



May 8, 2015

File #14-08

DELIVERED BY EMAIL

Denis Harvey
[REDACTED]
[REDACTED]

Dear Mr. Harvey:

COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* – REQUEST FOR RECUSAL OF PANEL MEMBER

I am writing in response to your letter of May 6, 2015, in which you express concerns regarding my background in terms of my participation as a member of the panel scheduled to hear your complaint. The issue for the BC Farm Industry Review Board (BCFIRB) in that complaint is whether the manure management practices of a nearby dairy farm – HS Jansen and Sons Ltd. – in Armstrong accord with “normal farm practice”.

You request that I “not be a member” of the panel for the following reasons:

It appears that Mr. Dolberg has spent much of his professional career promoting the interests of the dairy producers in BC, including serving at some as the Manager of the BC Milk Producers Association. While Mr. Dolberg is no doubt well qualified as an expert in agricultural matters and particularly with respect to dairy farm practises, it appears to me that his experience with the Dairy Producers, and as lobbyist for the agricultural industry generally, could cause him to view and consider all evidence presented in the hearing through the filter of that experience and deny him the appearance of impartiality and objectivity required by the principles of natural justice.

Allegations of bias against BCFIRB members go to the core of this board’s ability to function as a quasi-judicial decision-making body and are taken very seriously. As background, please see the attached previous decisions of BCFIRB regarding such matters:

- *K&M Farms and Ireland Farms v. BC Turkey Marketing Board*, August 26, 2004;
- *Saputo Inc. et al v. BC Milk Marketing Board*, September 26, 2008; and
- *Edward Baran et al v. Country Drive Poultry Farm Ltd. et al*, March 3, 2012.

Please also note in *Edward Baran*, the references to *Eckervogt v. British Columbia*, 2004 BCCA 398, *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394 and other court decisions which I do not intend to repeat here. I can advise that I have reviewed your request in the context of the above referenced decisions and the accepted common law test which

requires the allegation of bias to be examined from the perspective of an informed person, with the necessary information, viewing the matter realistically and having thought the matter through.

As noted in *Saputo*, there are circumstances where a BCFIRB member may decide to recuse him or herself from a proceeding. In this case, however, the concerns you have laid out in your letter are more akin to the issue outlined in *Edward Baran*. You provide no evidence that I have had any direct involvement in the issue identified in your complaint or with the parties involved, and I can certainly confirm and assure you that I have not. Rather, your concerns seem to arise solely from my past employment with farm organizations and not something more. I note also that I have not worked for the dairy sector since 2003 and left the employ of the BC Agriculture Council in 2011.

I am satisfied that an informed person would require something more than merely demonstrating prior employment in the same industry before there could be a finding of a reasonable apprehension of bias. In my view, a party would need to show something in the nature of a personal relationship, some conduct on the part of that panel member or previous direct involvement in the issue being considered which may lead an informed person to conclude that a perception of bias exists, as occurred in the *Saputo* situation.

In order for BCFIRB to carry out its statutory mandate under the *Farm Practices Protection (Right to Farm) Act*, its membership must be knowledgeable about the agricultural sectors affected by BCFIRB decisions. This is especially so in the farm practices complaint process where the subject matter of what is being adjudicated is whether the complained of practices are “normal farm practice” and where what is “normal farm practice” involves a consideration of the practices of similar farms in similar circumstances.

My agricultural sector expertise is one of the reasons why I sit as a member of BCFIRB. However, and as clearly outlined in *Edward Baran*, it is incumbent upon all members of BCFIRB to hear and decide “in a fair and unbiased manner and to bring an impartial mind to bear on the case”. There is no reasonable indication that I cannot and will not do so in this case.

Given all of the foregoing, I have concluded that your concerns about bias are not well founded on the evidence and therefore decline to recuse myself from the panel hearing your complaint. It was, however, appropriate for you to bring your concerns about such an important question to the attention of BCFIRB and myself in the first instance and I thank you for doing so.

Yours truly,



Andreas Dolberg
Vice Chair

Attachments

cc: Dale Jansen
HS Jansen and Sons Ltd.