March 6, 2013 File #12-26

DELIVERED BY EMAIL

Doug and Dianne Hill
[redacted]

Dean Gauthier
[redacted]

Dear Sirs/Madam:

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

On November 6, 2012, Doug and Dianne Hill filed a complaint with the British Columbia Farm Industry Review Board (BCFIRB) regarding the siting of a manure pile on a property operated by Dean Gauthier. At the case management conference conducted on November 27, 2012, the parties agreed that the issue on this complaint was whether the manure management practices on the respondent's farm are in accordance with normal farm practices. The case management report identified that what is being complained of is the respondent's practice of hauling composted manure away from animal pens located near the front of his property to an uphill location at the rear of his property and within 100 feet of the complainants' home. The alleged disturbance was the visibility of the pile from the complainants' bedroom and living room windows. At that point in time, there was no allegation that the manure pile was a source of nuisance odour, dust or pests.

On December 15, 2012, the respondent applied to BCFIRB for an order dismissing the complaint on the basis that it was trivial, frivolous and vexatious, and alleged that the issue was a personality conflict between two neighbours and not related to farm practices. After completing a review of this file, I determined that it was premature to deal with the respondent's summary dismissal application on the grounds alleged as it was not clear that the complaint was within the jurisdiction of BCFIRB.

In order for BCFIRB to have jurisdiction to hear a complaint, it must meet the requirements of section 3 of the *Farm Practices Protection (Right to Farm) Act* ("the *Act*"). This section states "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 the requirement that a complaint arise out of a farm operation carried on by a farm business, this complaint which relates to the siting and visual impact of a manure pile must relate to a farm business. If there is no underlying business, the *Act* has no application. The second issue related to the nature of the practice complained of, as it was unclear to me whether the definition of "other disturbance" in section 3 of the *Act* includes complaints of a purely aesthetic nature. I asked the parties to provide written submissions on both issues.

In my letter dated January 30, 2013, I concluded that that the respondent is carrying on a farm business wherein he raises and sells cattle on his property, and as such the disturbance complained of (relating to a manure pile) results from a farm operation conducted as part of a farm business. This decision addresses the second issue, relating to whether "other disturbance" includes complaints of a purely aesthetic nature.

Submissions of the parties

The complainants argue that BCFIRB has heard several cases regarding siting and proximity, visual impact and aesthetics. In *Jory* v. *Beacham*, August 31, 2012, the panel held that proximity was a factor to be considered in assessing what constitutes normal farm practice in the circumstances of that case. In *Ollenberger (Geertsma)* vs. *Breukelman*, November 18, 2005, the panel found that the proximity of chicken barns to the property line exceeded the tolerance limits of normal farm practice. In *Hodge* v. *Eben* November 20, 2008, the panel stated "it is my conclusion the Ms. Hodge is aggrieved by unsightliness (an "other disturbance")." The complainants argue that based on the above cases, BCFIRB does have jurisdiction to hear a complaint where visual impact and aesthetics constitute an "other disturbances" within the meaning of the *Act*.

The respondent is critical of the complainants' submission stating that they have cherry picked passages from various cases and taken them out of context. With respect to the *Jory* decision, he argues that this was a complaint made regarding dust, noise and diesel fumes resulting from operations carried out on a road in close proximity to the complainant's home. The respondent says the *Ollenberger* decision is "miles apart" from this complaint as it relates to dust, noise and odours emanating from a commercial chicken operation. Proximity was an issue as the barn was built at the minimum required setbacks. The respondent relies on paragraph 74 of the *Ollenberger* decision where the panel stated that it "heard a great deal about the aesthetics of the Breukelman farm and the fact that the barns are an 'eyesore' obliterating the view of Mount Baker" but then dismissed that part of the complaint. He says the aesthetics of looking out at a chicken barn is hardly comparable to this complaint about a pile of dirt. With respect to the *Hodge* decision, the respondent observes that despite the reference to Ms. Hodge being aggrieved by unsightliness (an "other disturbance"), the decision goes on to say that the unsightliness does not result from a farm operation and as such the BCFIRB had no jurisdiction to hear the complaint. The respondent argues that his practice of moving well-rotted manure/soil mix to a site on his property does not constitute a disturbance under the *Act*.

In their February 3, 2013 response, the complainants have expanded the nature of their complaint considerably. They now say "we have come to the realization that, during the complaints process, we have not clearly conveyed the nature of our grievance. Our complaint is not purely of

an aesthetic nature, but relates specifically to the offensive location of this manure pile – in particular, its proximity to our house."

The complainants now identify the following concerns:

1. Contamination of our water supply - the location of the manure pile is just within the requirements set by the Agricultural Waste Control Regulation (*Environmental Management Act*) and is a potential health hazard;
2. Attraction of pests, including flies and rodents to this "biological hazard";
3. Odour from freshly dumped manure;
4. Frustration living next to growing manure pile while farmer acknowledges other siting choices and has offered to move in exchange for land swap;
5. Farmer is conducting operation specifically to bully neighbours
6. Visual impact of manure pile just outside house;
7. Impact on property value.

DECISION

Visual impact and "other disturbance"

I have considered the submissions of the parties. I agree with the respondent that the initial submission of the complainants is unhelpful. In farm practices complaints, issues of proximity are often central to the consideration of whether a farmer, in his site specific circumstances, is following normal farm practices. Siting of operations may also be an issue as decisions to site operations close to a neighbour may increase the potential impact of those operations on the neighbour: see Ministry of Agriculture's website regarding the Strengthening Farming initiative. Other BCFIRB decisions have recognized that poor aesthetics may reflect larger farm practices issues where there is otherwise a disturbance under the *Act*: see *Evans/Bradley v. DeKleyne*, January 28, 2005.

The issue before me is whether the visual impact of something is, in and of itself, a disturbance under the *Act*. The passage from the *Ollenberger* case cited by the respondent above is some authority for the proposition that issues relating to the aesthetics of a farm operation do not fall within the definition of a disturbance sufficient to ground a complaint. On the other hand, the passage from *Hodge* v. *Eben*, relied on by the complainants, does provide some support for the complainants, even though the passage relied on was not necessary for the result, since the panel found that there was no farm operation in that case (involving a salvage yard).

In my view, it is apparent from past decisions that the issue whether visual impact can constitute a "disturbance" within the meaning of the *Act* has not to date been the subject of a direct and systematic examination in light of the wording and the purposes of the *Act*. In my view, it is appropriate to undertake that examination in this decision.

The phrase "other disturbance" comes from section 3 of the *Act* which states "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". There is a rule of statutory interpretation that gives guidance on how to interpret a general term which follows a list of specific terms. This rule is known as the limited class rule (*ejusdem generis*). It provides that where there is an identifiable class to which all the specific terms belong, the general term is narrowed or restricted to the same class.

The first consideration then is whether odour, noise and dust form an identifiable class. I find that they do. The *Act* was specifically created to give persons farming on land zoned for farming protections from nuisance actions, court injunctions, or specific nuisance bylaws related to the operation of the farm that they might otherwise be subject to, as long as they follow normal farm practices and are not in contravention of the *Health Act, Integrated Pest Management Act, Environmental Management Act* and/or other land use regulations. Understanding this legislative background, it is then apparent that odour, dust and noise are all matters which could form the basis of a nuisance action at common law. Given that the identifiable class is matters that could form the basis of a nuisance complaint a common law, the term "other disturbance" must take its meaning from that identifiable class.

In this case, at least initially, the complainants argued that the "other disturbance" is the visual impact of a manure pile in close proximity to their home. Is this the sort of claim that would form an action in nuisance at common law?

In *Christensen* v. *District of Highlands*, 2000 BCSC 196 (CanLII), at paragraph 11, Mr. Justice Melvin defined private nuisance as an unreasonable interference with the use and enjoyment of land. He then went on to quote from two learned texts on the issue of private nuisance at paragraph 12 and 13:

> In terms of private nuisance Fleming's Law of Torts, ninth edition, at page 464 states:
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> > The gist of private nuisance is interference with an occupier's interest in the beneficial use of his land. The action is thus complementary to trespass which protects his related interest in exclusive possession.
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> The author further discussed the subject matter at pages 465 to 466:
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> > The interest in the beneficial use of land protected by the action of nuisance is a broad and comprehensive notion. It includes not only the occupier's claim to the actual use of the soil for residential, agricultural, commercial or industrial purposes, but equally the pleasure, comfort and enjoyment which a person normally derives from occupancy of land. Accordingly, harmful interference may be manifold: it may consist in physical damage to land, buildings, and chattels thereon, through vibrations, flooding, fire, and the like; in disturbing the comfort, health, and convenience of the occupant by offensive smell, noise, smoke, dust, by telephonic harassment or fear for one's safety or health, or by only affronting the susceptibility of (reasonable) neighbours by a house of prostitution or a sex shop close to a residential area. Thus, certain sophisticated interests of personality which, standing alone, receive only limited protection by our law, are more amply vindicated if asserted in title of the free use and enjoyment of land, where such factors as personal taste and sensibilities are accorded fuller protection.
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> > Not all amenities, however, commonly associated with beneficial use of land, are vindicated by the law of private nuisance: not aesthetic values, like an unobstructed or pleasing view from one's home, or against an isolation hospital moving in next door; nor such privacy values as freedom from being spied upon from a vantage point; not even an absolute right to light or lateral support for one's buildings. The erection of a building interfering with TV reception has also been declared immune on analogy with loss of prospect, as otherwise imposing too great a restriction on development in cities.

> Linden on Canadian Tort Law, third edition, discussed the significance of the interference with the use and enjoyment of land at pages 539 to 540:
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> > ... Thus, just because a person's peace of mind may be affected, an action in nuisance does not necessarily lie. For example, the use of land for an isolation hospital, however unpopular and disconcerting that may be, rarely amounts to a nuisance. Neither does a defendant cause a nuisance if he fails to preserve the aesthetic appearance of his land for his neighbour's benefit.
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> > [emphasis added]

In the case of *St. Pierre* v. *Ontario (Minister of Transport and Communications*) [1987] 1 S.C.R. 906, the Supreme Court of Canada dealt with a situation where the Crown built a highway in a previously quiet rural area and the plaintiff sued in nuisance for the interference with his general enjoyment of the land and loss of aesthetic view. Mr. Justice McIntyre in dismissing the appeal stated:

> I agree with the Court of Appeal that what the appellants complain of here is the loss of prospect or the loss of view. There are as well the elements of loss of privacy, but in essence the complaint is that once they dwelt in a rural setting with a pleasing prospect and now they are confronted on one side of their land at least with a modern highway. It is a claim for loss of amenities. That the use of the highway will constitute a disruptive element is probably true but that is a field of damage which may not be considered. The claim is limited to loss occasioned by the construction.
>
> From the very earliest times, the courts have consistently held that there can be no recovery for the loss of prospect... (paras. 12 - 13)

Based on the foregoing, I am of the view that common law of nuisance does not recognize interference with aesthetic appearance. To say this another way, the fact that a neighbor creates an eyesore does not create an action in nuisance. Given that the common law does not recognize interference with aesthetics as nuisance, I find that "other disturbance" cannot be interpreted so as to give a complainant the right to file a complaint based on the unattractive appearance of his neighbour's property.

This outcome accords with larger and fundamental purpose of the *Act*, already referred to above. The *Act* establishes a "*quid pro quo*" as between farmers and their neighbours. If a farmer acts in accordance with normal farm practice, his neighbor cannot sue him for nuisance. If the farmer does not act in accordance with normal farm practice, the neighbor can sue him and can also apply to BCFIRB for significant remedies. In all of this, the common law of nuisance, which is modified by the *Ac*t where the statutory conditions are met, lies at the foundation. Where a farmer is engaging in activities which would not otherwise trigger the common law of nuisance, the *Act* clearly has no application. To conclude otherwise would create imbalance and an improper overreaching of the statutory scheme.

Expansion of original complaint

I turn now to consider the complainants' reply whereby they seek to expand their complaint beyond the grounds confirmed in the case management conference with 7 items of concern. To the extent that items 4-7 are simply different ways of characterizing the complaint based on a visual disturbance, I find that they do not fall within the jurisdiction of the *Act* and they are hereby dismissed.

Item 1 identifies a potential health hazard related to a risk of water contamination as the siting of the manure pile is "just" within regulatory requirements. It appears that what is being identified here is not even an allegation of contamination but rather a risk that contamination might occur. In any event, issues relating to water contamination are not within the jurisdiction of BCFIRB. Allegations of contravention of the *Environmental Management Act* or the *Health Act* or their regulations should be taken up with the appropriate authority. As Item 1 is not within the jurisdiction of BCFIRB, it too is dismissed.

Finally, I turn to items 2 and 3 relating to attraction of pests (flies and rodents) and odour. Given that the complainants did not raise either pests or odour in their initial complaint, the case management conference, or even in their initial submission in this process, legitimate questions obviously arise as to the magnitude of any disturbance associated with pests or odour. I am also mindful of the allegations made by both the complainants and the respondent that what is really at the core of this complaint is a personality conflict between neighbours arising out of an unsuccessful land swap arrangement. Whether this is really the core issue between the parties will likely require a determination based on the evidence provided at a full hearing on the merits.

However, given that the complainants would be entitled to file a new complaint alleging these disturbances I am prepared to accept them for present purposes. Accordingly, what this means is that the issue on this complaint agreed to in the case management conference remains the same: whether the manure management practices on the respondent's farm are in accordance with normal farm practices? What has changed are the grounds as the only valid aspects of the complaint are the allegations relating to those manure management practices of the respondent that cause disturbances related to odour and pests (flies and rodents).

In light of my decision above, I have given BCFIRB staff instructions to retain a suitable Knowledgeable Person (KP) to assess the complaint, conduct a site visit of both properties and provide a report to BCFIRB. A copy of the proposed terms of reference to be used in retaining the KP as well as a summary of the KP's qualifications will be provided to the parties once the KP has been retained.

Once the KP's report has been received, I will issue further procedural directions to the parties. If you have any questions regarding this process, contact BCFIRB Case Manager, Gloria Chojnacki at 250-356-1817 or via email at Gloria.chojnacki@gov.bc.ca.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

Ron Kilmury, Chair