



February 12, 2014

File #13-09

DELIVERED BY E-MAIL

DELIVERED BY MAIL

Allan Lychowyd
[REDACTED]
[REDACTED]

Therese Washtock
Richard Barkwill
[REDACTED]
[REDACTED]

Dear Sirs/Madame:

RE: A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING MANURE MANAGEMENT, DUST AND NOISE.

Background:

1. On June 18, 2013, the B.C. Farm Industry Review Board (BCFIRB) received a complaint from Allan Lychowyd about disturbances resulting from a farm operated by Therese Washtock. In particular, Mr. Lychowyd claimed that in the nine month period preceding the filing of his complaint, Ms. Washtock piled horse manure on their common property line and that it creates strong odours when the wind blows towards his home. He also claimed that Ms. Washtock chain harrows a horse riding ring which creates large amounts of dust and that she operates a skid steer in the late evenings that creates noise.
2. On June 27, 2013, in a letter that was sent to the parties on behalf of the Chair of BCFIRB, they were advised that an issue had been raised by the respondent as to whether the complaint fell within BCFIRB's jurisdiction and accordingly, the parties were directed to provide written submissions and documentary evidence to address the issue of whether the "complained of practices related to a farm business." On October 2, 2013, following an extended submission process (which included further requests for documentary disclosure), the Chair, Mr. Kilmury, advised the parties in writing that he had determined that Mr. Lychowyd had established a *prima facie* case that there was a horse related

business operated on the respondent's farm. Mr. Kilmury made this finding based in part on Ms. Washtock's inconsistent submissions as to whether she continued to operate a farm business and her failure to provide any rebuttal evidence that her horse operation was not part of a farm business. Notwithstanding that finding, Mr. Kilmury decided to convene a hearing via conference call on October 25, 2013 to get oral evidence from Ms. Washtock on that issue.

3. On October 17, 2013, BCFIRB received an application from Ms. Washtock to adjourn the hearing on grounds that she did not have sufficient time to prepare for the hearing. That application was dismissed primarily because the issue to be dealt with at that hearing (namely whether Mr. Washtock's horse operation was part of a farm business) was simple and straight-forward and the same issue that the parties had been asked to address in their written submissions over the previous four month period.
4. Ms. Washtock did not attend the hearing on October 25, 2013. Ms. Washtock's spouse, Mr. Barkwill, attended the hearing but stated that he was not attending on behalf of Ms. Washtock and that he wished to question the complainant, Mr. Lychowyd. Given that Mr. Barkwill did not have standing to participate in the hearing at that time and given also that the hearing had been convened primarily to obtain oral evidence from Ms. Washtock as to whether her horse operation was conducted as part of a farm business, the hearing did not proceed. Instead, the panel issued a decision on October 28, 2013 remitting all matters (including jurisdiction and any other substantive arguments) to a full oral hearing to be held on January 21, 2014.
5. In correspondence to BCFIRB dated December 4, 2013, Mr. Barkwill sought to be added as a Respondent in these proceedings. After receiving written submissions from the parties on that issue, Mr. Barkwill's application was granted in a decision of the hearing panel dated December 17, 2013.
6. In his December 4, 2013 letter to BCFIRB Mr. Barkwill also sought a six week adjournment of the hearing scheduled for January 21, 2014. The primary ground for the application was that the respondent(s) had a number of other personal matters to deal with and they required more time to prepare for the hearing. After receiving written submissions from the parties, the hearing panel issued a decision dated December 18, 2013 granting the respondents' application and re-scheduling the hearing for March 19, 2014.
7. On December 27, 2013, the respondents applied for Judicial Review (JR) of the panel's decision dated October 28, 2013. The respondents seek as a remedy that BCFIRB be ordered to determine the issue of jurisdiction and if necessary to hear their application for a summary dismissal of Mr. Lychowyd's complaint before proceeding to a full hearing. The respondents applied for a stay of the hearing currently scheduled for March 19, 2014. That application has not yet been heard by the Supreme Court.

8. On January 29, 2014, BCFIRB received a third application from the respondents to adjourn the hearing until such time as their Petition for JR is heard and a decision on it is issued by the Supreme Court. The respondents submit that if the hearing into Mr. Lychowyd's complaint by BCFIRB proceeds before the hearing of their JR application, it would render their JR application moot and they would therefore be "denied justice."
9. The respondents also submit that they would "suffer irreparable harm" if the hearing into Mr. Lychowyd's complaint precedes the hearing of their JR application insofar as their time and efforts in preparing for JR application would have been wasted. The respondents further submit that Mr. Lychowyd would not be prejudiced by an adjournment of the hearing into his complaint because the disturbances he alleges are trivial and without merit.
10. In written submissions dated January 30, 2014, Mr. Lychowyd objected to an adjournment of the hearing and submitted that any further delay would infringe his right to have his complaint heard in a reasonable time (i.e. in excess of nine months). Mr. Lychowyd also submitted that the respondents have unreasonably been "wasting his and BCFIRB's time" in their attempts to have his complaint summarily dismissed.
11. In correspondence to BCFIRB dated February 3, 2014, Mr. Lychowyd expressed his concern that one day would not be sufficient to complete the hearing and he requested that a second day be added. In correspondence dated February 4, 2014, BCFIRB asked the respondents to provide by February 11, 2014 their position on adding a second day of hearing however they did not do so.

DECISION:

12. Practice and Procedure Rule 25(4) to the *Farm Practices Protection (Right to Farm) Act* [RSBC 1996], ch. 131 (the "FPPA") states as follows:
 - "In deciding whether or not to grant an application for adjournment, the hearing panel will take into account the following factors:
 - The reason(s) for the adjournment;
 - Whether the adjournment would cause unreasonable delay;
 - The impact of refusing the adjournment on the other parties;
 - The impact of granting the adjournment on the other parties;
 - The impact of the adjournment on the public interest."
13. The panel agrees that the respondents' JR application would be rendered moot if BCFIRB proceeds with the hearing of Mr. Lychowyd's complaint prior to the hearing of their JR application. However, the panel disagrees that this would deny the respondents justice. The respondents had an opportunity between June 27, 2013 and September 11, 2013 to

participate in a written submission process set up by the Chair of BCFIRB specifically to resolve the preliminary issue of jurisdiction. However, as noted by the Chair of BCFIRB in his letter dated October 2, 2013, Ms. Washtock was “equivocal” about whether she continues to operate a horse-related business and she failed or refused to provide any documentary evidence “to rebut the *prima facie* case established by the complainant” that she does operate a horse related business.

14. Notwithstanding this determination, Ms. Washtock was given a further opportunity during an oral hearing on October 25, 2013 (also convened to deal solely with that issue) to rebut the *prima facie* case established by the complainant, however she failed or refused to attend the hearing. As noted in the hearing panel’s decision dated October 28, 2013, had the respondent(s) provided some evidence at the hearing on October 25, 2013 as to whether or not her horse operation is part of a farm business, BCFIRB would then have been in a position to either dismiss the complaint for lack of jurisdiction or alternatively to consider a summary dismissal application from the respondent on other grounds. Given the Chair’s determination that a *prima facie* case had been established and given that the respondents failed or refused to provide any evidence on the issue of jurisdiction, in the panel’s view, it had no other recourse but to send all issues arising under the complaint to a full hearing for determination.
15. The panel does not agree that an adjournment of the hearing would not prejudice Mr. Lychowyd. By asking for an adjournment of the hearing until a decision is issued by the Supreme Court on their JR application, the respondents are seeking to adjourn this hearing to an unknown future date. Given that the respondents do not yet have a date certain for the hearing of their petition, the panel finds that it could take many months before Mr. Lychowyd’s complaint could again be set down for hearing. Mr. Lychowyd submits that he is entitled to have his complaint heard in a reasonable time frame and given that he has already waited for nine months for a hearing, a further delay of the hearing would be unfair. The panel agrees that an adjournment on the terms requested by the respondents would significantly delay the hearing of the complaint and that this is prejudicial to Mr. Lychowyd. As the panel noted in a previous adjournment decision dated October 23, 2013, even if BCFIRB determines that it does not have jurisdiction, Mr. Lychowyd may wish to pursue his complaints in another forum.
16. The panel gives little weight to the respondents’ submission that they would suffer “irreparable harm” if the hearing was not adjourned because the time and effort they have invested into their JR application would then be wasted. While it is the right of the respondents to bring a JR application should they so choose, there is no guarantee that they will be successful on that application. The panel also disagrees that the respondents would suffer irreparable harm by proceeding with the BCFIRB hearing given that once a final decision is issued, the respondents would have a right of appeal and the Court would then have the benefit of the panel’s considered determination on all of the issues.

17. The panel also wishes to point out that on December 4, 2013, the respondents applied for a six week adjournment of the hearing primarily on the ground that that they needed more time to prepare for it. Although the panel granted the respondents an eight week adjournment on December 18, 2013, nine days later the respondents applied for JR and are now seeking a stay of the complaint hearing. Consequently, it is the panel's view that it is unreasonable to suggest that it is responsible for any consequences to the respondents arising from a conflict in the scheduling of the BCFIRB complaint hearing (which was done with the respondents' knowledge and participation) and the hearing of a JR application of which the panel was unaware.
18. The panel has also considered the impact of an adjournment on the public interest. The respondents seek (among other things) an adjournment so that they can obtain an Order from the Supreme Court to set aside the panel's decision dated October 28, 2013 remitting all issues under the complaint to a full hearing. The respondents submit that the issue of jurisdiction and summary dismissal should be dealt with before requiring them to participate in a full hearing. As set out above, BCFIRB has already made a number of attempts to determine the issue of jurisdiction prior to remitting the complaint to a full hearing however its efforts have been frustrated by the respondents. In the panel's view, even if the respondents are successful in their JR application, the result would be that the proceedings would revert to where they were eight months ago; i.e. attempting to obtain rebuttal evidence from the respondents. Should the respondents then be again unwilling to provide evidence on the issue of jurisdiction, the panel would be faced with the same dilemma that gave rise to the October 28, 2013 decision. Consequently, the panel finds that an adjournment of the hearing would only serve to delay further the resolution of this highly acrimonious dispute.
19. BCFIRB has recently accommodated the parties with an eight week adjournment to assist them in preparing for the hearing. In total the parties will have had five months (since the October 28, 2013 panel's decision remitting the complaint to a full hearing) to prepare for the hearing. Consequently, the panel finds that the parties have had ample opportunity to prepare for the hearing and that it would not be in the public interest to delay the hearing of this complaint any further.
20. For similar reasons, the panel finds that a second day of hearing should be convened. While the panel is of the view that one day *should* be sufficient to hear a complaint of this nature, the panel is also mindful that if the hearing does not complete within the time currently scheduled, the completion of that hearing would be delayed until such time as an additional hearing day could be convened.

CONCLUSIONS:

21. Having considered all of the above-noted factors set out in Rule 25(4) of the *FPPA*, it is the panel's decision to dismiss the respondents' application for an adjournment. Consequently, the hearing on all issues under the complaint currently scheduled for March 19, 2014 will proceed.
22. It is the panel's further decision that a second day for the hearing will be convened on March 20, 2014.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Carrie H. Manarin, Presiding Member



Ron Bertrand, Vice Chair



Andy Dolberg, Member