



May 15, 2013

File #12-24

**DELIVERED BY EMAIL**

Gurjeet Sohi  
[REDACTED]  
[REDACTED]

Don Malenstyn  
[REDACTED]  
[REDACTED]

Dear Sirs:

**RE: A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING DUST, MANURE MANAGEMENT AND FLOODING.**

1. On September 28, 2012, the B.C. Farm Industry Review Board (BCFIRB) received a complaint from Gurjeet Sohi about disturbances resulting from Don Malenstyn's development of a cranberry operation on DJM Farms.
2. In particular, Mr. Sohi claims that Mr. Malenstyn has brought in significant amounts of fill to build dykes and raise fields for a cranberry farming operation but argues that he has not taken measures to suppress the dust from it with the result that it has damaged or diminished the value of his blueberry crop (especially in the east portion of his field). Mr. Sohi also claims that since Mr. Malenstyn began constructing his cranberry operation, the west field of the Sohi farm has been experiencing more wet areas or flooding.
3. Mr. Sohi's complaint also involves dust and odor from chicken manure stored on the Malenstyn farm very close to the property line of the Sohi farm and in close proximity to a new home being constructed by Mr. Sohi. Mr. Sohi claims that the dust and odour has prevented him from completing the construction of a new home on the Sohi farm.
4. On April 18, 2013, the Parties participated in a Pre-Hearing Conference call. At that time, Mr. Malenstyn stated that he would not be available from June through to October, 2013 because he was expecting a delivery of cranberry plants and would be too busy planting them to participate in the hearing of this complaint during that period. Mr. Sohi indicated that he did not wish to wait until the late fall to hold the hearing into his complaint. Consequently, the parties agreed to set the hearing of the complaint on May 27 and 28, 2013.
5. On May 6, 2013, Mr. Malenstyn sent an e-mail to the BCFIRB in which he requested an adjournment of the hearing for the following reason(s):

“I have just found out that my cranberry plants will be arriving as early as next week – as it is 3 weeks earlier than expected, I am advising that I will be unable to make the May 27<sup>th</sup> and 28<sup>th</sup> hearing dates as I will be too busy trying to plant my field. As you know, it is just myself and one worker, and I do not have a crew of people working. This matter needs to be put off until the fall when I will have more time.”

6. In a further e-mail of May 7, 2013, Mr. Malenstyn again claimed that he had been advised by his cranberry plant supplier that his order would be shipped “within the next week” and in support, he provided a copy of a Shipping Summary from Integrity Propagation indicating an expected shipment date of May 15, 2013. Mr. Malenstyn also provided a copy of an e-mail from the supplier dated May 7, 2013 that stated:

“I will be contacting you very soon on the exact day of delivery. If there is a day you cannot receive this shipment, please tell me what it is.”

7. In his written submissions, Mr. Malenstyn argues that he needs to devote all of his attention to completing the cranberry field, to ensure the cranberry plugs get established and to ensure there is a source of fresh water for irrigation.
8. Mr. Malenstyn also argues that he crop shares a field with a neighbour and is responsible for readying the field for planting. Mr. Malenstyn provided a letter from the person with whom he claims he sharecrops dated May 7, 2013 who states that “*we are in the process of readying the fields for planting crops and will be working 16 hour days for at least the next 7-10 days.*”
9. Mr. Malenstyn further argues that his witnesses, who are all farmers, will likely all be too busy doing “spring work” for him to ask them to attend the hearing.
10. Mr. Malenstyn states in his submissions that Mr. Sohi was supposed to serve him with a witness list and documents on May 2<sup>nd</sup> but that as of May 8<sup>th</sup>, he had not received them. Mr. Malenstyn argues that Mr. Sohi’s failure to serve him will “put him behind” in his efforts to produce documents for the hearing and that he is now too busy with field work and planting to prepare for the hearing.
11. Mr. Malenstyn claims that in 2011, he lost cranberry plants due to contaminated water, that in 2012 he lost plants due to and flooding from a broken irrigation pipe and that he is “not willing to risk taking a further \$40,000.00 loss on plants due to water quality issues or neglect.” Consequently, Mr. Malenstyn proposes to re-schedule the hearing for the middle or end of July by which time the newly planted cranberry plugs should be established and then he “can devote his full attention to this matter.”
12. Mr. Malenstyn states that until this matter is resolved and as “a measure of good faith” he will not store any chicken manure/compost and will plant corn along the east/west ditch between his and the Sohi farm to minimize alleged dust issues. Mr. Malenstyn says that

the cranberry field that he is planting is far from the Sohi property and should cause little disruption to Mr. Sohi and his farm operation.

13. Mr. Sohi opposes an adjournment of the hearing. In a written submission sent by e-mail on May 10, 2013, Mr. Sohi states that he is concerned that “a delay will allow Mr. Malenstyn to continue with activities that are disruptive to the Sohi family and their farm.”
14. Mr. Sohi claims that he attended Mr. Malenstyn’s residence on May 6, 2013 with a member from the Delta police department to serve his documents and witness list on Mr. Malenstyn. Mr. Sohi claimed that no one would come to the door so he left the documents attached to the door of Mr. Malenstyn’s residence and took photographs (which he submitted as proof of service). Mr. Sohi claimed that he then went to Mr. Malenstyn’s mother’s residence which is nearby and informed her that he had left the documents.
15. On May 7<sup>th</sup> Mr. Malenstyn advised BCFIRB staff that he had not received Mr. Sohi’s documents. As a result, on May 9<sup>th</sup> Mr. Sohi said he sent another copy of his documents and witness list to Mr. Malenstyn’s residence via courier.. Mr. Malenstyn admits that a courier attended his residence but claims they would not wait until his spouse came to the door and would not leave the package. According to tracking information provided by Mr. Sohi, Mr. Malenstyn refused service of the documents and returned them to him.

**DECISION:**

16. Practice and Procedure Rule 25(4) to the FPPA states as follows:

“In deciding whether or not to grant an application for adjournment, the hearing panel will take into account the following factors:

- The reason for the adjournment;
- Whether the adjournment would cause unreasonable delay;
- The impact of refusing the adjournment on the other parties;
- The impact of granting the adjournment on the other parties;
- The impact of the adjournment on the public interest.”

17. Mr. Malenstyn provided a copy of an Order form for cranberry plants dated April 4, 2013. The Panel notes that the form contains a statement that “***Integrity Propagation shall ship the rooted stolons on or about mid May to early June of 2013.***” Consequently, the Panel concludes that Mr. Malenstyn knew or should have known that his plants were scheduled to be delivered at the same time as the hearing when he agreed to the hearing date at the pre-hearing conference held on April 18, 2013.

18. In any event, Mr. Malenstyn argues that he would be prejudiced by having to proceed with the hearing once his cranberry plants are delivered because there would then be a risk of damage to them if they are not monitored to protect them from contaminated water or from neglect.
19. Mr. Malenstyn also argued that he has a contractual obligation to prepare a share-cropped field for planting and would be too busy doing that to prepare for the hearing. The panel finds, however, that Mr. Malenstyn also knew about this responsibility when he agreed to the hearing date at the pre-hearing conference.
20. Mr. Malenstyn further argued that his proposed witnesses are all farmers who are busy doing spring work and he could not ask them to give up 2 full days of spring work to attend the hearing. Mr. Malenstyn did not provide a witness list nor did he provide any evidence from any proposed witnesses that they could not attend the hearing. The Panel finds that Mr. Malensyn's reluctance to call a witness who he assumes would be inconvenienced is not sufficient reason to adjourn the hearing.
21. Finally, Mr. Malenstyn stated that he had not been served with Mr. Sohi's documents that were due on May 2, 2013. Mr. Malenstyn argued that this prejudiced him because it meant he would be delayed in preparing his documents for disclosure. However, Mr. Sohi claims that he served Mr. Malenstyn on two separate occasions with his documents and witness list but that Mr. Malenstyn would not acknowledge service of them.
22. Practice and Procedure Rules 20 and 21 of the FPPA state how documents are required to be served by one party on another party. In particular, it states that service must be made either by personal delivery, by mail or courier to the party's address of record, or by fax or e-mail. Any other form of service requires the approval of BCFIRB.
23. The Panel finds on a preponderance of the evidence that Mr. Sohi left his documents at Mr. Malenstyn's residence on May 6, 2013. The Panel finds that it would serve no practical purpose nor benefit Mr. Sohi by returning to the Malenstyn property later that day to remove the documents as Mr. Malenstyn suggested. However, the Rules of Practice and Procedure to the *FPPA* do not provide for service of documents by posting them at a party's address of service.
24. In any event, the Panel also finds that Mr. Sohi re-served his documents via courier to Mr. Malenstyn's address of service on May 9<sup>th</sup> but that Mr. Malenstyn refused to accept them. Although Mr. Malenstyn claims that the courier failed to wait for someone to come to the door, the Panel finds that this contrary to the information stated on the shipment order that "*the receiver did not want the order and refused this delivery.*" Consequently, the Panel finds that Mr. Sohi's documents were served as required by the Rules and that even though Mr. Malenstyn refused to accept them, he is deemed to have been properly served.
25. In summary, the Panel finds that when Mr. Malenstyn agreed to the hearing date of May 27 and 28, 2013, he knew that his cranberry plants would be delivered around that time

and that he would also have obligations to prepare fields under a sharecropping agreement. However, the Panel understands that Mr. Malenstyn may have underestimated his ability to deal with all of these obligations at the same time and has now come to the realization that it will be difficult to satisfy all of those obligations and to find the time to prepare for and proceed with the hearing as scheduled.

26. The Panel also has considered that Mr. Sohi has not identified any specific prejudice to him by granting an adjournment of the hearing other than by stating generally that there would be a further delay in resolving his complaints. Mr. Malenstyn states that he is willing to minimize the extent of any delay of the hearing by making himself available by mid-July (or in approximately 6 – 7 weeks). Mr. Malenstyn also states that he is willing to take some measures prior to the hearing in an attempt to minimize some of the disturbances complained of by Mr. Sohi.
27. The Panel has also considered the impact of an adjournment on the public interest. The Panel finds that it is in the public interest to resolve disputes as quickly as is practicable while ensuring that both parties have a reasonable opportunity to prepare for the hearing and to present their respective cases.
28. Having considered all of these factors, it is the Panel's decision that the hearing should be adjourned to a date that will be fixed at a pre-hearing conference. In the absence of any evidence to the contrary, the Panel finds that there is a potential prejudice to Mr. Malenstyn in his ability to plant cranberry plugs which he has already ordered and which he claims are to be delivered to him prior to the date currently scheduled for the hearing. While there is also a significant interest in reducing any delay of the hearing into Mr. Sohi's complaint, the Panel notes that he did not identify in his written submissions any prejudice that he would suffer as a result of a short adjournment of approximately 6 weeks.
29. **The Panel emphasizes that in granting an adjournment of the hearing for the purpose of accommodating Mr. Malenstyn's cranberry planting activities, it is in no way authorizing or condoning those activities. The Panel specifically cautions Mr. Malenstyn that pursuant to s. 6(1) of the FPPA, the Panel may as part of its decision, issue an Order that he cease or modify a practice giving rise to the disturbance complained of.**

#### CONCLUSIONS:

30. The hearing of this matter that was scheduled for May 27 and 28, 2013 is adjourned. A *pre-hearing conference call will be held on May 23, 2013 at 10:00 am* to fix a new date for the hearing that will be determined by agreement of the Parties or failing agreement of the Parties as Ordered by the Panel. BC FIRB staff will provide each of the Parties with

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further details of the pre-hearing conference in a separate letter that accompanies this decision.

31. The Panel finds that Mr. Malenstyn has been served with Mr. Sohi's documents as required by the Rules of Practice and Procedure to the *FPPA*. Consequently, if necessary, Mr. Malenstyn will now have to obtain those documents from Mr. Sohi at his own expense.
32. Time limits for any further documentary disclosure by Mr. Sohi and for documentary disclosure by Mr. Malenstyn will be set at the pre-hearing conference on May 23, 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



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Carrie H. Manarin, Presiding Member



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Andy Dolberg, Member



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Corey Van't Haaff, Member