



BC Farm Industry Review Board

January 12, 2023

File: F2206

DELIVERED BY EMAIL

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Dear Parties:

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

On June 29 and July 6, 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 being used on a neighbouring farm owned and operated by Jealous Fruits Ltd. (Jealous Fruits).

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 4, 2022.

On November 21, 2022, the respondent farm applied for a summary dismissal of the notice of complaint 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 on November 28, 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

Position of Respondent

The respondent's application states:

(Jealous Fruits) is a large cherry farmer operating cherry orchards and associated production facilities in the Okanagan Valley, British Columbia. Unfortunately, rain and frost are common and unavoidable phenomenon which seriously impact the quality of cherries.

One of the most effective means of preventing damage to cherries from these two factors is to move air through the cherry trees. This is accomplished primarily through the use of helicopters hovering over the cherry trees, tractor mounted fans, and large stationary fans. While some of these tools may be used separately, by far the most effective way of drying cherries after a rain is to use helicopters, and the other methods to supplement the helicopters. All of the respondent's orchards employ the three methods described in this paragraph to combat damage caused by rain and frost. Due to the expense of employing these procedures, they are used sparingly and only when necessary.

The respondent relies on the KP's report which concluded at page 9: "...the respondent farm is following practices consistent with or exceeding those used by similar farms under similar circumstances"

In applying section 6(2) of the *FPPA*, the respondent makes three points:

- 1) **Frivolous nature of complaint:** There is no reasonably possible scenario whereby (Jealous Fruits) would be found to not be using normal farm practices, and therefore, the complaint going to hearing is a waste of resources and an unnecessary expense to the Respondent and the taxpayer. The resources of BCFIRB should be reserved for those cases in which it is at least arguable that the farmer's conduct is not a normal farm practice.
- 2) **Relevance:** The Complainant's residence is very far removed (½ kilometer away) from (Jealous Fruits') farming operations. As such, going to hearing in this case broadens the application scope of the BCFIRB complaint process to such an extent that it borders on ridiculous. Farmers would be spending half their time and a considerable expense dealing with urban complainants from hundreds of thousands of residents anywhere in remote earshot of a farm creating undue hardship on farmers, and overwhelming the tribunal process.
- 3) **Precedent:** (Jealous Fruits) previously went through a hearing involving noise complaints ([Learmonth & Lewis v. Coral Beach Farms Ltd.](#)) and was found to be following normal farm practices, specifically with respect to its use of helicopters and wind turbines. (Jealous Fruits') practices have not changed and are consistent across its farms. While it is understood that there are no blanket exemptions, and that farmers must mitigate impacts on immediate neighbours to a reasonable extent, this complaint is much weaker than the Learmonth case where the complainants lived less than 50 meters from the orchard, and immediately above the orchard. In this case the complainant's residence is 450 meters distant, and approximately 30 meters below the orchard. (Jealous Fruits) was guided by the decision in conducting its operations as no doubt were other farmers in making operational decisions including capital and contractual commitments. The decision must be given some weight in considering the futility of the present complaint.

Position of Complainant

In response, the complainant says his concerns are not trivial and this position disregards the rights of the people living in the area surrounding and adjacent to the farm's leased plot of land, some of whom experience helicopters flying less than 25 meters from their home. The complainant's fundamental premise is that everyone has a right to breathe clean air and be able to sleep at night regardless of the *FPPA*. He argues that just because it is only him making this complaint does not mean that the neighbours are ok with the farm's "ridiculous practice".

He says the fact he resides more than 450 meters from the farm property does not render his complaint trivial, as noise travels regardless of the distance. Only a large mountain between his home and the farm would render the noise inaudible.

The complainant argues the *FPPA* is outdated and should be revisited and rewritten to adjust to farm locations. As the farm's leased property is within Kelowna city limits, it should be required to abide by Kelowna's Noise By-laws and be penalized accordingly. He argues that if Jealous Fruits wants to farm within city limits, surrounded by neighbours, it must change its farm practices or move. The right to farm does not outweigh the right for the people to live in the Okanagan.

The complainant argues that using helicopters to dry cherries is complete nonsense. He says the disturbance at 04:00 extends to all people living around where the helicopter starts, and along its flight path and comes at an astronomical cost: (6 days X 6 hours X \$1500.00/hour = \$54000.00). The helicopter discards clean, fresh rainwater with a film of poison liquid from its exhaust, which then dries and is blown into the trees, which along with pesticides, slowly poison the cherries. Further, furnaces that are in use at this hour suck in helicopter exhaust, slowly poisoning home occupants without their knowledge or approval, violating their right to live. He is further concerned about loss of sleep for himself, his neighbours and their children. He argues farmers in Europe and even in China are using technology that works, not "outdated, stone age, polluting and noisy practices" like farmers in the Okanagan.

In summary, the complainant says this issue is not trivial. He is seeking an order that Jealous Fruits be required to stop using helicopters "as a good gesture and good will" failing that he says this is an issue for the Ministry of Health and the Human Rights Tribunal. To the point that the *Learmonth* decision can be viewed as a precedent, he argues that this case is not similar and should be assessed on its own merits.

Reply of Respondent

In reply, the respondent says the complainant has not responded to the law, the facts or the legal test for summary dismissal but has instead raised irrelevant new arguments related to human rights which are not within the purview of this tribunal. His submission does not respond to the *FPPA* but instead argues that the law should be repealed. That is not an issue for BCFIRB and as such, the complaint should be summarily dismissed.

Decision

In considering whether to summarily dismiss this complaint, my job is not to interpret and apply BCFIRB's mandate as others may wish it would read or as it might more conveniently be read. Rather, I must interpret and apply the *FPPA* as it is, adopting the approach that accords best with the language, purpose and context of this legislation as enacted in 1995. If law reform is necessary, as appears to be the suggestion of the complainant, that is the legislature's job not mine.

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.

Purpose and operation of the FPPA

The "right to farm" created by the *FPPA* was a significant change to the existing common law and statute law of this province. As recognized in *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, [2003] B.C.J. No. 839 (S.C.) at para. 32, the *FPPA* creates novel statutory rights and protections from court proceedings where certain conditions are met:

... a central feature of the scheme appears to be the establishment of a 'Right to Farm' provided 'normal farm practices' are followed. To achieve this goal there are provisions exempting the farmer from liability in nuisance and from having his farm operations interrupted by injunction or court order.

In addition to protections from court proceedings, section 3 of the *FPPA* creates a complaint process before a specialized tribunal and offers potential remedies for persons aggrieved by farm practices. The terms "normal farm practice", "farm business" and "farm operation" are defined as follows:

"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).

"farm business" means a business in which one or more farm operations are conducted, and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations;

"farm operation" means any of the following activities involved in carrying on a farm business:

(a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals;

(b) clearing, draining, irrigating or cultivating land;

(c) using farm machinery, equipment, devices, materials and structures;

- (d) applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying;
- (e) conducting any other agricultural activity on, in or over agricultural land; and includes
- (f) intensively cultivating in plantations, any
 - (i) specialty wood crops, or
 - (ii) specialty fibre crops prescribed by the minister;
- (g) conducting turf production (i) outside of an agricultural land reserve, or (ii) in an agricultural land reserve with the approval under the Agricultural Land Commission Act of the Provincial Agricultural Land Commission;
- (h) aquaculture as defined in the *Fisheries Act* if carried on by a person licensed, under Part 3 of that Act, to carry on the business of aquaculture;
- (i) raising or keeping game, within the meaning of the Game Farm Act, by a person licensed to do so under that Act;
- (j) raising or keeping fur bearing animals, within the meaning of the Fur Farm Act, by a person licensed to do so under that Act;
- (k) processing or direct marketing by a farmer of one or both of
 - (i) the products of a farm owned or operated by the farmer, and
 - (ii) within limits prescribed by the minister, products not of that farm, to the extent that the processing or marketing of those products is conducted on the farmer's farm; but does not include
- (l) an activity, other than grazing or hay cutting, if the activity constitutes a forest practice as defined in the Forest and Range Practices Act;
- (m) breeding pets or operating a kennel;
- (n) growing, producing, raising or keeping exotic animals, except types of exotic animals prescribed by the minister;

Complaints before BCFIRB apply this novel statutory concept of “normal farm practice” which modifies the law of nuisance to allow a neighbour to seek significant and special remedies against a farm operation that is creating a disturbance other than in accordance with normal farm practice:

3 (1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

6 (1) The panel established to hear an application must hold a hearing and must

(a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or

(b) order the farmer to cease the practice that causes the odour, noise, dust or other 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.

Upon the filing a proper complaint, a complainant may apply for compulsory orders requiring the farmer and its witnesses to produce documents and to attend a hearing:

section 11(5). Upon determining that a farm is not following normal farm practice, BCFIRB can order a farm to cease or modify its practices. These remedial orders can be filed and enforced as orders of the Supreme Court: section 6.1. Understandably, these powers can be intrusive, time-consuming, and costly for all parties and their witnesses. As a result, a person who comes before BCFIRB with a complaint must do so with the bona fide intention of demonstrating that the farm in question is not following “normal farm practice” and seeking an order that BCFIRB can in fact make.

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 improper purposes. 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 now to the complaint before me, there is no dispute that the respondent is operating a farm business. Further, it is a farm operation (periodic use of a helicopter to dry cherries) that is alleged to have caused a noise disturbance. 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 the noise disturbance which arises out of a farm operation (helicopter use to dry cherries) carried out as part of its farm business.

I note that the complainant takes the position that despite his lack of proximity to the farm, he brings his complaint on behalf of other unidentified neighbours, some of whom are adjacent to the farm. A notice of complaint is personal and requires each complainant to demonstrate that they are aggrieved. It is not enough for a complainant to point to others who may be more impacted by a farm’s practices. A complainant only has standing to make a complaint where they are directly and adversely affected by a farm practice, which for present purposes I accept.

However, the key question on this complaint is whether the noise 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 50 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 450 m from the respondent's property and is approximately 45 m lower in elevation (page 2)
- Highway #33, four rows of houses and another farm property are between the complainant's and respondent's respective properties. (page 3)
- helicopters have been used in the Okanagan to blow water from cherries since the 1970/1980s. (page 6)
- expansion of cherry acreage and increasing investment has resulted in increased use of helicopters to protect against frost and rain damage.
- 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 6-7)
- helicopters, whether for water removal or frost protection, are commonly used by cherry growers in the Okanagan Valley. (page 7)
- disturbance caused by helicopters 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 such prohibition as that could effectively render a significant amount of farmland sterile to some types of agriculture. (page 12)
- given the large separation between the complainant and respondent properties it would not typically be considered an edge planning area under the Guide. (page 12)

The KPs' report at page 13 concludes the respondent farm is following practices consistent with or exceeding those used by similar farms under similar circumstances. They did not identify any contextual factors that would cause them to recommend any modifications to the farm's use of helicopters.

In his response to the summary dismissal application, the complainant does not dispute any of the facts or conclusions of the KPs. Significantly, he does not allege that this farm is doing something different from similar farms in similar circumstances to protect its cherries. Instead, he seeks an order that no farm be allowed to use helicopters for crop protection as, in his view, the disturbance is too great¹. He also alleges that the associated down draft and exhaust from the helicopter poisons the cherries and poses a serious health risk to occupants of homes beneath the helicopter's flight path. He argues that the *FPPA* is outdated and needs to be rewritten and the City of Kelowna noise bylaws should be given precedence. In short, he says the respondent farm must be ordered to change its practices or move. The complainant sees this issue as a violation of his human rights and asserts that everyone has a fundamental right to breathe clean air and sleep at night.

¹ On this point, I note Mr. Britschgi has commenced a similar complaint against Hillcrest Farms Ltd. which is the subject of a separate 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. BCFIRB must take its enabling statute as written. 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.

Similarly, I cannot order that City of Kelowna bylaws take precedence as that balance is struck in section 2 of the *FPPA*. Further, where a local government seeks to restrict agriculture in a particular area, the *Local Government Act* establishes a process to obtain appropriate approvals from the Minister of Agriculture.

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. Similarly, BCFIRB does not adjudicate on matters related to human rights, that would be for the Human Rights Tribunal.

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 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 improperly seeks to redefine what is considered “normal farm practice” for farms operating within Kelowna city limits. In my view, that is abusive of the farm, and of BCFIRB, which 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.

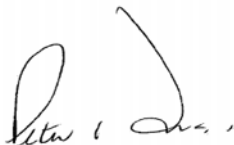
Order

For the reasons set out in this decision, it is my view that this complaint is frivolous and vexatious, and 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:



Peter Donkers
Chair, BC Farm Industry Review Board