

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 VINEYARD IN WEST KELOWNA, BRITISH COLUMBIA

BETWEEN:

FARLIE PAYNTER

COMPLAINANT

AND:

SARWAN GIDDA

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Ron Bertrand, Presiding Member
Honey Forbes, Member
Dave Merz, Member

For the Complainant

Farlie Paynter

For the Respondent

Sarwan Gidda

Date of Hearing

February 5, 2010

Place of Hearing

Kelowna, British Columbia

INTRODUCTION

1. The complainant, Farlie Paynter, lives on a farm property immediately north of the respondent vineyard. His family has owned this property since the 1950s and it currently consists of an orchard and fruit market. The Paynter's residence is located approximately 15 metres from the respondent's vineyard.
2. The respondent, Sarwan Gidda, owns and operates a vineyard in Westbank, British Columbia. He grows grapes for wine and ice wine production. Although Mr. Gidda owns the farm property, the ice wine grapes that are protected by the propane cannons which are the subject of this complaint are under an agreement whereby they are owned and managed by another winery. The respondent's vineyard is located in the Agricultural Land Reserve and is zoned agricultural.
3. In his complaint filed with the British Columbia Farm Industry Review Board (BCFIRB) on November 25, 2009, Mr. Paynter alleges that the propane cannons relied upon by the respondent vineyard for bird predation management are not operated in compliance with the guidelines prepared by the Ministry of Agriculture and Lands (MAL). He complains that noise resulting from the respondent's use and management of propane cannons makes living in this otherwise quiet farming area very difficult from late September to the date of harvest in late fall or winter.
4. The respondent's position is that the use of propane cannons on the vineyard is part of his bird predation management practices and is in keeping with normal farm practice and is in compliance with the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131 (the Act).
5. At the request of Mr. Paynter, BCFIRB summoned Bert van Daltsen, of MAL to appear and testify at the hearing regarding his knowledge of the "Farm Practices Interior B.C. Wildlife Damage Control" (Interior Guidelines).
6. The complaint was heard in Kelowna on February 5, 2010.

ISSUES

7. Is the complainant aggrieved by the noise generated from the use and management of propane cannons on Mr. Gidda's vineyard?
8. Does the respondent's use and management of the propane cannons on his vineyard accord with normal farm practice?

BACKGROUND

9. The respondent's vineyard produces grapes for both conventional wine and ice wine. The netting system used provided adequate protection of the grapes during the main part of the growing season but did not provide sufficient protection in the fall and winter after the leaves had fallen from the vines. Propane cannons are not used during the main part of the growing season.
10. While the majority of the grapes are harvested for conventional wine production, some grapes are left on the vines to be harvested for ice wine. These grapes are located on two fields in close proximity and are protected with netting and a propane cannon on each field. As the netting is not sufficient to keep birds from damaging the grapes used in ice wine production, the propane cannons are used until harvest (which may be as late as February depending on when temperatures fall low enough to create the proper conditions for ice wine grape harvest).
11. In this case, as the other winery takes ownership of the ice wine grapes while they are still on the vines, it assumes responsibility for the use and management of propane cannons on the vineyard.
12. MAL published the Interior Guidelines for the use of audible bird scare devices. These guidelines were adopted by the Minister of Agriculture in 2003 and remain in effect. The Interior Guidelines allow for the use of propane cannons between May 15 and November 15 of each year.

COMPLAINANT'S SUBMISSIONS

13. Mr. Paynter submitted that he is aggrieved by the constant bombardment of noise from the firing of the propane cannons on the Gidda vineyard. He stated that he can no longer enjoy his property when the cannons are in use; he is tired of wearing ear protection. Customers and visitors to his orchard have complained about the intrusion of the cannon.
14. The complainant alleges that the respondent operates his propane cannon outside the parameters of the Interior Guidelines in the following respects:
 - Operation after November 15 – The cannon is operated until the grapes are harvested; the latest having been early December.
 - Cannon repositioning – The cannon was not moved on a frequent basis to maintain effectiveness.
 - Bird pressure and monitoring – The cannons were operated when there was inadequate bird pressure and damage to justify their use.

- Number of activations – From time to time, the cannon was activated more than the allowed 11 times per hour.
15. Mr. van Daltsen, MAL lead in developing the Interior Guidelines, testified at this complaint. He did not investigate the individual complaint between the complainant and respondent but gave evidence regarding the meetings and discussions that took place among industry representatives, local government officials and Ministry staff leading to the development of the Interior Guidelines. According to Mr. van Daltsen, the Interior Guidelines for propane cannons and other noisemakers have been in effect since 2002 and they were originally intended to apply to propane cannon use in both the Interior and South Coastal Regions. However, following meetings with the B.C. Fruit Growers Association, Okanagan-Kootenay Cherry Growers Association, B.C. Independent Grape Growers Association and the B.C. Wine Institute, the amended guidelines were adopted by the Minister as the Interior Guidelines. The Interior Guidelines do not specify any separation distances between cannon location and neighbouring residences.

RESPONDENT'S SUBMISSIONS

16. The respondent, Mr. Gidda submitted that his vineyard's use of propane cannons for protecting ice wine grapes from bird predation is in keeping with normal farm practice. Apart from ceasing the use of propane cannons on or before November 15, he maintains that the vineyard follows the Interior Guidelines.
17. Mr. Sidhu of the other winery indicated that there are international standards for making ice wine. The grapes must remain on the vines until a threshold temperature is reached. In the Okanagan, temperatures sufficiently cold to meet these standards generally occur between November and February. Therefore, the grapes may have to remain on the vines for an extended period after the leaves have fallen from the vines. Because of the limited food sources for birds during the winter months, ice wine grapes are a very attractive food source and are subject to high levels of bird predation if not adequately protected.
18. Mr. Sidhu states that the Interior Guidelines are not the law and therefore they do not prevent the use of propane cannons on the Gidda vineyard from November 15 until harvest. In 2009, the harvest date was December 5 and no cannon has been used since that time. Mr. Sidhu testified that propane cannons are effective at reducing bird predation. He observed that grape losses in a similar vineyard to Mr. Gidda's, which relied on netting alone, were much greater.

19. In response to the complainant’s allegations regarding non-compliance with the Interior Guidelines, Mr. Sidhu indicated that the respondent vineyard did follow the Interior Guidelines. With respect to the allegation that on occasion the cannons fired 12 times/hour instead of the 11 times/hour, while not conceding that this in fact occurred, he indicated a willingness to ensure that, in the future, the firing frequency of the cannon would not exceed the Interior Guidelines.
20. By way of remedy, the respondent, Mr. Gidda, requested that the Interior Guidelines be modified to accommodate the use of propane cannons after the current November 15 cessation date to allow for protection of ice wine grapes as in his view this is normal farm practice.

DECISION

21. The complainant sought to raise health concerns as part of this complaint. The panel’s jurisdiction covers normal farm practices and does not extend to issues relating to health. If he so wishes, the complainant can take his allegations regarding health issues arising out of propane cannon use to the appropriate public health officials for possible action under the *Health Act* if those officials consider the farms’ conduct to give rise to a “health hazard”.¹
22. We turn now to the issues before the panel. A complaint under the *Act* involves a two-step analysis. In this instance, we accept that the complainant has met the threshold question of establishing that he is aggrieved by noise as a result of the operation of propane cannons on the respondent’s vineyard. As such, the panel must now determine whether the grievance results from a normal farm practice.
23. 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).

[emphasis added]

¹ The *Health Act* defines a “health hazard” as: a condition or thing that does or is likely to endanger the public health, or prevent or hinder the prevention or suppression of disease...”

24. 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.
25. Unfortunately, the respondent did not adduce any evidence of what the proper and accepted customs and standards are for ice wine production, nor did he provide evidence of what similar farm businesses in similar circumstances do with respect to the protection of ice wine grape crops. The respondent testified regarding the practices on his vineyard. The only evidence relating to similar farms was Mr. Sidhu's testimony relating to another farm that relied only on netting and experienced higher rates of crop loss due to bird predation.
26. The BC Grape Growers Association and BC Fruit Growers Association were invited to attend the hearing as interveners but did not do so. Had they done so, the panel may have had evidence of the practices of other ice wine grape growers in the area.
27. In the absence of any evidence regarding what the proper and accepted customs and standards are or what similar producers of ice wine grapes do to protect their crops in the Okanagan or elsewhere, the panel cannot make a finding that the use of the propane cannon in these particular circumstances conforms with normal farm practice.
28. The Interior Guidelines are a reflection of the accepted standards for bird predation devices for fruit producers in the Okanagan region. These standards apply to the conventional harvest season. In a complaint, it remains open for a farmer to introduce evidence relating to his specific operation and attempt to establish why the guidelines may not be appropriate to his operation. Even with conventional production, the guidelines provide a useful starting point for determining normal farm practice but they are not determinative.
29. In this case, the Interior Guidelines are silent with respect to protection of late season crops. It was open to the respondent to demonstrate why the Interior Guidelines should not apply to his particular circumstances. Mr. Sidhu testified that there is increasing growth and value in ice wine grape production in the Interior, that the season for ice wine grapes is longer than for traditional grapes and that netting, which works well against bird predation for traditional grapes, does not work well once the leaves have fallen leaving the ice wine grapes exposed. Based on this evidence, the panel can see that a case could be made that the Interior Guidelines either

have no application or that they should be modified to address the particular circumstances of ice wine grape production. Clearly for ice wine producers, the November 15 cessation of use date eliminates an important crop protection tool. However, in the absence of any evidence as to what similar vineyards producing ice wine grapes are doing, we can not make a finding that the use of a propane cannon in the fall and winter season is normal farm practice.

30. Accordingly, we agree with the complainant that the respondent's use of propane cannons is not a normal farm practice.
31. We note that by way of remedy, the respondent asked that we amend the Interior Guidelines to allow for propane cannon use beyond November 15. The BCFIRB does not have the jurisdiction to amend the Interior Guidelines. These guidelines were developed by MAL; if they are to be revisited or amended that would be a MAL decision. However, we do acknowledge Mr. Sidhu's testimony regarding the growth in ice wine production in the Okanagan and the value of the crop. Given this expansion, it is foreseeable that propane cannon use in the late harvest may increase resulting in more complaints of this sort. It would be helpful both for the grape industry and the public at large if the Interior Guidelines were revisited to incorporate bird predation management guidelines for late season production.

ORDER

32. Section 6 of the *Act* provides that a panel must dismiss a complaint if it is of the opinion that the disturbance results from a normal farm practice, and must order a farmer to cease the practice that causes the disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.
33. The panel has found a breach of the *Act* insofar as the farm management practices complained of (operation of propane cannons) create excessive noise disturbance beyond November 15. As noted above, there was no evidence tendered with respect to accepted customs and standards for ice wine grape production and/or the farm management practices of similar farms in similar circumstances. As such, the panel finds that the respondent's use of propane cannons is not a normal farm practice. Accordingly, the panel orders the respondent to cease operating propane cannons on his vineyard beyond the November 15 cessation date set out in the Interior Guidelines.
34. Given that we have ordered that the farm practice complained of to be ceased, it is not necessary to go further and consider whether the actual use

of the propane cannon on the respondent vineyard requires a modification order to comply with normal farm practice in other respects.

35. This Panel expects the respondent's full and ongoing compliance with this order.

Dated at Victoria, British Columbia this 20th day of May 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Ron Bertrand, Presiding Member



Honey Forbes, Member



Dave Merz, Member