



September 2, 2011

File #11-07, 11-08, & 11-09

DELIVERED BY EMAIL

John G. Ofiesh
[REDACTED]

John Alexander, Counsel
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John David Elving
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Dean E. Knapp
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Dear Sirs:

SUMMARY DISMISSAL APPLICATIONS - DECISION

Introduction

1. In October 2010 Mark Falck filed a complaint with the BC Farm Industry Review Board (BCFIRB) under section 3 of the *Farm Practices Protection (Right to Farm) Act* R.S.B.C. 1996, c. 330 (*FPPA*) with respect to the use and management of propane cannons by Beckwith farm in the period from April to October 2010. That complaint purported to be on behalf of the neighbours of Beckwith farm. Mr. Falck was informed by BCFIRB staff that he could not file the complaint on behalf of his neighbours but only for himself. The complaint named as respondents Island Berry Company Ltd. and Beckwith Farm and indicated these respondents were also known as Beckwith Holdings Ltd. and Merdyn Development Group.
2. Following an early case management conference, BCFIRB retained two experts (Knowledgeable Persons) to prepare a report to assist with the possible settlement of the Falck complaint. The District of Saanich and BARA were granted intervener status. The District of Saanich then also retained an expert to assist with resolution of the complaint. The experts' reports were received and provided to the parties and interveners in the Falck complaint. The parties then engaged in settlement discussions until mid-May 2011 and when discussions failed to resolve the matter the Chair of BCFIRB appointed a panel to hear the complaint.

3. In a pre-hearing conference held at the end of May 2011, Mr. Falck was again advised that he could not file the complaint on behalf of neighbours and confirmed he would proceed with himself as the sole complainant. Counsel for the respondents advised that Beckwith Holdings Ltd. was the sole owner and operator of the farm in respect of which the complaint had been filed and it was agreed that the complaint would proceed against Beckwith Holdings Ltd. as the sole respondent.
4. Following that three new complaints were filed in the first half of June, 2011 (the “June complaints”) with respect to the use of propane cannons on the Beckwith farm. Except for the name and address of the complainant, the June complaints and the Falck complaint are all identical as they are copies of the original complaint filed by Mr. Falck in October 2010. The new complainants are: John Ofiesh, John Elving and Dean Knapp.
5. Island Berry Company Ltd. and Beckwith Holdings Ltd. filed applications on June 23, 2011 under section 6(2) of the *FPPA* with respect to each of the June complaints requesting that the complaint not be forwarded to a panel for the purposes of a hearing.
6. Section 6(2) of the *FPPA* provides:
 - (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.
7. The Chair of BCFIRB designated this panel to hear the section 6(2) applications. The applications were heard by way of written submissions. Written submissions were received from each of the June complainants and the respondents’ reply to the submissions filed by the complainants was received on July 12, 2011. The applications and all submissions have been considered by the panel.

Respondents’ Submissions

8. The applications state that Island Berry Company Ltd. is not an owner, operator or occupier of the Beckwith farm property and that none of the activities of Island Berry Company Ltd. or Merdyn Development Group relate to the matters of the June complaints. The respondents submit that the inclusion of Island Berry Company Ltd. and Merdyn Development Group as respondents is unnecessary and vexatious and they should not have been named as respondents.

9. The respondent Beckwith Holdings Ltd. asks that the June complaints be summarily dismissed pursuant to section 6(2) and submits:

- The June complaints are frivolous and/or made in bad faith to the extent the complaints relate to the current farming activities and operations carried out by Beckwith Holdings Ltd. on their land. The use of propane cannons on the Beckwith farm ceased Oct 19, 2010. Since that time Beckwith Holdings Ltd. has finalized and published a bird predation management plan for 2011 in keeping with the recommendations of the experts retained by BCFIRB and the District of Saanich in connection with the Falck complaint. While the bird predation management plan continues to contemplate the potential use of propane cannons it does so as a last resort measure. Consistent with the plan there was no cannon use in 2011 prior to the filing of the June complaints.
- The June complaints do not allege any cannon use in 2011 and make no allegations of current aggravation. They offer no new or different perspective and make no allegations that these complainants are impacted differently than Mr. Falck as contemplated in BCFIRB's multi-party ruling in *Miller v. Pan-O-Ramic Farms Ltd.* (January 8, 2009)¹. The June complaints add nothing to the matters at issue in the Falck complaint. As such any separate complaints at this time are frivolous.
- The Falck complaint is at an advanced stage and includes the District of Saanich as an intervener which the June complaints do not. The June complaints contribute nothing to the issue of cannon use on the Beckwith farm and therefore are frivolous and not in good faith.
- There is no evidence the June complainants are aggrieved by noise. At best, they may have been between April and October 2010.
- While section 3 has no express limitation period and multiple complaints that are timely may be heard together, section 3 must be interpreted so as to require complaints be made within a reasonable time, failing which a person is no longer aggrieved. Here the June complaints have been filed too late to consolidate them with the Falck complaint and this will inevitably result in 2 sets of hearings.

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Complainants' Submissions

10. Mr. Ofiesh requests that his complaint proceed to a hearing and consents to the hearing of his complaint at the same time as the Falck complaint. With respect to the respondents' submissions he responds:

- The inclusion of others than Beckwith Holdings Ltd. as named respondents was done in an attempt to be complete based on the limited information available. He consents to the correction of the name of the respondent or respondents.
- The complaint is neither frivolous nor made in bad faith. Cannons have been fired outside the "prescribed farm practices guideline".
- The complaint is about the use of cannons in 2010. He makes no complaint about cannon use after that to the time of his complaint. However, there is nothing yet that would limit the use of cannon tomorrow.
- There is no time limit set for a complaint. He filed the complaint after learning from Mr. Falck that such a process was available.
- The complaint brings a unique perspective in that he lives some 2 miles apart from Mr. Falck on the perimeter of the Blenkinsop Valley. This distance makes it evident that the farm's impact extends beyond a small locale. Attending as a witness for Mr. Falck as suggested by the respondent is not sufficient. In *Miller* BCFIRB recognized that each person aggrieved has an obligation to raise the matter individually.

11. Mr. Elving submits that his complaint is neither vexatious nor frivolous. He states that he is personally aggrieved by noise from the use of propane cannons and other noisemakers at the Beckwith farm. He asks that his complaint proceed to a hearing and be consolidated with the Falck complaint and the other June complaints.

12. Mr. Knapp states that he is concerned about the noise and that the nature of some complaints will differ from others due to individual circumstances.

Analysis

A. Proper Respondent(s)

13. As the Falck complaint originally did, the June complaints identify Island Berry Company Ltd. and the Merdyn Development Group, as well as Beckwith Holdings Ltd. and Beckwith farm, as respondents.

14. The Falck complaint has since been amended by consent to reflect that the proper respondent is Beckwith Holdings Ltd. as the owner and operator of the Beckwith farm.
15. The applications confirm that Beckwith Holdings Ltd. is the sole owner, occupier and operator of the property and the farming operations comprising the Beckwith farm in the Blenkinsop Valley that is the subject of the June complaints.
16. The complaints as against Island Berry Company and Merdyn Development Group when they are not owners, occupiers or operators of the Beckwith farm are frivolous and vexatious. We do not consider the complaints to have been made in bad faith against these persons and accept Mr. Ofiesh's explanation that these persons were included only in an attempt to be complete. We order that the June complaints not proceed as against Island Berry Company Ltd. and Merdyn Development Group and that the June complaints be amended to reflect that the sole respondent is Beckwith Holdings Ltd., the owner and operator of the Beckwith farm.

B. Summary Dismissal Request

17. In the *Miller* complaint decision referred to above, the question was whether a number of people who had signed a petition in support of the filing of a complaint and had contributed to the \$100 filing fee could properly be considered as co-complainants. The decision was that there is no provision under the *FPPA* for multiple persons to file a single complaint.
18. For the same reasons as stated in *Miller*, a single complaint cannot be filed on behalf of a group of neighbours. This was explained to Mr. Falck at least twice, the last time at the pre-hearing conference relating to his complaint held at the end of May 2011.
19. The June complaints were filed shortly after in June 2011. This is consistent with Mr. Ofiesh's statement that he filed his complaint after learning he could do so from Mr. Falck.
20. As stated in *Miller*:

The *Act* sets out the rules by which a person can lodge a complaint with the British Columbia Farm Industry Review Board (BCFIRB). There is no provision allowing for multiple persons to file one complaint. Rather the *Act* provides that a person who is aggrieved by a farm practice may file a complaint; the notice of complaint must contain a statement of the nature of the complaint and the name and address of the person making the application and be accompanied by the prescribed fee. These minimal requirements are intended to give the farmer a general idea as to the nature of the complaint and the name and address of the complainant. They also show that a farm practices complaint is personal to the person making it, in the same way a nuisance complaint would be in a court of law.

The legislation recognizes that each person likely has a unique perspective as to the nature of the complaint as a result of personal circumstances (such as the proximity of his or her residence in relation to the farm, the use of his or her property, varying microclimates or geographical features).

21. In the present matter each of the June complainants, because they live in different locations in the area surrounding the Beckwith farm, is likely to have a unique perspective as a result of their personal circumstances. As noted by Mr. Ofiesh, he lives some two miles distant from Mr. Falck and believes he will bring a unique perspective to the issue of noise from the firing of propane cannons on the Beckwith farm.
22. On their face, we find no reason to conclude the June complaints are frivolous, vexatious or not made in good faith. Each is a complaint brought by a person living in the area surrounding the respondent farm who alleges that he was personally aggrieved by the farm's use and management of propane cannons in 2010.
23. We note the respondent farm's submission that it now has a bird predation management plan for 2011 and that under that plan cannons are to be used only as a last resort and have not been used in 2011 to the date of the applications. However this does not address the concern articulated by Mr. Ofiesh that there is nothing that would limit the use of cannon tomorrow. Without something more, either an agreement with the farm or an order if the panel were to make one after a hearing on the merits, there is nothing to say that the farm could not revert to its previous 2010 cannon use and management practices for the same purposes for which it used them in 2010, which we understand to be the protection of immature blueberry bushes from predation by geese. While any order made would be directed to the use of cannon for the purposes they were used in 2010, it would be enforceable with respect to future cannon use for the same or similar purposes. It should be noted by the June complainants, however, that any such order would not be applicable to the use of cannon for other purposes such as the protection of the blueberry crop once the bushes have matured and the farm becomes a producing blueberry farm as the considerations would be different in such circumstances.
24. While the perspective of each of the June complainants might be brought forward by having Mr. Ofiesh and the other complainants appear as witnesses for Mr. Falck in the hearing of his complaint, we note every complaint is site specific both as to the respondent farm and the complainant's property. As witnesses, the June complainants' evidence may be relevant to the issue of whether or not Mr. Falck was aggrieved by the farm's use of propane cannons as such evidence might assist him in proving that cannons were firing on the Beckwith farm in a certain period and were loud and noisy. It may also have relevance to the magnitude of the disturbance experienced by Mr. Falck.
25. More importantly, if the June complainants were to appear only as witnesses in the Falck

complaint rather than in their own respective complaints as suggested by the respondent farm, this could give rise to a number of procedural issues as noted in *Miller*.

26. From the perspective of the June complainants, perhaps the most significant of these are that they would not be a party to the complaint and would not be able to seek to enforce any order made in the Falck matter or, if not satisfied with the decision in the Falck matter, have the right to appeal that decision.
27. With respect to the time of filing of the June complaints, the notices of complaint make it clear that the complaints relate only to the respondent farm's use of propane cannons between April and October 2010. There is no allegation that the disturbance continued after that, indeed Mr. Ofiesh states it did not. Some 7 to 8 months passed after the alleged use of cannons by the farm and the filing of the complaints.
28. However, this passage of time must be viewed in the context of the initial Falck complaint which purported to be made on behalf of the neighbours and the fact that Mr. Falck was still indicating his complaint was being made on behalf of the neighbours at the end of May 2011. Once Mr. Falck clearly understood that he could bring a complaint only on his own behalf, very little time passed before the June complaints were filed.
29. In any event, we do not consider the intervening period between the alleged cessation of cannon use in 2010 and the filing of the complaints to be significant. Certainly, it is not significant enough to deprive the June complainants of their right to bring their own complaints so that they will have standing as parties to a complaint and be able to enforce an order or appeal a decision made in relation to their respective complaints.

Decision

30. The applications are allowed to the extent that:

We order that the complaint of Mr. Ofiesh filed June 8, 2011, the complaint of Mr. Elving filed June 9, 2011 and the complaint of Mr. Knapp filed June 14, 2011 not proceed as against Island Berry Company Ltd. and Merdyn Development Group and that these complaints be amended to reflect that the sole respondent is Beckwith Holdings Ltd.

31. The applications are otherwise dismissed and each of the complaints as so amended will proceed to a hearing.
32. Finally, we note that while the Falck complaint has proceeded, it is now scheduled to be heard in January 2012. We anticipate that the June complaints could be heard at the same time as the Falck complaint and note Mr. Ofiesh and Mr. Elving agree with their respective

complaints being heard at the same time as the Falck complaint. Mr. Knapp has not addressed this issue. The respondent farm in its applications expressed reservations as to the hearing of the June complaints at the same time as the Falck complaint because of possible delay in the hearing of that complaint. However, at that time the Falck complaint was scheduled to be heard in early October.

33. We order that the June complaints be heard at the same time as the Falck complaint. The scheduled hearing dates are January 9 to 13, 2012. A prehearing conference will be arranged with respect to the June complaints during which the parties will be given an opportunity to make submissions to the panel with respect to the hearing of the new complaints at the same time as the Falck complaint. The panel will then issue directions to ensure an efficient hearing of all four complaints.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Suzanne K. Wiltshire, Presiding Member



Cheryl Davie, Member



Derek Janzen, Member

cc: Mark Falck
Carrie MacPhee, District of Saanich
Jim Griffith, BARA
John Bremner, BARA