



June 3, 2011

File #10-07 & 11-06

DELIVERED BY COURIER

Edward Baran
Kevin Baran



Henry Roberts
Country Drive Poultry Farm Ltd.



Dear Sirs:

A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT*

On September 13, 2010, Edward Baran filed a complaint with the British Columbia Farm Industry Review Board (BCFIRB) against the farm operations of Country Drive Poultry Farm Ltd. operated by Henry Roberts. In his complaint, Mr. Baran took issue with several farm practices of the poultry operation.

A case management conference was conducted on October 21, 2010 wherein the following issue was identified:

1. Are the rodents, flies, manure spreading, dumping of rotten eggs, mortality disposal (dead carcasses and the contaminated air being released by the exhaust fans toward the complainant's property) in accordance with normal farm practices?

The respondent's position at the case management conference was that, other than installing hoods on two exhaust fans, the farm has implemented all the modifications ordered by BCFIRB in its September 2005 decision concerning the Baran's previous, 2004 complaint and the farm's current practices are in accordance with normal farm practices.

Subsequently, BCFIRB retained John Durham as a knowledgeable person (KP) to prepare a report regarding the respondent farm operation. His report, dated November 30, 2010 was provided to the parties.

On April 12, 2011, the respondent applied to BCFIRB for an order dismissing the subject complaint on the basis that it raised the same issues addressed in the Baran's first complaint which resulted in the September 2005 order. The respondent argues that he has completed all the modifications required by the September 2005 order, (namely installation of fan hoods, commencing "a parasite program" and a rodent control program, maintaining the hedge and instituting a system to reduce dust when using a conveyor to ship out manure). He further argues that the Durham KP report confirms that all the modifications were made with the exception that Mr. Durham did not witness the dust control system as manure was not being shipped out at the time of his site visit. The respondent indicates that BCFIRB is welcome to attend and observe his manure management practices the next time he ships manure.

The complainant, Edward Baran and his son Kevin Baran oppose the application to dismiss and seek a hearing of the complaint. The Barans did not specifically address the substance of the summary dismissal application (i.e that this complaint raises the same issues as the 2004 complaint and as the modifications have been completed as ordered in that complaint, this complaint should be dismissed). However, it is clear from the Baran's response that they continue to feel victimized by the respondent's farm practices on his poultry operation.

Subsequently, Kevin Baran filed his own complaint with respect to the respondent's poultry operation. The notice of complaint repeats the same allegations made by Edward Baran in his September 2010 complaint.

DECISION

Section 6 of the *Farm Practices Protection (Right to Farm) Act (FPPA)* provides that the chair may refuse to refer an application to a panel for the purpose of a hearing if, in the opinion of the chair:

- (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.

In this case, the respondent farm argues that as this complaint raises the same issues as the 2004 complaint and as he has complied with all modifications ordered in that decision, this complaint should be dismissed. Although the respondent did not rely on the language of the *FPPA*, I take his argument to be that this complaint is either trivial or alternatively it is frivolous, vexatious or not made in good faith.

To deprive a complainant of his right to a hearing is an extraordinary remedy and as such this power can only be exercised in limited situations, where it is clear on the face that the complaint cannot possibly succeed or that it is devoid of merit. In support of his application for summary dismissal, the respondent must do more than merely assert a position; he must demonstrate that this appeal is frivolous, vexatious or trivial. *The Canadian Oxford Dictionary* (1998) defines frivolous as meaning "silly or wasteful...having no reasonable grounds...not sensible or serious". "Vexatious" is defined as meaning "not having sufficient grounds for action and seeking only to annoy the defendant".

The central issue here is whether the new complaint raises the same issues that were addressed in the first complaint and if so, has the respondent satisfactorily met the terms of the September 2005 order such that compliance with that order is a complete answer to this complaint. If the answer is yes, I think it would be fair to characterize this new complaint as frivolous, vexatious or trivial.

Looking at the September 2005 decision, it appears that it addressed similar issues relating to dust from exhaust fans, pest management, noise, odour and barn clean out practices. However, I note that this complaint raises several new issues including the use of the incinerator, composting of carcasses and the storage of litter on site.

Further, the September 2005 decision imposed a higher standard of "normal farm practice" on the respondent. Not only are the two properties adjacent to each other, building decisions on both the properties have placed barns and residences in close proximity. In the case of the farm, the panel concluded that the siting of the poultry operation at minimum set backs brought with it a corresponding obligation to consider a whole range of options to minimize the impact of the operation on neighbours than might otherwise be necessary (paragraph 54).

The September 2005 order provided:

54. Accordingly, the Panel orders the Respondent to modify his farm management practices to reduce pests, specifically flies and rodents, as follows:
 1. Implement fly and rodent control systems to maintain populations at appropriate levels.
 2. Maintain appropriate records in support of the foregoing management plans.
 3. Employ the necessary qualified technical professionals to assist in the design and implementation of the foregoing management plans including the implementation of any spray program.
 4. Maintain CHEQ™ certified farm status with the Commission and continue ongoing monitoring by the BHEPA to ensure compliance with the best management practices as set out in the CHEQ™ program.
55. With respect to the dust problem on the farm the Panel orders the Respondent to modify his farm management practices as follows:
 1. Install fan hoods on all fans on both sides of the barn to reduce dust surrounding the farm.
 2. Use of a tarp system over the truck and clean-up area when cleaning out the barns to reduce dust levels.
 3. Maintain the health and growth of the hedge between the two properties.
 4. Maintain a grass barrier along the side of the barn facing the Baran property and keep this grass cut to a reasonable length to discourage rodents using long grass as a cover.
56. The Panel's modification order in paragraph 57 will take effect immediately. Within 30 days, Mr. Roberts is directed to submit his pest and rodent control programs to the Provincial board office, including the names and qualifications of the professionals who approved the plans and an outline of the records which he will maintain. Mr. Roberts is also directed to forward a schedule of the monitoring to be done by the BHEPA with respect to his compliance with the CHEQ™ program.
57. In respect to the Panel's modification order in paragraph 58, Mr. Roberts has 60 days in which to install the fan hoods and to send confirmation of this to the Provincial board office. Within 60 days, he is also directed to show evidence to the Provincial board of the tarp system which will be employed during clean-out periods.

If in his KP report, Mr. Durham concluded that the modification order set out above had been complied with in the time frames set out in the order, I would likely have found favour with the respondent's argument that to the extent this complaint sought to raise the same issues again, it was frivolous and/or vexatious. However, that is not the case. Mr. Durham identifies several issues with the respondent's farm practices. He concludes:

“while the Roberts' farm, as we saw it, was following “normal farm practices” I do not believe that the location of the barn or its configuration can be considered normal. I believe that the barn could have been better located and should have been configured in the traditional manner with the service area at the front. I also believe the Roberts were slow to react to the Decisions set out

in the appeal and that the hatching egg industry must be more proactive when these decisions come down. It is for these reasons that I feel Mr. Roberts needs to go beyond “normal farm practices”.

I do not believe the current situation is a full “normal farm Practice” and because of the barn setup I believe that FIRB needs to consider the recommended changes or other changes to achieve the same result, before re-endorsing this farm.

Mr. Durham then makes 7 recommendations to improve the current farm practices on the respondent operation to accord with the higher standard directed by the panel in its September 2005 decision. In light of the Durham report, I can not conclude that the respondent farm has satisfied the terms of the modification order. This matter will need to proceed to a hearing where a panel can assess the evidence of both parties before making any determination as to whether the September 2005 order has been complied with and whether the respondent farm is currently following normal farm practices. Accordingly, I am dismissing this application.

In light of the history here, I believe it is worthwhile to make a few additional comments. First, BCFIRB does not have jurisdiction to consider pollution or health related issues. To the extent that the complainant wants those issues addressed, he will need to take them up with the appropriate authority.

Second, given that this is the second hearing related to this farm operation, it would be of assistance if the complainant identified any instances of the respondent’s alleged breach of the terms of the modification order; any deficiencies in the modification order warranting a change in practice and any new areas of complaint. The respondent should in turn be prepared to defend any allegations of breach of the modification order, explain why any further modified practices are unnecessary and respond to any new areas of complaint.

Third, if a panel of BCFIRB determines that the respondent is not meeting normal farm practices for his operation, a new order will be issued. A certified copy of this order can be filed in Supreme Court. Further, a finding that a farm is not following normal farm practice will remove the protection from nuisance actions offered by the *FPPA*.

Finally, I commented earlier that Kevin Baran has filed a complaint against the respondent farm. His notice of complaint appears to be the same as the one filed by Edward Baran with the exception of the signature. Given that this complaint raises the same allegations, I direct that it be heard at the same time as the Edward Baran complaint. I will leave it to the Case Manager to address any process issues arising out of this direction with the parties in the pre-hearing conference call.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Ron Kilmury, Chair