



September 10, 2012

File #12-16

DELIVERED BY EMAIL

Ann and Gord Baird
[REDACTED]

Tom Plasterer
[REDACTED]

Dear Sir/Mesdames:

JURISDICTION UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT*

On June 25, 2012 the BC Farm Industry Review Board (BCFIRB) received a formal complaint from Ann Baird regarding noise, land clearing, burning and rodents generated from a cattle operation owned by Tom Plasterer. On the July 11, 2012 case management call the issue of jurisdiction was raised by the complainant and BCFIRB initiated a submission process to assist in determining whether the practices in question results from a farm operation conducted as part of a farm business.

Section 6(2) of the *Farm Practices Protection (Right to Farm) Act (Act)* allows the chair of BCFIRB, after giving the parties an opportunity to be heard, to refuse to refer an application to a panel for the purposes of a hearing on various grounds. A complaint about a matter that is outside the scope of the *Act* would fall within these grounds.

In BCFIRB staff's July 11, 2012 letter, the parties were referred to the *Hanson v. Asquini* (October 31, 2003) decision which confirms that where there is no underlying farm business, the *Act* has no application. The parties were also asked to provide submissions on whether the practices complained of relate to a farm business.

I have had the opportunity to review all the submissions submitted by both parties.

The respondent, Mr. Plasterer, made his first submission on July 19, 2012. He provided a brief historical overview of the farm and advised of his efforts to ensure the property could "carry on as a farm operation and business". He reported the sale of eight calves in 2012 and provided an estimate of the farm's income and expenses for 2012 and outlined future expansion plans and anticipated revenue.

Ms. Baird responded on July 20, 2012, outlining her experience in bookkeeping, including in the agri-food sector and challenging Mr. Plasterer's estimated figures in terms of the farm's current and projected operations.

Mr. Plasterer replied on July 30, 2012, providing further information in response to Ms Baird's calculations.

On August 8, 2012, BCFIRB requested that Mr. Plasterer submit actual evidence in the form of documentation (e.g., receipts, invoices, property assessment) supporting his farm status. Ms. Baird could respond to any new evidence submitted and Mr. Plasterer would have right of final reply.

On August 13, 2012 Mr. Plasterer submitted a variety of documents including receipts for equipment rental, invoices related to building of a new barn, farm income receipts, livestock purchase receipts, a 2012 property assessment and a 2012 property tax notice. Provided as well were a list of calves born in 2012, photograph's of the farm's new pastures, oat crops and the newly built barn.

Ms. Baird responded on August 16, 2012, detailing a number of questions and comments, amongst which were: the tax status of various parcels owned by the farm; the farm tax status of the property in question given that "not much had occurred in the past 10 years"; the assessed value of the barn; the history of farming on the site; the environmental impact of the land clearing on the property's "wetlands"; and, the lack of financial information regarding land clearing and other activity. Ms. Baird said it could not be determined whether the "farm is financial viable" and stated that the "actual farming component of the activity...accounts for only a minor portion of the financial activities taking place".

On August 19, 2012, Mr. Plasterer replied to each of the points raised by Ms. Baird in her response submission. He noted that "although we have not done much work on the farm over the last 10 years we had sheep grazing every year" and that the "wetlands" have been farmed for over 100 years (and) provide green feed in the summer months".

Section 3 of the (*Act*) provides for complaints to the board:

3(1) if a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

Given that section 3 requires that a complaint arise out of a farm operation carried on by a farm business, the complaint must relate to a farm business. "Farm business" and "farm operation" are defined by the *Act*:

"farm business" means a business in which one or more farm operations are conducted, and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations;

"farm operation" means any of the following activities involved in carrying on a farm business:

(a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals;

- (b) clearing, draining, irrigating or cultivating land;
- (c) using farm machinery, equipment, devices, materials and structures;
- (d) applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying;
- (e) conducting any other agricultural activity on, in or over agricultural land;
- ...

- (k) processing or direct marketing by a farmer of one or both of
 - (i) the products of a farm owned or operated by the farmer, and
 - (ii) within limits prescribed by the minister, products not of that farm,

[emphasis added]

The “farm business” requirement makes it clear that the *Act* was never intended as redress for every complaint between neighbours involving practices relating to plants or animals on a piece of land.

Where the *Act* does apply, it has significant implications. It gives a neighbour a potentially powerful remedy, i.e., the right to ask BCFIRB to require a farmer to cease or modify a farm practice. At the same time, it gives a farmer potentially significant protection where he acts in accordance with normal farm practice (i.e., the right to be protected against a nuisance action and the right to be protected against municipal bylaw enforcement). Given the significant effects of the *Act*, its drafters wanted to focus its scope, and its boundaries. This recognized that where the *Act* does *not* apply, the general law does, meaning that where neighbours cannot work things out in a neighbourly way, they can seek a remedy from local government or the courts.

In addressing the jurisdiction issue in this case, I adopt the approach set out by the BCFIRB panel in *Hanson v. Asquini*:

In determining whether a person is carrying out a “farm business”, a number of factors can be considered (this list is neither exhaustive nor exclusive, and not all factors are necessarily of equal weight):

- a) What is the location and magnitude of the farming operation in comparison to other operations producing similar agricultural products?
- b) Does the farm operation operate or intend to operate on the basis of generating income or profit?
- c) Do the farm operation’s plans clearly contemplate future commercial activities and is income anticipated as a result of defined development plans (such as plantings that may not be productive for several years)?
- d) Does the farm qualify for a farm tax credit under the Income Tax Act?
- e) Does the farm hold licences related to agricultural or aquacultural activities?
- f) Is the operation a farm education or farm research institution?

The Canadian Oxford English Dictionary (1998) defines “business” amongst other things as “one’s regular occupation, profession or trade”. Black’s Law Dictionary (7th ed. 1999) defines “business” as “(a) a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”.

Implicit in the definition of “business” as it is used in the Act is some aspect of an agricultural undertaking carried out for the purposes of generating income or profit (except perhaps in the special case of farm education and research institutions which, for obvious reasons, have also been given the Act’s protections). Thus, as a bare minimum, in order to establish that a farmer has a “farm business”, there should be documentation supporting revenue or an intention to generate income from recognised farming operations or activities....

In his November 20, 2010 decision dismissing the *Hodge v. Eben* complaint, my predecessor made the following comments:

The term “farm operation” is broad, and it includes “using farm machinery, equipment, devices, materials and structures”. But while the definition is broad, it has limits. It is clear from the definition itself, and the overall purpose of the Act, that the use of equipment must be incidental to a farming activity....

While the Provincial board has a specialized role to play in deciding questions such as what constitutes a farm operation, that role does not exclude the application of common sense. ..

DECISION

I have carefully reviewed all the submissions. The farm has provided evidence in accordance with *Eben* that does establish, at least on a preliminary basis, that there is currently a farm business (raising of cattle) and the complained of practices (relating to excavating and clearing) are being undertaken for the purpose of expanding the farm operation. I note also the complainant does not dispute that there is at least some level of farming activity being undertaken. While I share the complainant’s concern that the magnitude of the excavating, clearing and fill works seems disproportionate to the farm business, I am satisfied that the respondent has demonstrated a prima facie case from which it could be concluded that the practices complained of relate to the expansion of a farm business. As such, I am not prepared to make any ruling regarding jurisdiction at this point in the proceedings. In these circumstances, the appropriate course is to establish a panel to hear this complaint and once the panel has had the benefit of oral evidence and argument, it can make a determination as to whether this is a farm operation and if so, whether the on-farm activities complained of accord with normal farm practices.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Ron Kilmury, Chair
BC Farm Industry Review Board