

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 PROPANE CANNON  
OPERATED BY A KELOWNA, BRITISH COLUMBIA VINEYARD

**BETWEEN:**

JIM WRIGHT

**COMPLAINANT**

**AND:**

ALEX & LOUISE LUBCHYNSKI  
DOING BUSINESS AS  
BEAUMONT ESTATE FAMILY ORGANIC VINEYARDS

**RESPONDENTS**

**AND:**

THE BRITISH COLUMBIA FRUIT GROWERS' ASSOCIATION  
BRITISH COLUMBIA INDEPENDENT GRAPEGROWERS' ASSOCIATION  
OKANAGAN KOOTENAY CHERRY GROWERS ASSOCIATION

**INTERVENORS**

**DECISION**

**APPEARANCES:**

For the Farm Practices Board

Carolyn Askew, Vice Chair (Panel Chair)  
Hamish Bruce, Member  
Richard Bullock, Member

For the Complainant

Alan Hunter  
Jim Wright  
Pat Wright

For the Respondents

Valerie Tait, Agent  
Alex Lubchynski  
Louise Lubchynski

For the Intervenor  
The British Columbia  
Fruit Growers' Association

Glen Lucas, General Manager

For the Intervenor  
British Columbia Independent  
Grapegrowers' Association

Hans Buchler, Director

For the Intervenor  
Okanagan Kootenay Cherry  
Growers Association

David Stirling, Member

Date of Hearing

June 27, 2002

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 Farm Practices Board (“the Board”) for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, the 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 Board is empowered to order the farmer to cease or modify the practice.
2. By letter dated November 2, 2001, Jim Wright (“the Complainant”) applied to the Board for relief from the disturbance caused by the noise from a propane cannon operated for several weeks in September and October, 2001 at a vineyard near his residence in the Lakeview area of Kelowna. The complaint was supported by many other people who signed a petition opposing the use of a propane cannon by the vineyard.
3. Alex and Louise Lubchynski (“the Respondents”) took the position that they were entitled to use the propane cannon as they were operating it in compliance with published guidelines. The “Guidelines” on which they rely were established after the Board’s *Review of British Columbia Ministry of Agriculture and Food Wildlife Damage Control Guidelines as they Apply to the Operation of Propane Cannons* was published in May 1999.
4. The Respondents applied to have the complaint struck out under Section 6 of the *Act* as frivolous or vexatious or not made in good faith. This application was dismissed by letter decision dated February 28, 2002.
5. The Respondents then sought adjournment of this hearing on the basis that June is a busy time for the vineyard. The Respondents were advised in a letter dated June 19, 2002 from Jim Collins, Manager Dispute Resolution Services, that this Panel had rejected that application.
6. In June 2002, The British Columbia Fruit Growers’ Association (the “BCFGA”), the British Columbia Independent Grapegrowers’ Association (the “Grapegrowers’ Association”) and the Okanagan Kootenay Cherry Growers Association (the “Cherry Growers Association”) all sought, and were granted, Intervenor status in these proceedings. Each of these grower associations is concerned that no decision be rendered that negatively impacts the ability of its members to use propane cannons as bird scare devices to protect agricultural crops.
7. The Intervenors were granted status to attend at the hearing, to present evidence, cross-examine witnesses and make submissions. The Intervenors were also directed to file a written statement with the Board and Parties outlining their positions and concerns.

## **ISSUE**

8. The Parties agreed in pre-hearing proceedings that the issues to be determined are:
  - a) is it proper and accepted practice for this farm to use a propane cannon as part of its predation control measures?
  - b) Alternatively, in the 2001 season did the farm locate its cannons as far away from the neighbours as possible?

## **FACTS**

9. The Complainant protested to the Board that the operation of a propane cannon on a 12-acre vineyard entirely surrounded by the Lakeview Heights residential area of Kelowna was not an acceptable farm practice and should be prohibited. The vineyard is operated by the Respondents under the name Beaumont Estate Family Organic Vineyards (“Beaumont Estate Vineyards”).
10. The Complainant and several others who support the complaint are property owners who reside next or near to the Respondents’ grape growing operation. The Lakeview residential area was established some 35 years ago. The Complainant and his spouse Pat Wright moved into their home in 1967.
11. The Respondents only recently began to use the subject property to grow grapes. This 12-acre parcel is in the Agricultural Land Reserve (the “ALR”) and has been largely used for agricultural crops such as apples or nursery plants. Beaumont Estate Vineyards also operates vineyards on two other nearby parcels of land. The Respondents operated a propane cannon on the subject property as their sole audible bird scare device to protect the grapes from damage by birds, particularly starlings.
12. Extensive evidence was called by the Complainant with respect to the Respondents’ use of a propane cannon on the vineyard operation in the fall of 2001 and its effect on the use and enjoyment of his residential property. There are approximately 90 residences within a 300-metre diameter of the centre of the vineyard property. The neighbourhood is semi-rural with a mixture of agricultural activities being undertaken alongside residential properties and hobby farms. The cannon is fired automatically three times every fifteen minutes beginning at 8:00 a.m. and continuing until sunset or later. The cannon was used on this property for the first time in 2001 for a period of 6 to 8 weeks.

13. Several witnesses spoke of shocking and nerve wracking noise, of feeling shock waves through their body, of inability to enjoy being outside on their property, disturbed day-time sleep, interference with enjoyment of songbirds on their property, distress exhibited by pets and of a concussion effect on windows. Every neighbour called as a witness by the Complainant found the noise intolerable. Some expressed concern that the noise was negatively affecting their health. Some expressed doubt that they could continue to reside on their property if a cannon is permitted.
14. The Complainant and witness Alan Hunter referred extensively to a Report to the Minister of Agriculture, Food and Fisheries (“MAFF”) dated February 2002 concerning *The Use of Audible Bird Scare Devices in British Columbia in 2001* (“the Bird Scare Devices Report”). The Bird Scare Devices Report was entered as an exhibit over the protest of Hans Buchler representing the Grapegrowers’ Association. Mr. Buchler’s objection is based on the fact that the Bird Scare Devices Report was published after the complaint was filed and considerably after the grape growing season that gave rise to these proceedings. The Bird Scare Devices Report recommends that a 150-metre separation distance between a propane cannon and neighbouring residences be included in new Guidelines. The Bird Scare Devices Report also recommends that a 300-metre separation distance between propane cannon use and an urban-residential/ALR edge be included in the Guidelines. The Respondents’ vineyard could not meet either of these recommended guidelines.
15. Most of the witnesses called on behalf of the Respondents were themselves grape growers. Each of these growers uses propane cannons during a 4 to 6 week period as part of an arsenal of crop protection devices. Other audible bird scare devices such as bird distress calls, electronic devices and bird expellers were described. Some witnesses also spoke of using shotguns, starter pistols, kites and netting to protect against crop destruction by birds. More than one witness expressed the opinion that propane cannons by themselves are not effective. Grower witnesses testified that cannon use needs to be varied during the day based on bird activity and that cannons need to be moved frequently to be effective.
16. Grape grower Leo Gebert farms a 78-acre parcel that is surrounded on three sides by residences. His bird predation control practices include netting, cannon, bird distress calls and electronic devices. He testified that cannons by themselves do not work; back up devices are needed. When the cannons are in use, he turns them off for 2 to 3 hours at a time if no birds are present and in consideration of his neighbours. If separation distances recommended in the Bird Scare Devices Report were mandatory, he could not use propane cannons at all.
17. Horst Mueller grows grapes on acreage approximately one kilometre from the subject property. His acreage is similarly close to residential property. He uses propane cannons which he places in the middle of the grapeyard. He turns the cannon on when he sees birds. When birds have settled, the cannon is of no use. He does not turn the cannons on all the time; he uses them periodically and frequently turns the cannon off about noon.

18. The Respondent, Alex Lubchynski, gave evidence that he used one certified multi-shot cannon placed near the centre of the property. He said that netting was too expensive and that other noisemakers were less effective against bird predation. The cannon can be turned on and off, as well as set to fire at specific times and at specific intervals. On the subject property, the propane cannon is set to automatically begin firing at 8:00 a.m. and continue firing until sunset or later.
19. The Respondents and all of the witnesses called on their behalf, acknowledged that the noise of the cannon is objectionable. Witnesses said: “You get used to it”.
20. Bert Van Dalfsen, Mechanization Engineer with MAFF, gave evidence with respect to the Bird Scare Devices Report. He stated that the earlier MAFF Guidelines for use of propane cannons had been amended to include recommended separation distances. Mr. Van Dalfsen testified that the purpose of the separation distance guidelines is to address the growing incompatibility between intensive agricultural operations using cannons located across the street from residential property. He also said that buffers are required to minimize the effect of audible bird scare devices.
21. Mr. Van Dalfsen said that propane cannons are the source of the highest number of complaints received by MAFF. He agreed that there is some pressure to set decibel levels on bird scare devices. He disagreed with Ms. Tait’s assertion that if the recommended separation distances were enforced, none of the farms in the Kelowna area would be able to use propane cannons. He did agree that none of the farms in the Okanagan Valley could comply with an optimum separation distance of 600 metres where urban development borders on property within the ALR.

## **SUBMISSIONS OF THE INTERVENORS**

22. By agreement of the Parties and Intervenors, the Intervenors gave evidence and made submissions together in their presentations.
23. David Stirling and his spouse farm 30 acres of cherries and 30 acres of apples in South Kelowna. Bird predation is a serious peril to these crops. Several methods to control birds are used: reflective tape, electronic noise makers, propane cannons, motorcycles riding through orchards, foot patrols and small pistols that fire an explosive shell. Mr. Stirling stated that none of these methods are a solution in themselves but in combination and variation are effective to control bird damage.
24. The Intervenor Cherry Growers Association has more than eighty members in the Okanagan and Creston valleys, all of whom want to maintain the option of using propane cannons as part of a crop protection strategy. Mr. Stirling submitted that the use of propane cannons to control bird predation is a normal farm practice.

25. Glen Lucas, General Manager of the Intervenor BCFGGA gave evidence that the BCFGGA represents 671 commercial fruit growers in the Okanagan-Similkameen valleys. The economic impact of birds on fruit production is severe. Of particular concern is the introduced starling species that causes extensive damage to cherries and some damage to apples. The Intervenor BCFGGA, in cooperation with other commodity associations, is conducting research beginning this year to gather information on best practices for the control of starlings. This problem is not confined to British Columbia or Canada but is a concern wherever agriculture land use and urban land use are situated too close.
26. The Intervenor BCFGGA agrees with many of the recommendations of this Board, MAFF publications, and statements of other commodity associations concerning promotion of public awareness of farming activities and noise, mandatory disclosure statements for inclusion on real estate contracts, registration at Land Title Offices, and establishment of landscape buffers on the non-ALR side of a border with residential properties.
27. Mr. Lucas testified that propane cannons are in common use in combination with other noise deterrents and visual deterrents. Mr. Lucas submits that it is normal farm practice to use propane cannons from dawn to dusk to prevent damage to cherries and occasionally, apples.
28. Hans Buchler, himself a grape grower, gave evidence for the Intervenor Grapegrowers' Association. Mr. Buchler is also active in the British Columbia Wine Institute. Mr. Buchler spoke of the different devices used by grape growers to control bird predation. He stated that auditory devices are economically effective when a property is exposed to low bird predation resulting in a 1 to 10% crop loss. Netting becomes economically effective when a higher bird predation rate results in a 30% crop loss. The cost of netting and other devices is a factor each farmer considers when making an annual guess/estimate of percentage of crop loss due to birds.
29. Mr. Buchler submits that neither the Guidelines nor the Bird Scare Devices Report is binding. He further notes that no standards for use of bird scaring devices have been prescribed by the Lieutenant Governor in Council under the definition of "normal farm practice" in the *Act*. Mr. Buchler is concerned that equitable treatment of persons engaged in agriculture is threatened by land use guidelines pertaining only to farms on the edge of the ALR. This inequality may lead, he submits, to land being removed from agricultural reserves with a consequential negative impact. Mr. Buchler submits that while the use of propane cannons causes a disturbance, it is limited to a 5 or 6 week period. He submits that it is the only effective, affordable option and is a normal farm practice.

## **SUBMISSIONS OF THE PARTIES**

30. The Complainant submits that the location of the Respondents' vineyard makes an obvious case for prohibition of the use of a propane cannon. The Complainant is not trying to set a precedent that would affect other grape growers who are situated differently. The Bird Scare Devices Report shows a consensus amongst people in the Okanagan and Fraser Valley as to required separation distances.
31. Mr. Hunter submitted that while the damage to grapes is quantifiable, the damage caused by loss of enjoyment of property by the neighbours cannot be readily measured. Both the residents and the farmer have a case for compensation. Mr. Hunter further submits that netting is more effective for higher levels of crop damage and that other audible devices are less disturbing. The Complainant urges this Panel to determine that use of a propane cannon by the Respondents on the subject vineyard is not consistent with proper and accepted customs or standards and is not a normal farm practice.
32. Ms. Tait, on behalf of the Respondents, spoke of concern about the scope of the issues raised by this complaint and concern that a precedent not be set that would negatively impact many other similarly situated farms. Farmers need more consideration she submits especially those who, like the Respondent, are starting their agricultural operations. Netting is prohibitive due to the cost. The use of propane cannons is a normal farm practice which the Respondents should be permitted to continue.

## **DECISION**

33. In general, the use of propane cannons to combat bird predation of agricultural crops is a normal farm practice. However, the management of the cannons, 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.
34. The Panel accepts the evidence that as the acreage of cherries and grapes in the Okanagan increases, so does the use of propane cannons as bird scare devices. A similar relationship exists in the Lower Mainland with increased plantings of berry crops. These high value crops contribute significantly to the provincial economy.
35. At the same time, increased urbanization in former farming communities has resulted in more complaints about noise, odour, and other disturbances. This conflict was foreseeable. Historically, local governments have been slow to react in controlling development adjacent to farms and often have contributed little to minimize disputes, considering the conflict to be "someone else's problem". Fortunately this attitude is changing as pressure from the farming and non-farming communities has built.

36. The *Act* was intended to protect farmers from unreasonable complaints of people who are intolerant of disturbances from farm businesses because they are used to city living. Farms are industrial sites although they can be pastoral for much of the year. Potential neighbours must be aware of this and make enquiries and be prepared to tolerate any normal farm practices that already produce a nuisance in that area. An argument can be made that real estate professionals should be obliged to inform potential homeowners of the industrial nature of farm businesses. However, as set out above, the Complainant and his neighbours are not new to the Lakeview area.
37. The Bird Scare Devices Report made recommendations for change to the earlier Wildlife Damage Control Guidelines. Bert Van Dalfsen testified that the Minister of Agriculture has accepted these changes and published them as standards for use by local governments in their bylaws. We concur with the submission of Mr. Buchler to the extent that neither the Bird Scare Devices Report nor the Guidelines are binding on this Panel. Both documents provide guidelines to which this Board may refer in determining particular modifications for particular areas.
38. The Bird Scare Devices Report recommended that no cannons be used on farm properties that are within 300 meters of an urban-residential ALR edge. However, included in the Bird Scare Devices Report is the further recommendation that there be a one-time fund made available to assist the farmers in this situation in protecting their crop with netting. In fact the Bird Scare Devices Report goes further, stating:
- Local governments could provide leadership in developing innovative funding arrangements whereby the farms and their neighbours share the cost of netting crops situated close to the ALR boundary.
39. In the Okanagan a significant percentage of acreage is unable to meet the 300-metre separation distances contained in the Bird Scare Devices Report. The farmers who testified in these proceedings expressed concern that if buffers are required, those buffers will eat away at scarce farmland at the sole expense of the farmer. Farms adjacent to subdivisions but still in the ALR are frequently devoted to the production of high value crops as the likelihood of being released from the ALR appears slim.
40. Damage due to bird predation can be very costly to the individual farm operation. The amount of loss varies from year to year. The Panel heard evidence that cannons are most effective when combined with other bird scaring methods. There was some evidence that netting does not become economical until the loss approaches 30% damage. The evidence of the cost of netting was anecdotal.

41. The subject farm operated by the Respondents (Lot 74, Plan 5381, Kamloops Registry), is located within 150 to 300 metres of approximately 90 residential lots. This 12-acre parcel is in the ALR. There is minimal difference between the relationship of the Respondents' farm to residential neighbours compared to other vineyards operated by the growers who gave evidence. We heard evidence that the orchard which existed on the property before was no longer economically viable. The Respondents determined that organic grape production would prove to be profitable. Part of the cost of grape production is the prevention of bird predation.
42. The subject farm is an obvious example of what happens when farmland becomes surrounded by residential neighbourhoods. The Lakeview neighbourhood is semi-rural. The subject vineyard is within the ALR. Most of the other properties are residential.
43. The Panel is encouraged by the evidence of research being undertaken to find new economically viable solutions to bird predation. Farmers of fruit and grape crops on new and existing acreage located in close proximity to residential properties cannot expect to operate propane cannons indefinitely. The Panel expects that in situations similar to this case, the use of propane cannons will have a short history. Progress on finding alternative bird scare methods needs to continue and the non-farming community is encouraged to participate in finding a solution. It will take a concerted effort by farmers, residents, local and provincial governments to find a better way to control crop damage caused by birds. This effort will likely need to include cost sharing programs like the netting fund referred to in the Bird Scare Devices Report.
44. The Respondents' use of a propane cannon, with the resulting noise, has affected the physical well-being of the Complainant to a significant degree and disrupted the use of his land and the neighbours use of their land during the period of operation of the cannon. The Panel finds that the firing of a multi-shot propane cannon, that is as loud as a shotgun blast, so close to residential neighbours throughout the day for 6 to 8 weeks interferes significantly with the residents' quiet enjoyment of their property.
45. In considering the interference, the Panel has considered the type of interference, the severity, the duration, the character of the neighbourhood and the nature of the Complainant's use of his land. With respect to the character of the neighbourhood, we have considered the zoning, whether the Respondent's conduct changed the character of the neighbourhood and the reactions of other residents in the neighbourhood.
46. The timing of the transformation of the subject property from an orchard to a vineyard is a relevant consideration. The Panel heard evidence that the orchard had not been viable for some time and that the land required renovation to change its use to the high value crop of organic wine grapes. An assertion was made by one of the witnesses for the Respondents that the farm was "here first". For the Complainant it was asserted that the residents were "here first" in relation to the vineyard.

47. The impact of timing has been considered by other Farm Practice tribunals and the courts in Canada where it has been described as “first in time, first in right”. An automatic “first in time, first in right” approach would not be warranted. That would be too restrictive an interpretation of the *Act* and would unduly limit the establishment of new farming operations. The relative timing of the establishment of the vineyard and the occupancy of those who complain of the noise is part of the site-specific circumstances to be considered.
48. Under the *Act*, this Panel must decide if the noise and disturbance caused by the propane cannon of the Respondents is a normal farm practice. The definition of “normal farm practice” found in the *Act* requires us to consider the “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. This means that the same practice may qualify as a normal farm practice in one situation but not in another where the circumstances are different.
49. Of the witnesses called by the Respondents who are engaged in growing grapes, none relies exclusively on propane cannons to control bird predation. Neither David Stirling or Hans Buchler relies exclusively on propane cannons to control bird predation. We refer again to the evidence of Leo Gebert and Horst Mueller that they use the cannon in combination with other devices and do not operate the cannon daily from early morning to dusk.
50. The propane cannon operated by the Respondents on the subject property is set to begin firing and stop firing daily during fixed hours. We heard no evidence of other bird predation control devices being used in combination with the cannon on the property. There was no evidence that the cannon is turned off when birds are not present, or if weather conditions make bird damage unlikely. The Respondents acknowledge that they did not actively manage the cannon like the other grape growers who testified.
51. Accordingly, the Panel finds that the practice of the Respondents that causes the noise and disturbance is not a normal farm practice. To answer the first issue, it is normal farm practice to use propane cannons as part of predation control measures. However, the Respondents’ are using the propane cannon as their single bird predation device. This practice is not a normal farm practice.
52. With respect to the second issue, in the 2001 season, the Respondents did not locate their cannons as far away from the neighbours as possible. Although the Panel appreciates the Respondents’ explanation as to why the cannon was located where it was in the vineyard, the Respondents are ordered to modify the practice to be consistent with normal farm practice.

53. The Respondents are ordered to modify their bird scaring practices for the subject property as follows:
1. limit the number of cannons to one cannon on the subject property.
  2. commence firing the cannon no earlier than 8:00 a.m. and cease firing the cannon no later than 8:00 p.m.
  3. within the hours permitted above, fire the cannon only when and as much as necessary to protect the vineyard from bird predation.
  4. permit the cannon to rotate freely (the Guidelines recommend that the cannon not be directed towards the neighbours' houses, however here, there is no real option).
  5. move the cannon location at least every four days in accordance with the Guidelines.
  6. limit the maximum number of cannon shots to those set out in the Bird Scare Devices Report and only when necessary. The Bird Scare Devices Report limits a multiple shot cannon to no more than 11 activations consisting of a maximum of 33 shots in an hour (multiple shots are considered one activation if they occur within a 30 second period).
  7. legibly mark their audible scare devices with their name and phone number in accordance with the Guidelines.
54. Further, the Respondents are also ordered to modify their practices by
8. using bird predation measures in addition to the propane cannon, such as human activity, visual deterrents or other scare devices on the subject vineyard.
  9. implementing a netting program to begin this 2002 season, such netting to be completed within a reasonable time period.
55. In support of the above directions and of effective production management, the Respondents are strongly advised to develop and implement a Wildlife Predation Management Plan as recommended in the Board's 1999 report. The Plan should be both a written record and an action plan. The written record should note the date and time of the Respondents' observations of the type and number of birds preying on the crop so that any predation pattern such as time of day or weather can be documented to allow for more effective control. The Plan could also substantiate the Respondents' compliance with the requirement that the firing of the cannon be minimized or ceased at times when bird predation is minimal or non-existent. The Respondents' attention is drawn to the model Plan outlined in the MAFF brochure *Integrated Bird Management* (for blueberries) published in June 2000.

56. This Panel requests the Parties and the Intervenors to make submissions by November 1, 2002, as to what a reasonable time period is within which netting of the subject vineyard is to be completed. The panel will issue a supplementary decision on the time period within which netting is to be completed.

## **SUMMARY**

57. The use of propane cannons as a bird-scaring device is a normal farm practice when used in combination with other predation control methods. The bird predation control practice of the Respondents is not a normal farm practice and the Respondents are ordered to modify their practice. The Complainant and other neighbours are encouraged to assist the Respondents in the observation of any predation patterns, and to be prepared to alert the Respondents whenever the crop appears to be at risk. Where as here, a farm business is conducted in such close proximity to residences, all parties need to compromise. Residents cannot expect to completely avoid the noise disruption of propane cannons and expect the farmer to bear the crop loss alone, or to immediately incur the cost of netting. Farmers of such acreage cannot expect to operate without taking neighbours into consideration. A reasonable level of dialogue with neighbours must be established, as well as a predation management plan appropriate for the subject vineyard.

Dated at Victoria, British Columbia, this 12th day of August 2002.

**FARM PRACTICES BOARD**

Per

*(Original signed by):*

Carolyn Askew, Vice Chair  
Hamish Bruce, Member  
Richard Bullock, Member