



BC Farm Industry Review Board

January 12, 2023

File: F2204

DELIVERED BY EMAIL

Nick Britschgi
[REDACTED]

Sukhpaul Bal
Hillcrest Farm Market Inc.
[REDACTED]

Dear Parties:

A COMPLAINT FILED UNDER THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT CONCERNING NOISE FROM HELICOPTERS AND ODOUR DUE TO SPRAY

On April 28, 2022 and May 12, 2022, the BC Farm Industry Review Board (BCFIRB) received a complaint and the \$100.00 filing fee from Nick Britschgi, of Kelowna BC, alleging that he is aggrieved by noise from helicopters and noise and odour from high powered sprayers on a neighbouring farm, Hillcrest Farm Market Inc, operated by Barbara and Chanchal Bal.

On July 27, 2022, BCFIRB staff and Knowledgeable Persons (KP's), Chris Zabek P.Ag and Lindsay King P.Ag conducted a site visit to both the complainant and the respondent properties. From this, a Knowledgeable Persons Report was produced and issued to parties on November 1, 2022.

On December 14, 2022, the respondent farm applied for a summary dismissal pursuant to section 6(2) of the *Farm Practices Protection (Right to Farm) Act (FPPA)* which provides:

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,

- (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.

By email dated December 16, 2022, BCFIRB established a submission process to give the complainant an opportunity to be heard and for the respondent to reply. I have now reviewed those submissions.

Summary Dismissal Application

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Position of Respondent

Based on its review of the KP report, the respondent submits its farm operations related to its use of helicopters and its airblast sprayers on its cherry orchard are consistent with normal farm practices.

The KP report states:

Our observations of similar cherry farms indicate that the use of helicopters is common as need arises due to weather events. Similarly, spraying is commonly conducted at any hour of the day or night depending upon factors including weather, pest pressure and operational need.

Assuming that the noise we heard at Mr. Britschgi's property was in fact emanating from Mr. Bal's sprayer, it is not atypical to that arising from the use of similar equipment on other cherry farms in B.C. or other jurisdictions. We recognize that the noise may be more noticeable during the night and early morning but at the time of our site visit it was very faint.

Although helicopters were not in use at the time of the site visit, we have heard numerous helicopters in use for agricultural purposes throughout the Okanagan. From the described use of the helicopters we do not believe the noise to be atypical to that arising from helicopters used on similar cherry farms

It is our opinion that the respondent farm is following practices consistent with those used by similar farms under similar circumstances. We nonetheless provide recommendations to further emphasize the beneficial practices being utilized. (page 12-13)

The respondent argues the complaint should be summarily dismissed as there is insufficient evidence to warrant a hearing. This farm has operated on this site for over 100 years and Kelowna has seen considerable growth during this time. While it is understandable that residents bordering the farm will have concerns, residents need to understand that they have chosen to live near an active agricultural area and accept that farming activity will be taking place on that land.

Position of Complainant

In response, the complainant says his concerns are not trivial. While he concedes there was only a faint audible noise at the KPs' site visit and no helicopter was hovering overhead, the issue is the next season and the season after that until Mr. Bal stops using his outdated, high pitch noise producing sprayer and switches to high tech equipment that does not create such noise.

The complainant argues that the provincial government needs to enact stricter rules and enforce them. He says by 2030, everyone will have converted to cleaner, renewable source vehicles except for farmers who, protected by the *FPPA*, will still be driving outdated, environmentally unfriendly vehicles. He points to other jurisdictions in Europe and China that have adopted new technologies while the Okanagan orchards rely on environmentally unfriendly helicopters to do the job.

The complainant readily accepts that other farms use this type of equipment but says the noise from helicopters and sprayers is unacceptable and produces pollution. Helicopter fumes are poisoning people and damaging the environment and the sprayers are using

multiple chemical herbicides and pesticides. Government has no data showing the long term impact of these chemicals on the health of those living around the orchards.

He argues the Ministry of Agriculture must protect citizens from misuse, overuse and improper use of helicopters, sprayers and chemicals. They should set the rules, not the farmer. Chemical use should be monitored by a third party and the “Environmental Agency” should measure the noise and air quality to make sure it is safe to live in this area, “not the Farm Act”.

The complainant takes issue with the attitude of government that people in surrounding areas should move if they do not like these disturbances. He says elected members of Government have to act and the *FPPA* needs to be revisited and changed so that farms within city limits abide by city rules and regulations.

Reply of Respondent

In reply, the respondent says the complainant’s response focuses on local and provincial regulations. If he wants to change regulations, he needs to lobby the appropriate level of government not BCFIRB. The respondent remains confident that it is following normal farm practices in its use of helicopters and airblast sprayers and as such, the complaint should be dismissed.

Decision

This decision is not a disguised adjudication of the merits of the notice of complaint, rather it is my assessment, on a preliminary and threshold basis, whether there is enough to this complaint to warrant the time and expense of a hearing and decision.

Section 6(2) of the *FPPA* gives me the authority to refuse to refer an application to a panel for hearing where the subject matter of the application lacks bona fides and is trivial, frivolous or vexatious or is not made in good faith, or where the complainant does not have a sufficient personal interest in the subject matter of the application. Terms like “vexatious” and “frivolous” appear somewhat jarring terms to persons who are not legally trained. However, as used in statutes, they have established meanings. A “vexatious” complaint is one made with an intent to harass, or even if not made with such intent, which abuses the board’s process because it is asking the board, and the opposing party, to commit resources to matters that have been fully and finally adjudicated or brought for an improper purpose. A “frivolous” complaint is one that is inappropriate to refer to a panel because it has no reasonable prospect of success. While this is a judgment that needs to be exercised wisely and with restraint, it recognizes that it is fundamentally unfair to the other party, and contrary to the public interest, to establish a hearing process for a complaint that has no reasonable prospect of success.

The Complaint

Turning to the complaint before me, there is no dispute that the respondent is operating a farm business. Further, the disturbances complained of arise out of a farm operation (periodic use of a helicopter and airblast sprayer to dry cherries and apply chemical herbicides respectively). For the purpose of this decision, and while it may be an arguable point, I am prepared to accept that the complainant is aggrieved by these disturbances which arise out of a farm operation carried out as part of its farm business.

However, the key question on this complaint is whether the noise/odour disturbance complained of results from a normal farm practice. To determine whether a complained of practice falls within the definition of normal farm practice, the practice must be “consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.” This test requires a consideration of general industry practices, together with the specific contextual circumstances of the respondent farm itself and in relation to properties around it.

The KP report provides as follows:

- The farm property has approximately 65 acres planted to cherries; it is in the Agricultural Land Reserve (ALR) and zoned for agriculture by the City of Kelowna. The land is classified as ‘Farm’ by BC Assessment. (page 2)
- the complainant’s residential property is approximately 290 m from the respondent’s property and is approximately 30 m lower in elevation (page 3)
- Highway #33, four rows of houses and another farm property are between the complainant’s and respondent’s respective properties. (page 4)
- the complainant reports high-pitched noise from the respondent’s airblast sprayer, all night long on numerous occasions throughout the growing season and he has also detected what he believes to be spray odours. (page 4)
- he believes helicopter use should not be allowed at all within city limits. (page 4)
- the farm uses helicopters as needed for frost protection and to blow rainwater off of the cherries to minimize splitting. (page 5)
- the need for helicopters, including frequency and duration of use and number of machines, is variable and highly dependent upon the annual weather conditions. The farm used helicopters for one rain event in 2022 and in 2021, there was one use frost protection. (page 6)
- airblast sprayers are an extremely common tool used by orchardists throughout the Okanagan Valley and are in other tree fruit producing regions in Washington State. Spray timing is highly dependent on weather conditions. (page 7)
- spraying equipment is operated at any time of the day or night in order to minimize spray drift and maximize beneficial impact on pest and weed control or to meet farm management needs and short operational windows. (page 8)
- helicopters have been used in the Okanagan to blow water from cherries since the 1970/1980s. (page 9)
- expansion of cherry acreage and increasing investment has resulted in increased use of helicopters to protect against frost and rain damage. (page 10)
- flight operations are regulated by Transport Canada and the use of helicopters for drying cherries or frost protection is not prohibited in B.C.
- helicopters are used for these purposes in the U.S., New Zealand, Australia and Chile. (page 10)
- helicopters, whether for water removal or frost protection, are commonly used by cherry growers in the Okanagan Valley, disturbance can be exacerbated by the early hour at which they are often used. (page 10)
- ALR/urban edge conflicts can be mitigated through edge planning but the B.C. Ministry of Agriculture and Food Guide to Edge Planning does not contemplate restrictions or prohibitions on important farm activities such as the use of aircraft as that could effectively render a significant amount of farmland sterile to some types of agriculture. (page 12)
- given the relatively large distance between the complainant and respondent properties, a vegetative buffer along the ALR edge would not be effective in reducing the disturbance complained of. (page 12)

The KPs' report concludes that, assuming that the audible noise on the site visit was in fact emanating from Mr. Bal's sprayer, it was not atypical to that arising from the use of similar equipment on other cherry farms in B.C. or other jurisdictions. The noise may be more noticeable during the night and early morning but at the time of the site visit it was very faint. With respect to helicopters, from the farm's description of their use, the KPs do not believe the noise to be atypical to that arising from helicopters used on similar cherry farms. The KPs concluded the respondent farm is following practices consistent with those used by similar farms under similar circumstances and did not identify any contextual factors that would cause them to recommend any modifications to the farm's use of helicopters or airblast sprayers.

Similar to his response to the Jealous Fruit's summary dismissal application, the complainant does not dispute the KPs' conclusions that this farm's use of airblast sprayers and helicopters is consistent with how similar farms in similar circumstances in the Okanagan make use of this equipment. He does not allege that this farm is doing something different from similar farms in similar circumstances to protect its cherries. Once again, the complainant is using this complaint for the improper purpose of creating a forum to get government to rewrite the *FPPA* and shift the balance in that legislation away from protecting farmers following normal farm practice to some other standard that he prefers.

The complainant appears to want BCFIRB to order that no farm be allowed to use helicopters or airblast sprayers for crop protection within Kelowna city limits. He raises concerns about pollution and associated health risks associated with the exhaust from helicopters and airblast sprayers. He argues that the *FPPA* is outdated and needs to be rewritten and the City of Kelowna noise bylaws should be given precedence.

As with the Jealous Fruits' summary dismissal application, I have no difficulty concluding that the complainant is abusing the complaint process of BCFIRB for the improper purpose of seeking remedies that BCFIRB has no jurisdiction over. The *FPPA* was put into place to provide a balanced approach to give neighbours a venue to complain when aggrieved by farming practices. At the same time, it protects farmers from these complaints when they are carrying on "normal farm practices" and taking reasonable actions to mitigate neighbour complaints. I cannot rewrite the statute to strike a different balance between the interests of neighbours and farmers than that which currently exists. That is a job for the legislature.

To the extent that the complainant seeks to characterize his issue as pollution or chemical poisoning and allege other serious health impacts, such issues could potentially fall within the *Health Act* or possibly the *Environmental Management Act*. BCFIRB does not have jurisdiction to deal with matters of pollution or violations of other statutes. Such determinations must be made by the appropriate agency with jurisdiction over the particular issue or contravention alleged.

I find that this complaint does not raise issues that fall within the scope of the *FPPA*. As such, there is no prospect that the complaint will be successful, and it is frivolous. Further, the complaint abuses the *FPPA*'s processes, and it is vexatious as it does not in good faith seek as its main purpose to demonstrate that this farm is not following normal farm practice. Instead, it seeks to redefine what is considered "normal farm practice" in the city limits of Kelowna. In my view, that is abusive of the farm, and of BCFIRB, which

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should be deploying its limited resources for cases that genuinely seek the remedies available under the *FPPA*. In my view, section 6 allows BCFIRB to stop that kind of abuse.

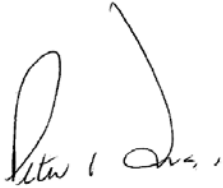
Order

For the reasons set out in this decision, it is my view that this complaint is frivolous and vexatious. The proper course of action is to refuse to refer the complaint to a panel for the purpose of a hearing pursuant to section 6(2)(b) of the *FPPA*

The complaint is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is written in a cursive style with a large initial 'P' and 'D'.

Peter Donkers
Chair, BC Farm Industry Review Board