

IN THE MATTER OF THE FARM PRACTICES PROTECTION
(RIGHT TO FARM) ACT, R.S.B.C. 1996, c. 131

AND

IN THE MATTER OF A COMPLAINT BY ROGER AND ANNE
CLAPHAM, ERNST STECKLER AND DEBORAH AND NORMAN
MCLEAN CONCERNING THE OPERATION OF A PROPANE
CANNON AT 202 LEFEUVRE ROAD, ABBOTSFORD,
BRITISH COLUMBIA

REASONS FOR DECISION

APPEARANCES:

Farm Practices Board	Ms Christine Moffat, Panel Chair Mr. Hamish Bruce, Panel Member Ms Wendy Jeske, Panel Member Mr. Frank Falzon, Legal Counsel Mr. Jim Collins, Panel Secretary
Complainants	Mr. Roger Clapham Ms Anne Clapham Ms Deborah McLean Mr. Norman McLean
Respondent	Mr. Tilak Raj Monga
British Columbia Blueberry Council	Mr. Mike Makara
Translator	Ms Satwinder Bains
Date and Place of Hearing:	July 7, 1997 Abbotsford, British Columbia

INTRODUCTION

1. This is the first Complaint to arise before a hearing panel under the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 (“the Act”). The Complaint, dated September 20, 1996, was filed with the Farm Practices Board (“the Board”) on September 25, 1996. The Complainants listed on the complaint are Ernst Steckler, Roger and Anne Clapham, and Charles Wiebe. The substance of the Complaint is set out in its opening paragraph:

We, the undersigned, hereby make formal complaint that a propane cannon was operated by H. Grewal at 202 Le Feuvre Road, ABBOTSFORD, B.C. V4X 1A2 between 9th July 1996 and August 29th 1996 in a manner that is not in keeping with acceptable farm practice.

2. The farm in question is a four hectare blueberry farm. The propane cannon referred to is a crop protection device designed to scare birds that feed on blueberries before harvest.

3. The Complainants all live in the vicinity of the farm. Their Complaint is about the noise caused by the cannon. The original Complaint can be summarized as follows:

- 1) Allowable noise levels: In view of the fact that the Wildlife Damage Control Guidelines issued August 10, 1996 by the Ministry of Agriculture, Fisheries and Food (the MAFF Guidelines) make no reference to allowable noise levels for propane cannons, the Board should accept Workers’ Compensation Board (“WCB”) hearing protection standards, or other standards, to regulate cannon noise.
- 2) Noise Measurement: The Complainants seek the “right to know” the measured noise levels emanating from the cannons.

3) Operation of the Cannon: (1996) The Complainants allege as follows regarding the operation of the cannon in 1996:

a) The cannon was operated continuously for 49 days, for 14 hours per day. This is contrary to the MAFF Guidelines which state that cannons should be used “only when required for the protection of specific crops and only when a problem is evident”.

b) The cannon, which is a 360 degree rotational cannon sometimes pointed in the direction of their properties. This is improper. Also, the MAFF Guidelines are deficient to the extent that they merely suggest that pointing cannons at neighbours should not occur “where possible”.

c) Appropriate screens or noise baffles must be erected in any situation where measured noise levels on neighbouring properties exceed the maximum allowable limit. If baffles do not solve the problem, “the use of propane cannons shall not be permitted in that particular situation.” The MAFF Guidelines, which encourage farmers to erect baffles “where possible” are too loosely worded.

d) The cannon was only 78 metres from Mr. Steckler’s property. “We ask the Board to rule on the need for an acceptable minimum distance from neighbouring properties.”

e) The MAFF Guidelines state that one propane cannon per two hectares of land can be used. “We therefore ask the Board to rule that in some situations, two cannons per four hectares may be unreasonably high, that a limit of one cannon may sometimes be the maximum allowable, and that in some situations their use may not be appropriate at all.”

4. After the Complaint was filed, an informal settlement process was entered into over a number of months pursuant to Section 4 of the Act. This process failed. The Panel was not privy to any part of this process except as consented to by the parties.

5. The July 7, 1997 hearing was held to address two issues:
 - 1) Is the farm operation complained about carrying out normal farm practices?
 - 2) Should the Farm Practices Board hold a hearing at a later date on normal farm practices in the context of specific allowable noise levels (measured in decibels at a neighbour's property line) that are permissible from propane cannons?

THE JULY 7, 1997 HEARING

6. At the outset of the hearing, the Panel granted the application of Deborah and Norman McLean to be substituted as Complainants for their former tenant, Mr. Wiebe.

7. The first portion of this hearing was dedicated to clarifying a number of issues concerning the nature and status of the Complaint in order that the Panel could consider whether or not and to what extent it could deal with this Complaint.

8. One complication arose from the fact that Mr. Grewal, whose farm practices were the subject of the Complaint, sold his farm and moved away shortly after the Complaint was filed. The Panel is faced with a situation in which there is no Respondent to answer to complaints made about the cannon in July and August, 1996.

9. The new owner is Mr. S.K. Sadana and the new operator is Mr. Tilak Raj Monga. Mr. Monga attended the hearing on his own behalf. Not having been involved in the previous year's crop, he did not respond to the September, 1996 Complaint. He has been working with MAFF officials to reduce the noise impacts on his neighbours in the 1997 crop year.

10. The Complainants accept the good faith shown by Mr. Monga in seeking to address the noise issue. He has committed to operate his cannon in accordance with the MAFF Guidelines. These Guidelines are modelled on the work of a committee of specialists, farmers and residents of Pitt Meadows, concerning the use of propane cannons. The Guidelines recognize “propane-fired cannons or exploders” as among the most common noisemakers utilized by farmers to scare wildlife away from crops. The Guidelines state:

- All noise devices should only be used when required for the protection of specific crops and only when a problem is evident.
- Operate noise devices only between 6:00 a.m. and 8:00 p.m. local time.
- Use no more than one noise device per two hectares of crop land at any one time.
- Where possible, aim directional sound-producing devices away from neighbours.
- Maintain propane exploders properly to avoid continuing noise when exploders are shut off.
- Locate noise devices as far away from neighbours as possible.
- Erect a noise barrier if possible.

11. Mr. Monga reluctantly attended this preliminary hearing out of concern for the Complaint’s implication on his future operations. He stated that he should not have been included in a complaint for which he bears no responsibility.

12. The other issue arising at the hearing related to the Complainant's request that this Panel conduct hearings at a future date to rule on the allowable noise level at the property line of adjacent properties, as measured in decibels. This request is fundamental to the Complaint. However, despite their view as to the importance of this issue, the Complainants strongly asserted that it was not their responsibility, but rather the Panel's, to obtain the necessary evidence regarding precisely what measurable noise levels were emanating from the Respondent farm and onto their properties.

13. Mr. Clapham, who spoke on behalf of the Complainants, repeatedly emphasized that the measurement of these noise levels is fundamental to the Complaint, that a ruling on allowable noise levels first requires proper measurement of such noise levels and that this Panel's refusal to commission and subsidize a study of the noise levels crossing their property lines reflects a lack of professional impartiality on the part of the Board and this Panel. The following excerpt from the Transcript (p. 12) outlines the Complainant's position:

Q. So do you -- assuming that Mr. Monga abides by the terms of the agreement that he has said that under those conditions he will operate the cannon, if he were to comply with those conditions...is that something that you would consider not to be a normal farm practice and that you'd be seeking relief against that?

A. The guidelines under which Mr. Monga agrees to operate make no reference of any kind to the maximum allowable decibel levels as they pass the property line and there is no standard for that upper noise limit in British Columbia, and we require that the Farm Practices Board will rule on that standard...In the absence of a standard the guidelines are unacceptable to us.

14. When asked whether the Complainants have any evidence as to the decibel levels from the cannons in 1996, Mr. Clapham advised the Panel (Transcript, p. 14):

No. We contacted Dr. Robert Lockhart at the B.C. Research Corporation... to conduct impartial testing and they agreed to do that and they wanted a \$750 fee for that and we couldn't raise the money between us so we didn't.

15. This Panel is unconvinced that three Complainant families were unable, between themselves, to raise the required funds to have these tests conducted. For reasons that can only be attributed to a misunderstanding of the nature and function of this Board, the Complainants assert that it is the responsibility of the Board to subsidize and collect the evidence to support their Complaint.

16. The Complainants also assert that to competently rule on the Complaint, this Board should make contact with specialists from the WCB, the Ministries of Health and Environment, and the UBC School of Audiology and Speech Science. Mr. Clapham gave specific names of various persons in these organizations he identified as being "well informed, experienced, educated, appropriate people who could inform the panel of an appropriate methodology by which to establish appropriate standards and noise levels" and who could comment on his allegations regarding the "physical and mental health problems associated with the use of these cannons". When asked whether he had endeavoured to have any of those persons appear on his behalf with supporting information, Mr. Clapham's response was: "We have been too busy and it's been short notice."

17. Given the time that has elapsed since the original filing of the Complaint, the Complainants' awareness of and participation in setting dates and the Complainants' own repeated emphasis on the importance of noise evidence, the Panel does not accept this statement as valid justification for failing to obtain information in support of their Complaint.

18. The Panel notes also that despite the Complainants' unwillingness to produce the evidence they assert is so important to their Complaint, they specifically seek a ruling from this Panel which would dramatically amend the MAFF Guidelines that currently apply throughout the province. The Complainants also suggested that this ruling should also establish appropriate sound levels for workers on farms themselves. Again, the far-reaching relief sought by the Complainants was not accompanied by any supporting evidence.

19. It is clear from the evidence and presentations that the use of propane cannons on blueberry farms has been a matter of significant controversy within this province. The extent to which this Panel can and should address the issue however, is governed by the statute described below.

THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT

20. The Farm Practices Board has been established by statute. Under Section 9(1) of the Act, the Board consists of the members of the British Columbia Marketing Board and "not more than 10 additional members whom the minister may appoint to the Farm Practices Board." The members of this Board have a fundamental duty to faithfully, objectively and independently interpret and apply the statute.

21. One fundamental feature of the Board's jurisdiction is the duty to hear complaints filed under Section 3(1) of the Act:

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.

22. "Normal farm practice" is defined in Section 1 of the Act 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).

23. Section 6(1) of the Act directs as follows:

The panel established to hear an application must hold a hearing and must

- (a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or
- (b) order the farmer to cease the practice that causes the odour, noise, dust or other disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

24. The complaints process is structured so that this Board operates as an independent adjudicative body. This Panel can operate much more informally than a court of law (Section 7 of the Act stipulates that hearings may be conducted informally and without strict adherence to rules of evidence) but the Panel is subject to the rule of law. This means that the Panel must not only uphold its statute, it must also conduct itself objectively and independently.

25. A “hearing” (ss. 6,7) initiated by a “complaint” (ss. 3,4) must be “procedurally fair” as that term is applied in administrative law. The Panel must consider the evidence of the parties, and then make a decision in accordance with the law. Because the process is initiated by a complaint, the onus is on the complainant to produce evidence and make submissions in support of the complaint.

26. It is important to emphasize that being aggrieved by “odour, noise, dust or other disturbance” from a farm operation is necessary, but not sufficient, to make a valid complaint under the Act. In this case, the evidence given by the Complainants satisfies the Panel that they have been aggrieved by the noise from the propane cannon.

27. Having proved that they are aggrieved by cannon noise, the Complainants must provide sufficient evidence in support of their Complaint to allow this Panel to enter into a proper inquiry as to whether the practice complained of is not a “normal farm practice” as defined in Section 1 of the Act - i.e., that it was not conducted in a manner consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”.

28. The Panel has considered the following points regarding the meaning of the phrase “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. First, where a farmer is found to be carrying on a farm practice that is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, the complaint must be dismissed by this Board despite the subjective impact of the practice on the complainant (Section 6(1)(a)). Whether or not the farmer would also be exempt from a common law nuisance action for that farm practice, or be exempt from the operation of municipal bylaws, would depend on whether the farmer also meets the conditions set out in Section 2(2) of the Act. Neither of these latter determinations can be made by this Panel.

29. Second, the balance between farmers and their neighbours has been established by the Act itself. Where a farmer is carrying out a practice in a manner consistent with proper and accepted customs and standards as established by similar farm businesses under similar circumstances, the complaint must be dismissed.

30. Third, this Board must have regard to all the words in the definition of “normal farm practice”, not just the words “proper and accepted”. The Board’s task is not to inquire into whether the farm practice is “proper” in the abstract, but whether it is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. Therefore, a complainant cannot merely argue that a particular farm practice is not, in his opinion, “proper” because it encroaches on one’s lifestyle or sensibilities. It is implicit in the Act, that farmers who are similarly situated will develop customs and standards of practice. These customs and standards help define the term “proper and accepted”.

31. Finally, the Act does not ignore the impact of certain farm practices on third parties. The reference to “similar farm businesses under similar circumstances” requires an examination of individual circumstances on a given farm and its vicinity. It does not assume that because a farm practice is conducted in one context, that it will necessarily be “proper and accepted” in all contexts. There may be some circumstances which are so unique - involving serious health and safety concerns on third parties - that it cannot be said that a practice on a particular farm is consistent with normal farm practice.

EVIDENCE AT THE HEARING

32. At the hearing, the Panel heard evidence from the Complainants regarding Mr. Grewal’s use of the cannon in the 1996 crop year and its impact upon them. They described their concern that given the layout of the valley, and long, narrow configuration of the Grewal farm, they were severely affected by the sound. The Complainants said that there are a number of blueberry farms with cannon in the area, including at least one in Washington State, which could be heard from their properties.

33. Mr. Monga pointed out that he lives on the farm with his children and is obviously also impacted by the sound. However, he views it as tolerable and necessary to protect his crop and points out that his property is also affected by impacts from the other farms in the area, including the farm of one of the Complainants.

34. In addition to the evidence of the Complainants and Mr. Monga, the Panel heard evidence from two MAFF officials and from an intervenor, Mr. Mike Makara of the B.C. Blueberry Council. The evidence generally described various features of propane cannons and their alternatives, as well as justification and efficacy of their use in protecting blueberry crops both in Canada and around the world.

35. Ms Mary-Margaret Gaye, MAFF Berry and Nut Specialist, advised that a MAFF official attended the Grewal farm once between July 8, 1996 and July 12, 1996 regarding the noise complaints. Ms Gaye stated that MAFF does not keep records of cannon owners, so she does not know exactly how many are in use and does not know how loud in decibels they are. Ms Gaye stated that farmers need as many tools as possible to scare starlings away. She referred to two separate studies on the topic of predation patterns. She describes cannons as an economical tool used throughout the world. She pointed out that the cannon Mr. Monga will be using is not the same cannon that was in operation during the complaint period.

36. Ms Gaye stated that the ideal protection to stop predation is “exclusion” netting. MAFF has conducted a feasibility study of netting and found that it is not always economically viable for blueberry farmers. MAFF did not assess the Grewal farm, but MAFF provides a fact sheet that permits farmers to calculate the feasibility of net use. Ms Gaye has not examined the impact of cannon use on non-farm neighbours.

37. Ms Gaye testified that the MAFF Guidelines were adopted after they had been developed by a committee of farmers and residents in Pitt Meadows. The hours of cannon operation now in the Guidelines resulted from a compromise reached by this committee. Ms Gaye stated that MAFF staff consult with farmers about noise levels and utilize industry peer groups to ensure that farm practices are within the Guidelines. MAFF does not however measure noise levels in decibels in response to complaints.

38. Mr. Bert Van Daltsen, a MAFF Engineering Technician, testified that he was not aware of standards that address decibel ratings for cannons. Manufacturer’s monographs do not indicate sound levels in decibels.

39. Mr. Van Daltsen has not measured noise level in decibels. He advocates sound reduction measures such as buffers. Stacked bales of hay provide a rough, absorbing surface to buffer sound and Mr. Van Daltsen has suggested this to Mr. Monga.

Mr. Van Daltsen has suggested placing the cannon close to Mr. Monga's house, with moves every two to three days to be effective. Mr. Van Daltsen stated that very few farms have tried buffering and its effectiveness is very site specific.

40. Mr. Mike Makara of the B.C. Blueberry Council appeared as an intervenor. He is a third generation farmer growing blueberries on 240 acres of farms. He has travelled through most growing areas of North America. He testified that cannons are the most popular method of bird control. Cannons are most effective when blasts are both random and loud. Sound level cannot be controlled therefore cannons must be moved regularly to maintain effectiveness.

41. A decibel level of 120 (as referred to by Mr. Van Daltsen) might be correct within five to ten feet of the cannon, but the decibel level at two hundred feet or five hundred feet is unknown. He is unaware of any technical specifications that mention decibel levels.

42. Mr. Makara has moved his cannons at the request of his neighbours. He operates cannons between 6:30 a.m. and 9:30 a.m., when they are most needed due to heavy early morning bird feeding. Timer controlled cannons are stopped at midday as birds do not feed during the hottest part of the day. The cannons are re-started after 3:00 p.m. and operated until 7:30 p.m. Older cannons do not have timers, but run as long as there is propane. Mr. Makara stated that netting is very effective, but it makes machine harvesting difficult and is very expensive. Labour costs are too high for farmers to hand pick the crop under the nets.

DECISION

43. Having set out the general framework governing the Panel's mandate under the Act and reviewed the evidence, the questions arising from the July 7, 1997 hearing have been decided as set out below.

44. The first question is whether the Panel has the jurisdiction to proceed with this Complaint in view of the sale of the farm after the Complaint was filed. The answer to this question is a qualified "yes". Section 3(1) of the Act clearly gives a person aggrieved the right to complain and apply to this Board for a determination as to whether a disturbance such as noise results from a normal farm practice. Nothing in the Act precludes this Panel from making this determination in response to a complaint. The language of Section 3, including the terms which are defined in Section 1, focus the right to apply for a determination on the "*practice*". Therefore, this right does not appear to depend on the presence of the farmer.

45. In most cases, of course, the farmer complained of will be present in view of the practical implications of the complaint on his future operations. However, where the farmer whose practice is complained about is absent, the nature of a particular complaint may require a complainant to make sure this Board has a sufficient evidentiary foundation on which to proceed with the complaint. This is particularly so where, as here, the new farmer is present but has no information about the previous operation, does not intend to defend it and proposes changes in his farm practice.

46. With one exception, the Panel was not persuaded that the Complaint has been made out as it relates to Mr. Grewal's operation of the cannon. The reasons for this conclusion are as follows.

47. Firstly, the Complainants' failed to accept any responsibility to produce any evidence whatsoever regarding the noise levels they assert are so fundamental to a determination of the various aspects of their Complaint. The Panel agrees with Mr. Clapham that it would be important for the Panel to know whether there is something extraordinary about the cannon noise from the Respondent farm, in order to make a meaningful determination for this Complaint. The Panel also agrees that it would be relevant to know whether and to what extent those sound levels do in fact give rise to demonstrable health or safety concerns. While the Complainants' anecdotal descriptions of the noise and its impact were useful, the Panel reiterates that this is not a nuisance statute and that the test for breach of the Act is not merely whether a farm practice causes emotional upset and frustration. The Act is designed to protect the right to farm. The test is whether the farm practice is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.

48. Virtually every aspect of this Complaint depends on the Panel "ruling" that the noise from the cannon cannot cross property boundaries, if it is beyond a certain decibel level. The "allowable noise levels" and "noise measurement" sections of the Complaint raise all this explicitly, and all but one of the objections to the 1996 operation of the cannon raise this also. It would not be responsible of this Panel to venture a determination regarding the operation in 1996 without sufficient evidence regarding the noise levels and their impact. Mr. Monga cannot provide that evidence because he was not there. Also, he is using a different cannon and he states that he expects the operation of his cannon will, with the assistance of MAFF, be different from that of his predecessor. The Complainants refuse to provide any evidence regarding noise measurements on the grounds that it is not their responsibility.

49. In all these circumstances, the Panel considers that the only responsible course of action is to dismiss the Complaint based on insufficient evidence.

50. The Panel can, however, give separate consideration to the complaint that the Grewal cannon was operated continuously for 49 days, for 14 hours per day, every 9 minutes in July and August 1996, in apparent breach of the MAFF Guidelines. The Panel accepts that the MAFF Guidelines on this point and in this case are a relevant indicator of normal farm practices in respect of the use of scare devices. While there was conflicting evidence regarding the frequency of detonations of the Grewal cannon, the Panel is prepared to find that Mr. Grewal used the cannon extensively and regularly. In view of Mr. Grewal's absence, there is no evidence regarding the nature and extent of any bird predation problem which might justify extensive use of the cannon under the MAFF Guidelines. The evidence heard suggested that bird predation did not necessarily require continuous firing of the cannon. As such, this Panel finds that the frequency of detonations of the cannon in 1996 was not a normal farm practice.

51. The Panel emphasizes that its decision is not intended to bind any future panel from reaching a different conclusion based on evidence regarding the nature and extent of bird predation on this or any other farm in any given year.

52. The Complainants requested that a future hearing be held to establish specific allowable noise levels for propane cannons, and challenged the application of the MAFF Guidelines in the absence of a decibel standard. Mr. Clapham asserted that cannon noise was in excess of levels that would be permitted by the WCB, yet produced no evidence as to those standards.

53. The Complainants failed to produce any noise measurements at their property lines. They did not produce any information about acceptability or possible criteria for use as standards or any information to support their statements about permissible levels in other jurisdictions or by other official bodies.

54. In the absence of any evidence and in the absence of any commitment on their part to produce such evidence despite having had their responsibilities explained at the July 7, 1997 hearing, this Panel rejects the Complainants' application that it hold a hearing at a future date to canvass this issue. This Panel is unable to rule on the other remedies sought by Mr. Clapham, due to the lack of evidence.

CONCLUSION

55. Complainants who come before this Board have a responsibility to present their case in a fashion that allows the Panel to properly exercise its statutory mandate. The determination of what is or is not a normal farm practice can have very real consequences for a farmer and his neighbours. It is not the function of this Board to argue the case of either the Complainant or the Respondent. In some cases, a party may require expert evidence or a summons obtained from this Board under Section 11(5) of the Act. Under the Act the responsibility falls on the parties to ensure that they produce sufficient evidence to support the complaint. These Complainants have not persuaded this Panel that a future hearing is warranted on the issue of specific "allowable noise levels".

RECOMMENDATIONS

56. The Panel encourages Mr. Monga to continue to work with MAFF to find ways to protect his crop while minimizing disturbances to his neighbours. This includes placing his cannon as far away from neighbouring homes as possible and monitoring bird predation patterns so that the cannon's use can be tailored to the periods of highest predation.

57. The Complainants are within their rights to file a new complaint in the event that they take issue, under the Act, with Mr. Monga's use of the cannon in the 1997 or subsequent crop years.

58. MAFF must acknowledge the controversy facing the use of propane cannons. MAFF officials should do further study of appropriate sound levels at property lines of farms.

Dated at Victoria, British Columbia, this 22nd day of September, 1997.

Original signed by

Christine Moffat, Panel Chair

Original signed by

Wendy Jeske, Panel Member

Original signed by

Hamish Bruce, Panel Member