October 2, 2014 File #13-14

DELIVERED BY COURIER AND EMAIL

Richard Barkwill
[redacted]

Allan Lychowyd and Carol Cockrill
[redacted]

Dear Sirs/Madam:

A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING DUST AND NOISE

Introduction

On December 17, 2013 the BC Farm Industry Review Board (BCFIRB) received a Notice of Complaint from Richard Barkwill pursuant to section 3 of the *Farm Practices Protection (Right to Farm) Act* (*FPPA*) concerning dust from haying and noise related to tractor, weed whipper and chainsaw use on property owned by the respondents, Al Lychowyd and Carol Cockrill (the "second complaint"). The second complaint reads as follows:

> Mr. Lychowyd operates his tractor in early morning hours and during the dinner hour disturbing us. He operates chain saws and weed whippers along the fence line when we are riding our horses in the ring. He creates clouds of dust when he hays.
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> We seek an order that 1) Mr. Lychowyd does not operate his tractor before 8:00 am 2) To not operate any equipment eg tractors during the dinner hour. 3) That he purchase a quieter electric tractor, weed whipper and chain saw and not operate this equipment while we are riding.

By letter dated January 10, 2014, I directed that the second complaint be held in abeyance pending the completion of a separate complaint filed by Mr. Lychowyd ("the Lychowyd complaint") concerning issues on the Barkwill property (co-owned by Mr. Barkwill's partner, Therese Washtock, whose horse operation is adjacent to the Lychowyd property), as the Lychowyd complaint had already been set down for hearing in the first part of 2014. My January 10, 2014 letter concluded:

> Given the foregoing, I have directed that this new complaint be held in abeyance pending the completion of the first complaint process. Once that process is completed, I will determine what further steps are required under ss. 4, 5 or 6(2) of the *Farm Practices Protection (Right to Farm) Act*.

On July 31, 2014, a panel of BCFIRB issued reasons for decision dismissing the Lychowyd complaint ("the *Lychowyd* complaint decision").

On September 3, 2014, I wrote to Mr. Barkwill, copy to the respondents, following my review of the Lychowyd complaint file including the numerous procedural decisions of BCFIRB, Mr. Barkwill's and Ms. Washtock's court petition, their stay application and the Reasons for Judgment dismissing the stay application. My September 3, 2014 letter stated as follows:

> There is clearly an extensive dispute history and adversarial dynamic between you and the respondent. That adversarial context, the decisions summarized above and the nature of the complaint (dust related to a tractor, weed eating and chainsaw use) all raise a legitimate question as to whether this matter should be referred to hearing, with the time and cost that would entail for all concerned.
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> As required under s. 6(2) of the *FPPA*, before taking any further steps in this matter, I am providing you as the complainant with the opportunity to address the seriousness and legitimacy of your complaint, including whether it is still your intention to proceed with it. If so, then in addition to canvassing whether the subject matter of the complaint is trivial, whether the application is frivolous, vexatious or not made in good faith, I would also ask you to clarify how each of the disturbances complained of (dust from haying and noise related to tractor, weed eater and chainsaw use) relate to farm operations conducted as part of a farm business.
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> Your submission is to be received by the BCFIRB office not later than the close of business, **Friday, September 19, 2014** following which I will make my ruling with respect to whether I will refer this complaint to panel.

Mr. Barkwill's letter dated September 16, 2014 was received on September 22, 2014, past the September 19 deadline. I have nonetheless accepted and considered it as part of my deliberations in relation to the summary dismissal of the complaint pursuant to s. 6(2) of the *FPPA*:

> 6(2) The chair of the board, after giving the complainant an opportunity to be heard, may refuse to refer an application to a panel for the purpose of a hearing, or, after a hearing has begun, the panel to which an application has been referred may refuse to continue the hearing or to make a decision if, in the opinion of the chair of the board or the panel, as the case may be,
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> (a) the subject matter of the application is trivial,
> (b) the application is frivolous or vexatious or is not made in good faith, or
> (c) the complainant does not have a sufficient personal interest in the subject matter of the application.

For the reasons that follow, I am refusing to refer Mr. Barkwill's complaint to a panel for a hearing under s. 6(2), as it is my opinion that the subject matter of the complaint is trivial, and the complaint is frivolous, vexatious and not made in good faith.

Background

The first Barkwill/Washtock complaint against Lychowyd (2008)

The first Barkwill complaint (co-filed with Ms. Washtock) regarding the farming practices of Mr. Lychowyd relating to flies, dust, noise, odour, and runoff from a cow/calf operation was filed in 2008. Case management of that complaint was made difficult by the fact that an alleged assault incident had taken place which resulted in the issuance of a restraining order preventing contact between Mr. Lychowyd and Ms. Washtock. A Knowledgeable Person (KP) was retained, but settlement efforts failed. In 2009, Mr. Lychowyd removed the cows from his property and

subsequently, in a decision dated August 4, 2009 the then BCFIRB Chair dismissed that complaint, stating in part:

> This board's resources are finite, and must be deployed to resolve real and active disputes. In this case, as the parties agree that the substance of the complaint has been addressed, I am dismissing this complaint. In so doing, I want to be clear that there is no question that, as originally framed, this was a serious and legitimate complaint made in good faith. However, in light of the removal of the cows from the Lychowyd property, this complaint is academic and fails to disclose a sufficient ongoing personal interest on the part of the complainants in accordance with s. 6(2)(c) of the FPPA…

Lychowyd complaint against Washtock (June 2013)

In June 2013, Mr. Lychowyd filed his complaint against Ms. Washtock, which ultimately gave rise to the *Lychowyd* complaint decision (July 31, 2014). Mr. Lychowyd's complaint was about odour, noise and manure management practices of Ms. Washtock relating to her horse operation. Legitimate issues arose as to whether the disturbances complained of related to a "farm business" as required by the *FPPA*, and so BCFIRB initially sought written submissions from the parties and scheduled a telephone hearing to resolve the issue on a preliminary basis. As noted at paragraphs 1-7 of the *Lychowyd* complaint decision, that telephone hearing was to no avail and the matter was set down for hearing. Subsequently, Mr. Barkwill and Ms. Washtock sought adjournments of the hearing, in part to accommodate an unrelated and ongoing Provincial Court Small Claim matter between Ms. Washtock and Mr. Lychowyd arising out of the alleged assault referenced above.

The second Barkwill complaint against Lychowyd (December 17, 2013)

As noted above, Mr. Barkwill filed the second complaint that is the subject of this decision on December 17, 2013, alleging disturbances related to tractor, chainsaw weed whipper use on the Lychowyd property, and alleging that "he creates clouds of dust when he hays". By way of remedy, he sought an order that Mr. Lychowyd not operate his tractor before 8:00 am or during the dinner hour and that he be required to purchase a quieter electric tractor, weed eater and chainsaw and not operate this equipment while people are riding horses. As also noted above, this second complaint was placed in abeyance on January 10, 2014 pending a resolution of the Lychowyd complaint.

Three days later, on December 20, 2013, Mr. Barkwill and Ms. Washtock applied to the Supreme Court of British Columbia for various orders related to the Lychowyd complaint against them, including an order preventing a full hearing on that complaint until BCFIRB had ruled on their application to dismiss the complaint and until after the civil litigation between the parties had concluded. As that Petition could not be heard before the March 2014 hearing dates, Mr. Barkwill and Ms. Washtock made an interim application to Supreme Court to stay the March 2014 hearing until the Petition could be heard. On February 21, 2014, that stay application was heard and dismissed by the Court.

As noted, the Lychowyd complaint was heard by a panel over two days in March 2014, and in a decision dated July 31, 2014 BCFIRB dismissed Mr. Lychowyd's complaint. The panel concluded that Ms. Washtock had adduced credible and sufficient evidence to establish that her

horse-related activities were not conducted as part of a farm business but rather were a hobby or recreational pastime: *Lychowyd* complaint decision, paras. 50-57.

The *Lychowyd* complaint decision also stated as follows:

> 58. Given our decision on this issue, it is unnecessary for the panel to make a determination on the merits of the complaint. However, given the great amount of time and resources that was expended by the parties and BCFIRB on pre-hearing matters as well as the hearing itself the panel wishes to make a few observations that it feels are significant with respect to this dispute.
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> 59. During the pre-hearing written submission process, the respondents vehemently argued that Mr. Lychowyd's complaint should be dismissed because it was vexatious and had no merit. The respondents alleged that Mr. Lychowyd had previously made many unsubstantiated complaints to numerous agencies. While BCFIRB has procedures for summarily dismissing complaints, the attempts by the former Chair of BCFIRB and the hearing panel itself to use a summary procedure were frustrated by the respondents' refusal to provide any evidence in support of their position that their horse related activities were not part of a farm business. This ultimately made it necessary for BCFIRB to convene a full hearing on all issues in dispute.
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> 60. Based on the evidence heard at the oral hearing, it was clear to the panel that there was little merit to Mr. Lychowyd's complaint…
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> 61. In summary, the panel concludes that even if BCFIRB was satisfied that this complaint involved a farm business, there was little evidence to demonstrate that the complainant was actually aggrieved by dust, noise, odour and manure management disturbances arising on the respondents' property or that the farm practices giving rise to these disturbances were inconsistent with "normal farm practice".
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> 62. It is regrettable in the view of the panel that this matter had to proceed to a full hearing. Obviously this entire process could have been avoided if the complaint had not been filed in the first place. But similarly, had the respondents co-operated with BCFIRB by providing evidence requested by the Chair of BCFIRB during preliminary processes, a summary dismissal decision on jurisdiction could have been made thereby avoiding the time and expense of a full hearing to the parties, their witnesses, the intervener and BCFIRB.

On August 8, 2014, Ms. Washtock telephoned the BCFIRB office to inquire about the status of the second complaint. She also advised that despite the fact that they were successful in having the Lychowyd complaint dismissed, she wanted to express her displeasure with how she felt she was treated by BCFIRB throughout the complaint process alleging that BCFIRB was both vexatious and unfair in its processes and its timelines. In a subsequent telephone message on the same date, she indicated that she wanted BCFIRB to follow up with the second complaint or else return the $100 filing fee.

Discussion

I begin this discussion by reproducing s. 6(2) of the *FPPA* again for convenient reference:

> 6(2) The chair of the board, after giving the complainant an opportunity to be heard, may refuse to refer an application to a panel for the purpose of a hearing, or, after a hearing has begun, the panel to which an application has been referred may refuse to continue the hearing or to make a decision if, in the opinion of the chair of the board or the panel, as the case may be,
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> (a) the subject matter of the application is trivial,
>
> (b) the application is frivolous or vexatious or is not made in good faith, or

> (c) the complainant does not have a sufficient personal interest in the subject matter of the application.

The second complaint of Mr. Barkwill (the "complainant") alleges that he is disturbed by dust from haying and noise related to tractor, weed whipper and chainsaw use, and seeks an order limiting the operating times of the tractor and a requirement that quieter electric equipment be purchased.

As referenced above, my September 3, 2014 letter initiated a submission process to determine whether the second complaint should be referred to a panel for hearing. As I stated in that letter to the complainant:

> As required under s. 6(2) of the *FPPA*, before taking any further steps in this matter, I am providing you as the complainant with the opportunity to address the seriousness and legitimacy of your complaint, including whether it is still your intention to proceed with it. If so, then in addition to canvassing whether the subject matter of the complaint is trivial, whether the application is frivolous, vexatious or not made in good faith, I would also ask you to clarify how each of the disturbances complained of (dust from haying and noise related to tractor, weed eater and chainsaw use) relate to farm operations conducted as part of a farm business.

The complainant's eight paragraph response does little to satisfy me of the legitimacy of the second complaint filed against Mr. Lychowyd (the "respondent") and only reinforces that the time and cost to hear such a complaint would not be justified for all concerned.

The response begins by taking issue with the fact that this second complaint was placed in abeyance in the first place and argues that BCFIRB has unreasonably and without legitimate cause, delayed considering the second complaint. While the complainant does not deny the adversarial nature of the relationship between himself and the respondent, he says that an extensive dispute history between a complainant and respondent is probably common in BCFIRB cases and in any event, the respondent's history of harassment was deemed irrelevant in his complaint against Ms. Washtock. With respect to the issue of how the specific complaints relate to a farm business, the complainant states:

> …This raises the issue of whether BC FIRB has jurisdiction to hear our complaint in that we have not established whether Mr. Lychowyd in fact has a "farm operation conducted as part of a farm business" per *the Farm Practices Protection (Right to Farm)* Act (*FPPA*).
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> *As with Mr. Lychowyd's complaint against us* it is apparent that this issue of jurisdiction needs to be settled first. To that end, I request that Mr. Lychowyd and Ms. Cockrill provide all revenue and expense records as well as tax returns and bank statements confirming the deposit of hay revenue verifying their farm income for the years 2013 and 2012.
>
> I have named both Mr. Lychowyd and his common law spouse Ms. Cockrill as respondents and requested both their financial information because I do not know whether the farm income is reported by Mr. Lychowyd or Ms. Cockrill or both as a partnership for income splitting purposes. [emphasis added]

He submits that if there is a farm operation conducted as part of a farm business, his intent is to pursue his complaint. He also indicates that he is concerned about "the unresolved issue of cows being penned next to the property line" as it "appears" that the respondent "is preparing a confined livestock area along the property line without regard to proper setbacks."

As Board Chair, I have authority to refuse to refer an application to a panel for the purpose of hearing where I find the subject matter of the application is trivial, or the application is frivolous or vexatious or not made in good faith: s. 6(2)(a), (b). I observe that the terms "trivial", "frivolous" and "vexatious" can be offensive terms to persons who are not legally trained, but they have established meanings. A "vexatious" complaint is one made with an intent to harass or annoy, or even if not made with such intent, abuses a board's processes by asking the board and the opposing party to commit resources to matters of little real significance (i.e., "trivial"). A vexatious complaint also includes an application that abuses the Board's process because it is brought for a purpose other than the assertion of legitimate rights. A "frivolous" complaint is one that is clearly lacking in substance and has no reasonable prospect of success.

The authority to summarily dismiss a complaint must be exercised wisely and with restraint. Section 6(2) exists precisely in order to provide a gate-keeping function that recognizes that the parties and the Board live in a world of finite resources and that it is fundamentally unfair to the opposing party, and contrary to the public interest, to establish a hearing process with regard to a complaint where the subject matter falls squarely within section 6(2). Against this backdrop, I turn to consider the second complaint and the complainant's letter dated September 16, 2014.

I turn first to that part of the complaint alleging that the respondent "operates chainsaws and weed whippers along the fence line when we are riding our horses in the ring". The related remedy is that he "purchase a quieter...weed whipper and chain saw and not operate this equipment while we are riding". For three reasons, any of which would suffice to support my conclusion, I conclude that this part of the complaint has no reasonable prospect of success. First, despite the specific request in my September 3, 2014 letter, the complainant has failed to address how chainsaw use and weed whipping relate to the conduct of the respondent's farm operation, i.e., hay production. Weed whipping and chainsaw use take place throughout the province, even on residential properties, as part of routine yard maintenance. In the absence of a plausible asserted link with a hay farming operation, it abuses the *FPPA*'s process to complain about those kinds of practices when a complainant is not prepared to assert how they relate to a farm operation. Second, even if these practices were considered practices that are part of a hay farming operation, there is in my view no reasonable prospect that a panel charged with determining "normal farm practice" would order a remedy requiring a farmer to purchase quieter equipment and modify the use of a chainsaw or weed-whacking according to when a neighbour might choose to ride his or her horse. Third, these aspects of the complaint suffer from many of the larger concerns I have regarding this complaint as a whole, discussed below in the context of "haying and tractor use".

The larger concerns I have are appropriately discussed in the context of those aspects of the complaint relating to haying and tractor use, where the remedy sought is an order preventing the respondent from operating his tractor before 8:00 a.m. and during the "dinner hour", and requiring that he purchase a quieter electric tractor. While I am satisfied that haying and tractor use are at least farm practices related to hay production, I find, for the reasons that follow, that this complaint should not be allowed to go hearing because, when considered in light of all the circumstances, it is frivolous, vexatious and not made in good faith.

The first point relates to the timing and subject matter of this complaint, which was made during a very litigious period of dispute in December 2013, in the context described earlier in this letter.

Against that backdrop, I note that, as reflected in the KP report at the time, the respondent has hayed for many years and that the complainant has never taken issue with that. Further, the complainant has not suggested in this second complaint that something has changed, or that the haying and tractor operations he complains of now are qualitatively different from those that existed when he filed his first complaint in 2008 when he made no complaint about those operations. This, together with the timing of the December 17, 2013 complaint, leads to what I regard as a reasonable inference that this complaint was brought for a purpose other than to address a legitimate grievance regarding farm practices.

This inference is reinforced when I examine the key passages from the complainant's September 16, 2014 response letter. That letter makes it apparent, in my judgment, that the complainant is not genuinely seeking to advance a farm practice complaint on the premise that the respondent is farming, but is rather seeking to use this complaint to exact a measure of reciprocity for the injustice he perceives he and Ms. Washtock were put through in the Lychowyd complaint. This is apparent from the following passages from his letter:

> You ask how each of the disturbances complained of relate to farm operations conducted as part of a farm business. This raises the issue of whether BC FIRB has jurisdiction to hear our complaint in that we have not established whether Mr. Lychowyd in fact has a "farm operation conducted as part of a farm business" per *the Farm Practices Protection (Right to Farm) Act* (*FPPA*).
>
> *As with Mr. Lychowyd's complaint against us* it is apparent that this issue of jurisdiction needs to be settled first. To that end, I request that Mr. Lychowyd and Ms. Cockrill provide all revenue and expense records as well as tax returns and bank statements confirming the deposit of hay revenue verifying their farm income for the years 2013 and 2012.
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> I have named both Mr. Lychowyd and his common law spouse Ms. Cockrill as respondents and requested both their financial information because I do not know whether the farm income is reported by Mr. Lychowyd or Ms. Cockrill or both as a partnership for income splitting purposes. [emphasis added]

The complainant's response just quoted appears to be based on his view that the process he was required to participate in should be equally applied to his neighbor now that their roles are reversed.

The obvious difference between the two cases was that in the Lychowyd complaint, it was Ms. Washtock (as respondent) who raised the issue that her operation was not a farm operation. That necessarily raised the "jurisdiction" issue for BCFIRB. Mr. Lychowyd, now the respondent to this complaint, has never taken that position regarding his hay operation. Mr. Lychowyd has always maintained that he *does* operate a farm business and in the March 2014 complaint hearing, he testified under oath that he still produces hay for sale on his property and previously had a small cattle herd on the property.

That distinction is critical because the complainant seeks a remedy from BCFIRB which can in law be granted only if the operation was a farm operation conducted as part of a farm business and only if he, as complainant, is in good faith prepared to so assert: *Hardy and Bond v. Stanhope Dairy Farm Ltd.* (October 4, 2013, BCFIRB), paras. 50-56. For this complainant, having filed the complaint – to now question whether his neighbour's operation is really a farm operation despite the respondent's position that he is a farm, to provide no plausible basis suggesting otherwise, and to characterize my September 3, 2014 letter as supporting a request that BCFIRB make orders

requiring the disclosure of income tax returns "as with Mr. Lychowyd's complaint against us", is in my judgment a clear misunderstanding and abuse of BCFIRB's complaint process. It shows what is in my judgment a strategic, vexatious attempt to use this second complaint as a vehicle to perpetuate the ongoing acrimony this dispute has exhibited throughout. In my view, BCFIRB's process should not be allowed to be used that way. In short, I take this response and request for income tax returns, together with the timing and subject matter of the second complaint, as evidence of the complainant's intention to use BCFIRB`s complaint processes to annoy and/or harass the respondent and of a complaint that is vexatious and not made in good faith within the specialized meaning of those terms.

Finally, I note that the complainant also uses his response submission to express concern that the respondent may be planning to resume his cow/calf operation at some point without regard to current setbacks and bylaws. I note that this is not an issue raised in the second complaint, and even if it had been raised, the fact that a farmer may or may not do something in the future is not the basis for a complaint under the *FPPA* and as such, has no prospect of success. If the complainant is concerned that the respondent is not following zoning requirements, those concerns should be directed to local government.

Conclusion

For the reasons given above, I exercise my discretion under s. 6(2) of the *FPPA* to refuse to refer this complaint to a panel for hearing. As such, this complaint is concluded.

As for the concern that the respondent may be planning to resume his cow/calf operation at some point and that future disturbances may result, the complainant will, if aggrieved by those practices, of course have the right to file a new complaint that reflects the realities and actual practices of the operation at that time.

As this is a final disposition of this complaint, I bring to the complainant's attention section 8(1) of the *Farm Practices Protection (Right to Farm) Act*:

> Within 60 days after receiving written notice, in accordance with section 6(5), of a decision of the chair or a panel of the (Provincial) board made under section 6, the complainant or farmer affected by the decision may appeal the decision to the Supreme Court on a question of law or jurisdiction.

Yours truly,

John Les
Chair