

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT ARISING FROM THE OPERATION OF A
DAIRY FARM IN BLACK CREEK, BRITISH COLUMBIA

BETWEEN:

DEBBIE JORY

COMPLAINANT

AND:

BRUCE AND BOB BEACHAM

RESPONDENTS

DECISION

For the British Columbia
Farm Industry Review Board

Ron Kilmury, Chair

For the Complainant

Debbie Jory

For the Respondents

Bruce Beacham

Location of Hearing

By Written Submission

Date of Decision:

December 19, 2012

BACKGROUND

1. On November 6, 2012, I issued a decision refusing to refer to a panel for hearing a series of farm practices complaints Debbie Jory commenced against Bruce and Bob Beacham during the period after she filed her Complaint #11-04 (May 2011) and before the panel issued its comprehensive decision dismissing that complaint: *Jory v. Beacham* (August 31, 2012). I made my November 6, 2012 decision pursuant to section 6(2) of the *Farm Practices Protection (Right to Farm) Act (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,

(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.

2. For the reasons outlined in November 6, 2012 summary dismissal decision, I issued the following order:

33. Complaints #11-25, 11-26, 11-27, 12-01, 12-02, 12-04, 12-05, 12-06, 12-12, 12-15, 12-17, 12-18 and #12-21 will not be referred to a panel for hearing.

34. Complaint #12-20, to the extent that it refers to farm activities which include noise, odour, dust, particulate matter from manure, and diesel exhaust caused by truck traffic, operation of equipment at the silage bag site or any other farm practice adjudicated on by the panel in the August 2012 decision, will not be referred to a panel for hearing.

35. The remaining issues which remain live in Complaint #12-20 relate to reconfiguration of barn resulting in increased odour from manure and tractor exhaust and poor pest management (flies and rodents).

36. No further steps will be taken with respect to the live issues in Complaint #12-20 until BCFIRB retains a specialist or specialists to attend at the respondents' farm and prepare a report to assist me in determining whether there is sufficient substance to those issues to warrant referral to a hearing panel.

37. The parties will be provided with a copy of any report prepared by the specialist(s).

38. The parties will be given an opportunity to make submissions before I make a decision to refer any or all of the above issues to a panel for hearing and to impose any further procedural directions necessary to manage this dispute.

3. Issues relating to disturbances alleged to be associated with a barn reconfiguration and pest management (paragraph 35 quoted above) were not raised in the original complaint and not addressed in the August 31, 2012 decision. These issues were not well developed by the complainant in either her notices of complaint or in the subsequent submission process on the summary dismissal application.

4. I considered whether either of the "new" issues should be referred to hearing. I concluded that I would obtain further information before making that decision:

25. The respondents agree that the complainant raises some new issues but says her complaints about flies and rodents are grossly exaggerated. They acknowledge that, between the date of the panel hearing and the release of its decision, there have been renovations to the barn and construction of a new paddock.

26. The hearing panel concluded that the respondents operate their modern dairy farm to a high standard. This conclusion, together with my finding above that the complainant's efforts to relitigate the same issues are vexatious *and* the fact that the issues relating to manure management and pests could have been fully canvassed in the original complaint, caused me to debate whether either of the "new" issues should also be considered vexatious and summarily dismissed.

27. I recognize that this is an emotionally charged issue for the complainant and I am prepared to give her the benefit of the doubt. I also recognize that the reconfigured barn complaint relates to subsequent events. But that does not mean that I am prepared to commit further board resources to addressing the complainant's concerns without some basic evidentiary threshold to warrant a full hearing.

28. As noted above, if a complaint has no reasonable prospect of success, it should not be referred to a panel. The history and dynamics of this matter are such that I consider it incumbent on me to make that determination. I stress that I am doing so not for the purpose of conducting a disguised adjudication of the merits, but for the purpose of assessing, on a preliminary and threshold basis, whether in fact there is enough in these complaints to warrant the time, expense and further delay for all of a further hearing and decision.

29. To assist me in making that determination, I have decided, pursuant to s. 10(3) of the *FPPA* to direct that a specialist or specialists knowledgeable in dairy operations and pest control be retained by BCFIRB to attend at the respondents' farm and to write a report to the Chair. That report will address two subjects. First, to what extent are the practices in question impacting on the complainant's property? Second, do the farm's practices in question raise any normal farm practice issue(s) that warrants further consideration? Upon receipt of that report, I will provide a copy to the parties, give them an opportunity to comment, and then decide whether to refer this matter to a hearing panel.

5. Terms of reference were developed in accordance with the above and provided to both parties. The specialist, John Luymes, P.Eng., a Farm Structures Engineer with the BC Ministry of Agriculture, attended at the complainant's residence and the respondents' farm on November 29, 2012. His report was received by the BC Farm Industry Review Board (BCFIRB) on December 6, 2012. Mr. Luymes' report was provided to both parties, who were given the opportunity to comment on the report.
6. The respondents' comments were received on December 7, 2012. The complainant submitted a series of emails, including emails attaching photographs and a diagram, on December 10, 2012. I have carefully reviewed all these materials.

THE LEGAL TEST

7. Section 6(2) of the *FPPA* authorizes the chair to refuse to refer an application to a panel for the purpose of hearing where the subject matter of the application 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.
8. I am applying section 6(2) of the *FPPA* as I described it at paragraphs 15, 16 and 28 of my November 6, 2012 decision:

Under section 6(2) of the *FPPA*, quoted above, I have the 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,

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. The terms “vexatious” and “frivolous” appear as somewhat jarring terms to persons who are not legally trained. However, as used in statutes, they have established meanings. For the purposes of this case, it will suffice to note that a “vexatious” complaint will be a complaint that is 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.

A “frivolous” complaint will be 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 with regard to a complaint that has no reasonable prospect of success....

As noted above, if a complaint has no reasonable prospect of success, it should not be referred to a panel. The history and dynamics of this matter are such that I consider it incumbent on me to make that determination. I stress that I am doing so not for the purpose of conducting a disguised adjudication of the merits, but for the purpose of assessing, on a preliminary and threshold basis, whether in fact there is enough in these complaints to warrant the time, expense and further delay for all of a further hearing and decision.

SPECIALIST REPORT

9. The barn reconfiguration was discussed by the Specialist as follows:

Approximately 120 animals are housed at the site, including a variety of younger stock, bred heifers and dry cows. The barn is undergoing renovations to replace deteriorating posts and outdated free stalls constructed of wood. One side of the barn has recently been converted from a bedded pack to free stalls with metal dividers. A drive through alley has been incorporated into the center of the barn to expedite feeding operations. Once complete, the building will have incorporated four rows of free stalls, two rows on each side of the centre alley. Renovations include plans for a polyethylene pipe flume across the width of the barn at the end of the manure alleys to collect semisolid manure deposited into it by automatic scrapers. Water from a vertical water tank already installed on the property will flush manure from this cross channel into the existing pit. The current tractor-mounted propeller will be replaced by an Houle agitator pump to expedite mixing of manure in the storage pit prior to spreading. The Beachams have removed the bedded pack portion of the barn to reduce the labour involved in manure removal activities, to reduce the farm’s dependence on wood-based bedding, to address excess densities of animals on the pack, and to reduce ongoing challenges in keeping cows clean. Plans are in place to install a DariTech *BeddingMaster* to convert manure into bedding compost.

In order to be able to carry out construction renovations, the Beachams built an outdoor fenced enclosure between the road and adjacent to the barn. This area provides opportunities for the cattle to have the choice of being both indoors and outdoors and to offer additional exercise options. The cattle exercise yard could not be located on the other side of the building because the permanent manure storage structure is located on that side.

Part of the building renovations also included the replacement of deteriorated plywood sheathing along the sidewalls with rough-cut dimension lumber provided by a local sawmill. At present, the top half of the sidewall for a length equal to approximately half the length of the barn is open. In most modern dairies, it is recommended that sidewalls in naturally ventilated barns be open as much as possible – especially in spring, summer and fall conditions – to promote cross ventilation. Virtually all new barns are constructed with adjustable side curtains to address changing weather conditions. In the winter, especially during cold spells of weather, it is common practice to partially close sidewall curtains to prevent drafting on animals and to keep manure from freezing. If weather temperatures drop below -10° C for extended periods of time, it is typically necessary to use front-end loaders to remove frozen manure buildup in the barn. The suggestion by the complainant to incorporate wall openings on the side away from the house will not mitigate the tendency of odours

– if and when they may be prevalent – to drift in the direction the complainant’s house if the prevailing winds are from the barn toward the house.

While it may be argued that the incorporation of a manure system with more semisolid than solid content could contribute to increased odours as a result of greater manure surface area being exposed to the open air, it is my view that such changes would be marginal. This is particularly true if odour generation from the farm is compared to those times when manure agitation of the pit is conducted. Agitation of liquid manure prior to spreading is necessary and a common practice on all dairy farms prior to spreading to ensure that it can be worked by liquid handling equipment and to ensure that nutrients are applied to the land as uniformly as possible. The generation of odours during spreading operations is a common phenomenon on all dairy farms in the province and is considered normal farm practice. Spreading operations are typically short-lived and are conducted for as long as it takes to cover forage fields between cuts or corn land prior to planting.

10. On the issue of pests, the Specialist stated as follows:

With respect to Ms. Jory’s comments regarding fly nuisances, I did not see any practices that would necessarily contribute to fly populations in excess of those experienced on typical dairy farms. It would be very difficult to attribute fly nuisances on the complainant’s property specifically to the subject dairy farm, given that another dairy farm is located nearby and given the presence of horse farms as well in the area. Residences in the area which may be composting or storing vegetative waste could also be contributors. Mr. Beacham mentioned that there would have been times on the Cedardale site where solid manure from the bedded pack was temporarily piled in the field near the back of the barn but this would have been removed as part of ongoing spreading activities when the time was suitable. Because all farms handle and store organic matter, it is impossible to prevent fly breeding opportunities completely. Proper management practices can mitigate conditions in which fly breeding is rampant. At the time of the visit, the farm was clean with no buildup of manure evident in or around the barn. It is recognized that opportunities for fly breeding during the summer season exist in the exercise area, in the solid manure crust that exists on the liquid manure storage, and possibly in the areas where seepage from the manure pit is intercepted and stored in a separate catchment area. Mr. Beacham mentioned that this seepage is pumped back into storage when necessary to enhance agitation conditions. Regardless of the seasonal and site-specific conditions that may contribute to fly populations in the area, the methods used for manure handling, application and storage on the site are very similar to those used on most dairies in British Columbia. It is in the interest of dairy producers to keep fly populations to a minimum to prevent conditions where the spread of disease such as conjunctivitis is likely and to mitigate the nuisances that flies impose on cattle from an animal welfare point of view. The Beachams remarked that they have not witnessed undue reactions to flies from the animals by way of excessive tail switching, for example. Ongoing attention to conditions around the exercise area and the manure storage area are therefore prudent in ensuring that fly populations are kept to a minimum.

As mentioned previously, there is ample evidence on the complainant’s property that rat populations are existent. It is difficult to ascertain to which source such nuisances can be attributed. The observation by the complainant that the rats must be coming from the subject farm by virtue of the evidence that they are burrowing underneath the outbuildings’ walls that are facing the farm property, in my view, is not obvious. Rats will find buildings or areas to populate primarily if feed sources are present and out of sight of humans and animals which they consider to be a threat. The Beachams mentioned that they have not seen rats on the farm and that they as a result have not found it necessary to carry out control measures such as trapping, baiting or poisoning. I did not find any evidence of fecal matter from rodents in and around feed mangers or along walls in the barn. Rats are typically attracted to areas which have easily-accessible supplies of food. The fact that the farm does not store or handle feed grain concentrates lends credence to the observation that rats do not seem to be attracted to the site. It was also pointed out by the Beachams that the kind of silage used for the animals on the site is grass silage only. No corn silage – a potential attractant for rats and other rodents – is fed to the cattle. The mice that are spotted on occasion are held in check by barn cats on the property.

11. With respect to odour, the Specialist stated:

At the time of my visit with Ms. Jory I did not detect any odours from the farm, despite the fact that the wind was moving from the farm toward the Jory property through the tree buffer. Noise was minimal and likely due to the entry and exit of cattle from feed fences or headlocks. Ms. Jory also mentioned that emissions from the barn have increased since the barns were altered and that cattle are closer to her property as a result of a paddock having been put in place along the outside of the barn. In our discussions, Ms. Jory mentioned that she could see evidence of emissions such as diesel exhaust coming through the trees regularly. I emphasized that in the course of normal farm operations there are times of the day when noise associated with tractor and truck operations are more pronounced, particularly when barn scraping activities are carried out and when forage mixing and preparation is conducted near the ag bag site toward the back of the barn and within the barn itself. Bob Beacham mentioned at the time of the farm visit that tractors are operating approximately one-half hour per day during feeding operations.

12. The Specialist concluded his report as follows:

In summary, my examination of conditions and concerns brought forward in association with barn renovations and pest management are not in conflict with and in fact substantiate the conclusions originally drawn in the Farm Industry Review Board decision report dated August 31, 2012. While I recognize that the complainant, Ms. Jory, continues to have ongoing concerns and perceives that her health and wellness issues are caused by farm activities, it is my view that the operations as presently carried out at the Cedardale site are well within what I would consider to be proper and accepted customs and standards for dairy farms in similar circumstances. While I also recognize the subjectivity surrounding nuisance complaints and that they affect one person differently from the other, my many years of working on dairy farms and my exposure to many different dairying operations as the Ministry of Agriculture's farm structures engineer allows me to conclude unequivocally that the subject farm carries on business in a manner typical of most dairy farms in the province.

COMPLAINANT SUBMISSION

13. The majority of the complainant's comments on the report reiterate arguments she advanced before the hearing panel, as reflected in her recitation of the history that was before the hearing panel, and her repeated references to her book of exhibits from that hearing, at which she was represented by counsel. Ms. Jory also continues to reference the substance of other complaints that my November 6, 2012 decision refused to refer to hearing.

14. The complainant has however also included responses that are specific to the Specialists' report and its discussion of pest management and barn reconfiguration:

- [The] "best manure management would deflect flies from my property; use the road up the middle of the 2 fields to put down manure" and "when stirring manure pit, position the tractor half way up the barn that runs parallel to the mature pit so the manure odours and tractor emissions do not blow onto my property".
- "I am clearly aggrieved by the reconfiguration of the barn and the cows being closer to my property; more odours, more noise, flies and manure on the grounds; this runs the full length of the barn, there is no buffering around this [and] as a matter of fact they have removed more buffering in that area and they have a prevailing wind. They do not have the required buffering or set back as specified by the commission as attached as Odour a4."

- That “all the buffer have [sic] been removed”. With reference to various photographs and other attachments she has included, the complainant states:

... I am clearly aggrieved by all the changes that has been made by the Beachams directing all thier farm practices towards my property.

Mr.Luymes also goes onto say Ms.Jory also mentioned ... that she could see evidence of emissions such as diesel exhaust coming from the trees regularly. he said he emphasized that in the course of farm operations there are times of the day when noise (i said emissions such as diesel exhaust) associated with tractor and truck operation are more pronounced particulary when barn scraping activities are carried out and when forage mixing and preparation is conducted near the ag bag site toward the back of the barn and within the barn itself.

I am clearly aggrieved by this, this is all directed towards my house, which is less than 80 feet away from the property line and there is only a single row of trees and they have a prevailing wind. These emissions and noise go all around my house. The Beachams do not have the required setback as specified by the commision or the required buffer as attached Odour A4 Put a ventilation system into your barn and direct all your odours towards your property, not mine waste management act protects the air from pollution

picture for paragraph 2- this is a sparce row of trees single trees and the same for picture number 3- The Beachams are not operating at the required setback as specified by the commission or the required buffer as attached Odour attached A4 waste management act protects the air from pollution.

Use the road up the middle of the 2 fields to harvest and put down manure, use the main road for the leased fields, put a ventilaton system into your barn, put your paddock in another location; use this as y.go thru the Enironmental farm plan to relocate your ag bag site to the north side of the big tree break.

DECISION

15. The sole issue I have to decide is whether the complainant has any reasonable prospect of success in seeking an order requiring the farm to cease or modify its farm practices relating to pest issues or any other disturbance resulting from the barn reconfiguration. Put another way, the question is whether the outstanding complaints are bound to fail. I cannot make that assessment unless I am confident that I have all the information that is necessary to make it, and that I can make such a determination at this stage without weighing and considering competing evidence.
 - A. Complaint regarding pests**
16. With regard to the pest (rodents and flies) complaint, the Specialist’s report observes that there may be many sources of those pests given the surrounding properties and the activities on those properties. The Specialist found “no evidence of fecal matter” or feed type and management practices that would support a pest problem on the farm. The complainant does not challenge these statements.
17. No panel would order a farmer to cease or modify a farm practice unless the complainant can establish that (a) the farm is actually causing the problem, (b) the practices leading to the problem are not the result of normal farm practice, and (c) a remedy from BCFIRB requiring the farm cease or modify the practice will have a material impact on the problem. Based on the comments made by the Specialist, not challenged by the complainant, it is my view that

there is no reasonable prospect that the complainant will be able to establish these points with regard to pests.

18. The link between the complainant's pest problems and the farm is tenuous at best. The complainant has provided nothing setting out how she intends to prove that her pest problems are caused by the farm, how the remedies she seeks (farmer using the road up the middle to put down manure and repositioning the tractor to spread manure) would have any material effect on the flies and rodents on her property, and why the remedies she seeks are appropriate because they are the only practices consistent with normal farm practice.
19. The *FPPA* exists precisely to allow farmers to engage in conduct, even where that conduct would otherwise be a nuisance at law, if it complies with normal farm practice. Unless a complainant can demonstrate that the farm practices complained of are not normal farm practice, the complainant simply cannot obtain a remedy from BCFIRB.
20. In this case, I have no hesitation in concluding that the complaints about pests are bound to fail, and as such, they will not be referred to a panel.

B. Odour arising from barn reconfiguration

21. Based on the material before me, it appears that to the extent the barn reconfiguration project (a) has resulted in new barn openings that face the complainant's property, and (b) has resulted in the clearing of land and the creation of a paddock, there has been a material change in the farm operation relative to the operation as adjudicated in the August 31, 2012 decision. The paddock allows the cows, which were previously inside the barn, to enter into a new fenced open area closer to the complainant's property, which was constructed adjacent to the barn and that now abuts the access road owned by the farmer that lies between the barn and the complainant's property. The complainant alleges that these changes and the associated clearing of vegetation have significantly increased the odour about which she complains in Complaint #12-20.
22. Should this aspect of that complaint be dismissed without a hearing? I have given that question detailed consideration. While I have little hesitation concluding that the pest allegations are bound to fail and should not be referred to panel, I have concluded that the odour allegations, summarized in the previous paragraph, can only properly be adjudicated if they are addressed by a panel.
23. In my view, for the odour aspect of the outstanding complaint to be properly addressed, more detailed information must be received on the following issues:
 - (a) The proximity of the paddock to the property line, and to the complainant's home.
 - (b) The nature and extent of vegetation clearing that was undertaken in order to create the paddock.
 - (c) The farmer's ongoing purpose and use of the paddock (both during and following the renovation) and the number of animals that are likely to be using the paddock at any given time.
 - (d) The farmer's manure management practices and any vehicle or other equipment use within the paddock area.
 - (e) The existence of any local government or provincial setback requirements or guidelines pertaining to the siting of the paddock for livestock on the land in question.

- (f) The nature of any other physical changes to the barn – including any new openings facing the complainant’s property – which have been made or will be made as part of the barn reconfiguration.
 - (g) The expected net impact of these changes on the nature, extent and movement of odour between the properties given the treed buffer that remains between the properties.
24. I am not in a position to answer these questions at this preliminary stage. I am only concluding that, having given detailed consideration to these issues in light of my limited role at this stage, these issues are best addressed by a panel of BCFIRB which can weigh the evidence and integrate that into a considered conclusion regarding normal farm practice.
25. I will be instructing BCFIRB staff to request the Specialist to provide a supplementary report to BCFIRB which addresses the questions identified at paragraph 23. The Specialist may contact either of the parties as necessary in order to answer these questions, but he will not be required to re-attend at the farm unless he considers that necessary in order to address the questions above. The Specialist’s updated report will be provided to the parties and the panel.
26. Upon receiving that report, the panel will issue directions regarding the form of the hearing, including whether this might be an appropriate case for the use of written submissions, possibly supplemented by a teleconference. However, I will leave that to the panel to determine after receipt of the report and consideration of any other information, including any court order which may be forthcoming and which I am advised may potentially impact on the communications between the parties.
27. I wish to make it clear again that in referring this matter to the panel, I am not commenting on whether this remaining part of Complaint #12-20 does or does not have merit. Only a panel can make that determination.

ORDER

28. For the reasons given in this decision, I refuse to refer to a panel the “pest” issues from Complaint #12-20 referenced at paragraph 35 of my November 6, 2012 decision, but I do refer to a panel those issues in Complaint #12-20 relating to alleged odour disturbances arising from new barn openings facing the complainant’s property, and creation of the paddock.
29. The six new complaints the complainant has filed since the release of the August 31, 2012 decision will be placed in abeyance pending the panel’s final decision in this matter. As the complainant is well aware, there is no benefit to her simply repeating complaints that have already been adjudicated. If, having been given that advice, the complainant wishes to withdraw her complaints, they will be returned to her with the \$100 filing fee. If the complainant does not withdraw those complaints, they will in due course be processed pursuant to s. 6(2) of the *FPPA*.

DIRECTION TO COMPLAINANT

30. The complainant has devoted extensive energy and emotion to these complaints. I note that despite repeatedly asking the complainant to limit her communications with BCFIRB to the submissions process (most recently, see my November 6, 2012 Decision, paras. 30-

32, 39), she has continued to send BCFIRB what are now hundreds of emails, faxes and make numerous phone calls, including one phone call to my personal residence.

31. While a complainant has a right to be treated fairly, a complainant does not have a right to bombard BCFIRB and its staff with communications. The extremes to which the complainant has gone are adversely affecting the operations of BCFIRB which functions with a small, busy staff. This cannot be allowed to continue.
32. **I am therefore specifically directing Ms. Jory, the complainant, to cease and desist from her ongoing phone calls, faxes and emails to BCFIRB, any of its members or staff, except where she is specifically invited to respond as part of the ongoing hearing process as set out in this decision.**
33. **Ms. Jory will be advised of her process rights in a separate letter to the parties from BCFIRB in due course following receipt of the supplementary Specialist's report. Given the time of year, that will likely be early in the New Year. Should Ms. Jory refuse to comply with my direction, this matter will be referred to BCFIRB legal counsel for appropriate action.**

Dated at **Victoria, British Columbia, this 19th day of December, 2012.**

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per



Ron Kilmury
Chair