

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 PROPANE CANNON
OPERATED BY A KELOWNA, BRITISH COLUMBIA VINEYARD

BETWEEN:

JIM WRIGHT

COMPLAINANT

AND:

ALEX & LOUISE LUBCHYNSKI
DOING BUSINESS AS
BEAUMONT ESTATE FAMILY ORGANIC VINEYARDS

RESPONDENTS

AND:

BRITISH COLUMBIA FRUIT GROWERS' ASSOCIATION
BRITISH COLUMBIA INDEPENDENT GRAPEGROWERS' ASSOCIATION
OKANAGAN KOOTENAY CHERRY GROWERS ASSOCIATION

INTERVENORS

SUPPLEMENTARY DECISION

APPEARANCES:

For the Farm Practices Board

Hamish Bruce, Member
Richard Bullock, Member

For the Complainant

Jim Wright

For the Respondents

Michael F. Welsh, Counsel

For the Intervenor
British Columbia
Fruit Growers' Association

Penny Gambell, President

For the Intervenor
British Columbia Independent
Grapegrowers' Association

Hans Buchler, Director

For the Intervenor
Okanagan Kootenay Cherry
Growers Association

Greg Norton, President

Date of Hearing

via written submissions

I. INTRODUCTION

1. On August 12, 2002, the Farm Practices Board (FPB) issued its Decision on this complaint, filed by the complainant on November 2, 2001, regarding the noise caused by the Respondents' use of a propane cannon on their organic grape vineyard.

2. The FPB's conclusions on the complaint were captured at paragraphs 51 and 57 of the decision:

51. ... the Panel finds that the practice of the Respondents that causes the noise and disturbance is not a normal farm practice. To answer the first issue, it is normal farm practice to use propane cannons as part of predation control measures. However, the Respondents are using the propane cannon as their single bird predation device.

57. The use of propane cannons as a bird-scaring device is a normal farm practice when used in combination with other predation control methods. The bird predation control practice of the Respondents is not a normal farm practice and the Respondents are ordered to modify their practice. The Complainant and other neighbours are encouraged to assist the Respondents in the observation of any predation patterns, and to be prepared to alert the Respondents whenever the crop appears to be at risk. Where as here, a farm business is conducted in such close proximity to residences, all parties need to compromise. Residents cannot expect to completely avoid the noise disruption of propane cannons and expect the farmer to bear the crop loss alone, or to immediately incur the cost of netting. Farmers of such acreage cannot expect to operate without taking neighbours into consideration. A reasonable level of dialogue with neighbours must be established, as well as a predation management plan appropriate for the subject vineyard.

3. As a result of this finding, the Panel ordered the Respondents to modify their bird scaring practices for the subject property as follows:

1. limit the number of cannons to one cannon on the subject property.
2. commence firing the cannon no earlier than 8:00 a.m. and cease firing the cannon no later than 8:00 p.m.
3. within the hours permitted above, fire the cannon only when and as much as necessary to protect the vineyard from bird predation.
4. permit the cannon to rotate freely (the Guidelines recommend that the cannon not be directed toward the neighbours' houses, however, here there is no real option).
5. move the cannon location at least once every four days in accordance with the Guidelines.
6. limit the maximum number of cannon shots to those set out in the Bird Scare Devices Report and only when necessary. The Bird Scare Devices Report limits a multiple shot cannon to more than 11 activations consisting of a maximum of 33 shots in an hour (multiple shots are considered one activation if they occur within a 30 second period).
7. legibly mark their audible scare devices with their name and phone number in accordance with the Guidelines.

Further, the Respondents are also ordered to modify their practices by

8. using bird predation measures in addition to the propane cannon, such as human activity, visual deterrents or other scare devices on the subject vineyard.
 9. implementing a netting program to begin this 2002 season, such netting to be completed within a reasonable time period.
4. In support of the directions given, the FPB strongly advised the Respondents to develop and implement a Wildlife Predation Management Plan, with the goals of ensuring that predation management is more closely tied to actual predation patterns, and substantiating the Respondents' compliance with our directions.
 5. Finally, and in furtherance of item 9 above, the Panel, at paragraph 56 of the decision, requested the parties and the Intervenor "to make submissions by November 1, 2002, as to what a reasonable time period is within which netting of the subject vineyard is to be completed. The panel will issue a supplementary decision on the time period within which netting is to be completed".

II. THE PARTIES' RESPONSES

6. The Complainant responded to our request by way of a letter dated October 15, 2002. Mr. Wright noted that he and other neighbours originally felt that netting should be installed "before the 2003 crop year". However, Mr. Wright went on to note that netting had been installed for the 2002 season. Mr. Wright reported that the "cannon is still being used, but not nearly as often as previously".
7. The first response from the intervenors was dated October 9, 2002, from the Intervenor British Columbia Tree Fruit Growers' Association. This Intervenor submitted a one-page letter asserting that there is "no reasonable timeframe" as the order is outside the FPB's jurisdiction. No basis for the jurisdiction argument is stated in this letter.
8. The second response from the intervenors was an October 24, 2002 letter from the Okanagan Kootenay Cherry Growers Association (the "Cherry Growers Association"). The letter outlined several reasons why this intervenor could not "determine any reasonable time line for a netting program to begin in this or any future cases".
9. The third response from the intervenors was an October 31, 2002 letter from the British Columbia Independent Grapegrowers' Association asserting the need for a "proper study" to demonstrate that it would be "cost-effective" for the Respondents to net and that the Province, local governments and the neighbours "compensate" the Respondents on an "ongoing basis for the netting program".
10. The final response was dated October 31, 2002, from legal counsel for the Respondents. Counsel's letter commences with a request for clarification regarding the netting program, particularly in light of the findings made at paragraph 51 of the Decision:

The ... modification to implement a netting program focuses on one means of control within that mix of measures. We thus ask for clarification as to whether the board is ordering implementation of netting

within a time frame that it will now determine, or whether this is a recommendation as part of the mix of other bird predation measures, with a recommended time frame, but with my clients to decide how and when to incorporate it.

11. Having made this request for clarification, counsel argues that the cost of netting is too much, and that accordingly the panel should fix no deadline but instead leave it to the Respondents and their client wineries to determine when and if netting is beneficial to install as part of their overall bird predation control program.

III. THE 2002 CROP SEASON

12. The panel rendered its August 12, 2002 decision in recognition of the fact that any cannon use scheduled for the 2002 crop season would likely commence in September 2002.¹
13. As events unfolded however, the Respondents entered into an arrangement with their client winery whereby the winery paid the cost of netting the vineyard for the 2002 crop season. As noted in counsel's October 31, 2002 submission:

Netting is most commonly used for grapes being saved for icewine production as they must hang for some 2-4 months longer in winter conditions with no leaf canopy protection. We advise the panel that Mr. and Mrs. Lubchynski's crop on the subject vineyard has been sold for icewine this year. That may not be the case in subsequent years. It will depend on various factors, including price, risk factor and other markets. The winery to which they have sold their crop this year has agreed to supply the netting for this year to protect the crop and it has been netted for this season. If the crop is not sold for icewine in subsequent years, the winery may not find it economically viable to net their crop. In that case, any netting cost will fall back to the Lubchynskis. [emphasis added]

14. Based on counsel's statements, there appears to be uncertainty regarding whether any or all of the Respondents' crop will be netted in the 2003 crop season. Accordingly, it remains relevant to provide this supplementary decision.
15. Recognizing that potential propane cannon use for the 2003 crop season would not begin until September 2003, the panel nonetheless wishes to acknowledge its regret at the delay in issuing this supplementary decision. The delay was partly due to uncertainty regarding whether the panel chair, whose appointment expired two weeks prior to the close of the submissions process, would be reappointed to the FPB (ultimately, she was not). Further delay was due to the serious illness, surgery and convalescence of another panel member. Members Bruce and Bullock now issue this supplementary decision, as the panel, under s. 7(4) of the *Farm Practices Protection (Right to Farm) Act*. They have thoroughly considered the matters herein in light of the evidence at the hearing, the panel's August 12, 2002 decision and the supplementary submissions received by the FPB.

IV. THE 2003 CROP SEASON

16. Having netted its entire crop for the 2002 crop season, the Respondents, looking to the future, seek clarification regarding whether they are legally required by our

¹ The Complainant's uncontested evidence was that, for the 2001 crop season, the Respondents began firing their propane cannon on September 13, 2001 and continued until November 7, 2001.

August 12, 2002 order to net their vineyard. We agree that it would be useful, given how our decision was worded, to provide such clarification in order to avoid misunderstandings regarding what was intended by our original decision.

17. It will be useful to repeat, and to clarify with greater detail, the key findings that underscored our decision regarding normal farm practice in this case:
 - The Respondents' use of a propane cannon, as a single bird predation measure and fired throughout the day without regard to actual bird predation threats and patterns, is not a normal farm practice.
 - Normal farm practice in a circumstance such as this includes the use of a propane cannon, but only where that cannon is used in combination with other bird predation measures, and is used only during times of day when bird predation is imminent. With regard to the latter point, the evidence of other grape vineyards was clear that when the bird pressure is low, the cannon is turned off for between two and five hours before it is turned on again: see evidence of Leo Gebert (Transcript, pp. 59, 62-64), Horst Mueller (Transcript, pp. 94-96). Mr. Mueller gave evidence that his cannon is used periodically "even during high season": Transcript, p. 96.
 - The use of netting, in combination with or in place of propane cannons, is a normal farm practice in circumstances and areas where bird predation is extremely high. In this regard, Mr. Mueller's evidence was that netting is used in areas of his vineyard where there is tremendous bird pressure (Transcript, p. 60). Hans Buchler gave evidence that netting becomes cost effective where bird predation threatens 30% or more of a farmer's crop. He gave evidence that he owns netting but, from a cost perspective, makes a decision each year on whether the bird pressure will be sufficiently high as to warrant its use.
18. An evidentiary difficulty we faced at our hearing was that, from the evidence of Mr. Lubchynski and his son, it was apparent that his decision to use a propane cannon was driven solely by their assessment that it was the cheapest and most effective solution. As stated by Scott "I mean, cannons seemed like the best alternative so – and the cheapest at the time so – we're just getting into the business so I guess it's – that's the route we took." (Transcript, p. 124).
19. While cost is obviously a relevant factor in determining normal farm practice regarding netting, it is not the only factor. It was apparent from the Respondents' evidence that they considered the bird predation threat at their vineyard to be extremely high. Leo Douillard, the owner of the lot in question, gave evidence that when he planted grapes many years ago, he lost an entire crop to bird predation in three days. Mr. Lubchynski went so far as to assert that "netting is not an option" and that, even if netting were employed, noisemakers would still be required to deter the birds.

20. From this evidence, we concluded that, in these circumstances and taking all relevant factors into account, at least some amount of netting, pursuant to a netting program, would be consistent with normal farm practices in these circumstances. This is the end to which item 9 of our modification order was directed.
21. We were not in a position, given the evidence at our hearing, to prescribe whether some or all of the Respondents' property requires netting or whether this should be to the complete exclusion of cannon use. That question would be a function of more detailed data and analysis regarding bird predation patterns and cost. With regard to bird predation, it was apparent that no detailed analysis was undertaken by the Respondents, beyond their evidence described above. Hence our comments at paragraph 55 of the decision. With regard to cost, we also considered that there was no satisfactory information, beyond rough estimates given in a Ministry of Agriculture publication.
22. The purpose of requiring the parties "to make submissions by November 1, 2002, as to what a reasonable time period is within which netting of the subject vineyard is to be completed" was clearly to encourage the Respondents to make the appropriate observations during the 2002 crop season.. The Respondents were to otherwise comply with our order regarding the cannon usage (paragraphs 53 and 54, items 1-8) and to make appropriate inquiries regarding the costs of netting. The intention was that this data could then be used by the Panel in determining the nature and timeline for completion of a netting program.
23. As the Respondents netted their entire crop in 2002, it is apparent that they were not able to generate the bird predation data we expected. What we do note is that (a) the Respondents did not provide us with any figures regarding the actual cost of the netting on their vineyard; and (b) the Respondents did not provide us with evidence of the crop saving provided by netting versus cannon use. This said, there is no evidence, other than the Complainant's passing comment in his October 15, 2002 letter, that noisemakers were also required, as originally suggested by Mr. Lubchynski at the hearing.
24. The result is that we essentially find ourselves today in the same position we were in when the decision was released. While we have found that at least some degree of netting is required by normal farm practice in circumstances such as this, we do not have the data required in order to make a decision regarding the exact quantity and timing of any netting program.
25. In the circumstances, having issued this clarification and having considered the respective advantages and disadvantages of a written versus oral hearing process, we consider it appropriate to proceed as follows with regard to the coming crop seasons:
 - If the Respondents net their crops in 2003 and in any further crop years as they have done in 2002, it will be unnecessary for us to issue a further order.
 - For the first year that the Respondents choose not to net their crop, they will be required to comply with paragraphs 53 and 54, items 1-8 of our order.

Following that season's harvest, the Respondents will be required to attend a hearing before us with a view to assessing a draft netting program prepared by the Respondents as flows from paragraph 54, item 9 of our August 12, 2002 decision, to be based on the observed bird predation patterns on their farm and the actual costs of netting. The panel would also expect such a hearing to consider whether the Respondents have demonstrated the practical ability to comply with paragraphs 53 and 54, items 1-8 of our order.

26. The panel continues to consider that its modification orders in this matter are appropriate and achievable. As to their appropriateness, we have made significant efforts to calibrate our remedy fairly and proportionately in accordance with our findings regarding normal farm practice. As to their achievability, we have taken the Respondents at their word that, while they do not live on the lot in question, they live nearby and, as Mr. Lubchynski's son pointed out, "I live next to the cannon day in and day out. As well I work in the vineyard while the cannon is on." This physical presence on the site makes each of the items 1-9 workable in the present circumstances.
27. Finally, we wish to say a word about item 7 of our modification order, which requires the Respondents to "legibly mark their audible scare devices with their name and phone number in accordance with the Guidelines". Contrary to the submission of the Intervenor Cherry Growers Association, this is not an invitation for neighbours to trespass onto a farmer's land. Rather, it is a common sense measure, incorporated as part of the Ministry's 2002 Wildlife Damage Control Guidelines, intended to facilitate communication with the farmer. In our view it is a normal farm practice in a situation such as this for a farmer seeking to use a propane cannon to communicate contact information to his neighbours. If such contact information is not already available to an adjacent landowner, and he is unable to see the information marked on the cannon from his property and does not have permission to go onto the land, he can obtain such information through various public officials who attend the property in response to concerns and complaints.
28. The parties are to conduct themselves accordingly.

Dated at Victoria, British Columbia, this 16th day of June 2003.

FARM PRACTICES BOARD
Per

(Original signed by):

Hamish Bruce, Member
Richard Bullock, Member