



January 17, 2013

File #12-23

DELIVERED BY E-MAIL

Alison D. Taylor
Taylor Granitto

Kimberley and Barry Bradshaw

Dear Sir/Mesdames:

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

On October 31, 2012, the British Columbia Farm Industry Review Board (BCFIRB) received a notice of complaint from James Russell of Duncan alleging that he is aggrieved by excessive dog barking and howling emanating from 6803 Norcross Road. This complaint was filed in accordance with section 3 of the *Farm Practices Protection (Right to Farm) Act* (“the Act”).

As part of the notice of complaint, the complainant raised a preliminary issue as to whether the complaint was within the jurisdiction of BCFIRB as the complainant submits that the Bradshaws do not operate a farm business to which this dog barking relates.

By letter dated November 15, 2012, BCFIRB established a submission process whereby the Bradshaws were given an opportunity to provide a submission and any supporting documents to demonstrate that the disturbances complained of (excessive dog barking) result from a farm operation conducted as part of a farm business, which they did on December 3, 2012 along with two supporting affidavits of Barry and Janice Bradshaw. The complainant provided a response submission on December 10, 2012 and the respondents’ reply was received on December 17, 2012. I have had the opportunity to review the submissions and supporting documents submitted by both parties in detail.

DECISION

Section 3 of the *Act* provides for complaints to the board where a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business. Given the requirement that a complaint arise out of a farm operation carried on by a farm business, the excessive dog barking and howling which is the subject of this 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;...

(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;

but does not include

(m) breeding pets or operating a kennel; ...

[emphasis added]

Is this a Farm Business?

Turning to this complaint, Mr. and Mrs. Bradshaw say that the property on Norcross Road has been in his family for approximately a hundred years. Some properties have been sold off; others have been lost in foreclosure. They say that the family “ekes” out an existence on this property but is severely limited by ongoing flooding issues which are the subject of long standing legal disputes (thirty years) with local, provincial and federal governments. Historically, the farm produced hay and vegetables, raised pheasants, cattle, goats, rabbits and sheep and raised and trained dogs for “farm and produce protection”. It has been many years since hay was harvested (1989) or cattle raised (1985). Attempts to establish a market garden have “been prevented”. Mr. Bradshaw reports flooding on the property of 1 to 3 meters depending on the season and large flocks of waterfowl now inhabit the property making the land uninhabitable by cattle. He also reports that beavers, raccoons, bear and predatory birds “disrupt the operation of the farm” and require a means of disturbing.

The Bradshaws state that despite the above, they are able to make a living on this land “meager though it may be”. Only about 23 of 90 acres are above water and that land is used primarily as grazing pasture for a horse as it is incapable of supporting any more livestock. In 2010, they began raising 30 pheasants on the property and current plans are to raise another 100 pheasants “to supplement our income”. Until 2010, the Bradshaws had a one acre vegetable garden for household use and friends but they say that has been discontinued due to stress. There are future plans to obtain a fish farm licence and to bring quail onto the property for hunting.

Mr. Bradshaw says that he raises and trains dogs to defend against waterfowl, to protect the pheasants from predators and to chase away beavers. He reports selling these trained dogs for

between \$1500 and \$5000 but says that he does not operate a kennel or breed pets. He keeps his dogs on running lines and the nearest neighbouring house is 150 meters away. He admits that the dogs do make noise and bark from time to time but this is usually in response to geese, predators or trespassers.

For his part, the complainant applies the indicia for demonstrating whether a farm business exists from *Hanson v. Asquini*, October 31, 2003 and states that the respondents have not offered any evidence to demonstrate that they are currently generating income or profit nor do they have a particularized plan to do so in the future; there is no evidence that the alleged farm qualifies for a farm tax credit under the *Income Tax Act* nor is there any evidence that the alleged farm holds any licences in relation to its activities. The complainant also relies on the BCFIRB decision of *Ridgeway v. McLuckie*, September 2, 2011 which also involved a dog barking complaint. In that decision, the panel stated:

It is clear from his correspondence that while Mr. McLuckie may generate at some point in the future an income from his farm operations, he has not provided any documented evidence supporting that intention or of his present status as a farm business. Nothing substantiated has been brought to my attention regarding the current or future nature of his business that could reasonably trigger the definitions in the *Act*.

The complainant says that a mere statement of intention is not sufficient to establish a plan for a future farm business.

By way of reply, the respondents clarified that their farm has and is currently operating on an income for profit basis, raising farm and ranch protection dogs. This income has been reported in income tax returns and more sales are anticipated next year. At this point, they only require federal Migrating Waterfowl licenses and Hunting Licenses. They indicate that they have met with all levels of government and the private sector and a waterfowl management plan was implemented which includes organized hunting and waterfowl management education.

In summary, the respondents state that they had great farmland that went to the lake. It produced fruit and vegetables, hay and pasture, livestock and poultry and fed five generations of their family. Dyking practices have caused extensive flooding and their farming plans have had to adapt to what useable land was left. Their future plans are to re-establish cattle and build a market garden.

The “farm business” requirement makes it clear that the *Act* was never intended as redress for every complaint between neighbours involving practices relating to plants or animals on a piece of land. Where the *Act* applies, it gives a neighbour a potentially powerful remedy, i.e., the right to ask BCFIRB to require a farmer to cease or modify a farm practice. At the same time, it gives a farmer potentially significant protection where he acts in accordance with normal farm practice (i.e., the right to be protected against a nuisance action and the right to be protected against municipal bylaw enforcement). Given the significant effects of the *Act*, its drafters wanted to focus its scope and its boundaries. Where the *Act* does *not* apply, the general law does, meaning that where neighbours cannot work things out in a neighbourly way, they can seek a remedy from local government or the courts.

In addressing the jurisdiction issue in this case, I used with the approach set out in *Hanson v. Asquini*. In addition to the indicia relied on by the complainants above, the following passage is relevant:

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....

Based on the respondents’ submission, there are two activities which could potentially be considered a “farm business”. The first is the raising of game birds (pheasants) and the second is the raising of “farm and ranch protection dogs”. As for the pheasants, the respondents have not offered any evidence that the pheasants are in fact sold or that there is an intention to generate income. They may be raised for personal consumption or they may be raised as a hobby or possibly as pets. I have no evidence before me to conclude that raising 30 pheasants is a “farm operation” or a “farm business” within the meaning of the *Act*. Therefore, the fact that the dogs raised on this property may protect these pheasants does not connect the disturbance complained of (dog barking) to a farm operation or farm business.

Although the respondents provided evidence as to the raising of pheasants it does not appear that they are arguing that raising of pheasants is their farm business. Rather, their main argument is that their farm business is the raising and training of “farm and ranch protection dogs”. The respondents do not offer a definition of a “farm and ranch protection dog” but do say these are not pets and they are not operating a kennel.

The evidence is unclear as to how many dogs the respondents are raising at any given point in time on this property. They do say that they are operating a business wherein they train and sell dogs for a profit and I am prepared to accept, for the purposes of this decision, their evidence that they report this income on their income tax returns. However, I am not satisfied that simply by calling the dogs “farm and ranch protection dogs” is sufficient in and of itself to bring this business within the jurisdiction of the *Act*. I say this because the definition of “farm operation” specifically excludes breeding pets or operating a kennel.

According to the Concise Oxford Dictionary of Current English (7th ed.), a pet is defined as a domestic or tamed animal kept for companionship or pleasure. In this usage, domestic means kept on farms or as pets, not wild. To breed is defined as to bear, generate (offspring), propagate or cause to propagate; raise (livestock) and breeding is the process of developing or propagating (animals, plants, etc.). A kennel is defined to include a breeding or boarding establishment for dogs.

Giving the exclusion in the *Act* its ordinary meaning, a farm operation does not include an operation that breeds pets. The respondents appear to be arguing that because their dogs are being raised as “ranch and farm protection dogs”, they are not pets. I do not accept this argument. The respondents are raising dogs. Dogs are domestic animals. The fact that the respondents’ dogs are trained does not mean they are not also kept for companionship or pleasure. However, even if I was to accept that these dogs are not pets, the respondents are still captured by the second part of the exclusion relating to kennels as the definition of kennel includes a place where dogs (not pets) are bred. Given the respondents admission that they are breeding ranch and farm protection dogs, they are by definition operating a kennel.

In the circumstances, it is my view that the *Act* does not apply to either the respondents’ pheasant or dog operations. As such, the complaints relating to excessive dog barking are not disturbances that result from a farm operation conducted as part of a farm business and as such the only appropriate outcome is to refuse to refer this complaint to a panel. Given that BCFIRB lacks jurisdiction as the *Act* has no application to these circumstances, the general law applies, meaning that where a dispute cannot be worked out, neighbours can pursue their usual remedies with the municipality or in the courts.

Accordingly, the complaint is dismissed.

Section 8 of the *Act* states:

Appeal

8 (1) Within 60 days after receiving written notice, in accordance with section 6 (5), of a decision of the chair or a panel of the board made under section 6, the complainant or farmer affected by the decision may appeal the decision to the Supreme Court on a question of law or jurisdiction.

(2) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Ron Kilmury
Chair