April 25, 2018

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Dear Sirs/Mesdames:

There are two issues before me in this matter. The first is whether or not I should permit a sur-reply by the Complainant De Vrij in light of his position that the Respondent Chang Yu Xu's reply to his application to dismiss these complaints raised new issues which should properly have formed part of his original submission and now that these new issues have been raised, the Complainants require a sur-reply as this is his first opportunity to comment on these issues.

The second issue relates to the substance of the Respondent's application raised in the February 27, 2018 letter that counsel for the Respondent which states:

> "attended at the property in person yesterday, February 25, 2018, along with others and can confirm that there is no active farming business being conducted or being carried out for profit at the property, and as such, it is respectfully submitted that the Farm Industry Review Board, does not have jurisdiction in relation to the various complaints".

1. Thus, this application by the Respondent is that the Chair (in this case Vice Chair as the Chair has recused himself from these proceedings) refuse to refer these complaints to a Panel (thereby dismissing these complaints).

2. The application is made on the ground that the odour, general unsightliness related to fencing, yard waste and trash complained of does not arise from a "farm operation conducted as part of a farm business", which is a condition of making a complaint under s. 3(1) of the *Farm Practices Protection (Right to Farm) Act (FPPA):*

> 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.

3. The application was made in a February 27, 2018 letter written by counsel for the Respondent. No affidavit or other evidence was provided. Instead, counsel advanced various unsworn representations regarding his visit to the property the previous day and sought to "confirm" that "there is no active farming business being carried out for profit on the property". He referenced, among other things, "our personal production permits", and he sought to assert "for the benefit of the neighbours" that "from my observations", his client appears to have successfully eliminated the smell. He asked that if any neighbours "pick up a smell in the future", to contact his office "so I can have someone take steps to try and rectify the situation as soon as possible", stating that he is "continuing to make inquiries with various experts to develop a permanent solution". Counsel submits that, as was done in *Truitt v. Baker* (January 25, 2010) and *Hanson v. Asquini* (October 31, 2013), the Chair should refuse to refer the matter to a hearing panel pursuant to s. 6(2) of the *FPPA* as the complaints "fall outside the scope of the Act":

> 6 (2) The chair of the board, after giving the complainant an opportunity to be heard, may refuse to refer an application to a panel for the purpose of a hearing, or, after a hearing has begun, the panel to which an application has been referred may refuse to continue the hearing or to make a decision if, in the opinion of the chair of the board or the panel, as the case may be,
>
> (a) the subject matter of the application is trivial,
>
> (b) the application is frivolous or vexatious or is not made in good faith, or
>
> (c) the complainant does not have a sufficient personal interest in the subject matter of the application.

4. The Complainant De Vrij responded to the application by way of a March 21, 2018 letter from his counsel and a supporting affidavit. He argued the Respondent's application was not supported by any evidence and that the mere assertion by counsel that there is no farm

business is not sufficient to support the application. He argues that there are "multiple indicators" that farm business is being carried out, including the fact that the property is in the ALR, the magnitude of the farm operations (his observations are described in his affidavit), the apparent investment in the farm operations and other factors (including rental) which he says are indicative of a business, for profit, operation. The Complainant argues that the BCFIRB decisions relied on by the Respondent were very different, that this case warrants the same outcome as in the *Ruck* and *Baird* complaints, where the Chair concluded that the question of farm business was best addressed by the Panel who could address the issue in the context of the hearing itself.

5. On April 9, 2018, counsel for the Respondent filed a "reply" submission which attached an Information to Obtain a search warrant dated March 14, 2017, an exhibit flow chart and a Report to A Justice Following Seizure dated March 29, 2017. Counsel made various statements about the history of the placement of the plants in the greenhouse and the state of the law regarding marijuana licences. Counsel advised BCFIRB that "I am considered to be an expert in relation to the medical marijuana situation in Canada" and made reference to other proceedings, including contested civil forfeiture proceedings. He asserts that "there is simply no evidence of any 'business' or 'farm operation'" and submits that the onus is on the Complainants to prove "some evidence to indicate the existence of a business, so that the Respondents are aware of the case against and so that they can have a fair opportunity to respond to it". He says that the Complainants do not describe "seeing any of the usual things that one might expect to see in a farm business". He argues that "there is ample information by way of the statements of others and some affidavits to determine that what is going on at the property is personal production of cannabis by patients" pursuant to federal regulations, and that all this supported by the RCMP investigation, the BC Civil Forfeiture Office's investigations to date, the Complainants' own evidence and the statements of counsel. Counsel submits that if I conclude that there is insufficient evidence to determine this question, then an independent knowledgeable person should be appointed to attend at the property with the consent of the Respondents to investigate the jurisdictional issue and report back to the Board. He further submits that if the matter must proceed to hearing, the (Complainants) should be required to post security for costs (section 47.1 of the *Administrative Tribunals Act*) that will be incurred unnecessarily to determine this simple question.

6. In light of this submission, the Complainant responded requesting the right of sur-reply stating that the Respondent raised new issues which should have been brought in his original submissions and which could not have been anticipated by the Complainants. Without sur-reply, the Complainant says he would have no opportunity to comment on the bulk of the Respondent's argument. He says his sur-reply will be legally proper and simply address these new issues and not provide further evidence or re-argue his position.

RULING

7. Where a complaint is made, all the elements of the complaint are normally addressed at the hearing, in the context of the evidence. Where, as here, a Respondent makes an application that the complaint should not even be referred to a Panel, the Respondent bears the onus of supporting such an application, particularly since it finally concludes the complaint without a hearing. In this case, the Respondent argues that the complaint process should not proceed, as the operation is not a "farm operation conducted as part of a farm business". While the counsel describes this as a matter of "jurisdiction" (and I acknowledge that it has been described that way in previous BCFIRB decisions) I think it is more accurate to describe it as an essential element of a valid complaint which BCFIRB has jurisdiction to decide. As previous cases make clear, this essential element is often heavily fact and evidence-based. While cases do arise where the facts are not in dispute, or where the Respondent has provided sufficient evidence to allow a decision to be made on a preliminary basis, there are other cases where there is a sufficient bona fide dispute on the issue as to make it more appropriate to establish a Panel who can finally rule on the matter with benefit of the evidence.

8. In my view, this is clearly a case where there is a genuine dispute on this issue, which I am not prepared to finally resolve at this preliminary stage. Without going any further than I need to in this ruling, I am satisfied that it is appropriate to refer the complaints to a Panel. The Respondent has not satisfied me that his position is so plain and obvious – or, in the language of s. 6(2), that the complaints are "trivial, frivolous or vexatious" on the farm business issue – as to justify refusing even establishing a Panel. It will be for the Panel to determine based on the evidence and any submissions made, whether the Respondent's operation ultimately satisfies the test for "farm operation conducted as part of a farm business". I rule only that there is sufficient information before BCFIRB to refer the matter to a Panel.

9. As this issue will be referred to a Panel, all issues including the matters that provoked the request for a sur-reply, will be addressed by the Panel.

10. Further, as to the procedure going forward, including the Respondent's request for the appointment of a knowledgeable person and security for costs, I note that section 47.1 of the *ATA* does not apply to BCFIRB when exercising jurisdiction under the *FPPA*. Beyond that I intend to give no further directions here, as this will be the prerogative of the Panel. I simply note that the procedure normally begins with a pre-hearing conference.

11. In this regard, the parties can expect BCFIRB staff to be in contact with them.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

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Corey Van't Haaff, Vice-Chair