April 20, 2016 File #14- 08

DELIVERED BY EMAIL

Denis Harvey
[redacted]

Dale Jansen
HS Jansen and Sons
[redacted]

Dear Sirs:

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

On December 15, 2014, the subject complaint was filed with the BC Farm Industry Review Board (BCFIRB) concerning the manure management operations of the respondent farm. On January 23, 2015, the complainant provided the following addendum to the notice of complaint:

> I believe I am "aggrieved by a disturbance that results" from the operation of the Jansen dairy farm. I do not believe the manner in which they spread dairy effluent is consistent with normal farm practice. I cannot see how any practice which contaminates a fresh water source for well over 60 families can be considered a "normal farm practice". The Jansens display an Environmental Farm Plan on their gate and yet the Environmental Protection Office has issued at least one compliance order regarding the farm citing the farm for contravening sections 13 and 14 of the Agricultural Waste Control Regulation and states that the Environmental Farm Plan reference guide suggest that no manure be applied to any fields from September to the end of March unless a cover crop is in place. Is it normal farm practice to disregard the Agricultural Waste Control Regulations and the Environmental Farm Plan guide when displaying a sign indicating you follow such a guideline?

Three other persons also filed complaints but after communication between the parties and BCFIRB, those complaints were withdrawn. On April 16, 2015, at the request of the complainant, the complaint was adjourned to the fall of 2015, in part to allow the complainant further time to prepare for a hearing. On October 9, 2015, again at the request of the complainant, the hearing panel further adjourned the complaint until March 2016 "to allow time for the respondent and other agencies to continue their work on resolving the issues that are the subject of this complaint".

On March 13, 2016, BCFIRB case management staff contacted the complainant requesting confirmation as to the status of the complaint. The complainant responded on March 21, 2016 with the following:

> While it seems like everyone believes there is cause for concern it doesn't seem like anyone is prepared to act in any sort of urgent fashion to rectify the problem. Therefore I feel I have no choice but to proceed with my complaint and try to get some action through that process.

The respondent advised BCFIRB that it would prefer the complaint be addressed but also questioned whether the outcome of any hearing by BCFIRB has the ability to provide any resolution with respect to water quality concerns impacting the Hullcar Aquifer.

BCFIRB is aware that a number of provincial ministries – agriculture, environment, health and forest and natural resource operations – are actively working with the Township of Spallumcheen, the Splatsin First Nation, the Save Hullcar Aquifer Team and others in reviewing the issue of water quality. It is BCFIRB's understanding that there continues to be some uncertainty as to the source(s) of the nitrates affecting the water quality of the Hullcar Aquifer.

It may be helpful at this point to reiterate the role and jurisdiction of BCFIRB in complaints under the *Farm Practices Protection (Right to Farm) Act* (the *Act*), as outlined by the BCFIRB Executive Director in a January 13, 2015 letter to the parties:

> The purpose of this letter is to clarify the role BCFIRB can play in complaints of this nature. Complaints are filed in accordance with section 3 of the *Act* set out below:
>
> > **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.
> >
> > (2) Every application under subsection (1) must
> > (a) contain a statement of the nature of the complaint, the name and address of the person making the application, the name and address of the farmer and the location of the farm,
> > (b) be in a form acceptable to the chair of board, and
> > (c) be accompanied by the fee prescribed by the Lieutenant Governor in Council.
>
> Section 3 requires complainants to establish that they are *aggrieved by a disturbance that results from a farm operation* conducted as part of a farm business. This language involves three components that must be satisfied before the panel considers the issue of what is "normal farm practice": (a) the matter complained of must actually be a "disturbance" within the meaning of the *Act*, (b) the disturbance must have sufficient personal impact on the complainant as to meet the definition of "aggrieved", and (c) there must be a sufficient connection between the disturbance and the farm as to conclude that the disturbance *results* from the farm operation. A complaint that only alleges the possibility of a disturbance at some point in the future raises an issue concerning whether it satisfies (b) and as such is in my experience the type of complaint that could be the subject of a preliminary application pursuant to section 6(2)(c) of the *Act* regarding whether such a complaint should be referred to a panel.
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> If the above issue arose and was resolved in favour of the complainants, the questions whether (a) excess nitrates in a water supply fall within the definition of "other disturbance", and (b) any such disturbance was contrary to "normal farm practice", would be for the panel to determine after hearing all the evidence.
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> Normal farm practice is defined in the *Act* to mean a practice that is consistent with "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". The consideration of what is "normal farm practice" requires the panel to look at contextual factors or the circumstances of the farm itself and in relation to properties around it to determine if there are any site specific factors that are relevant. The statutory requirement does not simply require the panel to apply an abstract test where a particular farm practice is condoned regardless of the different circumstances that may arise on different farms. Instead, the test requires the panel to consider the proper and accepted customs and standards established and followed by similar farm businesses under similar circumstances.
>
> It is only if the panel determines that a disturbance results from a farm practice inconsistent with normal farm practice that it has jurisdiction to order a remedy. The only remedy available to the panel is an order requiring the farmer to cease or modify the practice to be consistent with normal farm practice. The panel cannot order the farm to pay damages or order other agencies or the provincial government to take a specific action or enforce their

> mandate. BCFIRB does not engage in ongoing monitoring of a farm operation. Perhaps most importantly, even if a panel were to issue a modification order, that order would turn on the requirements of normal farm practice. BCFIRB is not a proxy for other agencies with specific jurisdiction to address issues arising under environmental, health or other statutes. BCFIRB has no authority to make decisions under those statutes, which have their own specialized mandates and decision-makers. While there can be overlap between problems raising normal farm practice issues that affect the mandates in other statutes, section 2 of the *Act* recognizes that a determination of normal farm practice does not automatically determine whether the requirements of other statutes have been satisfied.
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> [emphasis added]

Section 39 of the *Administrative Tribunals Act* (*ATA*) allows the hearing panel to adjourn a complaint on its own motion but in doing so, must have regard to a number of factors, including: the reason for adjournment; whether the adjournment would cause unreasonable delay; the impact of an adjournment on the parties; and, the impact of the adjournment on the public interest.

Here we have an issue where provincial government agencies – including those which have explicit statutory authority to address water contamination issues – continue to work with the parties and others to confirm the source(s) of water contamination and construct a resolution. It is also a situation, as outlined above, where the scope of BCFIRB's jurisdiction is unlikely to result in an effective remedy following a hearing. Regardless of whether the panel finds the farm to be following normal farm practice or not, the water contamination issue could still remain unresolved pending the outcome of the cross-government review.

In the panel's view, a further adjournment will make no practical difference pending the outcome of the cross-government review. Nor is it in the interest of the parties, agencies and the public more generally to divert resources and attention to a separate proceeding at this time. While it is appreciated that due diligence is necessary, BCFIRB would encourage the cross-government agencies to do their best to expedite their process.

Accordingly, the complaint is adjourned generally in accordance with s. 39 of the *ATA*. BCFIRB will continue to monitor this issue in consultation with the parties.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

Andreas Dolberg, Vice Chair, Presiding Member

Diane Fillmore, Member

Brenda Locke, Member