

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 USE OF PROPANE CANNONS ON
A BLUEBERRY FARM IN SURREY, BRITISH COLUMBIA

BETWEEN:

JIM McMURTRY

COMPLAINANT

AND:

SNP BLUEBERRY FARM LTD.
AND
SEKHON BLUEBERRY FARM LTD.

RESPONDENTS

AND:

BAN THE CANNONS
AND
BC BLUEBERRY COUNCIL

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Suzanne K. Wiltshire, Presiding Member
Ron Bertrand, Member
Dave Merz, Member

For the Complainant

Jim McMurtry

For the Respondents

Purdip Sekhon

For the Interveners

Ban the Cannons
BC Blueberry Council

Don Gibbs
Will Van Baalen

Date of Hearing

October 27, 2009

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The respondents, SNP Blueberry Farm Ltd. and Sekhon Blueberry Farm Ltd., conduct blueberry farming operations in Surrey, British Columbia on farm sites running along the south side of Highway #10 on either side of 168 Street in west Cloverdale. SNP Blueberry Farm Ltd. is owned by Mr. Karnail Sekhon, Mr. Himmat Sekhon and their respective wives. Sekhon Blueberry Farm Ltd. is owned by Mr. Baldev Sekhon and his wife. The blueberry farming operations in this location are collectively referred to as the Sekhon blueberry farm in this decision. The farm sites are located in the Agricultural Land Reserve and zoned agricultural.
2. The complainant, Mr. Jim McMurtry, lives to the north of Highway #10 on 167 Street in Surrey in a residential subdivision. His residence is located some 350 metres from the nearest blueberry field edge and at an elevation approximately 20 metres higher than the field. He complains that noise resulting from the Sekhon blueberry farm's use and management of propane cannons makes living in his otherwise quiet neighbourhood very difficult from 6:30 a.m. to 8:00 p.m. every day for three months of the year.
3. The complaint was received by the British Columbia Farm Industry Review Board (BCFIRB) on July 14, 2009. The complaint alleges that the propane cannons on the Sekhon blueberry farm are not being operated in compliance with provincial guidelines.
4. The respondents' position is that their use of propane cannons as part of the bird predation management practices of the farm is in keeping with normal farm practice and in compliance with the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131 (the *Act*).
5. BCFIRB retained Mr. Mark Sweeney, P.Ag., Berry Industry Specialist, Ministry of Agriculture and Lands, as a knowledgeable person pursuant to section 4 of the *Act*. Mr. Sweeney conducted a site visit on September 25, 2009. He then prepared a report (KP report) assessing the bird predation management practices on the two farm sites, and in particular the operation of propane cannons. His report was issued to the parties on September 28, 2009.
6. The Ban the Cannons group and the BC Blueberry Council were each granted intervener status. The Ban the Cannons group was represented by Mr. Don Gibbs who provided a written submission in support of the complainant. The Blueberry Council, represented by Mr. Will Van Baalen, Executive Director also provided a written submission with respect to its position regarding predatory bird management on blueberry farms in the lower mainland of British Columbia.
7. The complaint was heard in Abbotsford on October 27, 2009. Mr. Sweeney was qualified as an expert witness in the area of bird predation management and blueberry farming operations in the Fraser Valley and testified with respect to his report. Mr. McMurtry, the complainant, testified. Mr. Purdip Sekhon, who also acted as the

representative for the respondents, and Mr. Tom Baumann were witnesses for the respondents.

ISSUE

8. Does the noise arising from the propane cannon use and management practices on the Sekhon blueberry farm result from normal farm practice?

BACKGROUND

Ministry Guidelines

9. The British Columbia Ministry of Agriculture and Lands has published a set of guidelines for the use of audible bird scare devices in south coastal British Columbia. The guidelines, first adopted in 1996, have been the subject of revisions over the years.
10. At the onset of the 2009 blueberry growing season in late June/early July, the June 2008 version of the guidelines continued to be the most current.
11. However, in early 2009 BCFIRB had commenced a review of the use and regulation of propane cannons in the south coastal region pursuant to section 11(2) of the *Act* and conducted several consultation sessions with stakeholder groups with an interest in the issue. While BCFIRB published its report¹ on its review of the use and regulation of propane cannons in May 2009, BCFIRB's recommendations for further revisions to the guidelines were not incorporated by government into the guidelines until August 2009.
12. Thus, the 2009 growing season represents a transition period from the June 2008 version of the guidelines to the August 2009 version of the guidelines.
13. The August 2009 version of the Ministry guidelines² is attached as Appendix 1.

¹ British Columbia Farm Industry Review Board *Review of the Use and Regulation of Propane Cannons in the South Coastal Region*, March 12, 2009 www.firb.gov.bc.ca/reports/Propane/09_May_PropaneCannonReview.com

² Ministry of Agriculture and Lands *Farm Practices South Coastal BC Wildlife Damage Control*, August 2009, at pp. 3 and 4 http://www.agf.gov.bc.ca/resmgmt/fppa/refguide/activity/870218-59_Wildlife_Damage_South_BC.pdf

British Columbia Blueberry Council

14. The BC Blueberry Council's written submission provides information as to its activities and efforts in relation to bird predation management issues and the use of propane cannons.
15. The Council works closely with growers to educate them in the proper use of propane cannons, to educate and encourage growers to use an integrated pest management approach in controlling bird predation and to encourage growers to follow the Ministry guidelines.
16. The Council responds proactively to complaints and works hard to find solutions to bird management issues. It does so by employing a liaison officer, Mr. Nazam Dulat, from May 15 to October 1 each year to respond to any complaints regarding contraventions of the guidelines. It also invests in research to find alternate methods and techniques of bird management to augment propane cannons in an effort to reduce grower reliance on noise deterrents.

Farm Operations

17. The Sekhon blueberry farm sites of interest in this complaint are located on both sides of 168 Street along the south side of Highway #10. The number of homes in the west Cloverdale area has greatly increased with many new subdivisions north of Highway #10. There has also been a change in the type of farming in the area from mostly vegetables to blueberries.
18. The Sekhon farm site to the west of 168 Street, referred to by the respondents and in this decision as farm site #2, is approximately 40 acres. This site is planted to an early maturing variety and the plants are nearing full maturity. Cannons were probably first used on this site in 1996 which was the first harvest year.
19. The Sekhon farm site to the east of 168 Street, referred to by the respondents and in this decision as farm site #4, is approximately 75 acres. This site is planted, running from east to west, to 3 varieties: one-third early maturing; one-third maturing mid-season; and, one-third which is a late variety. It is a relatively young blueberry field in its second year of cropping.
20. Bird Predation Management Plans dated June 29, 2009 were provided to Mr. Sweeney for each of the sites of interest. The plans name Mr. Rajinder S. Cheema as the contact person for the farms and provide a telephone number. They include a map showing areas of severe bird pressure and list the type and number of bird control devices to be utilized in predation management on each site.
21. The propane cannons and other devices were deployed in the fields about July 1, 2009. The propane cannons were operated at the maximum frequency indicated under the guidelines.

Knowledgeable Person

22. Mr. Sweeney is familiar with blueberry farm operations in the lower mainland generally and the Sekhon blueberry farm operations in particular, having visited both farm sites on several occasions over the years. He had visited the farm sites during harvest on July 15, 2009 in addition to his September 25, 2009 site visit. He also met with Mr. Dulat a few days after his site visit and his report records the information Mr. Dulat provided.

COMPLAINANT'S SUBMISSIONS

23. The complainant submits that he is aggrieved by the constant bombardment of noise from the firing of propane cannons on the Sekhon blueberry farm. The complainant states that for approximately the last six years he, his family and his neighbours have found it difficult to live alongside the noise from the propane cannons used on the Sekhon blueberry farm, which is the closest blueberry farming operation to his residence. He says the constant noise has affected his health and the health of his family.
24. The complainant alleges that the Sekhon blueberry farm propane cannons were operated outside the parameters of the Ministry guidelines in the following respects:
- Frequency of firing – Some cannons have been firing at a frequency in excess of that specified in the guidelines.
 - Cannon repositioning – The cannons are not moved every four days as called for in the guidelines and some cannons are stationary.
 - Cannon direction – Cannons are directed to the north toward the power lines along Highway #10 and therefore toward the complainant's subdivision, intensifying the sound.
 - Bird pressure and monitoring – The cannons were operated when there was inadequate bird pressure and damage to justify their use.
 - Cannon concentration – While the total number of cannons appeared to be within the overall density specified in the guidelines, there were more cannons in operation than reported and the cannons tended to be concentrated in certain areas contrary to the guidelines.
 - Time of operation – In late June or early July one cannon fired continuously for two nights until Mr. Dulat was free to come and reset it. Cannons have also continued firing during the noon to 3 p.m. pause.
 - Contact information – The complainant said he was informed by Mr. Dulat that there was no contact address or phone number on the cannons.

25. The complainant submits that the Ministry guidelines establish what is normal farm practice in this case.
26. The complainant says that the respondents' use and operation of the propane cannons is not in accordance with normal farm practice because the cannons on the Sekhon blueberry farm are not operated in compliance with the Ministry guidelines.
27. The complainant submits that the August 2009 guidelines enshrine the principle that cannons are to be used only when justified by bird pressure. He argues that the failure of the respondents to keep a written log of their monitoring of bird presence and pressure is evidence of their failure to comply with the guidelines as is the constant firing of the cannons in the absence of any birds. He also submits that the constant firing of the cannons is not normal farm practice and that it results in the birds becoming habituated to the sound.
28. The complainant submits that there is also a need for someone to monitor compliance with the guidelines. While Mr. Dulat is helpful in this regard, he cannot do it alone.

SUBMISSION OF BAN THE CANNONS

29. The Ban the Cannons Group provided a written submission in support of the complainant. The group submits that the complaint is typical of situations that many of its members experience in the lower mainland area. The group seeks greater restrictions on the use of propane cannons in the west Cloverdale area and the application of the restrictions to all users of propane cannons across the lower mainland.
30. Ban the Cannons submits that there are so many blueberry farms in the area and so many cannons firing that it is difficult to determine if any one cannon is firing within the frequency limits set out in the guidelines and to police their use in accordance with the guidelines. While Mr. Dulat has been somewhat helpful, his impact has been insignificant because of the sheer number of blueberry farms and cannons being used. Municipal bylaw support is ineffective and bylaw officers in Surrey simply refer all complaints to the BC Blueberry Council.
31. The group agrees that an integrated approach must be used to deter birds and that a number of alternatives are necessary. However, it submits that cannons should not be an alternative in more populated areas and should be phased out in such areas. Growers should not rely to the extent they do on propane cannons and cannons should not be used as the dominant device to protect the crop as is the case on the Sekhon blueberry farm and many other farms in the area.
32. Ban the Cannons also submits that cannons have limited effectiveness because birds habituate to the noise, in particular when cannons fire at regular intervals.

33. Ban the Cannons' view is that the new guideline recommendation that cannons only be used when birds are present has much potential for reducing blast count in an area such as west Cloverdale. However, the group submits that as written the guidelines provision will be difficult to monitor and needs to be more specific and be given some "teeth". It makes several suggestions, including that cannons not be started automatically every morning on automatic timers, not be run all day long and not be left firing unattended but that active monitoring be required.

RESPONDENTS' SUBMISSIONS

34. Mr. Purdip Sekhon, a Sekhon family member and its representative, submits that the use of propane cannons as part of the bird predation management practices of the Sekhon blueberry farm is in keeping with normal farm practice. He argues that the respondents follow the Ministry guidelines and that there have been only two to three problems over the years and all were corrected.
35. Mr. Sekhon identifies bird pressure as the main point in issue. He submits that the presence of birds and bird pressure is site specific. He argues the evidence, in particular that of Mr. Baumann and the farm's packer, establishes the presence of birds and bird pressure. Because the complainant may not have seen birds, it does not mean birds are not present. He submits that the respondents would not use the propane cannons if they did not need to in order to protect the crop in response to bird pressure.
36. With respect to the keeping of a written log, Mr. Sekhon submits that it is not a violation of the guidelines to fail to keep a log.
37. Mr. Sekhon submits that the use of propane cannons in combination with other tactics and devices to scare birds is part of normal farm practice in blueberry farming. He submits that the respondents, who were among the first farmers to produce blueberries in the Cloverdale area, have improved their bird predation management techniques over the years. However, the respondents' use of propane cannons is necessary to protect the crop from bird damage.

SUBMISSIONS OF THE BC BLUEBERRY COUNCIL

38. The Council submits that propane cannons are a proven and effective method of bird control especially when rotated within the field and when other scare tactics are deployed. The Council agrees starlings can habituate to any one method if used solely. The Council notes that bird pressures vary considerably between fields. Growers need to continually assess and adjust their bird management plan; no one device is a solution, but all are required to adequately protect crops.

ANALYSIS

39. The complaint was filed pursuant to s. 3(1) of the *Act*. That section provides as follows:

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.

40. A complaint under the *Act* involves a two-step analysis.
41. The panel accepts that the complainant has satisfied the first step of establishing that he is aggrieved by noise as a result of the operation of propane cannons on the Sekhon blueberry farm.
42. Once the initial step has been satisfied, the panel must go on to make a determination as to whether the grievance results from a normal farm practice.
43. Section 1 of the *Act* defines normal farm practice:

"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).

44. The complainant submits that the Ministry guidelines establish normal farm practice in the case of the Sekhon blueberry farm.
45. The panel notes that the guidelines are not "standards prescribed by the Lieutenant Governor in Council" under paragraph b) of the definition of normal farm practice. Nor are the guidelines automatically determinative, without more, of what is normal farm practice with respect to propane cannon use for a specific farm subject to a farm practice complaint under section 3 of the *Act*. That is a determination to be made by the hearing panel in each case.
46. BCFIRB has previously considered the meaning of "normal farm practice" and "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". In determining whether a complained of practice falls within the definition of normal farm practice, the panel looks to whether it is consistent with proper and accepted customs and standards as established

and followed by similar farm businesses under similar circumstances. In making this decision, we necessarily take into account the particular circumstances of the site both on its own and in relation to those around it

47. In an earlier BCFIRB decision (see *Morgan Creek Homeowners Association v Himmat Sekhon dba Sekhon Farm*, October 6, 2000) the hearing panel determined that the Ministry guidelines in existence at that time were proper and accepted customs and standards as established and followed by blueberry farms in Surrey.
48. The Ministry guidelines, as updated from time to time, have since become generally accepted by blueberry growers in the Lower Mainland to constitute the prevailing standards for the use of propane cannons. The BC Blueberry Council encourages growers to follow the Ministry guidelines as revised from time to time. The current guidelines are the standards referred to by the Blueberry Council's liaison, Mr. Dulat, in dealing with neighbour complaints. The panel concludes that, in general, for blueberry farms in the lower mainland the Ministry guidelines represent "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances".
49. Since a complaint under the Act is made with respect to disturbance resulting from a farm operation of a specific farm business, in determining normal farm practice the panel must also consider the relevance of any site specific circumstances of the respondent farm business. The purpose of the Ministry guidelines is to set standards for best management practice in areas of urban/rural interface in the south coastal region and to educate and encourage farmers to adopt the practices set forth. In this sense the Ministry guidelines are a good fit given the Sekhon blueberry farm's location in the west Cloverdale area with its increasing urbanization to the north of Highway #10 and agricultural lands to the south of the highway. The evidence establishes that there is crop damage as a result of bird predation on both farm sites and that there is a need for the use of cannons as a tool in an integrated bird predation management plan as contemplated by the guidelines. The evidence also establishes that the distance of approximately 350 metres between the nearest blueberry field edge and the complainant's residence is well in excess of the separation distance (200 metres) specified in the guidelines. Having considered the particular circumstances of the two Sekhon blueberry farm sites, the panel finds that the Ministry guidelines establish normal farm practice for the Sekhon blueberry farm.
50. The Ban the Cannons group seeks more stringent restrictions on the use of propane cannons than those specified in the guidelines, the application of such restrictions to all blueberry farms in the lower mainland and the gradual phasing out of cannons. Pursuant to section 6 of the *Act*, we are limited to either dismissing the complaint if we are of the opinion that the disturbance results from a normal farm practice, or ordering that the respondent farmer cease a practice that is not normal farm practice or modify a practice to be consistent with normal farm practice. Given our conclusion that the current Ministry guidelines constitute normal farm practice for the farm in this case, we have no jurisdiction to make orders that would be more

restrictive than indicated by the Ministry guidelines. Nor do we have the power to extend an order made against the respondents to other farms.

51. The panel notes that this complaint was brought shortly after the 2009 blueberry growing season commenced and before the Ministry guidelines were amended in August 2009. The panel therefore recognizes that the 2009 season was a period of transition. However, the recommended changes to the guidelines were well known to the industry prior to being incorporated in the guidelines and the evidence received covers the full 2009 season. We have thus considered this complaint in relation to the compliance of the respondents' operations during the entire 2009 season with the August 2009 version of the Ministry guidelines. We have done so to ensure any orders are consistent with the most recent version of the Ministry guidelines since the orders will be applicable to 2010 and later blueberry seasons. In our discussion of specific allegations below we have noted any areas where the earlier 2008 version of the guidelines is materially different.
52. Overall, the fundamental difference between the 2008 and August 2009 versions of the guidelines is the change in the August 2009 version to an approach that requires the farm to strategically manage the use of propane cannons and other devices as part of a bird predation management plan. Simply turning the cannons on and off within the hours outlined in the guidelines is not enough, for example. The farm must also be able to demonstrate that the bird predation specific to its operation necessitates the use of the cannon – as part of an overall predation management plan – even during the hours outlined in the guidelines. Operation of cannons within those limits may, depending on the circumstances, still constitute a breach of the guidelines.
53. Mr. Sweeney was of the opinion that “the farm was generally in compliance with the guidelines.” He did note, however, that there were a few instances where improvement could be made and that there were also gaps in the information provided and differences in observations between the parties resulting in inadequate information for him to form a firm assessment.
54. The panel's view of the evidence is similar to that of Mr. Sweeney. In an overall sense the evidence indicates an attempt on the part of the respondents to meet the guideline requirements. However, that attempt in our view failed in certain respects. That failure appears to be due to the fact that the respondents' actions were directed to meeting the more rule oriented requirements of the June 2008 version of the guidelines. In taking that view, the respondents failed to come to grips with the change in emphasis of the August 2009 version of the guidelines and the need to take a more strategic approach to the management of propane cannons on the Sekhon blueberry farm.
55. We have separately considered each of the areas of alleged non-compliance identified by the complainant. They are discussed below.

Bird Pressure, Monitoring and Designated Individual

56. As noted above, the August 2009 version of the Ministry guidelines reflects a more strategic, outcomes-based approach. Those guidelines provide, in part:

Farmers are responsible for the strategic management of devices, and must take due measures to minimize noise impact on neighbours. To achieve this, farmers:

- should ensure that a Bird Predation Management Plan is completed before the first use of devices in each growing season and that the plan is kept up to date throughout the season. A Bird Predation Management Plan requires that producers monitor bird populations and activity on their properties, utilize a range of approaches or techniques to prevent bird damage, and undertake strategies to minimize both device use and bird habituation to devices;
- should assign an individual who will be responsible for:
 - being familiar with the Bird Predation Management Plan and the terms it establishes for the use of devices;
 - making regular visits to the sites to ensure that devices are functioning properly and that bird pressure is sufficient to justify propane cannon use;
 - ensuring that devices are not operated outside of the hours permitted within the guidelines, and responding promptly should out-of-hours operation be reported.
- should provide the contact information for that individual to [the BC Blueberry Council], and, where their local governments maintain a registry of devices, with their local governments.

57. The previous version of the guidelines only required that devices be used as part of a wildlife predation management plan and a local contact person be established where the owner/operator was not living within a reasonable distance of the farm.
58. The respondents did complete bird predation management plans for each of the farm sites at the start of the season. The evidence also establishes that the respondents used a variety of devices and techniques to prevent bird damage and enquired about and were prepared to try innovative ideas as part of their overall bird predation management strategy. They are to be commended for doing so. Clearly, at the start of the 2009 season, the respondents demonstrated an intention to comply with the then current June 2008 version of the guidelines.
59. However, with the arrival of the August 2009 version of the guidelines, monitoring of bird pressures became critical in order to justify the use of cannons in response to such pressures. The extent of the feeding pressures from starlings on the Sekhon blueberry farm thus became the subject of much of the testimony, some of it conflicting.
60. The complainant said he went by the Sekhon blueberry fields frequently. He saw no one there monitoring the bird presence. While he sometimes saw birds, at other times he could not see any birds but the cannons continued to fire without diminishment.
61. Mr. Sweeney testified that on previous years' visits he had observed that because of the geography and nearby power lines, both farm sites were a heavy bird feeding area. He also indicated that site #4 was likely to experience greater crop damage because

the fields were younger and, without the cover more mature plants provide, starlings had easy access.

62. Mr. Sweeney noted that the bird predation management plans provided to him by the respondents indicated 8 propane cannons would be used, 4 on site #2 and 4 on site #4 as well as various other bird scare devices. As confirmed by Mr. Sekhon at the hearing, the cannons were put into the fields and began operating on July 1 and were set at maximum frequency from the time they were first put into operation. Mr. Sweeney said he was told by the respondents that feeding pressure and damage was heavy necessitating continuous cannon use through the season.
63. Mr. Sweeney noted, however, that in 2009 many other farmers throughout the Fraser Valley had observed that starling numbers were below normal and that they were able to reduce the intensity of cannon use. Mr. Sweeney indicated that while this may not have been the case on the Sekhon blueberry farm, on the day of his visit bird pressure was very light and with more attention to monitoring there may have been other times when cannon use could have been reduced.
64. Mr. Sweeney also noted that while not specifically mentioned in the guidelines, the Ministry's "Integrated Bird Management Factsheet" recommended that cannons be set at the lowest frequency at the start of the season and the frequency be increased if and when bird pressure increased.
65. Mr. Sekhon testified that there was constant bird pressure. He placed much emphasis on the respondents' bird predation management plans that indicated the locations where bird pressure was anticipated to be most severe based upon past experience. He described these areas as the power lines running along the south side of Highway #10 on which the birds roost and areas of grass and bush in the ditch running along Highway #10 and the canal along 168 Street in which the birds shelter and nest. He said the result was heavy bird pressure in the north east corner of farm site #2 and the north west corner of farm site #4 and also bird pressure along the boundaries with both Highway #10 and 168 Street. Mr. Sekhon noted that because site #4 is a young, open field and the crop is clearly visible, bird pressure also comes from the heavily treed area of the Mound Farm which is adjacent to the south east corner of that site.
66. Responding to the complainant's evidence that he did not see any birds, Mr. Sekhon said that the birds are not always up in the sky but in the bush, coming up only to eat and then returning to the bush. He also stated that birds do not feed at specific times. He provided a number of photographs taken in August 2009 and identified these as showing birds sitting on the power lines at the corner of Highway #10 and 168 Street and along Highway #10 and in the air midfield above site #2.
67. Mr. Sekhon also provided a letter from the packer for the Sekhon Blueberry farm indicating that the respondents had significant bird damage in their blueberry crop in 2009, in particular the Duke and Elliott crops which had higher than normal damage in the fruit, much of it due to bird damage.

68. Mr. Sekhon indicated that the cannons were moved to accommodate picking and to deal with heavier areas of bird pressure such as the corner area at 168 Street and Highway #10. On site #4 the cannons were also moved from west to east across the site as the different varieties matured until the cannons became located on the east side about mid August.
69. Mr. Sekhon confirmed that no daily log or record was kept with respect to bird pressures and cannon operations. He said that Mr. Cheema, the contact person for the Sekhon blueberry farm, or another Sekhon family member or an employee were always present onsite and birds were seen coming in and out and fruit damage could be observed from visual inspections. Mr. Sekhon said that he himself was onsite every day during harvest and could see that birds were coming into the fields.
70. As to the statement in Mr. Sweeney's report that others had experienced less bird pressure, Mr. Sekhon stated that bird pressure continued throughout the 2009 season at the Sekhon blueberry farm.
71. Mr. Baumann who appeared as a witness for the respondents indicated he had visited the Sekhon blueberry farm from time to time since 1997 in connection with his consulting work as a crop insurance adjuster. He said that when he visited the Sekhon blueberry farm in 2009 he saw many birds on the wires surrounding the farm, in the ditches and in the area of the railway tracks to the south and that flocks of birds were coming into the two farm sites from these areas.
72. Mr. Baumann also observed that with the removal of more and more bush to the north of the Sekhon blueberry farm over the years there were fewer places for the birds to roost, resulting in lots of birds in the area of the Mound Farm to the south. He indicated that many birds roost in the trees in that location and come into the fields from there.
73. The bird predation management plans for both farm sites designate Mr. Cheema as the contact person for the Sekhon blueberry farm and provide a telephone number. Mr. Sekhon identified Mr. Cheema as his sister's father-in-law and said he was selected to monitor the cannons because he was someone the respondents knew and could rely on and because his farm was next door to the Sekhon blueberry farm and he was available. He said Mr. Cheema would start the cannons each morning, turn them off for the lunch break, turn them back on again for the afternoon and then turn them off at night.
74. With respect to misfiring cannons, Mr. Sekhon stated that Mr. Cheema does not adjust cannon settings but relies on the technology supplier or Mr. Dulat to do so. Mr. Cheema would turn off the misfiring cannon and call either Mr. Dulat or the technology supplier or advise the respondents.

75. The complainant noted that there was no contact information on the cannons, making it difficult to know how to contact the appropriate person if the cannons were not operating within the guidelines.
76. Mr. Sweeney noted in his report that while a person had been designated in the bird predation management plan to be responsible for the cannons, communication appeared to be sometimes difficult and at times the person designated appeared to be slow to address malfunctions.
77. Mr. Sweeney also noted that there appeared to be no active recording of bird pressure and damage.
78. In the panel's view the evidence is insufficient to establish constant bird pressures and thus the need for constant cannon use at maximum frequencies. Nor does the evidence establish that the respondents' actively monitored bird populations and bird activity. While those present or working on the two farm sites may have observed birds, casual observation is not monitoring.
79. We accept the evidence of Mr. Sweeney that bird pressure was light on his one visit. We also accept the evidence of Mr. Baumann that on his visit in 2009 he saw many birds and that they were coming into the farm from various known roosting and shelter locations surrounding the farm. We also accept the evidence of Mr. Sekhon that he saw birds when he was present during harvest. What this evidence demonstrates is that bird pressure could be heavy but that it was not constant. It is difficult to be more precise given the lack of active monitoring or the keeping of records.
80. While the respondents did designate Mr. Cheema as a contact person in the bird predation management plans for the two sites, the respondents seemingly failed to recognize the extent of the designated individual's responsibilities under the August 2009 version of the guidelines and to make appropriate changes. It appears Mr. Cheema was selected because he was a relative and lived next door and that appropriate regard may not have been given to his ability to perform the duties required under the August 2009 version of the guidelines. Mr. Cheema's authority was very limited and restricted to turning the cannons on and off at set times, with problems and issues to be referred to others. While this may have been sufficient under previous versions of the guidelines, it is not sufficient under the August 2009 version of the guidelines.
81. To properly carry out their responsibilities under the guidelines, the designated contact person needs to have proper training and knowledge with respect to the guidelines, and be familiar with the bird predation management plan prepared in accordance with the guidelines. The contact person is not there merely to turn the cannons on and off at the times set out in the guidelines, but to monitor the operation and use of the cannons in the context of bird pressures and to have the authority to

adjust cannon usage in relation to bird pressure with a view to minimizing both cannon use and bird habituation.

82. The designated individual is also to respond quickly and proactively to misfiring cannons. It would therefore be desirable for the contact person to have the technical capability to make adjustments to the firing frequencies, both having regard to bird pressures and to correct misfirings. In the view of the panel, the farm bears fundamental responsibility for its own operations. The reliance of the respondents on Mr. Dulat to adjust cannon frequencies and other cannon malfunctions places an undue burden on the resources of the Council and takes up time Mr. Dulat could more usefully employ in the resolution of complaints. It may also explain why cannon frequencies were set at maximum at the start of the season and not varied.
83. Ideally, the designated individual would also log bird pressures and corresponding cannon deployments, operation times and frequencies, as well as cannon malfunctions and misfirings and any cannon complaints, both for later strategic evaluation as to bird pressures, cannon usage and possible adjustments to the bird predation management plan and to provide a record. While the guidelines do not specifically require that written records be kept, it is difficult to see how the strategic management requirements are to be met – and shown to have been met – in the absence of such record keeping.
84. The 2009 guidelines call for a strategic approach in the management of propane cannons. Turning the cannons on at the start of the season at maximum frequency and continuing to use them constantly at that level does not meet the requirement. It fails to address issues of habituation and variations in bird pressures. The movement of cannons to deal with previously known areas of bird pressure, accommodate picking and because of varying crop maturities appears to be the only consideration given to the management of the cannons. The guideline requirement to undertake strategies to minimize both device use and bird habituation to devices was not in our view satisfied by the respondents.
85. With the arrival of the August 2009 guidelines, a new approach was required and the respondents failed to modify their practices. Their use and management of propane cannons therefore ceased to be consistent with the guideline provisions and could no longer be considered to be within the boundaries of normal farm practice.

Frequency of firing

86. The Ministry guidelines limit firing to one firing every 5 minutes for single shot devices and no more than 11 activations (multiple shots from a device in less than a 30 second period) or a maximum 33 shots in any hour for a multiple shot device.
87. The complainant noted one occasion in late July when the firing frequency was exceeded and Mr. Dulat reported to the complainant another occasion when Mr. Dulat attended to adjust the firing frequency of one cannon and then had to return to readjust it. Mr. Sweeney on his visit in mid-July noted one single shot cannon firing more than once per minute and Mr. Dulat adjusted it. Mr. Dulat advised Mr. Sweeney that this type of malfunction of the single shot cannons did occur from time to time throughout the season, but was rectified by him or the farm staff.
88. Mr. Sweeney observed in his report that the frequency setting mechanism of the single shot cannons is a relatively crude needle valve which can malfunction and since these cannons do not have a timer and must be manually turned on and off, they are prone to human error. We note, however, that the guidelines also provide that farmers are to maintain devices, including timing mechanisms, to ensure cannons operate properly.
89. We conclude the cannons operated on the Sekhon blueberry farm exceeded the firing frequency specified in the guidelines on several occasions. The fact that this was seen by Mr. Sweeney as likely given the nature of the frequency setting mechanism and the opportunity for human error because the cannons are manually turned off and on, does not in our view relieve the respondents from the need to comply with the firing frequency guideline or the requirement to maintain timing mechanisms so as to ensure cannons operate within the guidelines. If cannons utilized on the Sekhon blueberry farm cannot be relied on because of problems with the frequency setting mechanism, then their replacement may be required or increased monitoring may be necessary to ensure misfiring cannons are immediately turned off until they can be properly reset.

Cannon Repositioning

90. The Ministry guidelines provide that farms should alternate or relocate devices at least every 4 days.
91. Mr. Sekhon told us the propane cannons were moved from time to time to deal with areas of bird pressure and to accommodate picking and varying crop maturities. We note, consistent with Mr. Sekhon's evidence, that the bird predation management plans for both sites record that the cannons would be moved "as needed" or every "7 – 10 days". Mr. Sekhon did not dispute the complainant's allegation that the cannons were not moved at least every 4 days.
92. We conclude that the respondents failed to meet the more robust August 2009 guideline. While the previous guideline stated that farmers should try to alternate or

relocate devices at least every 4 days, the revised guideline tells farmers to take that action and not merely “try” to do so.

Cannon direction

93. The Ministry guidelines provide that farmers should point directional devices away from the nearest neighbouring residence or facility and away from nearby roads.
94. The evidence on the direction of cannons is limited and contradictory. The complainant stated one stationary single shot cannon was directed toward the subdivision in which he lives and, more generally, that cannons were directed toward the power lines along Highway #10 and therefore in a northerly direction toward his subdivision. Mr. Sweeney noted in his report that he had specifically discussed cannon direction with the respondents and with Mr. Dulat and was told that the cannons were always directed into the field and never in the direction of the road or residences.
95. We do not find the evidence sufficient to conclude that any cannon was directed toward the road and the complainant’s subdivision. However, we note the guideline and observe that any cannon directed to fire northward toward the complainant’s subdivision and the highway would not be in compliance with the guideline. The complainant’s allegation with respect to the one stationary cannon was fairly specific. With this in mind the respondents will need to check the direction of firing of all cannons to ensure going forward that no cannons are directed toward Highway #10 and the subdivision in which the complainant lives.

Cannon Concentration

96. The Ministry guidelines provide that farms should “operate as few as possible devices on a given farm site up to a maximum of one device per two hectares of cropland at any one time”. Multiple devices are to be placed “at a distance from each other so they are not concentrated within the field and do not exceed the permitted density.”
97. The complainant acknowledged that the total number of cannons appeared to be within the overall density specified. However, he testified that after the crop was picked on site # 2, the cannons from that site were moved to site #4 in late July or early August resulting in more than 4 cannons on site #4 from that time on. The complainant also said that as the crops on site #4 progressively matured and were picked the cannons were moved across the site resulting in an even greater concentration within the site.
98. Mr. Sekhon acknowledged that the cannons were moved around and that this resulted in more concentrated usage in certain parts of each site. However, he stated that the density guideline of one cannon per 2 hectares was not exceeded, although there could for example be more cannons to the west or east in the 75 acres comprising site #4 as the cannons were moved across the site as the different varieties matured.

99. Mr. Baumann noted that because of the size of the two farm sites, the respondents would have been able to use many more than the four cannons per site that they did use. Since he still had to chase birds out of the fields on his visit in 2009, he did not think the respondents were using enough cannons.
100. Mr. Sweeney observed that while the respondents did move the cannons as the different varieties ripened and to allow for picking, he did not see any concentration when he visited the farm in mid-July. He also noted that Mr. Dulat did not agree there was a concentration of cannons.
101. We find the evidence does not support non-compliance with the density and concentration guidelines. We do note, however, that the bird predation management plan for each site indicated the use of only 4 cannons on each site and thus any movement of cannons to site #4 after the crop on site #2 had been harvested should have been indicated in the bird predation management plan either initially as part of the plan for site #4 or at least when it occurred, by way of amendment.

Time of Operation

102. The Ministry guidelines provide that: devices are to be operated only between 6:30 a.m. and 8:00 p.m. local time or dawn to dusk, whichever is of lesser duration; and devices should not be operated between noon and 3 p.m.
103. Mr. Sweeney indicated in his report that no mid-day or after-hours violations were reported to him. At the hearing the complainant said that early in the season one cannon had fired continuously for two nights before Mr. Dulat was available to come and fix it. The complainant also indicated that sometimes cannons continued firing after noon. Mr. Sekhon said that it was Mr. Cheema's responsibility to turn the cannons on and off and that he turned them on in the morning, then shut them off for the afternoon break, then turned them on again until it was time to shut them down for the evening.
104. The panel concludes that with the exception of the one cannon firing through the night early in the season, the guidelines respecting time of operation were generally complied with. No explanation was offered by the respondents for how a cannon could continue to fire into the night and not be shut down if it was being properly monitored and there was always someone available to deal with the cannons. While Mr. Dulat may not have been available immediately to deal with the situation and reset the cannon, the cannon should have been shut down immediately and not restarted until it was reset. Failure to do so is a clear breach of the guidelines.

Other Issues Raised

105. We note that Mr. Sekhon, in describing the high grass and water in the area of the ditch and canal at the corner of Highway #10 and 168 Street as providing a good

shelter site for birds, stated that the respondents cannot spray to control the vegetation here because it is not their property. Mr. Sekhon said the respondents had asked the municipality to clear and cut this area. However, this was not done until mid July, which was too late because it was after the birds had established themselves.

106. We also note the complainant and the Ban the Cannons group raised the issue of lack of response of local governments to complaints of violations of the guidelines.
107. The panel recommends that as part of a comprehensive approach to starling management the parties ask the municipality of Surrey to maintain the ditch and canal areas along the boundaries of the Sekhon blueberry farm so as to minimize the shelter area available for starlings.
108. The panel encourages the municipality of Surrey and other local governments in the lower mainland to consider the development of appropriate bylaws implementing the guidelines and the allocation of resources to enforcement.

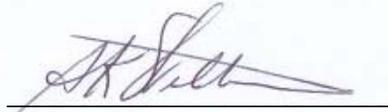
CONCLUSION

109. The panel finds that the August 2009 Ministry Guidelines for the use of Audible Bird Scare Devices for South Coastal BC establish normal farm practice in the case of the Sekhon blueberry farm operations located in Surrey on both sides of 168 Street along the south side of Highway #10 .
110. The panel also finds that the propane cannon use and management practices on the Sekhon blueberry farm were not, to the extent discussed above, in compliance with the August 2009 Ministry Guidelines. Accordingly and to that extent, the noise arising from the propane cannon use and management practices on the Sekhon blueberry farm does not result from normal farm practice.
111. The respondents are ordered to modify their bird predation management practices with respect to the use and operation of propane cannons to bring such practices into compliance with the August 2009 Ministry Guidelines for the use of Audible Bird Scare Devices for South Coastal BC.

Dated at **Victoria, British Columbia**, this **29th** day of **January 2010**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Suzanne K. Wiltshire, Presiding Member



Ron Bertrand, Member



Dave Merz, Member

Appendix 1 Follows:

FARM PRACTICES

SOUTH COASTAL BC WILDLIFE DAMAGE CONTROL

Description

Wildlife can disrupt damage and harm agricultural crops and livestock, the land they are raised on and the infrastructure and equipment needed to raise them. Wildlife can also spread undesirable insects, weeds and diseases.

Numerous methods are used to control or reduce the impact wildlife has on agricultural enterprises. These include fencing, netting, scare tactics, repellents, trapping, the use of firearms and poisoning, habitat modification and cultural management.

Nuisance Concerns

The three main disturbances mentioned in the *Farm Practices Protection (Right to Farm) Act* are odour, noise and dust. Of particular concern to wildlife damage control practices is noise.

Noise

Farmers engage in a variety of activities that generate noise. Most equipment generates some noise. Noise is defined as any sound that is audible but judged to be an unwanted, irregular or erratic disturbance. Wildlife scare devices may create noise as a scare tactic. Noise may be generated continuously or intermittently.

See Nuisance Reference: [Noise](#)

Activities and Operations

Fencing

A fence is a constructed barrier intended to prevent the intrusion or escape of undesirable species. Common fence designs to protect crops from wildlife are woven wire fences and electric fences or a combination of the two. Electric fences along pedestrian areas should be posted with warning signs.

Habitat Modification and Management

Habitat that may be especially suited and attractive to wildlife can be modified or eliminated. Similarly, access to the food, water and shelter wildlife requires can be reduced or eliminated. Cultural management techniques such as mowing, cutting down weeds and plant debris, and removing breeding and hiding places are also effective. Land leveling or contouring to reduce water ponding may be effective in reducing the attraction of birds and animals to a field.

See Farm Practice: [Farmstead Maintenance](#)
[Habitat Management](#)

Netting

Netting is used to prevent birds and animals from entering valued areas. Overhead nets covering the entire production area are normally used in crops that are harvested multiple times such as blueberries. Nets covering individual rows are often used in grapes and sometimes in cherries. Screens or netting should be incorporated in new buildings to keep birds and animals out of farm structures that contain feed or feeding areas. Plastic strips can be used to cover drive-through openings in the barn.

Repellents and Deterrents

Repellents that keep predators away or reduce their numbers include, but are not limited to, the following:

- natural repellents including plants, animals and natural products that are unpleasant to unwanted species of wildlife and
- chemical repellents that repel unwanted species of wildlife.

See Farm Practice: [Pesticides](#)

Scare Tactics

Various devices are used to scare wildlife away from crop land, livestock and farm animals. The most common methods are:

Audible devices including, but not limited to:

- propane-fired cannons or exploders;
- broadcasting general sounds designed to unsettle birds;
- broadcasting bird calls such as distress, alarm and predator calls;
- shell launcher (orchard pistol) with various shells (screecher and banger);
- motor cycles or vehicles; and
- people clapping hands, banging pails, blowing air horns etc.

Visual devices including, but not limited to:

- inflated owls and other fake predators;
- kites with likenesses of predatory birds such as owls, hawks, etc.;
- scarecrows;
- Mylar strips or flash tape;
- scare-eye balloons; and
- the presence of people.

To be effective in scaring wildlife, a variety of scare tactics should be used in a manner that prevents the birds from becoming used to the scare tactics. Farmers should monitor the wildlife, their habits and the crop damage and develop an integrated wildlife management plan to minimize crop damage and loss.

The following guidelines can help reduce the impact audible devices have on neighbors:

- use audible devices only when required for the protection of specific crops and only when a problem is evident;
- operate noise devices only between dawn and dusk;
- where possible, aim directional audible devices away from neighbors;
- maintain the devices properly to avoid continuing noise when they are shut off; and
- screen pens containing fur bearing animals to reduce attraction of birds.

See Farm Practice: [Mobile Equipment](#)
[Stationary Equipment](#)

Guidelines for the use of Audible Bird Scare Devices – South Coastal BC Only

Audible bird scare devices are devices that deter birds from damaging or consuming crops by emitting a loud noise which frightens the birds away from the crop area. Audible bird scare devices can be annoying to nearby residents. In response to a growing number of complaints, the British Columbia Farm Industry Review Board (May 1999 and May 2009) and the Ministry (February 2002, February 2004 and April 2008) have reviewed this issue. As a result of these reviews, the Ministry has revised the guidelines for the use of audible bird scare devices. Audible bird scare devices are divided into two main categories.

Category ‘A’ bird scare devices create an impulse sound. Impulse sound is from impacts or explosions. Propane-fueled exploders or cannons are an example of Category ‘A’ devices. Firearms and shell launchers such as orchard pistols are not included.

Category ‘B’ bird scare devices are any other stationary device, not in Category ‘A’, which generate sounds to scare or disturb birds. Examples are devices that broadcast birdcalls or other sounds through loudspeakers. Firearms are not included.

Guidelines applying to both Category A and B devices are as follows:

Farmers are responsible for the strategic management of devices, and must take due measures to minimize noise impact on neighbours. To achieve this, farmers:

- should ensure that a Bird Predation Management Plan is completed before the first use of devices in each growing season and that the plan is kept up to date throughout the season. A Bird Predation Management Plan requires that producers monitor bird populations and activity on their properties, utilize a range of approaches or techniques to prevent bird damage, and undertake strategies to minimize both device use and bird habituation to devices;
- should assign an individual who will be responsible for:
 - being familiar with the Bird Predation Management Plan and the terms it establishes for the use of devices;
 - making regular visits to the sites to ensure that devices are functioning properly and that bird pressure is sufficient to justify propane cannon use;
 - ensuring that devices are not operated outside of the hours permitted within the guidelines, and responding promptly should out-of-hours operation be reported.
- should provide the contact information for that individual to BCBC, and, where their local governments maintain a registry of devices, with their local governments.

With respect to the operation of devices, farms:

- should operate devices only between 6:30 a.m. and 8:00 p.m. local time or dawn to dusk, whichever is of lesser duration;
- should operate as few as possible devices on a given farm site up to a maximum of one device per two hectares of cropland at any one time. If multiple devices are used on a larger field, they should be placed at a distance from each other so that they are not concentrated within the field and so that they do not exceed the permitted density;
- should alternate or relocate devices being used on a farm operation at least every 4 days;
- should point directional devices away from the nearest neighbouring residence or facility and away from nearby roads;
- should maintain devices, including timing mechanisms, to ensure they operate properly and not outside the permitted hours of operation;
- should use devices only when required for the protection of a crop during periods when that crop is vulnerable to bird predation;
- should use devices only as outlined in the Bird Predation Management Plan.

Guidelines applying only to Category A devices are as follows:

Farmers:

- should operate devices with a firing frequency of no more than one firing per 5 minutes for single shot devices and no more than 11 activations or maximum of 33 shots in any hour for a multiple-shot device. Multiple shots from a device are considered as one activation if they occur in less than a 30-second period;
- should maintain a 200 meter separation distance between a device and a neighbouring residence. Where written permission from the owner of a neighbouring residence is obtained, the separation distance can be waived.
- should not operate devices between noon and 3pm.

Guidelines applying only to Category B devices are as follows:

Farmers:

- should maintain a 100 meter separation distance between a device and a neighbouring residence. Where written permission from the owner of a neighbouring residence is obtained, the separation distance can be waived.

Guidelines for shell launchers (orchard pistols) :

Farmers:

- should operate shell launchers following guidelines for Category A devices except for the guidelines on number of devices per hectare, firing frequency and mid-day break.
- should not operate “bear bangers” as a bird scare device.

Wildlife Control

Sometimes it is necessary to remove certain wildlife species or individuals that are doing too much damage to the crops or livestock which are being farmed. Removal methods include:

- trapping (both live and lethal traps can be used);
- crossbow or bow and arrow;
- firearms to scare away or kill wildlife; and
- poisoning with registered rodenticide baits and/or fumigants (pocket gophers, ground squirrels).

See Farm Practice: [Pesticides](#)
[Pest Management](#)

Legislation

Information on federal and provincial legislation can be found in Appendices B and C. Acts, regulations and bylaws that regulate or may affect wildlife damage control practices include, but are not limited to, the following:

Federal

Fisheries Act – protects fish and fish habitat

Migratory Birds Convention Act – protects migratory birds

Pest Control Products Act – ensures the safety, merit and value of pest control products

Provincial

Fish Protection Act – protects fish and fish habitat by limiting licences in water short regions and providing directives for residential, commercial and industrial development

Pesticide Control Act - regulates all aspects of pesticide sale, transport, storage and use

Wildlife Act – regulates hunting and declares and protects endangered species

Local Government

Applicable *Firearms Bylaws* where in place.

Publications

Publications that provide further information on wildlife damage control include, but are not limited to, the following (refer to Appendix D for details):

British Columbia Environmental Farm Plan Reference Guide
BC Agricultural Fencing Handbook
Integrated Bird Management – Blueberries
Netting for Bird Control in Blueberries – A Decision-making Guide
Netting for Bird Control in Cherries – A Decision-making Guide
Netting for Bird Control in Grapes – A Decision-making Guide
Rodent and Bird Control in Farm Buildings
Rodent Control on Agricultural Land in British Columbia
Suppliers of Bird Control Materials and Equipment
Watershed Stewardship: A Guide for Agriculture