



March 19, 2015

File #14-05

DELIVERED BY EMAIL

Rob Isaac, Eng.L.,
Director of Wastewater and Drainage
Engineering and Regional Utilities
City of Abbotsford
32315 South Fraser Way
Abbotsford BC V2T 1W7

Mohinder S. Kapoor
[REDACTED]
[REDACTED]

Dear Sirs:

A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING DUST

Thank you for your submissions (December 8, 2014, December 29, 2014 and January 8, 2014) in response to my questions of December 1, 2014. I have considered them carefully and in the context of a number of decisions of the British Columbia Farm Industry Review Board (BCFIRB) and of the courts. I asked three questions:

1. To what extent can local governments complain under the *Farm Practices Protection (Right to Farm) Act* (the “Act”)?
2. How is the City of Abbotsford (the “City”) an “aggrieved” party?
3. How would a decision of BCFIRB assist the City?

Question 1 – Can Local Governments Bring a Complaint Under the Act?

In regard to question 1, first the *Act* may apply to the City since it is a “person” based on the definition found in the *Interpretation Act* (RSBC 1996, c. 238, s. 29). The City supports this approach and Mr. Kapoor has not questioned this element of question 1, which has been confirmed by the courts (*Central Saanich (District) v. Kimoff*, 2002 BCCA 169).

Mr. Kapoor questions whether the City can be categorized as a “neighbouring owner” who “enjoys” its property on Dixon Road since the *Act* as a matter of policy is based on the law of nuisance. Mr. Kapoor commented that the law of nuisance was established for the purpose of reconciling continuous uses of land and to balance rights of competing property owners, but not to address one off events.

There are a number of cases that give a good discussion of the scope of a common law cause of action in private nuisance beyond just “use and enjoyment”, see for example *Christensen v. District of Highlands*, 2000 BCSC 196 (CanLII) paragraphs 11 -13 where after setting out that private nuisance consists of an unreasonable interference with the use and enjoyment of land, it quotes from Fleming's Law of Torts, ninth edition, at pages 464-466, which states as excerpted in the following (underlining added for emphasis):

The gist of private nuisance is interference with an occupier's interest in the beneficial use of his land. The action is thus complementary to trespass ...

The interest in the beneficial use of land protected by the action of nuisance is a broad and comprehensive notion. It includes not only the occupier's claim to the actual use of the soil for residential, agricultural, commercial or industrial purposes, but equally the pleasure, comfort and enjoyment which a person normally derives from occupancy of land. Accordingly, harmful interference may be manifold: it may consist in physical damage to land, buildings, and chattels thereon, through vibrations, flooding, fire, and the like; in disturbing the comfort, health, and convenience of the occupant by offensive smell, noise, smoke, dust, by telephonic harassment or fear for one's safety or health...

Not all amenities, however, commonly associated with beneficial use of land, are vindicated by the law of private nuisance: not aesthetic values, like an unobstructed or pleasing view from one's home, or against an isolation hospital moving in next door; nor such privacy values as freedom from being spied upon from a vantage point; not even an absolute right to light or lateral support for one's buildings. The erection of a building interfering with TV reception has also been declared immune on analogy with loss of prospect, as otherwise imposing too great a restriction on development in cities.

See also *Boggs v. Harrison*, 2009 BCSC 789 (CanLII), paras 22-24 where the court reviews numerous authorities and refers to the Supreme Court of Canada's decision in *St. Pierre v. Ontario (Minister of Transportation & Communications)* [1987 CanLII 60 \(SCC\)](#), [1987] 1 S.C.R. 906 (at paragraph 10), in this way:

[10] A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

The common law of nuisance is helpful as an interpretative guide for matters or terms within the *Act* that are ambiguous (for example, the meaning to give “other disturbance” as in the *Hill v. Gauthier* March 6, 2013 decision of BCFIRB). However, it is less helpful here where one of the issues is whether the City is aggrieved. While the respondent may be correct when he says the City's “enjoyment” of the property at Dixon Road has not been interfered with, I could see how soil blown from adjacent property and accumulating in the ditch at Dixon Road, results in harmful interference with the City's land, or physical injury or damage to it.

The common law of nuisance is not determinative of who can file a complaint. I am bound by section 3 of the *Act* which allows a “person” (which as stated above I find the City to be) who is aggrieved by a disturbance from a farm operation, to file a complaint. The City alleges that its ditch has been clogged with soil and the soil accumulation it alleges resulted from the farm’s poor soil management practices. The alleged physical injury to the property of the City is in my view, sufficient to fall within the definition of “aggrieved” so as to allow this complaint to proceed.

While the City may have other ways to deal with this matter, the *Act* in this case provides an avenue of complaint for a local government against a farmer. The courts have confirmed that the *Act* provides a mechanism for a local government to seek a remedy regarding farm practices even if it has not exhausted its other remedies (see *Kimoff*, supra).

In summary, where a local government suffers physical injury or damage to its land and it believes this is as a result of a farmer’s practices, it may file a complaint and seek relief from BCFIRB with regard to those practices.

Question 2 – Is the City Aggrieved?

Ultimately it is for BCFIRB to consider more fully the evidence and arguments of the parties in coming to an answer to this question about whether or not the City is aggrieved. I have however determined that the facts as alleged by the City, if proven, would be sufficient to demonstrate that it was “aggrieved” within the meaning of the *Act*, while considering question 1 above. The City alleges physical damage to its land due to the accretion of soil introduced to its ditch from elsewhere. It will be for BCFIRB to determine whether the ditch was clogged as alleged, that the farm was the source of the soil and the soil settling in the ditch was due to the improper farm practices undertaken on Mr. Kapoor’s land, following a hearing on the merits.

Question 3 - Can a Decision of BCFIRB Assist the City?

I accept the submissions of the City that an order under section 6 of the *Act* pertaining to farm practices on the Kapoor land could be of assistance to the City in remediating the situation on Dixon Road. Any order made under this provision will be specific to the circumstances of the farm and adjacent property subject to the complaint and likely would not have broad application.

Conclusion

I deny Mr. Kapoor’s request for a summary dismissal of the City’s Notice of Complaint as I find that the complaint is properly before BCFIRB.

BCFIRB’s case manager will follow up with the parties to arrange a pre-hearing conference call to address the nature and timing of the complaint process. Since the City raised the issue of the use of experts or knowledgeable persons, I would encourage both parties to obtain the best information possible about the specifics of soil management in farming situations similar to those found on Mr. Kapoor’s land.

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Should the BCFIRB panel determine it necessary, it will retain a knowledgeable person pursuant to section 4 of the *Act* to prepare a report on matters relevant to the complaint.

BCFIRB staff will contact you regarding the next steps in this complaint.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in cursive script that reads "D. E. Stancil".

Daphne Stancil, Presiding Member