

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 USE OF
PROPANE CANNONS AND OTHER NOISE DEVICES ON A BLUEBERRY
FARM IN ABBOTSFORD, BRITISH COLUMBIA

BETWEEN:

BARBARA FISCHER

COMPLAINANT

AND:

GURDEEP SIDHU

RESPONDENT

AND:

BC BLUEBERRY COUNCIL, HORSE COUNCIL OF BC
AND BAN THE CANNONS

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board:

Carrie H. Manarin, Presiding Member
Ron Bertrand, Vice Chair
Suzanne K. Wiltshire, Member

For the Complainant:

Barbara Fischer

For the Respondent:

Gurdeep Sidhu

For the Intervener(s):
BC Blueberry Council:

Debbie Etsell, Executive Director

Horse Council of BC:

Alice Harper, Zone 3 Representative

Ban the Cannons:

Geraldine Goodman

Date of Hearing:

March 12, 2013

Place of Hearing:

Abbotsford, British Columbia

INTRODUCTION

1. The respondent, Gurdeep Sidhu, operates a blueberry farm in the Agricultural Land Reserve in Abbotsford, British Columbia. The farm is located on the south east corner of Lefevre Road and Downes Road. The respondent does not currently reside on the farm although a residence is under construction.
2. The complainant, Barbara Fischer, lives on a five acre parcel of land on Lefevre Road where she breeds, raises and trains horses. The southern boundary of the respondent's blueberry farm abuts the complainant's property along the entire north side for approximately 1,000 feet. The respondent farm then forms a "dog leg" and runs along the entire back side (or east) of the complainant's property for approximately 330 feet.
3. The complaint was received by the British Columbia Farm Industry Review Board (BCFIRB) on July 25, 2012 and concerns noise resulting from the use and management of propane cannons and other audible bird scare devices on the respondent farm. The complainant alleges that the propane cannons and other noise devices are not being operated in compliance with the current provincial guidelines for use of audible bird scare devices. The complainant argues that the farm's use of propane cannons and other noise devices is not in accordance with normal farm practice.
4. The respondent's position is that he uses propane cannons and other noise devices as part of a bird predation management plan for the farm. The respondent argues that he operates the cannons in compliance with the provincial guidelines and that his use of propane cannons and other noise devices constitutes normal farm practice as defined under the *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c. 131 (*FPPA*).
5. The BC Blueberry Council ("BCBC") submitted a late application for full intervener status on March 8, 2013. At the commencement of the hearing, the parties consented to Debbie Etsell, Executive Director of BCBC, giving oral evidence and filing written submissions.
6. The Horse Council of BC and an organization known as Ban the Cannons applied for and were each granted limited intervener status to make oral and written submissions at the hearing.
7. The complaint was heard in Abbotsford on March 12, 2013.

ISSUE

8. Does the noise arising from the use and management of propane cannons and other noise devices on the respondent's farm result from normal farm practices?

PROVINCIAL GUIDELINES

9. Some years ago, the British Columbia Ministry of Agriculture developed guidelines for the use of audible bird scare devices in response to a growing number of complaints from nearby residents about the use by farmers of bird scare devices (primarily propane cannons) that emit loud noises to frighten birds away from crop areas that might otherwise suffer damage and loss from predation.
10. In August 2009, the Ministry updated the guidelines and published its revised Guidelines for the use of Audible Bird Scare Devices for South Coastal BC (the “Guidelines”). The 2009 revision continues to be the current version of the Guidelines for the Fraser Valley area where the respondent farm is located.
11. In order to achieve a balance between farmers’ interests in protecting their crops from predatory birds and the interests of nearby residents not to be subject to unreasonable noise, the Guidelines set out maximum limits for the number, density and location of devices such as propane cannons as well as the frequency of firing and permitted hours of operation of such devices.
12. However, a farmer is not entitled to simply operate propane cannons and other noise devices at the maximum standards established by the Guidelines but is also required to strategically manage the devices by taking reasonable steps to minimize the impact of the noise on neighbours. In order to strategically manage the use of audible bird scare devices, the Guidelines require that a farmer:
 - (a) Prepare a bird predation management plan prior to the start of each season that provides for the use of a range of approaches or techniques to minimize audible bird deterrent device use and bird habituation to the devices;
 - (b) Regularly monitor bird population and activity on a property and ensure that noise devices are only used when bird pressure is sufficient to justify their use;
 - (c) Make regular visits to the farm to ensure devices are functioning properly and that the devices are not being operated outside of the hours established by the Guidelines.
13. As will be discussed in more detail below (in the Analysis section of this decision), the Guidelines have been adopted by many agricultural organizations including blueberry growers in the Fraser Valley as proper and accepted customs and standards for the use of propane cannons and other audible bird scare devices.

KNOWLEDGEABLE PERSON’S REPORT AND TESTIMONY

14. BCFIRB retained Mark Sweeney P. Ag., an Agrologist and Berry Industry Specialist with the Ministry of Agriculture, as a knowledgeable person (“KP”) pursuant to section 4 of the *FPPA*. Mr. Sweeney visited the respondent farm and the complainant’s property on October 12, 2012. He then prepared a report assessing the bird predation management practices on the farm site and in particular, the operation of propane cannons and other noise devices such as orchard pistols. In accordance with the terms of engagement for knowledgeable persons, his report dated November 2, 2012 (the “KP report”) was provided to the complainant and respondent shortly after its completion.

15. Mr. Sweeney was called to give evidence at the hearing. He was qualified as an expert witness in the use of propane cannons for berry crop protection.
16. In his report, Mr. Sweeney describes the respondent's farm as being approximately 33 acres in total size of which 27 acres are planted with the Duke variety of blueberries (which are early maturing). The field is in its fifth year of "cropping" and is productive. Mr. Sidhu does not live on the farm but a new home is under construction at the north east corner of the property.
17. There are bushes and trees running along the respondent farm's eastern field margin and power lines run along Lefevre and Downes Roads (to the west and north, respectively). Mr. Sweeney notes that all of these features are potential roosting areas for birds to move back and forth into the fields. Mr. Sweeney said the respondent told him that due to these features, his fields are subject to heavy feeding pressure from starlings and if he does not take "an aggressive approach" to protecting his crop, he believes he would lose up to 50% of it to predation.
18. Mr. Sweeney stated that the respondent advised him that he prepared a bird predation management plan and kept logs of bird pressure in the field. Mr. Sweeney said he asked the respondent for these records but they were not provided to him.
19. Mr. Sweeney stated that he had also visited the farm on three separate occasions during the 2012 crop production and harvesting season in order to make observations as to the respondent's use of propane cannons. On those visits he observed that there were five triple shot rotating cannons in the respondent farm's field: three in the back field along the eastern boundary of the property and two located in the front west block.
20. Mr. Sweeney said Mr. Sidhu advised him that only two of the three cannons in the back field along the eastern boundary operated at any one time.
21. Mr. Sweeney reported that Mr. Sidhu also advised him that:
 - (a) The cannons were set at the number two setting which would result in a firing frequency of 11 activations or 33 shots per hour, the maximum allowable under the Guidelines;
 - (b) Timers on the cannons were set to start at 6:30 am, cease between 12:00 pm and 3:00 pm, resume after 3:00 pm and shut off for the day at 8:00 pm as required by the Guidelines; and
 - (c) During the harvest of a particular block of the field, the cannons were shut off in that block only.
22. Mr. Sweeney said the complainant advised him that she had been keeping track of the time of use and number of cannons operating and that there were five cannons and that all were operating at the same time and that they frequently operated during the mid-daybreak. The complainant told Mr. Sweeney that based on her observations, there was insufficient bird presence to justify the maximum use of cannons by the respondent and she believed one or more of the cannons was within the 200 metre separation distance

required under the Guidelines from her own and other nearby residences. Mr. Sweeney said the complainant advised him that she was also concerned about the use of an orchard pistol by the respondent's farm worker.

23. Mr. Sweeney said he personally observed all five cannons in the field operating at the same time. Mr. Sweeney noted that while this would "in theory" be the maximum allowable under the Guidelines for a farm the size of the respondent's, the use of the maximum nevertheless would only be justified in response to extreme bird pressure. However, Mr. Sweeney also observed that due to the separation distance requirements from neighbouring residences and concentration limits under the Guidelines (discussed below), the respondent should only be using three devices in the field.
24. Mr. Sweeney observed that the three cannons placed along the east boundary of the respondent's farm were concentrated in an area of about seven acres which exceeded the permitted density (or concentration) under the Guidelines. Mr. Sweeney said he observed on one occasion that all three of these cannons were operating at the same time.
25. Mr. Sweeney further observed that during a site visit on July 19, 2012 with the BCBC liaison person and a City of Abbotsford by-law enforcement officer, one cannon was found to be within the 200 metre setback area of a residence (not the complainant's) to the north of the farm. Mr. Sweeney noted that the respondent was advised several times to move the cannon and was given a map showing him the areas where the cannon could be moved in order to be in compliance with the 200 metre setback. Mr. Sweeney testified that despite this information and further visits from a by-law enforcement officer, it was several weeks before the cannon was relocated and the respondent was issued a fine by the City of Abbotsford.
26. Mr. Sweeney noted that one or more of the east cannons were not in compliance with the separation distance with respect to a residence to the south of the complainant's property. Although Mr. Sidhu said that he had verbal permission from the residence in question to place the cannon within 200 metres, there was no corroborating evidence of this. The Guidelines require such a consent to be in writing.
27. Mr. Sweeney said he had some conversations with the BCBC liaison person who advised him that at the beginning of the season one of the cannons was on the number one setting and therefore was firing too frequently as the Guidelines permit a maximum setting of two. While Mr. Sidhu adjusted the cannon to the number two setting, Mr. Sweeney said he recommends starting the cannons at the lowest frequency at the beginning of the season and increasing the frequency only if and when bird pressure increases. According to Mr. Sweeney, this practice increases the cannons' effectiveness by interfering with established feeding patterns and extending the time it takes for starlings to become habituated to the cannons.
28. Mr. Sweeney stated that there was no evidence that Mr. Sidhu made efforts to monitor for birds as he claimed. He noted, "the fact that the cannons were used virtually continuously from the first ripening berries until the last fruit was harvested in August

provides evidence that Mr. Sidhu did not operate his cannons in response to bird feeding pressure.” Mr. Sweeney said he observed the fields on the farm on several occasions over the harvest season and did not observe evidence of heavy bird pressure or damage to the crop.

29. Mr. Sweeney said he also found that one of the cannons was firing a couple of minutes after the mid-day break however this was rectified a short time later by adjusting the automatic timers.
30. Mr. Sweeney said the respondent also advised him that he had a worker present on the farm who used an ATV and orchard pistol for bird control. Mr. Sweeney stated that Mr. Sidhu reported that his worker followed the Guidelines regarding the use of orchard pistols. Mr. Sweeney said he was unable to verify if this was the case or not.
31. Mr. Sweeney noted that the Guidelines state that a grower should assign an individual to be responsible for bird monitoring, cannon operation and plan implementation. While Mr. Sidhu had a person on the farm, Mr. Sweeney observed that it was not clear that this person was adequately assigned or trained to fulfill this task. Mr. Sweeney considered there to be an over-reliance on the BCBC liaison person to trouble-shoot cannon issues.
32. In summary, Mr. Sweeney found there was no evidence that the respondent:
 - (a) Had prepared or was following a bird predation management plan;
 - (b) Was monitoring for birds and varying the intensity of use and location of cannons in accordance with bird pressure; or
 - (c) Was making adequate use of other tools and techniques.
33. Mr. Sweeney concluded that “it is clear to me that Mr. Sidhu’s use of propane cannons was neither in compliance with the Guidelines nor reflecting practice that is typical among blueberry farmers” and that he knew “of no other blueberry farm in BC that would follow this intensity of cannon placement.”

COMPLAINANT’S EVIDENCE AND SUBMISSIONS

34. The complainant gave evidence that she has lived on her five acre farm since 1980. The complainant said she is aggrieved by the noise from the continuous firing of timer-activated propane cannons on the respondent’s farm. The complainant stated that she is also aggrieved by the noise of orchard pistols being discharged and workers banging on pails in the field.
35. The complainant breeds, raises and trains horses on her property. She testified that the noise from the cannons and orchard pistols frightens her horses. The complainant said that in 2012, the cannon noise was so frequent that leading her horses to the paddock each morning “became precarious” and she had to time intervals between shots and carry a special stick so that the horses would not run into her should they attempt to run away from the noise. In her written complaint, the complainant referred to an incident when an

orchard pistol was discharged by the respondent's field worker causing her horse to bolt and injure its handler; however, she did not testify to this at the hearing.

36. The complainant said she was disturbed by noise from the respondent's farm in 2011 so that when the frequency increased in 2012, she began to record her observations about the timing and frequency. The complainant said that five cannons were in use at the same time on some occasions, noting that she had observed the barrels of all five cannons rotate after being discharged. The complainant also said that although the cannons started on July 2, 2012, she saw no starlings until July 26, 2012 and at that time the birds were not disturbed by the cannon blasts.
37. The complainant said there is another ten acre blueberry farm operation on the immediate south side of her property (the "Gill farm") and a further blueberry farm across from her property to the west (the "Deol farm"). The complainant said the operators of these farms are subject to the same bird pressures as the respondent farm yet discontinued their use of loud noise devices out of consideration for her and her horses and other neighbours.
38. The complainant also said she has observed eagles nesting in the trees on the east side of the respondent's farm and they fly over her and her neighbours' properties on a daily basis. The complainant said she believes these birds of prey may deter starlings from remaining in the area.
39. The complainant's witness, Diane Danvers, stated that she resides on Downes Road, north of the respondent's farm. She gave evidence that in early July 2012, the cannons on the respondent's farm were firing too frequently and were being fired during the noon break. She agreed that these issues were later corrected. Ms. Danvers also testified that one of the cannons was within 200 metres of her residence and she advised the BCBC liaison person on July 2, 2012 about it. Ms. Danvers said on July 16, 2012, the liaison person asked the respondent to move it but that it was not moved until after August 7, 2012.
40. The complainant's witness, Francene Groves, stated that her residence is on the northwest corner of Lefevre and Downes Roads, kitty corner across the intersection from the respondent's farm. Ms. Groves stated that the cannons on the respondent's farm were being discharged more often in 2012 than the preceding year. She said she often looked at the respondent's field when she heard the guns fire but never saw large numbers of birds - only seven at the most. Ms. Groves said she sent a complaint by e-mail to the BCBC liaison person about this and also complained twice about the cannon continuing to fire past the noon hour break.
41. The complainant's witnesses, Natalie and Roger Todd, reside on Lefevre Road, directly west of the respondent's farm. These witnesses gave evidence that there was excessive noise from cannon shots and orchard pistols as well as from workers constantly beating on pails at or near the edge of the field across from their house in 2012. Ms. Todd also recalled a number of occasions in July 2012 where a worker drove a truck up and down

the street along the perimeter of the farm early in the morning honking the vehicle's horn. Ms. Todd said she and her spouse have horses; however, they did not ride them during the summer of 2012 due to concerns about safety while the respondent's cannons were in use.

42. Ms. Todd said she did not observe excessive bird pressure on her farm despite having cherry trees, currants and grapes. Ms. Todd stated that she believes the starlings are deterred by a resident eagle population in the immediate area. Mr. Todd claimed that what few starlings were present on the respondent's farm were not deterred by the cannons.
43. These witnesses also testified that on several occasions during the 2012 growing season, a farm worker discharged an orchard pistol within 40 metres of their residence. Mr. Todd said he explained to the respondent's worker that he was not supposed to discharge the pistol that close to a residence; however, this practice continued for some days thereafter.
44. The complainant's witness, Natalie Vonk, is a horse trainer and riding instructor and has worked with horses in excess of 20 years. Ms. Vonk said based on her experience, horses have a flight response to sharp noises. Consequently, it becomes more difficult and also hazardous to handle horses when there is nearby cannon fire because their flight responses are already heightened.

BC BLUEBERRY COUNCIL'S EVIDENCE AND SUBMISSIONS

45. The BCBC's written submission states that "its role in bird management has been to educate the growers on the Guidelines" and that since 2001 it has been the first responder to complaints. The council employs a bilingual grower liaison officer to respond to complaints and to assist in educating growers and their neighbours about the Guidelines and to mediate disputes between them.
46. Debbie Etsell gave evidence that in 2011 and 2012, BCBC received a large number of complaints about the operation of propane cannons on the respondent's farm. She said the grower liaison officer visited the farm several times in each of those years in response to the complaints and on some occasions the respondent was found not to be in compliance with the Guidelines. At those times, the respondent would have been instructed on how to comply.
47. Ms. Etsell said the grower liaison officer asked the respondent for his bird predation management plan on one of these occasions and "confirmed that one was in place for 2012". Ms. Etsell admitted that she did not personally see the bird predation management plan for the respondent's farm. She explained that bird predation management plans are prepared by the farmer and are supposed to be kept on the farm site.
48. Ms. Etsell said she had driven out to the farm herself five times to check on certain situations. Due to the large number of visits to the respondent farm required by the

grower liaison officer in 2012 (more than any other farm), BCBC gave notice of the situation to the Ministry of Agriculture and Ministry staff attended the respondent's farm to review and encourage the respondent to comply with the Guidelines.

49. Ms. Etsell said BCBC supports a protocol whereby fines are issued to a grower by the municipal by-law authority if the grower is non-compliant with the Guidelines after repeated educational efforts by both BCBC and the Ministry of Agriculture. Ms. Etsell said she knows of no other grower that requires this level of assistance from BCBC. Ms. Etsell said she was aware that the respondent had been fined for contravening the Guidelines in 2012 but did not know the reason for the fines.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

50. At the commencement of the hearing, the respondent sought to admit four documents into evidence which had not been previously disclosed: a WorkSafe BC inspection report, an undated falcon bird control quote, a bird predation management plan and a document referred to as "monitoring records". The panel admitted the documents noting they would consider the weight to be given to the documents in making their decision.
51. The respondent gave oral evidence that he purchased the property on which the blueberry farm is situate in 2005. He alleged that ever since that time the complainant has discriminated against him by filing complaints with Fisheries, Ministry of the Environment and WorkSafe BC over matters that do not concern her.
52. The respondent said he developed a bird predation management plan for the 2012 growing season and followed the Guidelines in 2012. The respondent said for the most part a worker he employed kept logs of bird pressure and frequency of cannon use. The respondent said he also made some records but that he did not attend the farm often. The respondent acknowledged that Mr. Sweeney asked him for a copy of his bird predation management plan for 2012 but stated that the plan and other records were at his residence and as no further request was made for the plan it slipped his mind.
53. The respondent claimed that the farm is highly susceptible to birds as a result of bushes to the north and east of the property and power lines along the roads. The respondent said that the BCBC liaison officer noted the bird pressure during some of his visits and checked to make sure he was in compliance with the Guidelines.
54. The respondent submitted that under the Guidelines he is permitted to have five cannons but claimed he only ever had a maximum of four operating at any one time and usually only three. The respondent said the cannons were fired at allowable frequencies and times under the Guidelines. The respondent said a WorkSafe BC officer investigated a complaint on the farm on July 20, 2012 and determined that the noise levels taken approximately 100 feet away from the cannons did not exceed the WorkSafe daily noise limit of 85 decibels.

55. The respondent said he also employs a full-time worker in the field who rides an ATV and uses an orchard pistol. As well, the farm uses ribbons, scarecrows and other bird scare techniques. The respondent said he has looked into the use of falconry but based on a quote he received from one supplier for \$43,000 he cannot afford the cost. The respondent said he intends to reduce the number of cannons on the farm for the 2013 season and use other devices such as an electronic Bird Gard (that emits a sound like a bird in distress).
56. The respondent said he operates other blueberry farms, one of which is near another horse farm and two of which are near cattle farms, and that those farm operators have not complained about the noise from the cannons he uses on those operations.
57. The respondent said he doubted that from her property the complainant would have been able to hear someone banging on a bucket in the northeast corner of the blueberry farm.
58. The respondent said that, contrary to the complainant's belief, the Gill farm and Deol farm do use blueberry cannons and that in particular, the operator of the Gill farm borrowed two propane cannons from him in the 2011 season (as Mr. Gill had a later maturing variety of blueberry).

SUBMISSIONS OF BAN THE CANNONS

59. Geraldine Goodman, the representative for Ban the Cannons, a group of concerned citizens, submitted that the loud noise from propane cannons causes emotional distress to occupants of neighbouring properties and can interfere with their health and lifestyles. She also submitted that reported crop losses due to bird predation are unreliable and that birds become habituated to the noise from the cannons in any event. Consequently, the representative for Ban the Cannons argued that farmers should be educated to use alternative bird deterrents and requested that the current Guidelines be re-examined and revised.

SUBMISSIONS OF THE HORSE COUNCIL OF BC

60. Alice Harper, the representative for the Horse Council of BC said that the organization represents 22,000 individual members, 146 businesses and 170 clubs in British Columbia and that over 20,000 properties in British Columbia house an average of five horses. She stated that one of the biggest concerns for horse farmers is the noise from audible bird scare devices including propane cannons on neighbouring berry farms.
61. Ms. Harper submitted that horses have a strong emotional response to sensory input such that a discharge from propane cannons can startle a horse which then triggers fear and an instinctual flight response. She argued that horses are unpredictable, and on breeding and training farms (where they are housed for a short time) are unlikely to become habituated to the noise. She indicated that horses can suffer physical ailments and behavioral disorders related to long-term tension from prolonged exposure to audible bird scare devices. The representative argued that the use of propane cannons next to horse farms

increases the potential for injury to both horses and handlers and results in the loss of use of the horses.

ANALYSIS

62. The complaint was filed pursuant to s. 3(1) of the *FPPA* which provides as follows:

s. 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.

Step one: Standing

63. A complaint under the *FPPA* involves a two step analysis. The first step deals with a party's standing to make a complaint. Complainants must establish that they are aggrieved by the disturbance that is the subject of the complaint. In the present case, the complainant provided evidence as to the frequency and duration of use of the propane cannons on the respondent's farm as well as the use of other noise devices such as orchard pistols. The complainant also gave evidence that these noises interfered with her ability to use and enjoy her property for the purpose of raising horses on it. The corroborating evidence of the complainant's witnesses (who are her neighbours) was directed at the aggravation caused by the noise of the cannons, orchard pistols and other noise devices being operated on the respondent's farm.

64. The panel finds that the complainant has established that she is aggrieved by noise as a result of the use and operation of propane cannons and other noise devices on the respondent's blueberry farm. The panel notes that the effect of the noise from the cannons and other noise devices on the complainant's horses is an aggravating factor and relevant to the contextual analysis of this complaint.

Step two: Normal Farm Practice

65. Section 1 of the *FPPA* 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, ...

66. In previous complaints dealing with propane cannons, BCFIRB has found that the current Ministry Guidelines are generally accepted by blueberry growers in the Fraser Valley and

constitute the prevailing standards for use of propane cannons. In particular, in *Mitchell v Bhullar*¹, the BCFIRB hearing panel noted at paragraph 37:

....the panel notes that propane cannons are widely used in the Lower Mainland to prevent damage to the blueberry crop and their use as part of a bird predation management plan is consistent with the Ministry guidelines. The BC Blueberry Council continues to encourage and educate growers to follow the Ministry guidelines. The current Ministry guidelines are the standards referred to by the BC Blueberry Council's liaison, Mr. Dulat, in dealing with neighbour complaints. The panel concludes that, in general for blueberry farms in the Lower Mainland, the use of propane cannons in accordance with the Ministry guidelines continues to represent normal farm practice.

67. The panel notes Ms. Etsell's evidence that the BCBC continues to refer growers to the Guidelines as the prevailing standards for use of audible bird scare devices, including propane cannons and orchard pistols. The panel concludes that the Guidelines continue to generally represent "proper and accepted customs and standards as established by similar farm businesses under similar circumstances" for the use and operation of propane cannons and other audible bird scare devices in the area in which the farm is located.
68. The Guidelines should apply to the respondent farm unless on a contextual analysis, there is a reason why the Guidelines should be modified to reflect normal farm practice for this farm. The panel has taken into consideration the particular circumstances of the site both on its own and in relation to surrounding properties to determine if there are any factors (for example prevailing wind, geographical features or land use) that would warrant deviating from the Guidelines in this case.
69. It is noteworthy that the Guidelines as revised in 2009 require farmers to take a **strategic approach** to the use of propane cannons and other devices as part of an overall bird predation management plan with a view to minimizing noise impact on neighbours. As indicated in paragraph 12 above, this means that farmers are responsible for preparing and implementing a bird predation management plan that utilizes a range of devices and techniques, and are also responsible for regularly monitoring bird activity on their farms and using propane cannons only when bird pressure is high. A strategic approach to the use of propane cannons and other noise devices is desirable because it not only addresses the unnecessary use of those devices and associated adverse impacts on neighbouring residences but also optimizes the usefulness of these devices for farmers so that birds do not become habituated to them.

¹ [*Mitchell v Bhullar dba Bhullar Farm Produce*](#), BCFIRB decision (June 10, 2011)

A. Bird Predation Management Plan

70. There is little evidence that the respondent completed a bird predation management plan at the start of the 2012 season as he claimed apart from the testimony of Ms. Etsell for the BCBC who testified that the grower liaison had seen one.
71. The panel notes that the bird predation management plan document submitted by the respondent at the hearing contains a number of discrepancies. First, it is dated for reference “July 2, 2013” instead of 2012. The document also indicates that there were four propane cannons on the farm during the growing season, two of which were located in the east field. This is contradicted by the evidence of Mr. Sweeney (as set out in the KP Report) and of the complainant that there were five propane cannons operating in 2012 and three of those were concentrated in the east field. The document further indicates that there were no other audible bird control techniques in use when the evidence of the complainant, her witnesses and the respondent was that field workers were banging on pails throughout the afternoons as a bird deterrent and an orchard pistol was used.
72. The panel places little weight on the bird predation management plan tendered by the respondent given that it was not disclosed prior to the hearing, was not given to the KP Mr. Sweeney upon request and the document as presented is not consistent with the actual cannon management on the farm. For all of these reasons, the panel concludes that either the respondent did not complete a bird predation management plan prior to the beginning of the 2012 season or if he did, the bird predation management plan was not reflective of actual farm practices.
73. The panel also finds little evidence that the respondent actually completed bird monitoring records on a daily basis during the 2012 growing season. The respondent tendered a summary of the daily logs completed by his field worker and himself but did not provide any of the original records or logs upon which this document was allegedly based. Mr. Sweeney requested these documents but the respondent did not provide them. The respondent also admitted that he spent little time each day at the blueberry farm.
74. The panel further notes that the monitoring record document has other inconsistencies. It refers to a maximum of four cannons being in use in the field during the 2012 season which corroborates the respondent’s bird predation management plan document but contradicts the weight of all of the other evidence (including that of the respondent) that there were in fact five cannons on the field during the 2012 growing season. The document contains scant information about observations of bird presence throughout the day and is silent regarding significant events such as on July 19, 2012, for example, when the BCBC liaison, Mr. Sweeney and a by-law officer attended the farm, confirmed a cannon was within a 200 metre setback area and ordered the respondent to move it. For all of these reasons, the panel finds that the respondent’s monitoring record document is unreliable and where other evidence exists as to specific observations of bird predation, we prefer that evidence.

B. Operation of Propane Cannons

75. In addition to requiring farmers to take a strategic approach to minimize noise impact on neighbours, the Guidelines state that:
- A grower should operate as few as possible devices on a given farm site up to a maximum of one device per two hectares of cropland at any one time;
 - If multiple devices are used on a larger field, they should be placed at a distance from each other so that they are not concentrated within the field and so that they do not exceed the permitted density;
 - Farmers should maintain a 200 metre separation distance between a device and a neighbouring residence (unless written permission is obtained from the property owner);
 - For triple shot cannons, there should be no more than 11 activations or a maximum of 33 shots per hour;
 - Devices should only be operated between 6:30 am and 8:00 pm but not between 12:00 noon and 3:00 pm; and
 - Devices should only be used when required for the protection of a crop during periods when that crop is vulnerable to bird predation.
76. ***Number of devices:*** The respondent argued that he had 27 acres of blueberries and therefore was permitted under the Guidelines to operate five propane cannons. However, as Mr. Sweeney observed, while “in theory” the size of the respondent’s farm would allow five cannons, in order to maintain a 200 metre setback from neighbouring residences and to comply with spacing between the devices or density requirements, the respondent should only have been using a maximum of three devices on the farm.
77. While the respondent said that he only had four cannons operating on the farm, the panel considers the evidence of Mr. Sweeney and the complainant on this point to be more reliable. We find that there were five propane cannons present and that at times all five were in use in the field at the same time during the 2012 growing season. Using this number of cannons did not comply with the Guidelines.
78. ***Concentration of devices:*** We accept Mr. Sweeney’s evidence that three of the five cannons were concentrated in a seven acre area along the east boundary which exceeds the permitted density under the Guidelines. The respondent argued that he only operated two of these devices at any one time. Mr. Sweeney’s evidence that he personally observed all three of these cannons operating at the same time is to the contrary and we prefer it as being more reliable. We find that the three cannons in the east part of the field were in use from time to time in non-compliance with the density requirements under the Guidelines.
79. ***Separation distance from residences:*** The evidence establishes that on July 19, 2012 one of the cannons was within 200 metres of the Danvers residence to the north of the farm. Appendix B to the KP report is a map prepared by Ministry staff showing the locations of neighbouring residences and appropriate setbacks from them. This map indicates that there was another residence to the north as well as one to the west that were

also within 200 metres of the cannon in question. We note that although the respondent was told to move this cannon, he did not do so for a number of weeks.

80. Mr. Sweeney also testified (and the map at Appendix B to the KP report shows) that one or more of the cannons in the east field were within the 200 metre setback zone of another residence to the south of the complainant. The respondent acknowledged that he did not obtain written permission from the residence owner to place the cannon within the setback distance as required under the Guidelines.
81. The panel finds that the respondent did not comply with the setback requirements under the Guidelines.
82. ***Frequency and times of firing:*** The evidence is not disputed and the panel finds that at the beginning of the growing season, one of the respondent's cannons was firing too frequently because it was at the number 1 setting. We note the evidence that when the BCBC grower liaison advised the respondent of this, the cannon was readjusted to the number two setting (the highest permitted setting under the Guidelines).
83. The evidence also establishes that at the beginning of the season the respondent's cannons were firing during the mid-day break. Following complaints, the automatic timer on one of the cannons was readjusted and the problem was rectified.
84. ***Strategic use in response to bird pressure:*** The respondent claimed that he usually only operated three cannons (but sometimes four) and then only in response to bird pressure. The complainant and her witnesses claimed that all of the cannons seemed to be firing constantly, even when no birds were present and even before the berries were ripe. Mr. Sweeney testified that on several occasions, he observed all five cannons operating at the number two (or maximum) setting permitted under the Guidelines but could not detect a significant bird presence to warrant that level of use.
85. Both parties provided records purportedly made on the dates alleged in those records.
86. The complainant gave evidence that she was bothered by the respondent's cannons in 2011 so that when the cannons started again on July 2, 2012 with greater frequency, she decided to keep a written record of the time and number of firings and sent e-mails regarding the same. For example, the complainant sent e-mails to the BCBC grower liaison on July 5, 10, 12, 13, 21, 23 and August 12, 14 and 24, 2012 reporting the time and frequency of shots on those days as well as observations of bird numbers. The complainant also sent a number of e-mails to the Ministry of Agriculture on July 30, 2012 reporting the time and frequency of shots and observation of bird presence on that day. Finally, the complainant provided copies of e-mails she sent to by-law authorities and to herself for record keeping purposes during the period, July 2 to August 12, 2012 regarding her observations of time, frequency of shots and bird presence on those various days.

87. The respondent provided the monitoring records which we have found above at paragraphs 73 and 74 to be unreliable and to which we attach little weight. In any event the “monitoring records” as we have noted previously did not show adequate monitoring of bird pressure.
88. We note the evidence of Ms. Etsell of BCBC that the grower liaison spent more time responding to complaints about the respondent’s use of cannons and educating him in how to comply with the Guidelines in both 2011 and 2012 than any other grower. Despite those efforts the respondent continued to be non-compliant.
89. We have already concluded that the respondent did not have an adequate bird predation management plan in place prior to the start of the 2012 season. Without an adequate bird predation management plan and the adequate monitoring of bird pressure it is not possible to respond to bird pressure in a strategic manner.
90. The panel finds that the preponderance of the evidence supports Mr. Sweeney’s conclusions that the respondent operated all of the cannons “virtually continuously from the first ripening berries until the last was harvested in August” and that this level of use was not justified by extreme bird pressure and was in contravention of the Guidelines.
91. **Conclusion:** Having found that the respondent farm’s use of propane cannons was not in compliance with the Guidelines, and there being no factors which would cause us to lessen the on-farm management obligations on the farmer, we conclude that the use and management of propane cannons on the farm is not consistent with normal farm practice. In coming to this conclusion, the panel is also persuaded by the evidence of Mr. Sweeney who testified that he knew of no other grower in BC that relied as heavily as the respondent on cannons as a bird deterrent.

C. Use of Other Noise Devices

92. The Guidelines also permit a farmer to use an orchard pistol during the same hours as propane cannons as well as during the mid-day break. Orchard pistol use is prohibited within 200 metres of neighbouring residences.
93. In her notice of complaint, the complainant indicated that on one occasion the respondent’s field worker discharged an orchard pistol close to her property line causing a horse to panic and injure a handler. The respondent reportedly told Mr. Sweeney that his worker followed the Guidelines for the use of the orchard pistol. However, two of the witnesses called by the complainant also gave evidence that on several occasions the respondent’s field worker discharged an orchard pistol within 40 metres of their residence. These witnesses said that although they brought the 200 metre setback required by the Guidelines to the field worker’s attention, he continued to fire the orchard pistol at the close distance.
94. The complainant and two of her witnesses also testified that on a number of occasions, the respondent’s field worker sat in the field banging on a bucket and that this noise was

constant and annoying. The complaint's witnesses also gave evidence of a person driving a truck on the roadside adjacent to the farm honking the vehicle's horn repeatedly in the early morning hours.

95. The panel finds that the respondent's field worker operated the orchard pistol at times during the 2012 growing season within 200 metres of neighboring residences contrary to the Guidelines respecting the use of orchard pistols. Consequently, the panel finds that the farm's use and operation of orchard pistols was not consistent with normal farm practice.
96. There are no specific rules set out in the Guidelines for the use of audible bird scare tactics such as honking a vehicle horn and banging on pails. However, it is our view that the Guidelines' strategic approach to the use of audible bird scare devices is applicable to such tactics. In this regard we note the Ministry's Farm Practices fact sheet in which the Guidelines are set out includes banging on pails as an audible bird scare device in response to bird pressure. We find that as put into use by the respondent farm these other bird scare tactics are not consistent with the Guidelines' strategic approach. In particular, persistent horn honking during early morning hours on public roads fails to give any consideration to the noise impact of such a practice on neighbours whose residences are situate along the road. There is no evidence to support that this is a usual or accepted farm practice or that this practice was in response to bird pressure. We find it is not consistent with normal farm practice. While banging pails or similar noise making within fields may be used by farmers from time to time to scare birds that are present, it is not in the panel's view consistent with normal farm practice to bang on a pail for a prolonged period at or near the edge of a field in close proximity to a neighbouring residence.

CONCLUSIONS

97. The panel finds that the use of propane cannons and orchard pistols by the respondent on his blueberry farm are not consistent with normal farm practice. In particular, the panel finds that:
 - The respondent failed to prepare, update and follow a bird predation management plan for the 2012 growing season.
 - The respondent failed to ensure that the person who was responsible for implementing a bird predation management plan (if one had been prepared) had the experience or training to monitor for birds and to operate cannons and other noise devices within the guidelines.
 - The respondent failed to monitor for bird presence and to adjust the use of audible bird scare devices to bird presence.
 - The respondent operated more propane cannons on the farm than permitted under the Guidelines.
 - The respondent operated propane cannons within the 200 metre setback from neighbouring residences and delayed significantly in remedying this.
 - The respondent concentrated three propane cannons in one area of the field exceeding the density permitted under the Guidelines.

- Early in the season, the respondent operated one cannon at a frequency not permitted by the Guidelines but immediately corrected the setting.
 - The respondent operated one or more cannons during the mid-day break but later adjusted the timer to correct the setting.
 - The respondent's field worker operated an orchard pistol within the 200 metre setback from neighbouring residences which is not permitted under the Guidelines.
98. The panel finds that because of the manner in which other audible bird scare tactics were put into use by the respondent farm, their use was not consistent with normal farm practice.
99. In coming to its decision, the panel notes that the issue in this case is not the noise disturbances themselves because some level of noise disturbance is permitted provided noise making devices are used and operated in accordance with normal farm practices.
100. In this case, the evidence establishes that the respondent has been repeatedly non-compliant with the Guidelines and has failed to give any consideration to minimizing the noise impact on his neighbours despite numerous complaints and frequent advice and assistance from both the Ministry and BCBC. We have found the noise resulting from the farm operations is not consistent with normal farm practices. For this reason, the panel considered ordering the respondent to cease the use of propane cannons and orchard pistols entirely. However, we accept the KP's conclusion that bird predation may sometimes be an issue for this farmer given the proximity of roosting sites. Instead, the panel has determined that past non-compliance, despite the on-going efforts of BCBC, its grower liaison, the Ministry of Agriculture representatives and by law enforcement officers, is a relevant factor which warrants a modification order that gives the respondent the ability to continue the use of audible bird scare devices but under more restricted circumstances than set out in the Guidelines.
101. This will mean that the respondent will likely have to make greater use of non-audible bird scare devices. The panel cautions the respondent that if there are further substantiated complaints that he is not complying with the following modification orders, he may face further serious consequences including an order that he cease the use of all noise making devices on this farm.

ORDER

102. Pursuant to s. 6 of the *FPPA*, the panel orders the respondent, Gurdeep Sidhu, in each year that he intends to use audible bird scare devices to modify his farm practices so that they comply with the Guidelines as modified by the following:
- (a) Prepare a bird predation management plan that complies with the Guidelines as modified by this Order. The respondent shall provide a copy of the plan to BCBC and the appropriate Ministry agent or employee for comment and shall make any changes to the plan as recommended by them. The respondent shall then provide BCBC and the Ministry agent or employee with a final copy of the bird predation

management plan before starting to use audible bird scare devices in each year. The respondent shall update the plan to reflect any changes made during the season and provide all updates to both BCBC and the Ministry. The plan (including monitoring records) shall be available on the farm at all times for use and review.

- (b) Comply with the bird predation management plan. If the respondent is not present on the farm on a full-time, daily basis, he shall designate and adequately train an individual who will be responsible for carrying out the bird predation management plan by monitoring and documenting bird presence, ensuring that all bird scare devices are operating within the Guidelines as modified by this Order and addressing any device malfunction. The person must be given the authority to and be instructed to turn off the propane cannons if the bird feeding pressure does not warrant their use. The respondent must advise BCBC of the person responsible for carrying out the bird predation management plan and provide the contact information for that individual.
- (c) Restrict use of audible bird scare devices on the farm to a maximum of three devices and only two of such devices can be propane cannons. (Appendix C to the KP report shows recommended placement for two propane cannons and one electronic device such as a Bird Gard.) The propane cannons must not be used or located within 200 metres of neighboring residences without the occupants' written consent. (Required 200 metre setbacks from existing residences are shown in the map attached as Appendix B to the KP report.) Electronic devices can be used with a lesser separation distance to residences of 100 metres. Any propane cannons placed in the front (west field) must be fixed to fire only in a northerly direction, away from residences to the south and west.
- (d) At the start of the season, operate propane cannons at the lowest frequency setting. The setting can only be increased if and when justified by bird feeding pressure. Bird feeding pressure must be monitored and documented daily and propane cannons and other noise devices must only be operated when crops are threatened. Propane cannons must not be operated when farm crews are in the field.
- (e) Orchard pistols must be used only between the hours of 6:30 am and 8:00 pm and only when propane cannons are not operating and when justified by bird feeding pressure. Orchard pistols must not be fired if there are horses with handlers in neighbouring paddocks or when horses are being ridden on adjacent properties and roads. In addition, orchard pistols must not be fired in a southerly direction (toward the complainant's farm) or fired within 200 metres of any residences (200 metre setbacks from existing residences are shown in the map attached as Appendix B to the KP report).
- (f) Other audible bird scare tactics such as banging on buckets or pails may be employed but only within the field, when justified by bird feeding pressure and in such a manner as to minimize noise impacts on neighbours. The respondent is to cease the practice of honking vehicle horns while driving along the roads adjacent to

the field but may continue to use an ATV within the field between the hours of dawn and dusk in compliance with the Guidelines.

103. Pursuant to s. 6.1 of the *FPPA*, these Orders may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Dated at Victoria, British Columbia this 24th day of May, 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

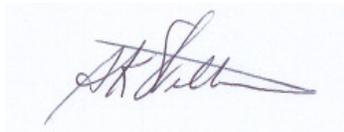
Per:



Carrie H. Manarin, Presiding Member



Ron Bertrand, Vice Chair



Suzanne K. Wiltshire, Member

CORRIGENDUM

Date Released: June 27, 2013

[1] This is a corrigendum to the panel's decision issued May 24, 2013. Subparagraph 102 (c) of the decision is amended to read as follows:

- 102(c) Restrict use of audible bird scare devices on the farm to a maximum of three devices and only two of such devices can be propane cannons. (Appendix C to the KP report shows recommended placement for two propane cannons and

one electronic device such as a Bird Gard.) The propane cannons must not be used or located within 200 metres of neighbouring residences without the occupants' written consent. (Required 200 metre setbacks from existing residences are shown in the map attached as Appendix B to the KP report.) Electronic devices can be used with a lesser separation distance to residences of 100 metres. Any propane cannons placed in the front (west field) must be fixed to fire only in a northerly direction, away from neighbouring residences.

Dated at Victoria, British Columbia this 27th day of June, 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Carrie H. Manarin, Presiding Member



Ron Bertrand, Vice Chair



Suzanne K. Wiltshire, Member