

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF UNCONTAINED CATTLE AND
CONTAMINATED RUNOFF
ARISING FROM A CATTLE FEEDLOT OPERATION
IN ARMSTRONG, BRITISH COLUMBIA

BETWEEN:

GUENTER LATTEN

COMPLAINANT

AND:

KEITH POMEROY

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board:

Ron Bertrand, Presiding Member
Suzanne K. Wiltshire, Member
Dave Merz, Member

For the Complainants:

Guenter Latten, Gisela Latten

For the Respondent:

Keith Pomeroy

Date of Hearing

May 12, 2010

Place of Hearing

Vernon, British Columbia

INTRODUCTION

1. The British Columbia Farm Industry Review Board (BCFIRB) is a specialised administrative tribunal. As part of its mandate, BCFIRB hears complaints about farm practices under the *Farm Practices Protection (Right to Farm) Act* R.S.B.C. 1996, c. 131 (the *Act*).
2. The *Act* provides that 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 BCFIRB for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, a panel of 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.
3. This complaint was initiated by Guenter Latten by way of a letter to BCFIRB dated August 17, 2009.
4. Guenter and Gisele Latten reside on Grandview Flats Road within the Township of Spallumcheen. They have lived on their 58.6 acre property since 1975. The majority of the property is used to produce alfalfa hay and is managed by a neighbouring farmer. A small portion of the property (the south west corner) is occupied by the Latten's house and associated out buildings. Their well, used for drinking water, is located in this part of the property, south and west of their house and approximately 20 metres from the Pomeroy property.
5. Keith and Amber Pomeroy also reside on Grandview Flats Road. They have lived on their 60 acre property since 2005. The property is west of the Latten property and is adjacent to a road allowance owned by the Township of Spallumcheen. The Latten property is adjacent to the other side of the road allowance.
6. Since owning the property, the Pomeroy's have constructed paddocks and livestock handling facilities for a number of rodeo cattle, horses, cattle and calves raised for beef.
7. In his complaint Mr. Latten alleged that, at certain times of the year, manure contaminated runoff flows onto his property from the Pomeroy property.
8. At the pre-hearing conference call held on March 8, 2010, the complaint was amended to add an additional complaint of "loose cattle" straying onto the Latten property from the Pomeroy property.
9. The Lattens seek an order directing the Pomeroy's to construct berms, ditches and fences on the Pomeroy property to prevent the escape of contaminated runoff and cattle onto the Latten property.

10. The Pomeroy's position is that their livestock operations are in keeping with normal farm practice under the *Act* and the complaint should be dismissed.

ISSUES

11. Are the complainants aggrieved by uncontained cattle and contaminated runoff from the property owned by Keith and Amber Pomeroy?
12. If so, are the uncontained cattle and contaminated runoff a result of livestock operations that are consistent with normal farm practice?

CONTAMINATED RUNOFF

Knowledgeable Person

13. Mr. Kevin Murphy, P.Ag., Regional Agrologist with the Ministry of Agriculture and Lands, was engaged as a knowledgeable person under the provisions of section 4 of the *Act*.
14. Mr. Murphy is a registered Professional Agrologist and holds a B.Sc. in Agriculture and a M.Sc. in Soils from the University of British Columbia. He has experience and knowledge of the livestock industry from a personal and professional perspective. He has worked with various producer organizations and environmental agencies to better manage non-point pollution associated with contaminated runoff from livestock farms in the North Okanagan and Shuswap. At the hearing, Mr. Murphy was qualified as an expert entitled to give opinion evidence with respect to livestock management practices in relation to contaminated runoff.
15. Mr. Murphy visited the Latten and Pomeroy properties on September 21, 2009. He viewed the area on the Latten property impacted by runoff from the Pomeroy property. Because he visited during the dry part of the year there was no surface water evident. He then visited the Pomeroy property and viewed the livestock pens, feed bunks, silage storage area and the earthen berms constructed to contain runoff. Mr. Murphy prepared his expert report dated October 16, 2009 following his site visit to the two properties.
16. Mr. Murphy's report provides the following information with respect to the Pomeroy's mixed livestock operation:
 - At the time of his visit there were 22 horses on the property and approximately a dozen rodeo cattle used for bull dogging of which 4 were being fed for slaughter. Mr. Pomeroy told Mr. Murphy he also owned 30 beef cows with calves that were grazing on crown range at the time but generally would return to the farm during the winter months. Mr. Pomeroy indicated his intention to overwinter the cows on a different site in the coming winter.

- The Pomeroy's have constructed a series of paddocks and livestock handling facilities for training horses, practicing rodeo skills and managing livestock on the front quarter of their 60 acre parcel. There are eight paddocks in total, four to the east and four smaller paddocks to the west divided by a feed alley. At the time of Mr. Murphy's site visit two of the paddocks to the east had been recently seeded to forage crops. The remaining six were not yet vegetated and included an earth pack for animal loafing set back from steel feed bunks.
 - The feed bunks are accessed from the central feed alley and are set on top of concrete pads to improve livestock comfort during winter feeding. The feed alley is constructed with a solid drain rock base and all weather surface. Water is provided from the Pomeroy's well using automatic waterers for adjacent pens.
 - There is also a livestock pen seeded to perennial forage near the south east corner of the property immediately across from the Latten homesite.
17. Mr. Murphy characterizes the livestock feeding practices as a hybrid of a seasonal feeding area and a confined livestock area. He describes a confined livestock area as an area used to feed, confine or water livestock that is generally on either a hard surfaced or soil based yard. In Mr. Murphy's opinion, the Pomeroy's soil based pens would be classified as confined livestock areas. Mr. Murphy indicated that other pens seeded to perennial grass or cereal grain forage and are used over the winter to feed livestock and may also be grazed during the summer months and would be better characterized as seasonal feeding areas.
18. Mr. Murphy notes that the amount of contaminated water generated would vary from season to season depending on the density of livestock in the paddocks, the amount of precipitation and the length of time the animals are confined.
19. Mr. Murphy was advised that in previous years feed was distributed throughout the entire pen for over wintering cows and this led to an excess amount of contaminated water adjacent to the Township roadway. This left the Pomeroy property and flowed into the neighbour's (Lattens') field. Mr. Murphy's report contains a photograph taken by the Ministry of Environment in March 2008 showing run off in the road ditch. According to his report, the Pomeroy's intend to restrict the feeding area to the portion of the pen near the feed alley which should reduce or eliminate the presence of waste feed and manure at the eastern end (the area adjacent to the Latten property) of the pens.
20. Mr. Murphy notes in his report that prior to his site visit the Pomeroy's had recently undertaken several projects to better manage the livestock and waste water generated during the winter months. These consisted of:
- An earthen berm constructed that summer along the northern boundary of the pen used to overwinter beef cows and calves.

- A smaller earthen berm more recently added to prevent contaminated runoff from leaving the property along the eastern boundary adjacent to the township roadway and the Latten property
 - Relocation of the silage storage area to the western side of the Pomeroy property in order to contain any effluent within the site as the height of land runs up the middle of the 60 acre parcel.
21. Mr. Murphy observed that there were no catchment basins to collect contaminated water on-site and no ditches constructed to divert clean runoff from the pen areas. He noted Mr. Pomeroy reported there was minimal overland flow during spring to divert from his pen area.
22. Mr. Murphy made the following recommendations:
- For seasonal feeding areas:
- Have stocking densities that do not cause soil compaction
 - Maintain runoff controls (through ditches and berms)
 - When used as cow calving areas, give additional attention to runoff flows
 - Collect and spread as a fertilizer manure generated near feed bunks
 - Harrow manured areas in the spring to break manure clods
- For confined livestock areas:
- Establish and maintain an adequate buffer between the outdoor area and any watercourse to keep wastes from entering a watercourse
 - Collect confined livestock area contaminated runoff
 - Divert upland area 'clean water' away from confined livestock areas
 - Prevent the escape of manure or silage effluent from the area and collect and spread as a fertilizer
 - Align loafing mounds to drain runoff to collection areas, then use water appropriately.
23. Mr. Murphy stated in his concluding remarks about the Pomeroy operation that establishing a livestock farm on what had been a grain and/or hay farm is taking some time and the farm had made adjustments to their feeding practices and more recently constructed berms to prevent contaminated runoff from leaving the farm. He indicated that while he believed the newly constructed berms would contain a significant amount of runoff, the combination of livestock numbers, feeding practices, winter snowfall and subsequent runoff must be monitored throughout the winter to ensure contaminated water did not leave the property boundaries. He concluded that the precautions recently implemented by the Pomeroy were consistent with commonly accepted farm practices by other farms of similar size.

Complainant

24. Mr. Latten testified that over the past 3 years there have been instances where runoff, contaminated with manure, left the Pomeroy property, crossed the Township

roadway and entered the Latten property. He provided numerous photographs documenting the flow of water.

25. Mr. Latten provided as evidence two letters, dated March 26, 2008 and March 27, 2009, from Geri Huggins, Environmental Protection Officer, Ministry of Environment, to Keith Pomeroy. The first letter stated that Huggins had observed several areas where agricultural waste runoff was leaving the Pomeroy property and accessing a roadside ditch. Ms. Huggins advised Mr. Pomeroy to prevent manure contaminated runoff from leaving the property possibly with a berm and/or ditches to a collection area. The second letter stated that there was agricultural waste runoff beyond the farm boundary and that Mr. Pomeroy had been advised that the feeding area must be operated in a way that does not cause pollution and have berms where necessary to prevent agricultural waste runoff from causing pollution.
26. Mr. Latten stated that adequate berms to prevent runoff, ditches to intercept and divert runoff and catchment areas to contain runoff have not been built. Any such works that have been constructed by the Pomeroy are inadequate and were only put in place prior to visits by persons such as Mr. Murphy.
27. Mr. Latten outlined the remedies that he is seeking to include:
 - a berm, ditch and fence along the east side of the Pomeroy property adjacent to the Township roadway,
 - fencing to ensure that livestock does not have access to the berm and ditch,
 - a buffer zone of vegetation along the east side of the Pomeroy property to minimize the potential for contaminated runoff to flow onto the road way and the Latten property,
 - expert advice to ensure that the works are designed and constructed properly, and
 - follow up to ensure the works are operating properly and that the Lattens are satisfied.

Respondent Farm

28. Mr. Pomeroy requested that the complaint be dismissed characterizing it as a nuisance complaint stemming from a personality conflict between the Pomeroy and the Lattens.
29. Mr. Pomeroy testified that he has tried to mitigate any instances where there may be contaminated runoff and has tried to be proactive. He has engaged the services of professionals who are telling him that the farm operation is within normal farm practices. In his view the operation is up to industry standards but not up to the standards of the Lattens. This has resulted in the Pomeroy continually being harassed.
30. Mr. Lewis Bogan a friend who frequently assists the Pomeroy with chores testified that he has seen runoff flow from the Pomeroy property and characterized it as

being sometimes clear and sometimes murky. On questioning he agreed that more berming and deepening and cleaning ditches might help to mitigate runoff.

31. Mr. Lee Hesketh, a rancher in the North Okanagan and program manager for the BC Cattlemen's Association's "Farmland-Riparian Interface Stewardship Program" provided testimony based on his knowledge of livestock operations in the North Okanagan region and his direct knowledge of the Pomeroy operation. As the Association's stewardship co-ordinator, Mr. Hesketh has worked in various capacities developing solutions to agriculture environmental issues. Mr. Hesketh testified that the Pomeroy's have put in a lot of effort to construct good facilities and have taken steps to address issues raised. He noted that the Pomeroy property had previously been a hayfield and was now a small feedlot. While in his view the Pomeroy's have been managing the livestock operations as best they can, he noted that there are going to be smells and minor inconveniences for neighbours when living next to livestock operations. He observed that Mr. Pomeroy had responded positively to the suggestion he made to take advantage of the environmental farm plan program.

32. Mr. Pomeroy introduced as evidence a report from Mr. Pete Spencer, Environmental Farm Plan Advisor, who has visited over 200 farms in the Okanagan area to assist producers to complete environmental farm plans for their operations. Prior to this, Mr. Spencer was a rancher in the Vanderhoof area. Mr. Spencer is assisting the Pomeroy's with preparing an environmental farm plan for their operation and viewed the Pomeroy property and livestock operations in May 2010. His findings and recommendations include:
 - because of soil type and topography, precipitation (rain and snow) can lead to runoff leaving the property
 - the volume and duration of runoff is not likely to be large or of long duration due to the relatively small catchment area,
 - the amount and type of erodible material available on the surface would affect the turbidity and nutrient loading in the runoff,
 - the soil based livestock pens near the property lines should be seeded to a suitable perennial forage,
 - stocking levels should be such that soil compaction is reduced and the forage cover is retained,
 - continue to place berms, as necessary, to control water flow,
 - if necessary, construct ditches to channel possibly contaminated water to a suitably sized retention pond or other areas,
 - provide good manure management, collect manure in pens and store in a suitable manner until it can be spread as fertilizer, and
 - where possible, adopt out of yard over-wintering practices and feed in areas away from lot lines in areas that will not lead to unacceptable runoff leaving the property.

Analysis

33. A complaint under the *Act* involves a two-step analysis. The panel must first be satisfied that the complainant is aggrieved by odour, dust, noise, or some other disturbance emanating from a farm operation. If the complainant fails to establish that he is aggrieved, the complaint is dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice. If however, the panel finds that the initial threshold question is met, it must go on to make a determination as to whether the grievance results from a normal farm practice.

34. Section 1 of the *Act* defines normal farm practice as follows:

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

(a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

(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 (b).

35. The evidence establishes that at certain times of the year, particularly during spring, water flows from the Pomeroy property onto the Latten property. No test results were provided confirming the runoff is contaminated. However, the evidence overall leads us to conclude that during the several years preceding the complaint in August 2009 it is likely the runoff was contaminated. Prior to the complaint being made, few if any measures had been taken to lessen contamination from the livestock operations on the Pomeroy property. The silage storage area had yet to be relocated to the west side of the property, cows and calves were overwintered on the Pomeroy property and feed was distributed throughout the livestock pens. As noted by Mr. Spencer in his report "All flowing surface water will be carrying something with it whether it is dissolved or in suspension...". As well, the 2008 and 2009 letters of Environmental Protection Officer, Geri Huggins refer to "agricultural waste runoff" leaving the property and the need to prevent manure contaminated runoff from leaving the property and to operate the feeding areas so as not to cause pollution.

36. Accordingly, we find that, from time to time, runoff containing manure contaminants has left the Pomeroy property and entered the Latten property. The Lattens have therefore met the initial threshold of demonstrating they are aggrieved

by contaminated runoff from the Pomeroy property. Having found the threshold question met on this issue, the panel must determine whether or not it is normal farm practice for the Pomeroy's to allow contaminated runoff to leave their property and flow onto the Latten's property.

37. In determining whether a complained of practice falls within the definition of normal farm practice, the panel looks to whether it is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. This analysis involves an examination of industry practices but also includes an evaluation of the context out of which the complaint arises. We necessarily take into account the particular circumstances of the site both on its own and in relation to those around it.
38. The Lattens introduced little evidence with respect to "normal farm practice" of similar farms in similar circumstances. Their main submissions are that they are being aggrieved by contaminated runoff onto their property and the Pomeroy's should construct adequate berms, ditches and other works to prevent this from occurring.
39. We note and accept the characterization by Mr. Murphy of the Pomeroy's' livestock operations as being a hybrid of a seasonal feeding area and a confined livestock area. The evidence provided by Mr. Murphy, Mr. Hesketh and Mr. Spencer, leads us to conclude that while the Pomeroy's have more recently taken some steps to mitigate the problem of contaminated water escaping from their property, the escape of contaminated runoff from their property onto the Latten property as a result of the livestock operations was not consistent with normal farm practices at and prior to the time of the complaint. While some of the practices more recently implemented, such as relocating the silage storage and restricting feeding to bunks located along the central alley are improvements that would be consistent with normal farm practices, we conclude there is more required to be done to bring the livestock operations fully into compliance with normal farm practices to reduce contamination of surface water and minimize the possible escape of contaminated water. In this regard we note that while some berms and ditches have been constructed they will need to be maintained and their adequacy will need to be monitored and other or improved works may be required.
40. We commend Mr. Pomeroy for his more recent efforts to deal with the problem of contaminated runoff, in particular in acting on Mr. Hesketh's advice to take advantage of the environmental farm plan program. The environmental farm planning process is commonly used by producers to identify the environmental issues on their operations and the measures needed to address any of these issues.
41. The evidence before the panel is that implementation of the further mitigation efforts identified by Mssrs. Murphy and Spencer in their reports are needed to deal with the issue of contaminated runoff. We note that to some extent their recommendations overlap.

42. In the case of the Pomeroy operations, the panel is of the view that farming according to an environmental farm plan together with the implementation of Mr. Murphy's recommendations with respect to both aspects of the Pomeroy's hybrid livestock operations will result in the farm being managed according to proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.
43. In line with the foregoing, the panel orders the Pomeroy's to:
 - implement the measures recommended by Mr. Murphy as set out in his report (and repeated in this decision) with respect to both seasonal feeding areas and confined livestock areas,
 - complete the portion of the environmental farm plan that pertains to the issue of runoff from the property,
 - implement the mitigative measures identified in the plan,
 - monitor the effectiveness of all implemented measures in minimizing contamination of runoff water and minimizing the amount of contaminated water leaving the property, and
 - modify the plan and mitigative measures in the future to ensure continued effectiveness.
44. Measures identified by Mr. Murphy and in the environmental farm plan that are necessary to mitigate escape of contaminated runoff are to be implemented by October 31, 2010.
45. The panel notes that it is important to separate the issues of nuisance and pollution. Nuisance falls under the purview of the *Act* and is the only issue that can be addressed by BCFIRB during this hearing process. Pollution falls within the jurisdiction of the British Columbia Ministry of Environment and must therefore be dealt with by that agency and can not be an issue dealt with by BCFIRB. With this in mind, the Pomeroy's can not assume that compliance with the above order will eliminate the potential for pollution and the future involvement of the appropriate regulatory authorities.
46. The panel emphasizes that the above order uses the word 'minimize' with respect to contaminated runoff. This recognizes that there may be unexpected circumstances that make elimination of runoff virtually impossible. These could include but are not limited to: extremely heavy precipitation, unusually rapid snow melt, unexpected precipitation when berms or ditches are being repaired or constructed. Therefore, there may be situations in the future where contaminated runoff leaves the Pomeroy property and flows onto the Latten property even though all of the measures ordered by this panel have been implemented.

CATTLE AT LARGE

47. Mr. Murphy did not address this issue in his report or testimony.

48. Mr. Latten testified that during 2007, 2008 and 2009 cattle from the Pomeroy property entered the Latten property. This happened more than a dozen times in each of 2008 and 2009. Sometimes there were 2 cattle and sometimes between 6 and 12 cattle. None of the Pomeroy's cattle have strayed onto the Latten property since the end of October 2009.
49. Mr. Latten observed that the fence posts around the boundaries of the Pomeroy property are spaced 10 metres apart while the inside pen divisions are spaced 5 metres apart. He felt the 10 metre distance might be too great. He noted while there were 4 wires strung along the fence line, he believed only one or two wires were electrified. He speculated that the power might at times have been turned off or have disappeared into the ground. The Lattens ask that Mr. Pomeroy look after his cattle better so that there are no more escapes.
50. Mr. Bogan testified that he has over 40 years of experience in maintaining fences and is a dealer in electric fence supplies. During January and February 2010 he observed a number of instances of tampering with the electric fence which rendered the fence inoperative. He has no knowledge of who may be responsible for the tampering. With the exception of the instances of tampering, it is Mr. Bogan's view that the fencing on the Pomeroy property is adequate.
51. Mr. Latten assured the panel that he had no responsibility for or any knowledge of any tampering with the fences on the Pomeroy property.
52. Mr. Hesketh considers a 10 meter distance between posts to be common for electric fencing. It is his view that the electric fences on the Pomeroy property are adequate and well constructed. If functioning properly, cattle will not go through.
53. Mr. Pomeroy believes the cattle at large were a result of calves escaping to look for their "moms" when he was hauling cattle from the property in mid October. He stated he would load 8 cows at a time and then load calves. He noted that the Lattens had not seen any cattle at large after October 2009. Mr. Pomeroy observed that longhorns can jump 6 feet. While he said he triple ties gates, he observed sometimes a gate can be left open. He stated that he does his best to make sure his electric fence is energized and operating properly.
54. The panel finds the complainants have clearly satisfied the first step of establishing that prior to the date of the complaint they were aggrieved by loose cattle entering onto their property from the Pomeroy property.
55. The question we must next address is whether the grievance results from a normal farm practice.
56. The evidence before the panel is that the fences used by the Pomeroy's are adequate and well-constructed, with posts spaced in keeping with usual standards for electrical fencing, and will, if functioning properly, for the most part prevent cattle from escaping. This is substantiated by the fact that no cattle have strayed onto the

Latten property since October 2009. The panel makes no comment on the fence tampering issue except to observe that the evidence is that it occurred in early 2010 and the Lattens do not complain of loose cattle at that time.

57. The panel finds that the Pomeroy's fencing practices conform with normal farm practices. No other farm practice was identified by the Lattens as possibly giving rise to the problem of cattle at large.

CONCLUSION

58. The panel finds that the Lattens are aggrieved by contaminated runoff from the Pomeroy livestock operations and that such operations are not in that respect in accordance with normal farm practices.
59. The panel orders the Pomeroy's to:
- implement the measures recommended by Mr. Murphy as set out in his report (and repeated in this decision) with respect to both seasonal feeding areas and confined livestock areas,
 - complete the portion of the environmental farm plan that pertains to the issue of runoff from the property,
 - implement the mitigative measures identified in the plan,
 - monitor the effectiveness of all implemented measures in minimizing contamination of runoff water and minimizing the amount of contaminated water leaving the property, and
 - modify the plan and mitigative measures in the future to ensure continued effectiveness.
60. The measures identified by Mr. Murphy and in the environmental farm plan that are necessary to mitigate escape of contaminated runoff are to be implemented by October 31, 2010
61. The panel finds that while the Lattens were aggrieved by uncontained cattle this has not been a problem since October 2009 and that in any event the Pomeroy's fencing practices are consistent with normal farm practice. Therefore, the portion of the complaint dealing with cattle at large is dismissed.

Dated at Victoria, British Columbia, this 31st day of August, 2010

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

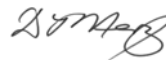
Per



Ron Bertrand, Presiding Member



Suzanne K. Wiltshire, Member



Dave Merz, Member