



November 22, 2016

File #16-05

DELIVERED BY E-MAIL

Michael and Nancy Harrison

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Grand Forks BC V0H 1H5

Adolf Jaeger

██████████

Grand Forks BC V0H 1H5

Dear Sir/Madames:

A COMPLAINT RE: BARKING DOGS FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT*

On October 6, 2016, the BC Farm Industry Review Board (BCFIRB) received a complaint filed by Michael and Nancy Harrison of Grand Forks, BC alleging that they are aggrieved by excessive dog barking emanating from 4570 Covert Road in Grand Forks, BC in accordance with section 3 of the *Farm Practices Protection (Right to Farm) Act* (“the Act”). In their Notice of Complaint, the complainants raised the issue of whether Mr. Jaeger was a *bona fide* farmer stating in part:

We have lived in the ALR for 30+ years (in Cloverdale, Enderby and now Grand Forks) and for twenty of those years, raised alpacas. We understand the basics of farming and good animal husbandry, and have no objections to any normal noises/odors commonly associated with operating a farm. However, it is our contention that this barking dog is not acting as protection for Mr. Jaeger’s sheep. We believe his dog is an untrained family pet that feels so territorial that he will bark at anything that falls within his view, day or night, including visitors to the new neighbours across the street, in order to protect his owner’s property, NOT his sheep. (emphasis in original)

Given that section 3 of the *Act* requires that a complaint arise out of a farm operation carried on by a farm business, and in light of the complainants’ query, BCFIRB set up a submission schedule to address the following two issues:

- a) Is the disturbance complained of (barking dog) resulting from a farm operation conducted as part of a farm business?
- b) Is the barking dog an integrated and functional part of the farm operation?

Submissions of the Parties

Mr. Jaeger advises that his property is located within the Agricultural Land Reserve (ALR) and he has farm status (a BC Assessment Notice was produced). He carries farm fleet plates on his farm vehicles as ICBC is also satisfied that he operates a farm business. Mr. Jaeger says he breeds, raises and sells sheep as part of his farm business. He is a member of the BC Agriculture Council, BC Sheep Federation, and Canadian Cooperative Wool Growers.

Mr. Jaeger states that his livestock protection dog is an integral part of his farm operation and he has never lost any livestock to predation when his dog was present. When his livestock was pastured on other properties without his dog being present, he has suffered significant losses. This year, there was increased cougar predation and he lost three ewes due to cougar attacks (one killed, two died of injuries suffered). Apart from cougars, there are other predators in the area, such as bears, coyotes, and uncontained domestic dogs.

In response, the complainants argue that Mr. Jaeger's listing of organizations that he belongs to, or participates in, does not confirm his status as a *bona fide* farmer. They say that applying for and receiving farm status is a simple process, but satisfying the Canada Revenue Agency's requirements and maintaining that status may not be. With respect to the dog, the complainants ask if the dog is an integral part of this farm operation, why is it not kept in closer proximity to the sheep? The dog stays close to the family home, away from the one pasture which houses the sheep.

Decision

Section 3 of the *Act* provides for complaints to BCFIRB:

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.

Given that section 3 requires that a complaint arise out of a farm operation carried on by a farm business, the complaint must relate to a farm business. "Farm business" and "farm operation" are defined by the *Act*:

"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; ...

(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,

In addressing the jurisdiction issue in this case, I adopt the approach set out by the BCFIRB panel in *Hanson v. Asquini*:

In determining whether a person is carrying out a "farm business", a number of factors can be considered (this list is neither exhaustive nor exclusive, and not all factors are necessarily of equal weight):

- a) What is the location and magnitude of the farming operation in comparison to other operations producing similar agricultural products?
- b) Does the farm operation operate or intend to operate on the basis of generating income or profit?
- c) Do the farm operation's plans clearly contemplate future commercial activities and is income anticipated as a result of defined development plans (such as plantings that may not be productive for several years)?

- d) Does the farm qualify for a farm tax credit under the Income Tax Act?
- e) Does the farm hold licences related to agricultural or aquacultural activities?
- f) Is the operation a farm education or farm research institution?

The Canadian Oxford English Dictionary (1998) defines “business” amongst other things as “one’s regular occupation, profession or trade”. Black’s Law Dictionary (7th ed. 1999) defines “business” as “(a) a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”. Implicit in the definition of “business” as it is used in the Act is some aspect of an agricultural undertaking carried out for the purposes of generating income or profit (except perhaps in the special case of farm education and research institutions which, for obvious reasons, have also been given the Act’s protections). Thus, as a bare minimum, in order to establish that a farmer has a “farm business”, there should be documentation supporting revenue or an intention to generate income from recognised farming operations or activities....

In his submission, Mr. Jaeger indicates that he breeds, raises and sells sheep as a farm business. He says that he meets the requirements for farm status for BC Assessment and ICBC. His dog is a livestock protection dog used to keep his sheep safe from predators such as cougars, bears, coyotes and other dogs. It is not clear from Mr. Jaeger’s submission how many sheep he keeps on his property or how many he sells in a given year. He also did not make any submission regarding the amount of income he generates annually from his sheep operation.

The complainants’ response seems to be that having farm status with BC Assessment and ICBC is insufficient proof as both are easily obtained and that meeting the more strict requirements of CRA (Canada Revenue Agency) would be better evidence of a *bona fide* farmer. The complainants also appear to challenge the respondent’s assertion that the dog in question is in fact a livestock protection dog. They suggest that the dog is a territorial pet that seems to bark at anything, day or night, to protect his owner’s property, not his sheep.

I have considered these submissions and while I agree that the respondent could have been more forthcoming with evidence in support of his farm business, I am prepared to find that he has established a *prima facie* case that his raising of sheep is a farm business. I am aware of the application requirements for obtaining farm status through BC Assessment and I disagree with the characterization that farm status is easily obtained. Applicants must submit an application supported by factual information related to leases and/or qualifying agricultural uses. Where an applicant is a producing farm, it must meet gross income requirements in a particular reporting period. Field inspections may be done to assess entitlement to farm classification. In this case, I accept the BC Assessment Notice and farm plates as evidence that the respondent is operating a farm business.

In this case, the disturbance complained of is a barking dog. The respondent asserts that this dog is an integral part of his farm business as it protects his sheep from predation. Based on this assertion, I am prepared to find that the disturbance complained (dog barking) may relate to a farm operation carried out by a farm business (the raising of sheep) such that this matter can be referred to a panel for hearing.

However, I would observe that it remains open to the complainants to argue at the hearing of this complaint that some, or all, of the barking that they are aggrieved by is in fact not related to the protection of sheep but is instead nuisance barking. If a panel were to find that the dog barking was not connected with livestock protection, the complaint would be dismissed and the complainants would need to pursue alternative remedies for nuisance actions either through the courts or local government. That determination can only be made by a panel after hearing all the evidence.

Summary Dismissal

In his submission of November 4, 2016, the respondent made a request for a summary dismissal of this complaint asserting that the complainants “violated” Part I of BCFIRB’s Practices and Procedures for Complaints in that they “did not serve respondent with copy of Notice of Complaint at the same time complainant filed it with BCFIRB”.

The respondent has misunderstood the intent of the Rules and the impact of non-compliance on a party. BCFIRB would not ordinarily dismiss a complaint for non-compliance with the Rules. Instead, where a party demonstrates that the non-compliance has resulted in an adverse impact to the opposing party that may be something BCFIRB would take into account when making further orders: (see Rule 26).

Summary dismissals are governed by section 11.1(1) of the *Act* and section 31 of the *Administrative Tribunals Act* which allow BCFIRB to dismiss all or part of a complaint where:

- (a) the application is not within the jurisdiction of the tribunal;
- (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
- (d) the application was made in bad faith or filed for an improper purpose or motive;
- (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the application will succeed;
- (g) the substance of the application has been appropriately dealt with in another proceeding.

The respondent does not argue that any of these sections apply to the circumstances here and as such, I dismiss the application for summary dismissal. I have already concluded that the respondent has established a *prima facie* case that he operates a farm business and the complained of disturbance (barking dog) may be a practice that relates to the farm operation of raising sheep and as such, I direct that this matter be referred to a panel for a full hearing on the merits. Ms. Chojnacki, Case Manager, will be in contact with both parties to schedule a case management call in due course.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



John Les
Chair