

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM THE OPERATION OF A BERRY FARM
IN THE MUNICIPALITY OF CENTRAL SAANICH, BRITISH COLUMBIA

BETWEEN:

LOIS MARION MCLEOD
ALAN AND WANDA LAMBETH

COMPLAINANTS

AND:

RICHARD AND PAMELA ENGQVIST

RESPONDENT

AND:

SOUTH VANCOUVER ISLAND DIRECT FARM MARKETING ASSOCIATION

INTERVENER

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Sandra Ulmi, Panel Chair
Garth Green, Member
Dave Merz, Member

For the Complainants

L. John Alexander, Counsel

For the Respondent

G. David Shaw, Counsel

For the Intervener
South Vancouver Island Direct Farm
Marketing Association

Phil Christensen

Date of Hearing

January 31, February 1, 2007

Place of Hearing

Sidney, British Columbia

INTRODUCTION

1. Under the *Farm Practices Protection (Right to Farm) Act (Act)*, a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to the British Columbia Farm Industry Review Board (BCFIRB) for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, BCFIRB is of the opinion that the odour, noise, dust, or other disturbance results from a normal farm practice, the complaint is dismissed. If the practice is not a normal farm practice, BCFIRB is empowered to order the farmer to cease or modify the practice.
2. This complaint was initiated by Lois M. McLeod by way of letter to BCFIRB on July 4, 2006. Submissions were also received at that time from Al and Wanda Lambeth, and Larry and Elizabeth Smith. The complaints were in relation to the noise from a propane cannon and four audible bird scare devices used on the Engqvist farm which borders the property of Ms. McLeod. The Complainants maintain that the Respondents' farm practices do not meet provincial guidelines with respect to distances and volume and therefore are not normal farming practices.
3. The Respondents' position is that the bird scare devices are used to protect and maximize the farm's yield from their crops and that their use is a normal farming practice.
4. The Complainant made an application on November 7, 2006, to have Al and Wanda Lambeth included as Co-complainants. The Respondents did not agree to this request and it was forwarded to the BCFIRB Panel for a decision.
5. On November 21, 2006, the Respondents applied to have the complaint dismissed on the grounds that the farming practices in question have repeatedly been ruled a "normal farming practice" and that the province has issued guidelines which the farmer has endeavoured to follow. Therefore, the Respondent requested a Summary Dismissal of the issue at hand as trivial and vexatious.
6. By way of a letter sent to the parties on December 6, 2006, a BCFIRB Panel allowed the Lambeths to be added as Co-complainants and denied the application for Summary Dismissal.
7. Intervener status was requested and granted to the South Vancouver Island Direct Farm Marketing Association to attend the hearing and present evidence.
8. The matter proceeded to hearing on January 31 and February 1, 2007 in Sidney, BC.

ISSUE

9. Is the noise generated from propane cannons and noise from audible bird scare devices from the Engqvist Farm in accordance with normal farm practice?

GROUNDS

10. The following grounds were provided by the Complainants:
 - a. The use of propane cannons and audible bird scare devices is not a normal farm practice in Central Saanich.
 - b. The bird scare devices are being used in contravention of Ministry of Agriculture and Lands (Ministry) guidelines:
 - c. Distance of the cannons to neighbouring residences
 - d. Frequency that the cannon is fired.
 - e. The devices are used from 6:00 a.m. – 9 p.m., at 5-minute intervals for up to 2-3 hours.
 - f. Some days the use of the cannon and the audible scare devices is continuous.

REMEDY

11. During the pre-hearing conference, the Complainants' counsel advised that the Complainant sought the following remedies:
 - a. A cessation of all noise devices.
 - b. A declaration that they (noise devices) are not considered normal farming practices for Central Saanich.
 - c. That netting be used as an alternative.

12. At the conclusion of the hearing, the Complainants' counsel described the remedies being sought as follows:
 - i. Eliminate the use of cannons and other category "A" bird scare devices
 - ii. Limit the number of other category "B" audible bird scare devices (screechers or speakers) to one for the 2007 growing season.
 - iii. Limit the use of the audible bird scare device to locations that are more than 100 m. from any residence not on the subject property.
 - iv. Move the audible bird scare device at least once every 4 days to an alternate location.
 - v. Otherwise, comply with the guidelines in the Wildlife Damage Control document No. 870.218-59, Ministry of Agriculture and Lands, May 2006.
 - vi. Implement a netting program to begin this 2007 season, and to be completed by the 2008 ripening season.
 - vii. Cease using audible bird scare devices by the 2008 ripening season, unless the Respondents can demonstrate good reason to BCFIRB why a netting program has not or will not provide adequate protection for commercially viable production crops, and the Board modifies this Order accordingly.

13. Although the remedies sought were described somewhat differently at the conclusion of the hearing than at the pre-hearing conference, they are substantially similar, and in the Panel's view, mainly a refinement of the Complainants' original request. Each of these issues was addressed during the course of the hearing. Therefore, the Panel does not feel there has been any unfairness to the Respondent by virtue of the remedy sought being refined as noted above.

FACTS

14. The properties along Hovey Road in Central Saanich are in general, long, narrow, 10-acre parcels with approximately 300 feet of frontage along Hovey Road. They are all in the Agricultural Land Reserve (ALR).
15. The Complainant, Lois Marion McLeod, purchased her 10-acre property at 1448 Hovey Road in Saanichton, in 1989. Her father, who is 95, lives on the property with her. Ms. McLeod has developed the property into a hobby farm with a paddock, a barn and a riding ring for horses. In 1990, she moved a trailer onto the property with the idea of running it as a Bed and Breakfast operation. She presently boards four horses on her property.
16. Wanda and Al Lambeth, Co-complainants, have lived at 1542 Hovey Road on a one-acre property since June 2004. They also board horses on their property. Theirs is the only 1-acre parcel of land on this road.
17. Richard and Pamela Engqvist, the Respondents, reside on a 10-acre property called Silver Rill Berry Farm located between the Co-complainants. They have 34 cherry trees that line their driveway. In addition, they grow berries such as currants, gooseberries and blueberries on approximately 2 acres of the land. The Engqvists sell the cherries and berries and make products such as jams, jellies and concentrates which they sell through direct farm marketing and to restaurants. Mr. Engqvist is employed full time off the farm at Benson Industries.
18. In 2005, the Engqvists purchased a propane cannon, a crop protection device used to scare birds, and used it briefly that year to test the machine. After the cherries were finished and the birds disappeared, the cannon was shut off. In 2006, the cannon was used starting on June 25th. The propane cannon is primarily used to protect the cherries. Other bird scare devices are also used on the farm including streamers, pie plates, a scare-kite and an owl decoy.
19. In addition to the propane cannon, the Engqvists have four audible bird scare speakers or “screechers” which they placed along their driveway. These devices make a loud sound like a bird in distress to scare the birds away.

KNOWLEDGEABLE PERSON’S SUBMISSION

20. BCFIRB called upon Mr. Brent Warner, employee of the Ministry of Agriculture and Lands, as a knowledgeable person under section 4 of the *Act* to present his perspective on the issue under dispute. Mr. Warner is the Industry Specialist with the Ministry of Agriculture and Lands and the past secretary of the North American Farmers Direct Marketing Association. He graduated from the University of Guelph, (BSc. Agr.) as an environmental biologist in 1977. Prior to beginning a career with Agriculture Canada, he was the assistant production manager of one of the largest ornamental nurseries on Ontario. His career spans over 30 years of working with farm families across North America.

21. As background, Mr. Warner stated that 10-acre farms on the Saanich Peninsula can be very viable, grossing up to \$100,000 per year. He noted that the Hovey Road area is very productive and was the site of the largest orchard on Vancouver Island. Mr. Warner is very familiar with the Engqvist farm, having visited it many times, and has been involved with Pamela Engqvist through direct farm marketing since the 1980's. He stated that in his opinion, Ms. Engqvist is a small, but legitimate farmer and processor and is very active in the industry.
22. Mr. Warner noted that in 1980, there were no blueberries on the Peninsula and birds were not a problem. There are now a lot of blueberries and consequently, a lot of birds. He stated that a farmer can lose one quarter of their crop in two days to birds.
23. He noted that the use of propane cannons to scare away birds is an issue and while cannons are acceptable on larger acreages, they are a problem on smaller farms. In the short term, Mr. Warner said that cannons can work, but the long-term solution is netting. He stated that on smaller plantings, up to 10 acres, netting pays for itself and "is the way to go". Mr. Warner noted that there is one blueberry farm netted and one being netted out of the six blueberry farms in the area. He stated that as nets become used on other farms around the Engqvists, cannons are no longer going to work because out of necessity, the birds will be forced to feed on the Engqvist berries.
24. When questioned about the need to shoot birds which become trapped in the nets, Mr. Warner stated that the nets have improved and don't catch many birds anymore.
25. Mr. Warner noted that the Engqvist farm is complicated to net because of the large cherry trees which line the driveway and are not adjacent to the berries. This makes netting more complicated and more expensive than a two-acre block of berries. He mentioned that the Engqvist cherries are not healthy and that the configuration of their planting with 17 trees lining each side of the driveway is not efficient and not standard farming practice. Mr. Warner noted that the lifespan of cherries on the Saanich Peninsula is limited. In his opinion, cherries are not financially viable as there is too much rain and too heavy a soil in this area. He also stated that because of the two crops on the Engqvist farm – cherries and berries - which ripen at different times, the propane cannon is used for a longer time than with a single crop.
26. When asked about bird screechers, Mr. Warner stated that they are not common on Vancouver Island, but are common in the Okanagan and in the Fraser Valley.
27. Mr. Warner was aware of the issue between the neighbours and the Engqvists and was called by the neighbours last summer to help resolve the issue. He thought that he had negotiated a solution to the problems between them and that the Engqvists were moving to netting their crops in the future.

SUBMISSION OF THE COMPLAINANTS

28. The Complainants state that this is not the usual urban/rural conflict, but rather a rural/rural conflict in this area of Saanich where hobby farming is the "traditional" use of the land with equestrian usage being the most common. They argue that it is the crop

farms which are new and that bird scare devices create a danger to the horses and their owners. They question whether a 10-acre farm farming crops only on approximately two acres is in reality a farm business.

29. The Complainants introduced a map showing the properties along Hovey Road. The map has circles placed around each property adjoining the Engqvists showing 100 and 150 meter distances from each residence. The distances are taken from the BC Ministry of Agriculture and Lands document for South Coastal BC Wildlife Damage Control (May 2006). This document gives guidelines for the placement of Category A devices such as propane cannons and Category B devices such as audible bird scare devices from surrounding residences. The allowable distance for the Category A devices is 150 meters and Category B devices is 100 meters. The Complainants argue that the map illustrates that the only position the propane cannon can be placed and be within the guidelines is at the back of the Engqvist property, behind the barn, far away from the cherries it is to protect. They argue that the Engqvists are unable to relocate this device every 4 days as the guidelines recommend, because there is no other place where it can be moved and be within the guideline recommended distances from neighbouring residences.
30. The Complainants also used the map to demonstrate that the placement of the bird scare devices along the driveway is not according to the provincial guidelines as they are within 100 meters of both the Gower and Smith residences.
31. They argue that the use of four bird scare devices is contrary to the provincial guidelines which state that farmers “should operate as few as possible on a given farm site up to a maximum of one device per two hectares of cropland at any one time.” They state that the Engqvists are farming less than two hectares of cropland and therefore, should only have one audible bird scare device.
32. The Panel heard a great deal of evidence about the impact of the propane cannon and the bird screechers on the Complainants. Ms. McLeod stated that the screechers began in 2004 and were used continuously from dawn to dusk creating a nerve-wracking noise. In 2005, the cannon was first used in addition to the screechers. She stated that she was injured when the cannon went off 70 feet from her barn startling her horse. She explained the impact of the noise on her health-wise, with increasing tension; financially, because she cannot run her Bed and Breakfast as planned or breed horses as she would like to; and socially, as having friends over is difficult and she cannot get respite care for her 95 year old father who lives with her.
33. Wanda and Al Lambeth stated that they have lived on their property on Hovey Road for three years and have never met Richard Engqvist or the Engqvist daughter and have no personal issues with them, but merely want to enjoy their home. They stated that the audible bird scare devices started in June and continued daily for seven weeks. The four devices are placed along the Engqvists’ driveway and face the Lambeth house making them very loud. They say they go off continually and the sound is so loud that it causes them headaches and makes them grind their teeth. When the cannon started for the first time, the Lambeths called the police as they thought it was a gun. They note that the cannon is sporadic, causing a startle reflex, as opposed to the constant noise of the bird scare devices, which causes tension. The Lambeths state that they have never been given

notice about the times and usage of the cannon or screechers. They note that they have three horses and must sedate the thoroughbreds because of the noise.

34. Ruth Lafontaine gave evidence that she boards three horses on the McLeod property but that she cannot use the ring when the cannon is being used and cannot let her daughter work in the barns because it is too dangerous when the horses are startled. She stated that she will have to move her horses out this summer if the cannon continues.
35. The Panel heard evidence from Elizabeth Smith who lives next door to the Engqvists on a 10-acre property where she has resided since 1997. She stated that she has chosen to avoid confrontation because she “didn’t think she had any rights”. She said that the audible bird scare devices give her a headache, as there is no relief from the sound. She also stated that when she spoke to Richard Engqvist about the placement of the cannon that he admitted that it was not within the guidelines. Ms. Smith said that she believes that the birds are desensitized to the cannon and that it does not seem to do any good. She also said that if she thought that the Engqvists were serious about going to netting over the next two years that she wouldn’t be here.
36. Cathy McLeod, daughter of Lois McLeod gave evidence that she occupied the mobile home on McLeod’s property but found the impact of the audible bird scare devices unbearable and has moved to get away from it. She stated that it is unsafe to be in a stall with a horse when the cannon is being used due to the possibility of the horse being startled and being trapped. She noted that eight of the homes on Hovey Road have horses and that the Saanich Peninsula has the highest population density of horses in North America.

SUBMISSION OF THE RESPONDENT

37. The Respondents stated that Pamela (Fox) Engqvist grew up on Hovey Road, that her family owned much of the farmland in the area, and that until a year ago, her brother still ran the original family dairy farm. The Engqvists believe that 10 acres is a legitimate farm and stated that Ms. Engqvist makes her livelihood from the land and must produce \$2,500 in income to retain her farm status with the BC Assessment Authority. The Engqvists also noted that berries have historically been grown in this area and that hobby farms have come along more recently. Ms. Engqvist is a member of the South Vancouver Island Direct Farm Marketing Association and a member of the Peninsula Agriculture Committee.
38. Richard Engqvist gave evidence that they have been growing berries since 1989 and grow mainly currants and gooseberries and are the largest growers of these unique berries on the Peninsula. He noted that these are not table berries but are used for further processing and that restaurants are their biggest buyer. He said that their intention is to expand the cherry trees and plant approximately 1 acre in dwarf cherry trees that would be possible to net.
39. Mr. Engqvist stated that birds have increased over the last four to five years. They are not a problem for the currants and gooseberries, but are a problem in the one-quarter acre plot of blueberries and in the 34 cherry trees that line his driveway. The Engqvists started

using audible bird scare devices in 2004. In 2005, they had a bird disaster and lost most of their cherries. For this reason, they purchased a propane cannon and tested it 8-12 times in 2005.

40. According to Mr. Engqvist, the use of the cannon was started on June 25th in 2006 and, at that time, it was not 150 meters from the Smith's house. When the formal complaint was lodged, he moved it to be in compliance. He uses it for about four weeks in the cherry season and two to three weeks in the rest of the berries. However, it is primarily for protecting the cherries. He said that 48 hours after turning off the cannon on July 8th there was not a single cherry left on the trees.
41. Mr. Engqvist stated that that he did not know that the audible bird scare devices were a problem and the first that he heard of the problem was in July 2006 at the time of the Lambeth wedding. He said that altering these devices is not a problem, as he can turn them down or turn them to face in a different direction.
42. Mr. Engqvist argued that the number of audible bird scare devices he uses does follow the guidelines because he only has one device, but four speakers.
43. Mr. Engqvist said that they are thinking of using netting for the cherries and blueberries, but that at \$6,000 - \$10,000 per acre it is expensive. It also has other drawbacks such as trapping birds that then have to be killed.
44. Mr. Engqvist admitted that he did not have a predation management plan but would probably look at one. He stated that he did agree with the provincial guidelines for the use of bird scare devices.
45. Pamela Engqvist stated that they were first aware of the complaint against them when Brent Warner came to the farm on June 26, 2006. She said that they have always been willing to discuss netting their crops but do not think it is the only solution.
46. Ms. Engqvist argued that they must use the audible bird scare devices to protect their crops, saying, "don't make it any harder for us". She stated that the devices have been run on photocells which mean that they come on when it is light, which may fall outside the guidelines. Ms. Engqvist stated that she won't do that again.
47. She stated that she can't give the neighbours notice when the cannon will be used as it depends on when the birds arrive and the weather. Ms. Engqvist stated that the total time the cannon was used in 2006 was 12-13 days for a total time of about 27-32 hours. She is now considering putting up a sign to let people know when it will be used.
48. The Panel heard evidence from Maryanne Middleton, a neighbour residing across the street from the Engqvists at 1511 Hovey Road. Ms. Middleton stated that she has a thoroughbred horse farm and raises hay. She boards six to eight horses of her own and breeds horses. She stated that the audible bird scare devices and the propane cannon have had no impact on her horses and that in her opinion, horses adapt very easily. Ms. Middleton did agree that her residence is more than 500 meters from the Engqvist barn and that she cannot see the Engqvist's residence from her barn.

SUBMISSION OF THE INTERVENER

49. The South Vancouver Island Direct Farm Marketing Association (Association), an organization of approximately 80 members, made a submission to the Panel. Mr. Phil Christensen represented the Association at the hearing.
50. A letter written by Dan Ponchet, President of the Association, and presented to the Panel stated the Association's support for the Respondent for the following reasons:
 - a. Silver Rill Berry Farm is an active, productive, working farm operating within the Agricultural Land Reserve.
 - b. The basis of the complaint against Ms. Fox is a normal farm practice needed as an option for crop protection.
 - c. This practice is recognized by the Province and governed by Provincial guidelines.
 - d. Our organization is made up of many small farms. This does not make them lesser farms. They are entitled to the same protection afforded larger acreage. Slight modification of the guidelines may be necessary. This is the reality on the Saanich peninsula.
 - e. Our members work hard, farming is their vocation and their life. They live in the country, not for ambiance, but to work the land. Birds are a problem for Pam's farm for a few weeks per year. Compliance with the guidelines should be the answer to this complaint. The benefit of the doubt in any dispute must go to the farmer.
 - f. Netting is not a panacea. Birds, including protected species often get entangled, injured, and require euthanasia. No birds die using Audible Bird Scare devices. Also, netting is very expensive to purchase, operate, and maintain.
51. The Association also felt that any restrictions imposed by BCFIRB will encourage more complaints and the cost of defending a complaint can bankrupt a farmer.
52. Mr. Christensen stated that the Association believed that the Respondent was acting in accordance with the provincial guidelines in relation to her use of the bird scare devices and the propane cannon.

DECISION:

53. Resolving a complaint under the *Act* involves a two-step analysis. First, the Panel must be satisfied that the Complainants are aggrieved by odour, dust, noise, or some other disturbance emanating from a farm operation. If the Complainants fail to establish that they are aggrieved, the complaint must be dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice. If, however, the Panel finds that the initial threshold question has been met, it must go on to make a determination as to whether the grievance results from a normal farm practice.
54. Section 1 defines "normal farm practice" as follows:

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
- (b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

55. In determining what is meant by “normal farm practice”, the Panel looks to whether a particular practice is consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. This involves an examination of industry practices weighed with factors such as the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, the nature of the disturbance, and the size and type of operation that is the subject of the complaint.
56. In this case, the Panel is satisfied that the Complainants have met the threshold of demonstrating that they are aggrieved by the Respondents’ farm management practices relating to the use of a propane cannon and noise from audible bird scare devices. The location and proximity of the Complainants’ homes to the operation of the cannon and bird scare devices, the ongoing nature of their complaints, and the magnitude of the disturbance all demonstrate sufficient personal interest in the subject matter of the complaints. Having found the threshold question met on these issues, the Panel must determine whether the Respondents’ use of bird scare devices and a propane cannon is normal farm practice.
57. In general, the use of audible bird scare devices and propane cannons to combat bird predation of agricultural crops is a common industry practice in BC. However, the BCFIRB in the *Wright s. Lubchynski* decision of August 12, 2002, recognized that account must be taken of the fact that the “management of the [bird scare device], that is the placement, number, direction, time and frequency of firing, can be affected by the proximity of neighbouring residences or the geography of the areas”. The Panel shares this view.
58. The Complainants state that it is the cannon that is the crux of their complaint. Therefore, we will first deal with the use of the cannon. In this case, the properties along Hovey Road are long narrow lots with a small frontage along the road. This creates a site-specific situation where the residences are much closer together than might be expected on ten-acre parcels. Meeting the South Coastal BC Wildlife Damage Control guidelines of the Ministry for placement of the propane cannon at 150 meters from any residence is difficult in this situation, and it is almost impossible to move its location to an effective position every four days as recommended by the guidelines. The Panel accepts that, while not the only indicator of normal farming practices, these guidelines offer a good indication of normal farm practices and provide easily understood rules for farms to follow when using cannons and bird scare devices.
59. The Panel heard a great deal of evidence from both the Complainants and Respondents in respect to normal farming practices in the area. The only other farm besides the Engqvists identified as using a propane cannon on the Saanich Peninsula is that of the spokesperson

for the Intervener, Mr. Christensen. He uses one propane cannon on his twelve and a half acre farm. He stated that most of his farm is at least 150 meters from neighbouring residences and that it would be difficult for him to place the cannon closer than 150 meters to any of them. Nonetheless, Mr. Christensen spoke to his neighbours before using the cannon to explain to them what he was doing and why the cannon was necessary. He does not use any other audible bird scare devices.

60. The Panel had the benefit of evidence about normal farm practice from a knowledgeable person, Mr. Brent Warner. He stated that while cannons may be a solution to bird predation on large acreages, they create problems on small farms. It was his evidence that netting was “the way to go” in this situation and that netting paid for itself. Mr. Warner admitted that the large cherry trees would be difficult to net and that the configuration of the farm with the cherry trees situated along the driveway makes netting of them more costly than a block of trees would be. However, he felt that it was still a viable alternative and that the Engqvists’ small plot of one-quarter acre of blueberries would be easily netted. It was also his opinion that cherries are not a viable crop on the Saanich Peninsula. While the Respondents said that they had considered netting, they could produce no cost figures of doing so, nor any concrete plan for netting in the future.
61. The Panel agrees with the Respondents that propane cannons, used in conjunction with other control measures, can be effective tools in the prevention of bird predation of crops. However, it is equally clear from this hearing that the use of cannons can have a very real impact on the neighbourhood. In this case, the Panel accepts the Complainants’ evidence that the geography of the area makes it almost impossible to use the cannon in accordance with the guidelines and when doing so, places the cannon in an ineffective position far from the cherries it is attempting to protect. The Panel accepts that what might be a normal farming practice of the use of a propane cannon on a larger farm or one situated further from neighbours, is not a normal farming practice in this case because of the proximity of the neighbouring residences and the configuration of the lots in this area.
62. We will now turn to the use of audible bird scare devices. The evidence given by the Complainants indicated that of nine farms contacted on the Saanich Peninsula, only one of these farms uses an audible bird scare device. The evidence of the Respondents indicated of the eight farms they contacted, three farms use audible bird scare devices and three others use starter pistols. The Panel accepts that the use of audible bird scare devices on the Saanich Peninsula is a normal farming practice.
63. The Complainants state that there are four audible bird scare devices on the Engqvist farm while the guidelines state that farmers “should operate as few as possible on a given farm site up to a maximum of one device per two hectares (4.94 acres) of cropland at any one time”. This would mean that the Engqvist farm of approximately two acres of cropland should have one device. The Respondents argue that there is really only one device but it has four outlets with speakers. The Complainants argue that these speakers are in fact “devices” as the ministry guidelines refer to the separation distance between the “device” and neighbouring properties. They state that this must mean the separation between the sound producing part of the “device” and not the “control unit” which does not make any sound, or the guidelines could not be applied. The Panel accepts the

argument of the Complainants that in this case, the four speakers creating the bird scare sounds are operating as four devices and that a property of this size should have only one bird scare device. If the speakers were placed together in one location, creating only one source of sound, the Panel would consider it one device. In reaching this conclusion we note that the determination of whether a multi-speaker unit is operating as one or more “devices” for the purposes of the guidelines will be a question that must be considered on the facts of each case. Further, we recognize that the guidelines are not legally binding on the Panel, and the Panel is free to depart from them when deciding what is normal farm practice in terms of number of bird scare devices for a farm of this size. However, we consider the guidelines reasonable and helpful, and appropriate to apply in these circumstances.

64. The Panel heard evidence from the diary kept by Ms. McLeod that the audible bird scare devices were used at times outside the guideline recommendations. This was confirmed by Ms. Engqvist who stated that that the screechers were on photocells which come on when it is light and therefore may fall outside the guideline times.
65. In the Panel’s opinion, the first step in bird predation control should be a Wildlife Predation Management Plan which will give the Respondents more concrete information on the type and number of birds preying on the crops, their predation patterns, and an action plan for effective bird control. The Respondents’ evidence is that they have thought about a plan but have nothing on paper or anything concrete.
66. During the hearing, the Panel became aware of the high level of animosity and ill will among some of the parties and would like to note that where a farm business is conducted in close proximity to other neighbours, all parties need to compromise. Residents in the area cannot expect to completely avoid the noise disruption of normal farming practices such as bird scaring devices or expect the farmer to bear the crop loss alone, or to immediately incur the cost of netting. Farmers creating noise must also take their neighbours into consideration. A reasonable level of dialogue and compromise among all the area residents would have gone a long way to avoiding the escalation of this issue. Even though the panel is ordering the farm to modify its practices to comport with normal farm practices in these circumstances, all neighbours must realize and accept that some disturbance will inevitably continue to occur. That is something that is to be expected and which must be accepted under the terms of the *Act*.

ORDER

67. Given that we have found a breach of the *Act* insofar as the farm management practices complained of result in excessive noise, s. 6(1)(b) of the *Act* confers upon the Panel the jurisdiction to order the farm to modify the practice in the manner set out in the order, to be consistent with normal farm practice. Normal farm practice with respect to this issue requires the implementation of reasonable measures to attempt to mitigate these complained of practices.
68. Accordingly, the Panel orders the Respondents to modify their farm management practices as follows:

- i. Cease use of the propane cannon.
- ii. Ensure that there is only one audible bird scare device (in the sense that sound emanates from only one location, even if multiple speakers are placed at that location); that it is used between dawn and dusk or 6:30 a.m. and 8:00 p.m., whichever is less; and that the audible bird scare device is at least 100 meters from neighbouring residences in accordance with provincial guidelines listed in the Wildlife Damage Control document, No. 870.218-59, Ministry of Agriculture and Lands, May 2006.
- iii. Create a Wildlife Predation Management Plan. This plan is to be filed with the BC Farm Industry Review Board within 60 days of this decision with copies provided to the Complainants.

Dated at **Victoria, British Columbia**, this **28th** day of **March 2007**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by:)

Sandra Ulmi, Panel Chair

Garth Green, Member

Dave Merz, Member