

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 OPERATION OF A CHERRY ORCHARD
IN OSOYOOS, BRITISH COLUMBIA

BETWEEN:

VICKY PARKER, WALTER PARKER, AND JOANNE PARKER

COMPLAINANTS

AND:

JOSEPH MACIEL AND MARIA MACIEL

RESPONDENTS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Garth Green, Member
(Panel Chair)
Christine Elsaesser, Vice-Chair
Barbara Buchanan, Member

For the Complainants

Vicky and Joanne Parker

For the Respondents

Joseph Maciel Jr.

Date of Hearing

January 6, 2006

Place of Hearing

Kelowna, British Columbia

INTRODUCTION

1. Under the *Farm Practices Protection (Right to Farm) Act* (the “Act”), a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to the British Columbia Farm Industry Review Board (the “Provincial board”) for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, the Provincial board is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, the complaint is dismissed. If the practice is not a normal farm practice, the Provincial board can order the farmer to cease or modify the practice.
2. The Complainants, Vicky and Walter Parker and their daughter Joanne made a complaint to the Provincial board on June 20, 2005. The Parkers asked for a hearing to determine whether the use of a propane cannon by Joseph and Maria Maciel on their cherry orchard accorded with normal farm practice. The Complainants contend that the manner in which the propane cannon is being operated causes them sleep disturbance and interferes with their ability to enjoy every day life. The Complainants seek an order from the Provincial board requiring the Maciels to implement bird predation management practices to mitigate the impact of the cannon on their lives.
3. The Respondents contend that they have operated the same propane cannon in the same manner since purchasing the farm some 17 years ago. They are in a farming area where the use of a propane cannon is normal and they suggest that increased sensitivity on the part of the Complainants is what underlies this complaint.

ISSUE

4. Are the Respondents’ orchard operations with respect to bird scare devices conducted in accordance with “normal farm practice”, given that the propane cannon:
 - a) is continuously pointed in an easterly direction toward the Complainants’ residence;
 - b) has been turned on as early as 5:00AM and shut off as late as 9:00PM;
 - c) is pointed towards a large commercial property causing noise amplification off the buildings;
 - d) is set at the maximum volume causing physical compression against the body; and
 - e) fires continually at five minute intervals.

FACTS

5. The Complainants’ property is situated on the west side of Highway #97 between Highway #3 and 74th Avenue in Osoyoos. The front of their residence faces east with the house located close to the highway. The Complainants’ western property

line is common with the eastern boundary of the Respondents' farm, bordering the Respondents' property near the southeast corner.

6. The Respondents carry on mixed farming on approximately 4.45 ha. The farm is situated between Meadowlark Drive and Highway #97. A motel and pub borders the property on the north and another cherry orchard borders it to the south. Approximately 1.1 ha. of the farm is in cherries, split into two narrow, 0.6 ha. strips, running east-west from Meadowlark Drive to Highway 97, at the north and south sides of the farm. The Respondents grow two different varieties of cherries, maturing at different times. Birds are initially attracted to the earlier ripening cherries. The propane cannon is initially located in the north (upper) block in early June and moved to the south (lower) block later in June as cherries ripen. The cannon is in the lower block (closest to the Complainants) for approximately 3 weeks each year firing throughout the day. The Respondents have used this propane cannon for 27 years and until the 2003 growing season, it had never been calibrated and firing frequency was variable.
7. The propane cannon now fires every 5 minutes throughout the day. There is no volume control on the cannon. The Respondents have had vandalism problems on their orchard and now keep the propane cannon on a wooden shipping pallet, placing it in the orchard every morning and removing it every evening.
8. The former owner of the motel and pub complex on the east boundary of the Maciel farm had issues with the Maciels' use of the propane cannon. He purchased bird distress devices (also known as chirpers and screechers) for the Maciels so that they would limit the use of the propane cannon near the motel. The bird distress devices located in the lower orchard were stolen in 2002 and they have not been replaced.
9. In March 2005, a supermarket was constructed on the east side of Highway #97 directly across from the Parker property. The supermarket is a large concrete block building facing Highway #97. A new bowling alley was built on the west side of Highway #97, two lots south of the Complainants' residence. Both buildings create surfaces that reverberate the percussion of the propane cannon.

SUBMISSION OF THE COMPLAINANTS

10. Vicky Parker and her daughter Joanne Parker appeared on behalf of the Complainants. The Complainants moved to Osoyoos in 1992 and have lived next to the Respondents' orchard for 13 years. They consider themselves very supportive of agriculture and are not against farming. They contend that over the years the propane cannon on the Respondents' farm has been increasing in volume and frequency. During the summer of 2005, the propane cannon became unbearable and interfered significantly in their ability to enjoy their home. When the propane cannon is in the lower orchard, they cannot spend time in their yard and do not get any relief by going indoors. In order to counteract the propane

cannon, they wear earplugs and run a fan when trying to sleep. Vicky Parker states that she can feel the cannon's compression on her chest if she happens to be in the yard when it fires. She sleeps in the basement to avoid the noise. The disruption of their normal lifestyle has created an extreme amount of interpersonal stress within their family especially given her husband's poor health.

11. During 2003, 2004 and 2005, Mrs. Parker kept a daily log of propane cannon activity on the Respondents' farm. The log shows that the propane cannon fires continuously in 5 minute intervals from as early as 5:20AM to as late as 9:05PM. In 2005, during the time the propane cannon was situated in the lower orchard, it was closer to the property line than in previous years and was frequently pointed at her house, within 300 ' or 92 m. of the property line.
12. Mrs. Parker states that she had a cordial relationship with the Maciels for the first 10 years. However, the relationship deteriorated following the disappearance of bird distress devices in 2002. The Maciels did not replace these devices in the lower orchard, instead relying on the propane cannon to scare the birds. During one particular conversation in 2002, Mrs. Parker asked Mrs. Maciel if the cannon could be muffled owing to her husband's ill health but was distressed to find that the cannon was placed in the lower orchard within 30 minutes of the conversation. Since that 2002 conversation, the parties have not spoken.
13. The Complainants called John Slater, the Mayor of Osoyoos, as a witness. Mr. Slater is aware of numerous verbal complaints from Osoyoos residents regarding the Respondents' use of their cannon. Mr. Slater forwarded the complaints on to Mr. Tomlin, Bylaw Enforcement Officer who then attended the farm to discuss the complaints. Mr. Tomlin asked the Maciels to point the cannon away from the Parker residence but after this visit, according to a letter from Mr. Tomlin and tendered by the Complainants, he observed the cannon pointing toward the Parker residence in June 2005.
14. Mr. Slater operates a commercial greenhouse operation on 74th Avenue, approximately 400 m. from the Respondents' orchard and he hears their cannon. He confirmed that prior to 2003, the cannon fired every 2-3 minutes but that it was now calibrated to 5-minute intervals.
15. In or around 2003, Mr. Carl Withler of the Kelowna office of the then Ministry of Agriculture Fisheries and Foods (now Ministry of Agriculture and Lands or "MAL") attended the farm to calibrate the cannon and instruct the Respondents on how to place and use the cannon in accordance with the Ministry's Wildlife Damage Control Guidelines¹. The Complainants maintain that Mr. Withler advised the Respondents that for maximum effectiveness the propane cannon should be rotated and positioned in different places in the orchard. Mrs. Parker contends that this is not being done; when the cannon is in the lower orchard it is always located

¹ The Ministry of Agriculture, Fisheries and Food published the Wildlife Damage Control Guidelines in February 2002 and the Interior BC Wildlife Damage Control Guidelines in April 2003.

in the same place, directed toward their residence. Mr. Slater confirmed that he had observed the cannon pointed in an easterly direction (towards the Complainants) after Mr. Withler's meeting in 2003.

16. The Complainants observe that MAL has recognised the potential for problems in urban/rural interfaces and developed the 2003 Guidelines for the use of bird scare devices. The 2003 Guidelines suggest that farmers communicate their integrated pest management plan to neighbours to promote understanding and also recommend using different devices in a variety of ways so that birds do not acclimatise to the tactics. The Complainants argue that the Respondents are aware of the 2003 Guidelines yet they do not follow them.
17. Mrs. Parker stressed that this complaint is solely about the use of the propane cannon and that she has no complaints with any of the Respondent's other farm practices. By way of remedy, the Complainants asked the Panel to order:
 - that the cannon never be pointed in the direction of their property;
 - that the cannon be kept a minimum of 300' (92 m.) from their property line;
 - that the cannon's use be restricted to one blast every 5 minutes between 6:00AM and 8:00PM;
 - that the cannon only be used when predatory birds are observed in the area;
 - that the Respondents explore the use of alternative bird scare devices such as balloons and ribbons in the lower orchard, similar to their use in the upper orchard;
 - that the Respondents provide 10 days written notice of the commencement of cannon operation and a schedule of operating times;
 - that bird distress devices from the upper orchard be moved to the lower orchard as soon as picking begins in the upper orchard; and
 - the Respondents respect requests for modified cannon use on special occasions.

SUBMISSION OF THE RESPONDENTS

18. The Respondents were represented by their son, Joseph Maciel, at the hearing. Mr. Maciel Jr. stated that he and his parents have owned the orchard in question for the past 30 years and in the same manner as other orchardists in the area. He further states that the Complainants accepted his parents' agricultural practices since moving to the area. He believes that the Parkers enjoyed being his parents' neighbours and that his parents have been reasonably good neighbours to the Parkers.
19. The propane cannon which is the subject of this complaint is the original cannon and has been used on the orchard for many years. It can only be adjusted for firing interval and not volume. He believes it was calibrated to fire at 5-minute intervals

after the 2003 growing season to conform to the MAL regulations. Mr. Maciel Jr. contends that his parents only operate the cannon at permissible times and that they point it away from adjacent residences. The cannon only fires for approximately 3 – 4 weeks of the year, a very short time, and not sufficiently long enough for the Parkers to have a legitimate complaint about its operation. Further, other cherry orchards in the immediate area also use propane cannons. Mr. Maciel Jr. challenged the Complainants on how they could discern the Maciel cannon from others in the area; he says it is unfair that his parents have been singled out.

20. With respect to the Complainants' suggestion that the Maciels use bird distress devices and netting, Mr. Maciel Jr. disagrees. Bird distress devices are neither prudent nor practical as they are not effective in tall trees; there is no access to power in that part of the orchard and there are vandalism concerns. Given that these devices are expensive, and they cannot get insurance for them, his parents are not inclined to replace the ones that were stolen. With respect to netting, his parents rejected this option as the trees in the lower orchard are too tall, making netting neither effective nor practical.
21. Mr. Maciel Jr. argues that his parents are simply trying to make a living and do what they have to do to protect their cherries from birds. He maintains that it is not his parents' practices that have changed but rather it is the Parkers tolerance levels that have changed. Activity that they once accepted is now intolerable. He argues that it is not appropriate for the Parkers to ask his parents to do something that would "preclude protecting their crop" simply because the Parker's attitudes have changed. Mr. Maciel Jr. argues that "farmland is not parkland"; farmers need to farm without being threatened or harassed. He asks the Panel to "tell the Parkers that it is unreasonable to move next to farmland and expect it to be parkland". Further, he argues that the new developments across the road from the Parkers are a major contributor to the noise problem and suggests that it would be more appropriate for the Parkers to seek remedies from the developers or the municipality rather than his parents.

DECISION

22. Resolving a complaint under the *Act* requires the Panel to undertake a two-step analysis. First, the Panel must be satisfied that the Complainants are aggrieved by odour, dust, noise or some other disturbance emanating from a farm operation. If the Complainants fail to establish that they are aggrieved, the complaint must be dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice. If however, the Panel finds that the initial threshold question has been met, it must go on to make a determination as to whether the grievance results from a normal farm practice.
23. Section 1 defines "normal farm practice" as follows:

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

- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
- (b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

24. In determining what is meant by “normal farm practice”, the inquiry is fact and site specific. The Panel looks to whether a particular practice is consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. This involves a contextual analysis where industry practices are examined and weighed with factors such as the proximity and impact on neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, the size and type of the operation subject to complaint, the nature of the disturbance and the relative timing of the establishment of the farming operation and the occupancy of those who complain.
25. In this case, the Panel accepts that the Complainants have met the threshold question of being aggrieved by the Respondents’ farm management practices. The ongoing nature of the complaint was confirmed by the testimony of the Parkers and Mr. Slater. Mrs. Parker also kept a log of the Respondents’ use of their cannon which documents the extent of the disruption over time. These factors when considered in conjunction with the proximity of the Complainants’ home to the Respondents’ orchard satisfies the Panel that the Complainants have sufficient personal interest in the subject matter of this complaint. Having found the threshold question met, the Panel will consider whether the Respondents’ use of bird scare devices accords with normal farm practice.
26. In general, the use of bird scare devices such as electronic bird distress calls and propane cannons to combat bird predation of an agricultural crop is a common industry practice in BC. However, the Provincial board in the *Wright v. Lubchynski* decision, August 12, 2002, recognised that account must be taken of the fact that “the management of the [bird scare device], that is placement, number, direction, time and frequency of firing, can be affected by the proximity of neighbouring residences or the geography of the areas”.
27. In this case, the Complainants testified as to the disruption the propane cannon causes on their lifestyle. During propane cannon season, the cannon disrupts sleep, prevents their use of the backyard and causes discord and upset in the family. Mrs. Parker’s log documents the hours the cannon operated for the past 3 years; on occasion the cannon began firing around 5:20AM and continued after 9:00PM. Although a representative from MAL has instructed the Respondents in the proper use of the cannon, they do not follow the Guidelines in their day-to-day operation of the cannon. Mr. Tomlin, the Osoyoos Bylaw Enforcement Officer has visited the Maciels and asked them to point the cannon away from the Parker residence. Since that time, the Parkers, Mr. Slater and Mr. Tomlin have all observed the

cannon pointing at the Parker's residence.

28. The Respondents chose not to testify in these proceedings. Mr. Maciel Jr. instead opted to cross-examine the Complainants and their witness in an attempt to discredit their observations and recollections of the cannon use on the property. Mr. Maciel Jr. resides in Kelowna and is only a periodic visitor to his parents' farm. As such he was unable to directly contradict the evidence of the Complainants, instead he argues that the Parkers' complaint arises out of external societal, local and individual factors beyond his parent's control:
- Other farms in the area use propane cannons in a similar manner and as such the Maciels should not be singled out.
 - The Complainants have been neighbours for 13 years and have over time become less tolerant of the propane cannon.
 - The orchard is farmland, not parkland and the Complainants should tailor their expectations to more reasonable expectations for people living adjacent to farms.
 - The municipality bears some of the blame for allowing the new development across the road which has exacerbated the sound impact of the cannon.
29. The thrust of the Respondents' argument is that they have not changed the way in which they operate their cannon for 27 years. In that time, there were no complaints. As such, this complaint must arise because of factors unique to the Complainants and not factors associated with normal farm practice.
30. The Panel agrees with the Respondents that propane cannons, used in conjunction with other control measures, are an effective tool in the prevention of bird predation in orchards. However, it is equally clear that as cannons can have a very real impact on the non-farming community, their operation must be carried out in strict accordance with general guidelines and with due regard to their impact on neighbours. Farmers with non-farming neighbours immediately adjacent to their farms must adjust their operations and their attitudes to that reality. Likewise non-farming neighbours must adjust their expectations. Harmonious coexistence is possible if these basic principles are accepted. Unfortunately, in this case the Respondents' arguments do not accord with these principles. Their position is that they should be allowed to farm in the same way they have done things for the past 27 years, regardless of the development in the area and changes in technology as well as generally accepted orchard management practices. They attribute the problem to factors beyond their control, ignoring their personal experience with the growing reality of the urban-farm interface.
31. We turn now to consider whether the Respondents' use of their propane cannon accords with normal farm practice. On this point, the Panel accepts Mr. Slater's evidence that the only difference between the Respondents' farm, and other farms in the Osoyoos area using propane cannons, is the proximity of residential

dwelling. The Panel heard that other cherry farms in the area use similar propane cannons and that those cannons can be heard throughout the day during cherry season. However, these farms are further away from residential dwellings and therefore, the blasts from their cannons are less intrusive.

32. Proximity is a major contextual factor in the determination of normal farm practice. The Panel accepts the Complainants' evidence that the Respondents' cannon was, in the 2005 season, frequently placed closer than 92 m. from the property line and their residence and it is located in the same general location for the duration of its required use in the lower orchard. We also accept that on occasion the cannon is pointed in an easterly direction, often directly at the Complainants residence, thus exacerbating its impact. The Panel notes that unlike the 2002 Guidelines, the 2003 Guidelines do not specify a specific distance from property lines stating instead the 2003 Guidelines recommend that farmers "should locate devices in a manner to minimise the impact on surrounding residences while maintaining bird control effectiveness" and "should try to alternate or relocate devices being used on a farm operation on a frequent basis to maintain effectiveness".
33. When the cannon starts and stops firing is also an issue in this appeal. Mrs. Parker's log demonstrates considerable variability in the daily start and stop time for the cannon, starting as early as 5:20AM and continuing as late as 9:05 PM. While the Respondents contest some of these times and suggest that the log was not generated contemporaneously, they chose not to testify and corroborate their claims. The 2003 Guidelines indicate that farmers should operate devices only between one half hour before sunrise and 7:00PM local time or dusk, whichever is of lesser duration (sunrise provided by Environment Canada)".
34. The Panel finds that the Respondents are not following the 2003 Guidelines in their orchard management practices. The Respondents appear to base their decisions about locating the propane cannon within the orchard and the start and stop times on their operational convenience rather than a concern over the impact on surrounding residences.
35. The Complainants submit that the Respondents should make use of alternative bird scare devices, such as ribbons and bird distress calls to scare birds out of the lower orchard. The Respondents contend that ribbons do not work and the distress device is not practical as there is no power in the lower orchard and they are expensive and not as effective in tall trees. Vandalism is a problem in the area and it is not economically viable to continually replace these devices. The Complainants also argue that the Respondents could employ netting to protect their crop but the Respondents maintain that netting would not be effective in this area because the older cherry trees are too high.
36. The Panel rejects the Respondents' arguments. The Respondents used bird distress devices in the lower orchard in the past and currently do so in the upper orchard. These bird distress devices were purchased by a previous owner of the motel/pub

complex adjacent to the upper orchard in order to ensure that cannon usage was restricted in that area. These devices were used in the lower orchard until they were stolen. The Respondents have simply chosen not to replace the devices and no other neighbour has graciously offered to purchase them. It is interesting to note that this complaint arises after the bird distress devices were stolen and the Respondents began relying solely on the cannon in the lower orchard. More significantly, the Respondents have not looked at their operation as a whole and designed an appropriate predation management plan for their orchard.

37. It was evident at the hearing that there is a lack of professional input on the farm with respect to effective predation management mitigating adverse impacts on neighbours. In response to the Panel's questions, Mr. Maciel Jr. indicated that his father did not participate in agricultural extension courses nor had he taken any further agricultural education since he started farming. He is not a member of any tree fruit growers association and as such has never received any training available through such organisations. Further, as the Respondents do not ship their cherries to a packing plant they do not have to meet the "best practices" often required of such shippers. From other hearings involving similar complaints, the Provincial board is aware that there is a significant body of knowledge regarding managing bird predation while mitigating effects on neighbours extant in agricultural professionals and orchardists within BC. This appeal may well have not occurred if the Respondents had stayed current with industry developments and taken advantage of the knowledge available to them.
38. The Panel heard much during the hearing about the new building across Highway #97 exacerbating the effect of the Respondents' propane cannon. It is postulated that the building provides a large flat surface from which the sound of the cannon is reflected back toward the Parker residence. While this may or may not be the case, focussing on that argument diverts attention from resolving the farm practices issues on this appeal. As said earlier, as farming areas become increasingly developed and urbanised, farmers must modify their practices accordingly. Finally, the Panel wants to address the Respondents' argument that this complaint is isolated and arises out of the Complainants' growing intolerance to farming in general. The Panel does not agree. The Complainants related their concerns to the Mayor and city council both verbally and in writing. Mr. Slater, the Mayor of Osoyoos, had other residents complain to him or council members about the Respondents' propane cannon. He too expressed concerns about the Respondents' use of their cannon. It is reasonable that the Parkers brought this complaint as they are the most affected neighbour as they live in such close proximity.
39. Having considered all the relevant circumstances and in the absence of any persuasive evidence or argument as to why the 2003 Guidelines should not apply in these circumstances, the Panel finds that the "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances" are for the Respondents to follow the 2003 Guidelines with respect to propane cannon use. The hours of operation set out in the 2003 Guidelines are a

compromise designed to show consideration for neighbours. The farmer's crops are unprotected for a period of time, in order that the neighbour has some period of relief. Accordingly the Panel finds that it is "normal farm practice" for the Respondents to:

- a) determine through the use of a predation management plan when a bird scare device is required for the protection of crops and to use that device only when a problem is evident;
- b) operate bird scare devices between one half hour before sunrise and 7:00PM local time or dusk, whichever is of lesser duration;
- c) use no more than one device per two hectares of cropland at any one time;
- d) locate the device in a manner to minimise the impact on surrounding residences while maintaining bird control effectiveness; and
- e) operate devices on an intermittent basis so that sound is not continuous.

40. The 2003 Guidelines also recognise the merit in a farmer communicating his integrated predation management plan to his neighbours. The more information the neighbours have the better able they will be to plan their lives around potentially disruptive orchard activities. It was clear from the submissions of all parties that communication has been lacking. Mrs. Parker has not spoken directly to the Respondents since 2002. The Panel urges the parties to reconsider this aspect of their relationship; communication can be accomplished in many different ways such as on-farm signals, email, phone messages or written note. Improved communication between the parties will assist in a long-term solution.

ORDER

41. Section 6 of the *Act* provides that a Panel must dismiss a complaint if it is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, and must order a 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. Given that we have found a breach of the *Act* insofar as the farm management practices complained of create excessive noise disturbance, s. 6(1)(b) of the *Act* confers upon the Panel the jurisdiction to order the farm to modify the practices in a manner set out in the order, to be consistent with normal farm practice. Normal farm practice with respect to these issues requires the implementation of reasonable measures to attempt to mitigate the complained of practice.

42. Accordingly the Panel orders the Respondents to modify their farm management practices with respect to the use of a propane cannon and other bird scare devices by:

- retaining a qualified professional(s) to assist in the development of a Predation Management Plan for the entire farm incorporating the 2003 Guidelines referred to in paragraph 40 above and including recommended practices designed to mitigate this complaint, particularly with respect to the effective use of alternative bird scare devices;

- filing a copy of the Predation Management Plan with the Provincial board within 30 days of receipt of this decision;
 - providing the Complainants with a copy of the Predation Management Plan within 30 days of the receipt of this decision; and
 - implementing the Predation Management Plan on their farm within 30 days of the receipt of this decision.
43. Until such time as the Predation Management Plan referred to above is filed with the Provincial board, the Panel orders that the Respondents cease using the propane cannon in the lower orchard.
44. This Panel expects the Respondents full and ongoing compliance with this order.

Dated at Victoria, British Columbia, this 9th day of May, 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by:)

Garth Green, Member, Panel Chair
Christine Elsaesser, Vice Chair
Barbara Buchanan, Member