



June 14, 2013

File #12-24

**DELIVERED BY EMAIL**

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Dear Sirs:

**A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING DUST, MANURE MANAGEMENT AND FLOODING.**

1. On September 28, 2012, the BC Farm Industry Review Board (BCFIRB) received a complaint from Gurjeet Sohi about disturbances resulting from Don Malenstyn's development of a cranberry farm. The farm is operated under the name DJM Farms Ltd. on lands owned by Dairylike Farms Ltd.
2. In his notice of complaint, Mr. Sohi raises issues concerning dust, manure management practices and flooding resulting from modifications made on the respondent farm property.
3. On April 18, 2013, the parties participated in a pre-hearing conference call for the purpose of setting a hearing date into Mr. Sohi's complaints. Mr. Sohi wanted to have a hearing as soon as possible but prior to the commencement of his blueberry harvest season in early July. Mr. Malenstyn initially wanted to put the matter off until November "*when he would have more time*", but agreed to an earlier date provided that it was prior to the date when he expected a delivery of cranberry plugs as he did not want the hearing to interrupt his planting. After canvassing a number of dates with the parties, they agreed to set the hearing for May 27 and 28, 2013.
4. On May 6, 2013, Mr. Malenstyn filed an application for an adjournment of the hearing. Mr. Malenstyn stated that he had been advised by a nursery that his cranberry plants would be delivered the following week or three weeks earlier than he had previously expected and therefore he stated that he needed more time (until July 8, 2013) in order to complete planting. The adjournment application was granted for the reasons set out in a decision dated May 17, 2013.
5. The parties attended a further pre-hearing conference call on May 23, 2013 for the purpose of setting the new hearing date. As set out in the Pre-Hearing Conference Report dated May 24, 2013, Mr. Sohi stated that he wished to have the hearing scheduled at the

end of June, before his blueberry harvesting season commenced, because he would not be available again until late September. Mr. Malenstyn reiterated that he was unavailable until after July 8, 2013 because he would be planting cranberries without the assistance of others and expected it would take him that long to do so and a hearing date in November would ultimately be more convenient for him. The panel also notes that Mr. Malenstyn indicated that he had received legal advice not to proceed with the hearing of this matter until enforcement proceedings commenced against him by the Agricultural Land Commission had completed. Although Mr. Malenstyn undertook to provide BCFIRB with written confirmation of this he did not do so. Mr. Sohi said he did not wish to delay the hearing until November but instead wished to deal with his complaint as soon as possible.

6. The parties were advised by the presiding panel member during the pre-hearing conference call that for a number of administrative reasons, July 3 and 4, 2013 were being considered by BCFIRB as the new dates for the hearing. In the absence of an agreement by the parties as to when the hearing should be re-scheduled, the panel, set the new hearing dates of July 3 and 4, 2013 pursuant to Rule 25(5) of the Practices and Procedures for complaints under the *Farm Practices Protection (Right to Farm) Act* (the *FPPA*).
7. On May 30, 2013, the BCFIRB received a second application for an adjournment of the hearing on behalf of the respondent. Counsel for the respondent indicated he had been recently retained and advised BCFIRB that he was seeking an adjournment on the basis of his inability to attend a July 3-4, 2013 hearing given prior commitments.
8. Counsel for the respondent also stated that during the pre-hearing conference call on May 23, 2013, Mr. Malenstyn advised that he was unavailable until after July 8, 2013 because before that time he would be busy planting cranberries and because he had scheduled a family vacation. In fact, Mr. Malenstyn had made no reference to the family vacation during the May 23, 2013 conference call.
9. In a subsequent submission dated June 7, 2013, counsel for the respondent conceded that Mr. Malenstyn did not advise BCFIRB or the complainant of the family vacation when the dates for the hearing were discussed at the pre-hearing conference call, as Mr. Malenstyn did not want Mr. Sohi to know when he would be away from his property.
10. Counsel for the respondent concluded his letter dated May 30, 2013 as follows:

*Consequently, it is submitted that the adjournment is necessary in order for Mr. Malenstyn's procedural fairness rights to be met. It is submitted that this adjournment will not prejudice the complainant. Mr. Malenstyn has previously advised the panel that until this matter is resolved and as a measure of good faith, he will not store any chicken manure/compost along the east/west ditch between his and the Sohi farm to minimize alleged dust issues. The cranberry farm Mr. Malenstyn is planting is far from the Sohi property and should not cause disruption to Mr. Sohi and his farm operation.*

11. In his June 7, 2013 submission, counsel for the respondent reaffirmed his position and stated, “*Mr. Malenstyn requires an opportunity to defend himself and to address the allegations on the merits. He requires the assistance of counsel in order to mount his defence....Further we require time to prepare a defence and to retain an expert to respond to the contentions in Ms. Zimmerman’s report.*”<sup>1</sup>
12. The complainant opposes a further adjournment of the hearing and says that the respondent misled those attending the second pre-hearing conference call when he advised them that he required an adjournment until July 8, 2013 to plant cranberry plugs. In particular, he noted that Mr. Malenstyn claimed he could not afford to hire a crew, would be the only one planting cranberries on the three acre field and therefore he expected it to take him a long time to complete planting. However, Mr. Sohi submits that only two days later, the respondent hired several labourers to assist him with planting and that the planting was finished by June 1, 2013. The complainant produced several photographs which he claims show four labourers leaving the Malenstyn property on May 25, 2013 as well as photographs of the cranberry field on the Malenstyn property before and after planting.
13. In reply, counsel for the respondent admits that Mr. Malenstyn hired labourers on May 25, 2013 to assist him with planting the main rows of the field but submits that the planting of the entire field has not been completed and that Mr. Malenstyn will be completing the balance on his own.
14. The complainant submits that Mr. Malenstyn has had ample time to secure legal counsel. He believes the respondent is trying to delay the hearing “*to allow him more time to conceal and remove contaminated landfill on his property.*” The complainant alleges that over the past four years the respondent has deposited fill, much of which appears to be contaminated with plastic and metal in his fields and that prior to planting the cranberry field the respondent removed approximately 16,000 tons of the scrap metal and sold it to a salvage company. Mr. Sohi provided photographs of a truck that he alleges removed the scrap metal from Mr. Malenstyn’s property and the salvage facility to which he claims it was taken.
15. The complainant says that both he and his family have suffered stress and hardship as a result of Mr. Malenstyn’s activities. In particular, he states that “*not only are Mr. Malenstyn’s activities creating a health concern, they are having an emotional impact on family relations and placing a financial burden on the family.*”
16. In a letter dated June 10, 2013, newly retained counsel for Mr. Sohi stated as follows:

*Last summer [the] blueberry crop was seriously damaged as a direct result of Mr. Malenstyn carrying out activities that have caused and continue to cause odour, noise, dust and other disturbances from conducting farm operations in an inappropriate fashion that are certainly not normal farm practices.*

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<sup>1</sup> Kathleen Zimmerman, P.Ag. is the “knowledgeable person” (KP) engaged by BCFIRB under s. 4(a) of the *FPPA*.

*The Sohi's greatest concern is that Mr. Malenstyn will destroy this year's blueberry crop by continuing to move soil and conduct other dust causing activities such that dust will get onto this year's blueberry crop and destroy substantial parts of [it]..."*

17. The complainant also submits that as a result of raising his property, Mr. Malenstyn has caused excessive amounts of water to run off of his property during times of high rainfall and onto the Sohi property causing flooding. The complainant says the flooding threatens to cause root rot to many of his blueberry plants with the result that if the blueberry plants have to be replaced, they would not mature for 6 years and this would have a "catastrophic" financial impact on his business.
18. The complainant further submits that the dust generated from Mr. Malenstyn's activities on his property are creating health concerns for his family, friends, workers and U-Pick customers who must often wear dust masks. The complainant says that two of his children must be confined indoors on days when Mr. Malenstyn works on his dyke due to respiratory problems aggravated by the dust and that the longer this matter is delayed, the greater the emotional strain and diminished quality of life that he and his family must endure.
19. The complainant states that despite Mr. Malenstyn's assurances that he will take steps to reduce alleged dust and odor issues, the reality is that Mr. Malenstyn continues to pursue activities such as digging a trench on the parties' property line that is encroaching on the Sohi property and eroding it. Mr. Sohi is concerned that these activities will destabilize the foundation of his home which is in close proximity to the property line. He produced two photographs of Mr. Malenstyn operating heavy equipment to dig the trench in close proximity to his home.
20. A further reply submission was received June 10, 2013 from the complainant (not the complainant's counsel). Although this letter reiterated much of what was said in earlier submissions, the complainant indicated that counsel for the respondent has been acting for Mr. Malenstyn since at least November 2012 when Mr. Sohi was served with a "Notice to File Civil Suit".
21. Counsel for the respondent says that Mr. Malenstyn denies trying to conceal or remove contaminated landfill and submits that the scrap metal that was removed was old potato farming equipment. Further Mr. Malenstyn denies the other allegations made by the complainant in his submissions.
22. Counsel for the respondent filed a further reply on June 12, 2013 saying that he had not been given an opportunity to respond to the submission of newly retained counsel for the complainant. Counsel for the respondent acknowledged being retained by Mr. Malenstyn on different matters since last year but that Mr. Malenstyn only sought his assistance with this complaint "in late May, 2013". He also states that planting of cranberries has not been completed, reiterates that the scrap metal removed was potato farming equipment and disputes that any adjournment will prejudice Mr. Sohi. While the respondent agrees

to not store any chicken manure until the hearing, he has no control over the actions of the farmer who leases some of the fields. Mr. Malenstyn again disputes causing any flooding to the Sohi property and says he cannot agree to not undertake operations that cause dust as “this would interfere with his ability to carry on ordinary farming practices”.

## DECISION

23. Practice and Procedure 25(4) to the *FPPA* states as follows:

*In deciding whether or not to grant an application for adjournment, the hearing panel will take into account the following factors:*

- *The reason for the adjournment;*
- *Whether the adjournment would cause unreasonable delay;*
- *The impact of refusing the adjournment on the other parties;*
- *The impact of granting the adjournment on the other parties;*
- *The impact of the adjournment on the public interest.*

24. The decision whether to grant an adjournment is discretionary, but the discretion must not be exercised in a fashion that would create procedural unfairness to the party seeking the adjournment.
25. As stated in the panel’s previous decision dated May 17, 2013, the panel finds that it is in the public interest to resolve disputes as quickly as is practicable while ensuring that both parties have a reasonable opportunity to prepare for the hearing and to present their respective cases.
26. The respondent seeks a second adjournment of the hearing principally on the ground that he has recently retained legal counsel to assist him with the hearing and that his counsel is not available on the date scheduled for the hearing. Mr. Malenstyn’s counsel submits that “*Mr. Malenstyn is entitled to legal representation of counsel of his choice*” and that “*an adjournment is necessary in order for Mr. Malenstyn’s procedural fairness rights to be met.*” He submits that if an adjournment is not granted, Mr. Malenstyn will not be able to defend himself and it will lead to an unfair hearing.
27. There is no absolute right in administrative law to an adjournment based on the desire to retain legal counsel: *Macdonald v. Institute of Chartered Accountants of British Columbia*, [2010] B.C.J. No. 2151. Even in discipline proceedings, where procedural protections are typically highest, the issue is not about the “right to counsel” *per se*, but whether, in the particular circumstances, a fair hearing can be held without legal representation.
28. It is noted in particular that the court in *Macdonald* cited the following statement from an administrative law text – that, “[o]n the other hand, refusal of an adjournment may not be a breach of the duty of fairness where the applicant has ample time to retain counsel but fails to do so”.

29. On the latter issue, the panel notes that the complaint was filed on September 28, 2012. A case management conference was held on October 24, 2012 where the issues and grounds of the complaint were clarified and the potential remedies that would be sought were identified. As of that date, Mr. Malenstyn was well aware of the particulars of the complaint and remedies available if the complaint was found to be valid. If Mr. Malenstyn felt he needed legal representation for the complaint process, he had ample time to do so in advance of the pre-hearing conferences where procedural decisions regarding hearing dates were made. On this point, we note counsel for the respondent's statement in paragraph 22 above that he has been retained by Mr. Malenstyn on other matters since last year.
30. Mr Malenstyn participated in the April 18, 2013 and May 23, 2013 pre-hearing conferences without indicating that he would be seeking legal representation for the hearing. Both his April 18, 2013 agreement to a hearing date, and his May 23, 2013 adjournment request, were advanced without any reference to retaining of counsel. As noted, his position on May 23, 2013 was that he would not be available prior to July 8, 2013 because he needed that much time to plant cranberries on his own. As noted above, Mr. Malenstyn was successful in arguing his adjournment application.
31. While Mr. Malenstyn continues to be permitted to have legal counsel represent him at the hearing if he so chooses and if he can at this late date find someone to represent him, his delay in retaining this counsel for this hearing is not justification for the adjournment he now seeks.
32. Nor are the other reasons advanced for an adjournment persuasive.
33. With regard to the issue of planting time, the panel has already accommodated Mr. Malenstyn by granting one adjournment request so that he could have more time to prepare for the hearing. That adjournment was granted in reliance on Mr. Malenstyn's assurance that he would be available to participate in the hearing after he was finished planting cranberries which he estimated would take him until July 8, 2013 *if he had to do it on his own*. Based on the submissions of both parties, it is apparent that Mr. Malenstyn subsequently hired labourers to assist with his planting, even if the planting is not completed as suggested by counsel for the respondent. In those circumstances, we have not been satisfied that this remains a valid reason to delay the hearing, particularly given the fact that the scheduled hearing dates of July 3-4 2013 are less than one week earlier than when Mr. Malenstyn had indicated he would be available.
34. With regard to the issue of the family vacation planned during the scheduled hearing dates, the panel gives little weight to this reason for an adjournment given that Mr. Malenstyn participated in the May 23<sup>rd</sup> pre-hearing conference call where the July 3 and 4, 2013 dates were proposed and other than expressing the need to plant his cranberries he did not express any other concerns with those dates despite having the opportunity to do so. His desire not to let Mr. Sohi know that he would be away was not a sufficient reason to keep from disclosing that information at the pre-hearing conference.

35. We have independently considered whether, despite our findings above, the particular nature, circumstances, complexity or seriousness of this complaint requires an adjournment because a fair hearing simply cannot take place unless the respondent has legal representation at the hearing.
36. Looking at the complaints process generally, section 7 of the *FPPA* states (in part) that hearings are “*conducted in an informal manner*” and that “*the panel may accept evidence whether or not it would be admissible in a court of law.*” This reflects the position BCFIRB has taken from the *FPPA*’s very inception – that it is meant to be accessible to lay persons, and that the hearing process under the *FPPA* is designed for the participation of unrepresented persons. To that end, BCFIRB has resources and staff to assist unrepresented persons to conduct their cases.
37. In the specific situation of this case, prior to the involvement of counsel, Mr. Malenstyn has fully participated in those processes, including the case management and pre-hearing conferences and successfully argued for his first adjournment. We are not aware of any reason either in respect of the subject matter of the complaint or in regards to Mr. Malenstyn himself which would preclude a fair hearing from taking place in the absence of legal representation.
38. Another reason the respondent advances for seeking adjournment is that more time is required to retain an expert to respond to the contentions in the KP report. The panel would note that one mechanism BCFIRB uses to assist the parties early on in the process is the retaining of a KP. The KP report is provided to the parties for the purposes of potential settlement without a hearing and, failing that, for use at the hearing. In this case, Mr. Malenstyn has had the KP report in hand for approximately 2 months and has had Mr. Sohi’s documents and witness list since May 9, 2013. In the view of the panel, he has had ample time to prepare for the hearing and more time remains before its July 3<sup>rd</sup> commencement.
39. Having found that denying the adjournment has not treated Mr. Malenstyn unfairly, we are also permitted to consider other factors, including the impact on the other party of *granting* an adjournment, and whether the panel decision is in the public interest.
40. Based on the representations of both parties at the pre-hearing conference call on May 23 2013, the panel finds that if the hearing was not to proceed as scheduled, it is unlikely that it would proceed for at least five months (or into the late fall). The panel concludes that such a lengthy delay would in all the circumstances be unreasonable, especially in light of the ongoing nature and magnitude of the disturbances alleged by the complainant which include allegations of crop loss. Such a long delay, a full six months from the time (late May) that the original hearing was scheduled, is also clearly not in the public interest.
41. The panel did give consideration to the request of complainant’s counsel that if an adjournment was to be made, that it be on conditions that restricted the respondent’s use

of his property. The panel notes that the *FPPA* only authorizes it to modify a farmer's practices once it has determined at a hearing that those practices are inconsistent with normal farm practice. The panel cannot order a party to modify its practices as a condition of granting an adjournment, and the respondent did not consent to doing so on the terms suggested by the complainant. Given that the panel has no ability to restrict the respondent's operations in advance of the hearing, the panel finds that it is all the more important that this complaint be heard as early as possible and not be delayed any further.

## CONCLUSIONS

42. The respondent's application for a further adjournment of the hearing is dismissed. The hearing of this matter will proceed as scheduled on July 3 and 4, 2013.
43. As instructed by BCFIRB in e-mail correspondence to the parties dated May 30, 2013 and June 3, 2013, the time limits for exchanging documents and expert evidence set out in the Order of the Panel to the pre-hearing conference report dated May 24, 2013 remain in effect.

## BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



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Carrie H. Manarin, Presiding Member



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Andy Dolberg, Member



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Corey Van't Haaff, Member