the Board did not properly deal with this evidence, which was key to the MOH's position. This error becomes more serious when one considers how the illiteracy, lack of education and language barriers that are prevalent in the MFW population would hamper the ability to effectively set up a complex schedule and choreography plan within one bunkhouse for a large number of workers. Furthermore, the Board did not grapple with the fact that if something did go wrong with the social distancing rules in a bunkhouse housing a large number of workers, and one worker did get sick, a significant number of others will also get sick. If the number is capped at three, the potential number of sick workers is similarly capped.

The Board Ignored the Evidence About the Need for a Precautionary Approach

[108] The precautionary approach embodies the principle that reasonable action to reduce risk should not await scientific certainty or proof. It is and should be at the core of public health practice

when dealing with a new disease such as COVID-19. Underlying the *HPPA* and particularly s. 22 thereof is a focus on preventing public health problems, rather than dealing with them after the fact. As the Honourable Justice Archie Campbell stated in the SARS Commission Report:

> The challenge of this new disease overcame the extent of their current scientific understanding…That is why it is better to follow the precautionary principle that reasonable action to reduce risk should not await scientific certainty…If the Commission has one single take-home message it is the precautionary principle that safety comes first, that reasonable efforts to reduce risk need not await scientific proof.

[109] The precautionary principle is specifically referenced in s. 77.7(2) of *HPPA*, which deals with the powers of a Chief MOH to issue a directive to a health care provider or health facility concerning the procedures to be followed to protect the health of anyone in Ontario. One of the situations where the principle is to be considered is where "in the opinion of the Chief Medical Officer of Health there exists or may exist an outbreak of an infectious or communicable disease."

[110] The Board failed to take into account this principle when considering whether Dr. Nesathurai had reasonable and probable grounds for the "3 to a Bunkhouse" Rule.

Issue 4: Did the Board improperly take financial issues into consideration?

[111] The Appellant argues that the HSARB made an error because it took the Respondent's financial interests into consideration in deciding that the 3-person-per-bunkhouse rule was arbitrary.

[112] In its decision, the Board made reference to the Respondent's argument regarding the financial impact of the rule. However, the Board did not explicitly make reference to the Respondent's or other farmers' financial interests in its analysis.

[113] Given our findings above with respect to the errors of law and fact, it is unnecessary for us to determine whether the Board improperly relied on the respondent's financial circumstances in reaching its conclusion. However, we note that, given that the uncontroverted evidence is that the safest number for self-isolation is one person, in our view it is implicit in the Board's analysis that it was taking the financial impact of the rule into account. This is especially evident from the fact that the Board found that the MOH should approve the number of people per bunkhouse on a case-by-case basis. Implicitly, this directive suggests that the financial burden of the Order should be as minimal as possible.

[114] It is important to note that while the pandemic is having a widespread financial impact, neither the MOH nor any level of government has caused this public health crisis or its financial impact. Rather, the MOH is fulfilling his statutory mandate to protect public health in the face of an unprecedented worldwide health crisis.

[115] The "necessity" test undoubtably suggests that there are to be restrictions on orders made under s. 22 of the *HPPA* to ensure that they do not impose unnecessary burdens. However, deciding whether to make an order is not meant to be a weighing exercise. If the order is necessary, especially in circumstances where the risk is high, then its financial impact is irrelevant. In this

case, it appears that the Board may have improperly engaged in weighing the benefits of the rule against the financial burden on the Respondent when it found that the three-person rule was arbitrary.

[116] Again, this finding is not necessary to the outcome of the appeal, but certainly supports our view that the Board did not approach the interpretation and application of s. 22 of the *HPPA* in accordance with the purpose of the statutory scheme and the evidence in the case.

Conclusion

[117] In conclusion, the appeal is allowed and the MOH's original order limiting the number of people per bunkhouse to three during the period of self-isolation is restored.

[118] As agreed between the parties, the successful party, the Appellant, is entitled to costs of $50,000 all inclusive to be paid by the Respondent.

Favreau J.

for **Sachs J.**

I agree N B

Backhouse J.

I agree Favreau J.

Favreau J.

Released: August 27, 2020

CITATION: Schuyler Farms Limited v. Dr. Nesathurai, 2020 ONSC 4711
DIVISIONAL COURT FILE NO.: CVD-TOR-22-AP
DATE: 20200827

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Sachs, Backhouse, Favreau JJ.

BETWEEN:

Dr. Shanker Nesathurai, Medical Officer of Health, Haldimand-Norfolk Health and Social Services

Appellant

– and –

Schuyler Farms Limited

Respondent

– and –

Canadian Lawyers for International Human Rights

Intervenor

– and –

The Community Legal Clinic-Brant, Haldimand, Norfolk, Industrial Accident Victims Group of Ontario and Justicia for Migrant Workers

Intervenor

REASONS FOR JUDGMENT

THE COURT

Released: August 27, 2020