IN THE MATTER OF THE

FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM THE 'TRESPASS' OF GMO PLANTS AND CHEMICAL OVERSPRAY IN SMITHERS, BRITISH COLUMBIA

BETWEEN:	JOSETTE WIER	**COMPLAINANT**
AND:	ALAIN LABRECQUE	**RESPONDENT**

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	Christopher K. Wendell, Presiding Member Brenda Locke, Member Corey Van't Haaff, Member
For the Complainant:	Josette Wier
For the Respondent:	Alain Labreque Keith Wilson, Counsel
Dates of Hearing:	By Written Submission

INTRODUCTION

1. The British Columbia Farm Industry Review Board (BCFIRB) hears complaints about farm practices under the *Farm Practices Protection (Right to Farm) Act* RSBC 1996, c. 131 (the *Act*).

2. Under section 3 of the Act, a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business may apply to the BCFIRB for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing and after a determination that the disturbance results from a farm operation conducted as part of a farm business, a Panel of the BCFIRB is of the opinion that the odour, noise, dust, or other disturbance results from a normal farm practice, the complaint is dismissed. If the Panel determines that the practice is not a normal farm practice, the Panel must order the farmer to cease or modify the practice causing the disturbance.

BACKGROUND

3. The Parties to this proceeding are owners of adjacent farm properties in the Bulkley Valley area of Northern British Columbia close to the town of Smithers. The Bulkley Valley is an area of the province with a significant history of agriculture and continues to support a wide variety of agribusiness enterprises.

4. The Complainant leases out portions of her property intermittently to local farmers, however the Complainant herself is not a farmer and instead operates a bed and breakfast on her property. She attempts to maintain her property free of chemical pesticides and genetically modified organisms (GMOs) which she believes are potentially harmful to her health and which she contends may undermine the value of her property. She says she prefers to keep her land available for more diverse agriculture should an opportunity present itself. As such, she has not had any pesticides used on her land in the 21 years since she has lived there. She was granted a pesticide-free zone status by the Ministry of Transportation in recognition of her control of thistles manually along her property. She takes pride in knowing her land intimately, having recorded some 100 native plants, along with mammals and birds. She believes strongly that biodiversity of plants, animals and insects for a more integrated approach to farming. The Complainant's home is located approximately 400 meters from the parties' common fence line. The Complainant believes that the Respondent has twice, in 2013 and 2014, trespassed on her property by overspraying Roundup weed killer and through the seed migration of GMO canola from his property; that these instances of spray drift and seed migration are disturbances that have aggrieved her and are not normal farm practices.

5. The Respondent operates a grain farm on his property and initially upon purchasing the property informed the Complainant and other neighbors that he intended to grow genetically modified canola on the property for the first few years to get the property into the condition in which he could then grow higher value grain crops. The Respondent was raised on a multigenerational farm and has more than 20 years of operational farming experience. He and his family previously farmed in Alberta but his wife's health problems, led her to have a hyper-sensitivity to air pollution, which is why the family chose to relocate to Smithers. They believe they are people

who take environmental impacts and environmental protection very seriously. They moved to Smithers in 2013. They currently share common fence lines with several farmers and complaints about their use of GMO canola and herbicides have come predominantly from the Complainant.

6. On February 2, 2015 the BCFIRB received a complaint from the Complainant with respect to the herbicide management practices of the Respondent as well as with respect to his use of genetically modified canola.

7. On March 3, 2015 the Parties resolved the issues on the complaint by way of a Settlement Agreement which included provisions that both parties would provide a four-meter buffer on each side of the common fence line to mitigate overspray issues, that the Respondent would notify the Complainant when he intended to spray along his side of the common fence line, and a general statement to the effect that the Parties would attempt to re-establish respectful relations.

8. Paragraph 8 of the Settlement Agreement specifically set out that "Once the claim is dismissed, if the terms outlined in this Settlement Agreement are breached the Parties acknowledge that the Complainant may file a new complaint and BCFIRB will expedite the process to a hearing before a Panel of the Board."

9. On October 16, 2015, BCFIRB did in fact receive a second Notice of Complaint from the Complainant alleging that the Respondent had breached the March 3, 2015 Agreement and in particular, that the Respondent had failed to notify the Complainant when he was going to spray along the common fence line.

10. On December 1, 2015, the BCFIRB Chair provided his decision with respect to an application for summary dismissal by the Respondent of the Complainant's complaint in which it was decided that the complaint was not frivolous, vexatious, or trivial as required by Section 6(2) of the *Act* and therefore was appropriate to be referred to a Panel for a hearing on an expedited basis.

11. However, in making that decision on the summary dismissal issue, the BCFIRB Chair also noted at the second paragraph on Page 3 as follows:

> "In her original complaint, the Complainant alleged that she was aggrieved by the use and trespass of GMO plants, spray trespass or overspray, refusal to give notice of spray and unmonitored repeated use of "pesticides" to the extent that the Complainant wishes to argue that the use of GMO seeds or herbicides are not normal farm practice. These issues are not properly before BCFIRB as the use of GMO seed and herbicides are both federally regulated. We have no jurisdiction to interfere with those public policy decisions. BCFIRB's jurisdiction is confined to hearing complaints from persons who are aggrieved by the farm practices of the farm business. What this means is that while BCFIRB cannot hear a complaint about a farm's decision to use a particular kind of seed or herbicide which has the appropriate government approval, BCFIRB can consider whether the farm's management practices related to the use of a particular seed or chemical accord with normal farm practice."

12. The BCFIRB Chair gave further direction to the Complainant in that decision as follows:

> Given the subject matter of this complaint I direct that it be heard by way of written submission where the Complainant will have an opportunity to put in her case and present evidence such as a written summary document and photographs to show:
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> (a) that she is aggrieved;
> (b) by a disturbance;
> (c) which disturbance arises out of a farm practice;
> (d) carried on by a farm business; and
> (e) the complained of farm practice is inconsistent with normal farm practice (defined as proper and accepted customs and standards as established and followed by similar farms in similar circumstances.
>
> [emphasis in original]

13. On December 16, 2015, a case conference call was held with respect to the hearing process which would be undertaken by BCFIRB to determine the issues between the Parties. At that case conference it was again articulated to the Parties that the issues before the Panel would be limited to those as they had been set out in the letter of December 1, 2015. At that case conference it was confirmed that a hearing by way of written submissions would occur, and that should the Panel need additional submissions, an oral hearing, at least on some issues, would be provided. Following the case conference, the Complainant applied for summonses for three witnesses. The presiding panel member subsequently issued a process decision by letter with respect to the summons application in which he reserved on the Complainant's application pending completion of the submission process. The Complainant was advised that her summons application would be addressed in the event that the Panel decided to hold an oral hearing.

14. On January 29, 2016 the Complainant provided her submissions to the Panel. On February 29, 2016 the Respondents provided their submissions in response to the Panel and on March 7, 2016 the Complainant provided her reply submissions. The Panel has taken some time to review all of these submissions in detail. As we find that we are in a position to make a final determination of the issues on this complaint based on the materials filed, there will not be a further oral hearing and as a result the Complainant's request for summons are dismissed.

15. It is worth noting again at the outset of this decision that despite the Complainant's clear ongoing concerns regarding the use of chemical herbicides and GMOs and the potential health risks that those products may represent, it is not within the scope or authority of this Panel or BCFIRB to make determinations with respect to the availability of those products for use in agriculture generally. The scope of the Panel's authority is limited to exactly what is set out in the *Act* (as set out below) and insofar as the Complainant hopes to affect some change in the use of the above noted products such change would need to be pursued through governmental entities other than BCFIRB.

ISSUES

16. The issue raised in this hearing to be determined by the Panel is whether the Complainant has been aggrieved by the "trespass" of GMO plants and spray drift from the Respondent's farm. If the Complainant has been so aggrieved, the Panel will need to consider and determine whether these alleged disturbances result from normal farm practice.

17. A preliminary issue of the status of the Settlement Agreement between the parties and the effect of that agreement on this hearing has also been raised by the parties. The Settlement Agreement between the parties as noted above included at paragraph 8, a term to the effect that if the Settlement Agreement was breached the Complainant could file a new complaint and that BCFIRB would expedite the process for that complaint to be heard on its merits before a Panel.

18. Both the parties have made submissions to the effect that the other party has in fact been responsible for breaching the Agreement. Based on paragraph (8) of the Agreement it was always within the parties' contemplation that a hearing would be the inevitable result of the breakdown of the Agreement. Furthermore, it was an explicit term of the Agreement that in reaching the Agreement no determination was made with respect to whether the activities complained of would be considered to be normal farm practices under the Act. As such the Complainant's first requested remedy, that the Agreement be enforced with certain changes made to further modify the behavior of the Respondent, would not be appropriate in the circumstances.

19. The Respondent submits that it would be prudent for the Panel to take the position that the agreement is at an end and that the Board should simply now determine whether the Complainant is aggrieved and whether the Respondent is using normal farm practices. The Respondent submits there is no merit for the Panel to rule on which party breached the Settlement Agreement.

20. In fact, the Panel has no authority to rule on who breached the Settlement Agreement as the remedy for a breach is already defined in the agreement. Breaches of the agreement have allegedly occurred and the remedy for such breaches is set out in the agreement. That remedy is the filing of a new complaint which has been done and is what led to the hearing.

21. The purpose of this decision is to determine if the Complainant has complaints which can be remedied by this Panel under the *Act*. To do so she will need to prove her complaints meet the legal standards as set out below. The purpose of this hearing is not to try and reestablish an agreement between the parties which has clearly broken down. The decision in this hearing will direct the parties and will be definitive.

THE LAW

22. Section 3(1) of the *Act* reads as follows:

> 3(1) If a person is aggrieved by any odor, 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 determination as to whether the odor, noise, dust or other disturbance results from a normal farm practice.

23. Normal farm practice is defined in Section 1 of the Act as follows:

> Normal farm practice means a practice that is conducted by farm business in a manner consistent with
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> a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
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> b) any standards prescribed by the Lieutenant Governor in Council, and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (a).

24. As set out in the sections of the *Act* noted above, in order to properly establish a complaint before BCFIRB there is a test to meet. First, a person must be aggrieved by any odour, noise, dust or other disturbance; second, that disturbance must result from a farm operation conducted as part of a farm business; and third, the disturbance must not be a normal farm practice. In determining whether a complained of practice falls within the definition of normal farm practice, the Panel must look at whether it is conducted in a manner "consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances."

25. If a Complainant can establish that the first part of test has been met and that he or she is an aggrieved party as contemplated by the *Act*, then the Panel will go on to make the necessary determination as to whether the disturbance resulted from a farm operation conducted as part of a farm business and whether that disturbance resulted from a normal farm practice.

SUBMISSIONS OF THE PARTIES

The Complainant

26. The Complainant helpfully framed her initial submissions on the directions which she was provided by the BCFIRB Chair in his letter of December of 2015.

27. In her written submissions, the Complainant states that she is aggrieved because the Respondent in 2013 and 2014 trespassed on her property by using Roundup and in 2013 by trespassing on her land with GMO canola. She says the Respondent originally told her he would grow Timothy seeds for export and did not mention GMO canola. She says the Respondent sprayed Roundup and used GMO canola all the way to their joint fence posts.

It was after the 2013 use that she first noticed "drift" along the fence and she asked the Respondent what he sprayed and what he seeded. She states he told her that his spray nozzle was too high and did not apologize. Later that summer, she found blooming canola on her property. She considers both these products (GMO canola and Roundup) crossing onto her property to be trespasses and considers them dangerous.

28. She says she is aggrieved because the Respondent's use of pesticides and GMO products limit her choices for growing organic crops. She states, that the contamination of her land would seriously impede her ability to obtain organic certification. Due to her age (70) she wishes to sell her land at some point "soon" and wants to advertise it as pesticide-free as she believes that designation will be in demand.

29. She says that the usual separation between two forms of agriculture, such as organic and conventional, is 25 to 30 feet and she believes she and the Respondent should split that measure of land with each taking a portion of the 25 to 30 feet on each respective property.

30. She believes she is aggrieved as her ability to have beehives on her property is compromised, based on her belief that another neighbour lost her ability to have beehives as that neighbour was too close to where Roundup was used by the Respondent. She also states that canola honey solidifies so is not liked by beekeepers.

31. The Complainant also believes she is aggrieved as her personal health has been threatened. She states that she has an 80% chance of getting cancer from a gene mutation she inherited, and is therefore concerned regarding the effect of carcinogens on her health including the pesticides used by the Respondent. She understands that BCFIRB does not have jurisdiction over issues of human health but thinks the BCFIRB should not ignore potentially harmful practices by a farmer. She asserts that the BCFIRB should consider as part of her grievance whether it is normal farm practice to refuse to give notice to somebody that a farmer is about to use a cancer-producing chemical so that she can protect herself.

32. The Complainant goes on to say that the disturbance is the actual contamination along their common fence line by both Roundup and GMO canola. She had asked previously for a buffer zone but instead of getting back to her, the Respondent sprayed Roundup to the fence line which she says drifted again onto her side. She says both the canola and the Roundup disturbances arise from the Respondent's farming practices.

33. The Complainant says the Respondent is a farmer with a farm business. He gave her a business card with Castor Inc. on it describing the farming services he offers, and indicating he is located on Old Babine Lake Road, where he farms and resides.

34. The Complainant asserts that the complained-about farm practice is not consistent with normal farm practices. She says the Respondent is the first and only grain commodity farmer in Bulkley Valley growing crops for export. His practice relies on fossil fuels and pesticides which are not used locally on that scale. The use of GMOs is not supported by

the Regional District of Bulkley-Nechako for agriculture purposes. The Complainant says the Respondent uses large machinery which seems oversized for the fields, contributing to pesticide drift.

35. The Complainant states that the Respondent failed to establish neighborly relationships and did not inform the Complainant of his plan to grow GMO canola and did not respond to her request for a meeting. Normal farm practices, she says, include open communication and consideration for those living nearby.

36. The Complainant states that the Respondent's pesticide use is not a normal farm practice as he uses repeated applications of different pesticides some of which have never been used in the region. She alleges that some of the pesticides used by the Respondent are not allowed to be used in BC. She further alleges the Respondent inadequately notifies neighbours of the spraying and possibly contravenes pesticide labeling requirements.

37. The Complainant also says normal farm practices includes respect for regulation and agreements and the Respondent has disregarded the Regional District resolution regarding GMO as well as breaching the March 15, 2015 BCFIRB agreement.

38. The Complainant noted that the pesticide trespass and the Canola seed drift had also impacted neighbouring crown land.

The Respondent

39. The Respondent has 20 years of operational experience farming for a living, and was raised on a multigenerational farm near Peace River Alberta.

40. Due to Ms. Labrecque's hyper-sensitivity to air pollution, she has developed long term health impacts, so the family moved to Smithers as it was their desire to live somewhere with clean air. They say they take environmental impacts and environmental protection "very seriously."

41. The Complainant's land, according to the documents filed by the Respondent, show that the Complainant's house is approximately 400 meters away from the Respondent's field and that dense vegetation, trees and terrain separate her residence from his fields.

42. The Respondent conducted an internet search of the Complainant using only her name and found information on "environmental campaigns" she has initiated focusing on her opposition to "modern 'pesticide' use." He also discovered that she had posted a derogatory YouTube video against his family.

43. The Respondent acknowledges the Complainant's right to continue her "environmental activism" but does not think it is proper for her to use "normal farm practice" complaints to target the Labrecque family in order to seek a change in government policies on herbicide use or GMOs.

44. In opposition to the Complainant's claim that the Respondent uses extraordinarily large farming equipment, the Respondent submitted photographs of his 1978 Case tractor, a 4 wheel drive tractor with harrow bar attached, the same vehicle with a cultivator attachment, a 1989 Massey combiner, and a 1991 John Deere 535 baler. He also submitted photos of their 2015 barley and oat crops, their grain dryer, and their children assisting with loading straw bales, and canola being stored in their shop. The Respondent also uses a Terra Gator tractor for seeding fertilizing and spraying.

45. The Respondent believes that when he uses the Terra Gator for broadcasting seed or fertilizer, the complainant may falsely believe he is spraying herbicides.

46. The Respondent acknowledges that in 2013 a small amount of herbicide spray drifted at one place along the common fence line, and he says he apologized and has taken measures to assure that won't re-occur. He has ordered a wind meter to record actual wind speeds so he can record those speeds in his crop log book.

47. The Respondent submitted his phone records to show that contrary to the complainants claim that he only contacted her four times, the records show eight contacts which the Respondent says are in addition to face-to-face discussions and emails. Also, the Respondent submitted an email exchange with a local beekeeper which he says contradicts the Complainant's claim that he will not communicate with beekeepers.

48. In response to the allegations that he is using products which are not allowed in the province or in the area of the Bulkley Valley, the Respondent submits that he has never used Ally and Frontline in the Smithers area, and has never used Grazon in his life. Furthermore, he has no intention or need to use any of these herbicides on his Smithers farm.

49. The Respondent submits that the airport wind data submitted by the Complainant is six kilometers away and is not similar to winds at his farm. The Respondent explains that the airport is in a valley on the west side of the river.

50. The Respondent attached to his submission several letters from farmers that he says say indicate that the farming practices employed by the Respondent are normal farming practices for the area of the Bulkley Valley.

51. The Respondent says the Complainant has not complained about noise or dust. Instead the Complainant complains about the trespass of canola plants as aggrieving her as is the Respondents' use of pesticides, which she believes is a trespass against her.

52. The Respondent submits that the Complainant is not aggrieved by the GMO canola which she claims is dangerous to her and others, nor by the Respondent's use of herbicides which she claims put her health at risk and restricts her from using her land for organic food production. The Respondent submits that there is no credible scientific or other evidence that either the GMO canola or the herbicides are dangerous.

53. The Respondent submits that according to the Complainants own evidence, organic crops require an eight meter buffer on their own side of the fence, and there was no evidence from the Complainant that should she decide to grow organic crops, the activities of the Respondents would harm her ability to maintain certified organic certification.

54. The Respondent notes that this case is different from BCFIRB's decision in *Truax v Hlusek* as in that case, one of the parties deliberately applied herbicide to the other's land.

55. The Respondent submits that the Complainant is not aggrieved and that no further analysis needs to be done with regard to normal farm practice, however, should the Panel wish to make a determination on normal farm practice, the Respondent submits that canola is a widely used crop in BC and that crop yield and quality grading achieved by the Respondent demonstrates that canola is viable in the Smithers area and can provide farmers with profitable crops to assist farms in being economically viable.

56. The Respondent submits that several letters he provided attest to his use of innovation with respect to modern agronomy and crop science technology. The Respondent submits that he uses less herbicide than other farmers in Bulkley Valley, an innovative practice that should be encouraged.

57. Regarding the Complainant's assertion that BCFIRB's *Deverall v Morning Bay Vineyard*'s decision supports her position that farmers should give advance notice of spraying, the Respondent says he has been given the Complainant notice and that notice has not alleviated her concerns as she has made public statements that she intends to stop the Respondent's use of both GMO crops and herbicides. Further the Respondent says the 400 meter buffer zone between the fence line and the Complainant's home means that notice serves no practical function.

ANALYSIS AND DECISION

58. The Complainant states that she is aggrieved by the Respondent's failure to contain the use of the herbicide known as Roundup, and the seed migration of genetically modified canola seeds. She submits that the use of both the Roundup and the GMO Canola are farm practices being carried on by the Respondent as a farm business and that such practices cannot be consistent with normal farm practices if they require a person in her position to have to accept spray overdrift and seed migration onto her property.

59. The Respondent states that the Complainant is not in fact an aggrieved person as defined under the *Act*, that no demonstrable trespass has in fact occurred and that in any event the Respondent's farm management practices are exemplary and that his use of both GMO Canola and Roundup are entirely consistent with normal farm practices for British Columbia and in particular for the Bulkley Valley. The Respondent also makes submissions to the effect that the Complainants particular beliefs with respect to GMO crops and chemical herbicides are the true source of the complaint and not any particular conduct on behalf of the Respondent.

60. The Panel accepts that the Respondent is carrying on a farm business and that the complained of disturbances arise out of the farm operations of spraying and seeding. The threshold issue that we must consider is whether the Complainant is in fact an aggrieved person as contemplated under section 3(1) of the *Act*.

61. It is common ground between the parties that the Respondent seeded GMO canola in 2013, a plant that the Complainant considers dangerous and invasive. In support of her allegation of seed migration, the Complainant relies on one photograph (found at Appendix A of her submitted materials) that shows several canola plants on her side of the fence line. The photograph does not show how many canola plants were growing on the Complainant's property and over what area. The Complainant does not provide any evidence to show the extent of canola growing on her property or of the number of plants she observed. There is also a photograph of a blooming canola plant on the Complainant's driveway (Appendix J) many hundreds of meters from the common fence line.

62. The question for the Panel is whether the evidence of a few isolated canola plants growing on the Complainant's property is a 'disturbance' within the meaning of the *Act*.

63. The *Act* provides farmers with protection from potential nuisance claims arising out of their farming practices where they follow normal farm practices. In giving meaning to "other disturbance", it is significant that "odour, dust and noise" are all matters which could have formed the basis of a nuisance action at common law. As such, the term "other disturbance" must take its meaning from that identifiable class of common law nuisances, (see *Hill v. Gauthier*, February 21, 2013).

64. The Supreme Court of Canada in *St. Pierre* v. *Ontario (Minister of Transport and Communications*) [1987] 1 S.C.R. 906, defined private nuisance as follows:

> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

65. With respect to the alleged seed migration in this case, the question therefore becomes whether the presence of canola plants on the Complainant's property can be seen as something that has caused physical injury to the land or has substantially and unreasonably interfered with the Complainant's use and enjoyment of land.

66. While the Panel accepts that there may be circumstances where the presence of plants from a neighbouring property may in fact be a substantial or unreasonable interference with the complainant's use of her land, in the circumstances of this case, we do not find that to be the case. The presence of the GMO canola plants on her property, in the amount identified by Complainant as occurring in 2013 is not an interference of a sufficient magnitude or duration to be considered unreasonable. We find that the evidence of a few GMO canola plants on the Complainant's property falls considerably short of being either a physical injury or substantial interference in the Complainant's use and enjoyment of her land.

While the presence of canola on the Complainant's property may be a "disturbance" under the *Act*, it is not of sufficient magnitude or duration to allow the complainant to meet the threshold of being aggrieved and as such, this aspect of the Complaint is dismissed.

67. It should also be noted that the Respondent's evidence (uncontested) is that he is no longer planting GMO canola. He says that his intention was to grow GMO canola only until he was able to grow the more high value grains which he is now able to do. In fact, the Complainant's most recent complaint of seed migration relates to 2013.

68. The Panel cannot direct the Respondent to modify a practice he no longer carries on. Accordingly, even if we had found that the seed migration in 2013 was sufficient to allow the complainant to meet the test of being aggrieved by a 'disturbance' under the *Act*, we would dismiss the seed migration complaint as having been fully mitigated by this change in circumstances.

69. With respect to the overspray of herbicide, the Complainant again relied on four undated photographs (Appendix L) which she says shows overspray along the common fence line in 2013 and 2014. The first photo shows an area approximately 2 ½ sections of fence long and an area of overspray (depicted by dead vegetation) which appears to be several feet wide. The second photo shows a brownish area of what appears to be dead vegetation in a field but it is difficult to tell the size of the area or where it is relative to the fence line. The third photo shows an area approximately 5 sections of fence with very minor overspray, perhaps a few inches wide, in a couple of fence sections. The fourth photo shows approximately 3 sections of fence with minor overspray (in the nature of inches) in a couple of fence sections.

70. The Complainant states that the amount of overspray is irrelevant, the Respondent introduced a toxic chemical onto her land and that she is aggrieved as a result.

71. The Respondent acknowledged having an issue with overspray in 2013 when he set the spray nozzle pressure too high. He says there has not been an incident of spray drift since. In his submission of October 28, 2015 received as part of his summary dismissal application, the Respondent pointed to the photographs the Complainant filed with her first complaint (Appendix B and C). These photographs are not the same as the ones she relies on in Appendix L but they are clearly labelled and appear to depict the same area. The Respondent says that the Complainant's photos show that "in 2013 the overspray is present whereas in 2014 it is clear that the spray stopped at the common fence line".

72. The Respondent says that as a result of the overspray incident in 2013, he agreed to monitor and modify his nozzle settings on his sprayer to reduce overspray to an absolute minimum. He says he has a wind meter (anemometer) to record actual wind speed in his crop log books which he says demonstrates his intention to minimize any negative impact on the neighboring properties.

73. The question for the Panel is whether the overspray on the Complainant's property as depicted in the Complainant's photographs is sufficient to allow the complainant to meet the test of being aggrieved by a 'disturbance' under the *Act*.

74. To his credit, the Respondent readily admits that he failed to properly calibrate his sprayer and as such he undertook modifications to account for the incident of overspray in 2013. His view is that the 2014 photographs show that his spray stopped at the common fence line.

75. The photographs taken in 2014 show that the Respondent's spray is confined to his property except for a couple of minor intrusions over the fence line, a few inches in width. It is significant that the Complainant does not make any complaint with respect to overspray for the 2015 growing season. In fact, the Complainant's complaint was with respect to the Respondent's failure to give notice as required under the Settlement Agreement as opposed to any spray practice in particular.

76. The Complainant may have been aggrieved by the overspray onto her property in 2013. The parties entered into the Settlement Agreement in part to account for that grievance and the Complainant withdrew her first complaint.

77. The best evidence before the Panel is that Respondent has modified his spraying practices since the incident in 2013. The few inches of over spray as identified in the Complainant's photographs in 2014 is not of sufficient magnitude to be considered either a physical injury or substantial interference on the Complainant's use and enjoyment of her property. The exceedingly minor effect on the Respondent's property is not unreasonable between farm properties sharing a common fence line, and in any event on the evidence before the Panel, was not repeated in 2015.

78. These facts are distinct from *Truax v. Hlusek*, May 27, 2014. In that case the Respondent farmer was intentionally spraying herbicides on the Complainant's side of a fence resulting in lost hay production.

79. We find that the amount of overspray of herbicides on the Complainant's property in 2014 is insufficient to meet the threshold test as the disturbance complained of is not an interference of a sufficient magnitude or duration to be considered unreasonable. As we find the Complainant is not aggrieved, this aspect of the complaint is dismissed.

80. The Complainant says she is aggrieved by the Respondent's conduct for other reasons than seed migration and overspray. She says she is limited in the types of organic crops that may be grown on her property. She says that seed migration and overspray may also affect the possible resale value of her property. She says she cannot have beehives due to the Respondent's pesticide use and that canola honey has less demand. She says the Respondent's failure to give notice of spray times could affect her health if she is exposed as a result.

81. The *Act* deals with actual disturbances and not potential disturbances[1]. That being the case, this Panel does not have the authority to deal with disturbances that the Complainant alleges may occur in the future.

Does the disturbance complained of (seed migration and overspray) result from normal farm practice?

82. The reasons given above are sufficient to dispense with the issues on this complaint; however we have also turned our minds to the issue of normal farm practice.

83. To determine whether a complained of practice falls within the definition of normal farm practice, the Panel must determine whether the practice is "consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances." The Panel must also consider the specific circumstances of the Respondent farm itself and in relation to properties around it, to determine if there are any factors that would increase or lessen the standards that would represent what is normal farm practice for this particular farm.

84. The Complainant states that the Respondent introduced GMO canola without warning and uses large machinery, oversized for the region. She says this method of farming is new to the Bulkley Valley and cannot be considered normal.

85. The Complainant does not address the Respondent's seeding practices in particular. Her complaint is that the respondent is growing GMO canola as opposed to how he seeded his crop. Her complaint is that GMO canola growing on her property is proof, in and of itself, that the Respondent is not following normal farm practices.

86. With respect to spray drift, the complainant takes issue with the products that the respondent uses and that his form of monoculture requires repeated applications of different pesticides. She also takes issue with his spraying practices alleging spray drift onto her property and spraying during windy conditions.

87. She points to Environment Canada archived weather data to prove that she has seen the Respondent spraying on days where the wind speeds were in excess of 15km/hr which she says is in violation of the label application requirements.

88. The Respondent submits based on the statements he provided as evidence from other growers in the area, that canola is a widely used crop in British Columbia and that his crop yields and quality grading demonstrate that canola is both a viable and profitable crop in the Smithers area. Furthermore, he submitted several letters attesting to his use of innovation with respect to modern agronomy and crop science technology. He says he plants his crops like other farmers do by using a seeder. He fertilizes his fields and uses herbicides like other farmers do, with one important and notable exception, he uses less herbicide than other farmers in Bulkley Valley. He says this is an innovative practice that should be encouraged.

[1] See for example *Yunker/Nurkowski v. Longhorn Farms Ltd*., (BCFIRB July 31, 2014) at paragraph 144.

89. The Panel accepts the evidence of the Respondent. The Respondent is following normal farm practice in the manner in which he seeds and sprays his crops. His farm practices are consistent with those of other grain producers within the province. The test is not whether the kind of farm is "normal" in a given geographic area. Rather, the test is whether the practices (that are the subject of the complaint) a farmer is engaged in on his particular farm, follow accepted standards and customs for the particular industry.

90. The Complainant has not demonstrated any marked departure from what would be accepted practices for seeding. With respect to spraying, the complainant says the respondent sprays in windy conditions, she questions whether he in fact uses an anemometer and points to an email from a Pesticide Management Inspector which indicates that in July of 2015, the respondent was using visual methods to assess wind speed and direction. She says he uses herbicides that are not authorized for use in Smithers.

91. While the Complainant seems to have many issues with the types of chemicals the respondent uses and his method of spraying generally, she does not link these concerns to either the 2013 or 2014 instance that are the subject of this complaint and which we have addressed above. Furthermore, the Panel finds that the Respondent has acted diligently in obtaining a wind meter and otherwise making reasonable efforts to take into account the wind and other conditions which may affect the impact of his spraying on neighboring properties.

92. We have also considered whether there are any contextual factors which would require the Respondent to do something over and above what would generally be considered accepted practice. The Complainant says the Respondent is running a large agri-business out of character for the Bulkley Valley, growing crops and using sprays that are controversial. Given that she wants to keep her land available for possible organic farming or beekeeping and the nature of the respondent's farming business, she says she requires a buffer and advance notice of spraying.

93. On this point, we rely on a previous decision of BCFIRB in *Yunker/Nurkowski*, supra where at paragraph 160-161, the Panel stated:

> While the panel agrees with the complainants that the character of the neighbourhood may be relevant, it is but one of the relevant contextual, site-specific circumstances to be considered. The number and proximity of neighbours, the use of their lands, types of farming in the area and the size and type of operation that is the subject of the complaint are all matters which may be taken into account in determining normal farm practice. However, the panel does not agree that some vague notion of what is "out of character" for an area is determinative of normal farm practice especially in circumstances as here, where the particular farm use is consistent with provincial and local government zoning for the area, nor do we read *Pyke* as authority for this proposition.
>
> Where a farm operation meets provincial or local government zoning requirements, as it does here, the appropriate approach of a panel would be to consider relevant industry customs and standards and then determine whether any site specific factors exist that would warrant modifying those practices on the particular farm. Quite simply what may be normal farm practice in one set of circumstances may not be normal in others.

94. We have not found any any relevant contextual factors which would require the Respondent to do something over and above what would generally be considered accepted practice. We do not require him to have a buffer in excess of any local government bylaw or resolution nor is he required to give the complainant notice of when he intends to spray herbicides. We do not find that the size or type of equipment used by the Respondent is contrary to normal farm practices in the Bulkley Valley or generally for the type of farm which he operates and as a result we do not require that he make changes with respect to the type of equipment which he uses on his farm. To grant these remedies would impose a higher standard of farm practice on the Respondent than is required based on the intent and purpose of the *Act*.

95. The Complainant is clearly opposed to the use of GMO plants and chemical herbicides. She feels that the arrival of the respondent's agri-business in the Bulkley Valley has and will negatively impact her lifestyle and possibly her health. As we stated earlier, the *Act* was enacted to protect farmers from nuisance claims from their neighbours provided that they use proper and accepted farming practices. It is not within BCFIRB's jurisdiction to order a farm to cease or modify operations that accord with normal farm practices but that may have potential food safety, public health or pollution implications. Those matters lie within the jurisdiction of other agencies such as the Canadian Food Inspection Agency, the Ministry of Health and the Ministry of Environment, all of which have the ability to make their own determinations and compliance orders.

Summary and Conclusions

96. With respect to the presence of GMO canola on her property, we find that the Complainant is not aggrieved within the meaning of the *Act,* and as such we dismiss this aspect of the complaint.

97. With respect to the overspray on the Complainant's property, we find that the complainant is not aggrieved, within the meaning of the *Act,* and as such we dismiss this aspect of the complaint.

98. The Panel finds that the respondent is following normal farm practice with respect to his seeding and spraying practices that form the subject of this complaint and, in accordance with section 6(1) of the *Act*, we dismiss the complaint.

Order

99. The complaint is dismissed.

Dated at Victoria, British Columbia this 8th day of June, 2016

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

_____

Christopher K. Wendell, Presiding Member

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Brenda Locke,Member

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Corey Van't Haaff, Member