



January 5, 2010

File #09-10

DELIVERED BY EMAIL

Dale & Shirley Truitt
[REDACTED]

Ken & Jennifer Baker
[REDACTED]

Dear Sirs/Mesdames:

A COMPLAINT UNDER THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT

On October 15, 2009, the BC Farm Industry Review Board (BCFIRB) received a formal complaint from Dale and Shirley Truitt against the manure management practices used by Ken and Jennifer Baker. On November 7, 2009 Mr. Baker raised an issue as to whether the complaint filed is within BCFIRB's jurisdiction and on November 20, 2009 a submission process was initiated.

By way of background, Mr. Baker initially raised the question as to "why the FIRB is involved in this matter". He stated that his horses are simply pets, and are not part of any money-making operation. Section 6(2) of the *Farm Practices Protection (Right to Farm) Act (Act)* allows the chair of BCFIRB, after giving the complainant 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 falls within these grounds.

Based on Mr. Baker's position, I wrote to the parties on November 20, 2009. I enclosed a 2003 decision of BCFIRB which confirms that where there is no underlying farm business, the *Act* has no application: *Hanson v. Asquini* (October 31, 2003). I also asked the parties for submissions regarding whether the practice complained of relates to a farm business. The submissions process closed on December 13, 2009.

In his first submission, on December 1, 2009, Mr. Truitt wrote as follows:

We enquired at City Hall (Kelowna) RE: conditions next door, and were referred to BC Department of Agriculture. We contacted Carl Withler (as Jennifer would not speak to me about the fouled water running into our yard), Carl talked to Jennifer and the problem was fixed. A few days later a three sided containment bin was constructed, within a ninety feet of our back door, which is subject to up hill water

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from the above crown lands. The water then flows into and around the manure pile and into the sacrifice area where the horses (4) spend most of their time during the wet and cold times. The odour is beyond belief.

"farm business" means a business in which one or more farm operations are conducted, and includes a farm education or farm research

"farm operation" Keeping animals, products of animals, equipment, structures, applying manure.

If the above is not in FIRB's jurisdiction? Who has jurisdiction? The City of Kelowna have no bylaws at this time?

On December 7, 2009, Mr. Baker reiterated the description he had given on November 7, 2009, prior to my letter:

I say again we are not a farm! We have no farm equipment, we pay residential taxes on our property, we do not qualify for agricultural plates for our vehicles, all because we don't have farm status. We do not make any money from our horses and they are used for our personal pleasure...

Mr. Truitt's second submission, a reply received on December 13, 2009, states in its entirety:

When we approached the City of Kelowna about our neighbor and the manure, odour problems, we were directed to FIRB.

The Truitts were accorded two opportunities to challenge any of the Bakers' statements that the manure practices complained about arise from horses that are pets, that the Bakers do not make any money from the horses, and that the horses are used for the Bakers' personal pleasure. They have not done so. I am prepared to decide this matter accordingly.

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,

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 pasture.

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 neighbours cannot work things out in a neighbourly way have their usual remedies going to the municipality or to the courts to resolve their disputes.

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 my opinion, nothing in this case has been presented by either party suggesting that the Bakers are in any way engaged in generating income from the four horses identified by the Truitts, or that the Bakers are engaged in an enterprise involving farm education or farm research. Collecting and keeping manure from pets which are kept for the pleasure of the household is not covered by the *Act*. Nothing has been brought to my attention regarding the scale of the operation that could otherwise reasonably trigger the definitions in the *Act*.

The complainants have not even alleged that this is a farm business despite being given two opportunities to do so after the issue was brought to their attention. In the circumstances, in my view that the only appropriate outcome is to refuse to refer this complaint to a panel as being outside jurisdiction. As such, it is not appropriate to put either party or BCFIRB to further time and expense in this matter.

Before closing, I will briefly address the Truitts' question regarding "who has jurisdiction", and their observation that the City of Kelowna directed them to BCFIRB. BCFIRB's jurisdiction is not determined by whether a complainant has been referred by a municipality. Local governments often refer people to BCFIRB in total good faith and with the intention to help, but BCFIRB must ultimately determine its jurisdiction based on the information provided. As my role is limited to the issue addressed in this decision, it would not be appropriate for me to give the parties advice as to their other remedies. As the *Act* does not apply, the parties will have to take their own counsel if they are otherwise unable to resolve their dispute in a neighbourly fashion.

Finally, the parties are advised of the following provision of the *Act* that explains how this decision may be challenged:

Appeal

- 8** (1) Within 60 days after receiving written notice, in accordance with section 6 (5), of a decision of the chair or a panel of the board made under section 6, the complainant or farmer affected by the decision may appeal the decision to the Supreme Court on a question of law or jurisdiction.
- (2) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

Yours truly,



Richard Bullock
Chair