



January 19, 2016

File #15-06

DELIVERED BY EMAIL

Sean McGill, Director
Human Resources and Corporate Planning
The Corporation of Delta
4500 Clarence Taylor Cr
Delta BC V4K 3E2

Santokh Hothi
Hothi Farms Inc.



Dear Sirs:

A COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT* CONCERNING A VEGETABLE FARM IN DELTA, BC

On November 30, 2015, the Corporation of Delta (Delta), in accordance with section 3 of the *Farm Practices Protection (Right to Farm) Act (FPPA)*, filed a complaint with the BC Farm Industry Review Board (BCFIRB) concerning Hothi Farms Inc., a vegetable producer.

In a letter dated December 3, 2015, the BCFIRB Executive Director noted that this board “has no authority under the *FPPA* with respect to health, pollution or food safety issues”. He also identified two preliminary issues, the first relating to whether the disturbance complained of fell within the definition of “other disturbance” and the second relating to the connection between that disturbance and a “farm operation conducted by a farm business” within the meaning of the *FPPA*. In his letter, the Executive Director drew the attention of the parties to previous BCFIRB decisions:

In [*Hill v Gauthier*](#), March 6, 2013, BCFIRB ruled as follows:

I find that “other disturbance” cannot be interpreted so as to give a complainant the right to file a complaint based on the unattractive appearance of his neighbour’s property.

It is unclear whether there are other issues in Delta’s complaint that result from the farm’s practices that would constitute the complainant being “aggrieved”. For example, odour from the potato storage bins.

In [*Hodge v. Eben*](#), November 20, 2008, BCFIRB ruled that “a significant connection” must exist between the unsightliness complained of and the “farm business”. Here it is unclear whether all of the issues in Delta’s complaint relate to a “farm operation conducted as part of a farm business”. If not, as also noted in *Hodge v. Eben*, the farm would not be “entitled to the protections of the (*FPPA*) to exempt (it) from nuisance actions and certain municipal by-laws”.

The parties were asked to provide their submissions on these preliminary issues and I have received and reviewed the following written submissions:

- a. December 14, 2015 from the complainant (Delta);
- b. undated (received December 22, 2015) from the respondent (Hothi Farms); and,
- c. January 6, 2016 reply from the complainant¹.

The Legislation

Section 3 of the *FPPA* provides for complaint to BCFIRB:

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.

Standing

In [*The Corporation of Delta v. Westcoast Instant Lawns*](#), September 24, 2004, BCFIRB found that “municipalities are not categorically excluded from making complaints” but “like any other person, they only have standing to do so where they are directly and adversely affected by a farm practice”. See also the [*City of Abbotsford v. Kapoor*](#), March 19, 2015. I accept that Delta has standing to bring this complaint.

Notice of Complaint

In its complaint, Delta advises that it owns Hawthorne Grove Park, a heritage farm adjacent to Hothi Farms. In Delta’s view, Hothi Farms has “excessive and unsightly storage of vehicles, equipment, parts, scrap metal and truck trailers” and alleges the “improper storage of potatoes in makeshift containers which are also unsightly and potentially unsafe”. Delta also states that it “strongly supports agriculture” but these activities on Hothi Farms “negatively impacted the public’s use of Hawthorne Grove Park along with and the use and enjoyment of the neighbouring residents’ properties”.

The Submissions

In its December 14, 2015 submission, Delta provides further information on the nature of Hawthorne Grove Park and how it “exemplifies Delta’s agricultural heritage and that the surrounding land use context is critical for the ongoing productive use of the site to the benefit of the entire community”. Delta says there is “a significant connection with the surrounding farm practices with respect to the value of” Hawthorne Grove Park.

Delta views the complained of activities (related to storage of vehicles, equipment and produce) at Hothi Farms as directly affecting its efforts, such as Hawthorne Grove Park, to increase “the awareness of the importance of farming and agricultural land and gaining residents’ acceptance of the typical nuisances associated with normal farm practices”.

¹ On January 8, 2016, BCFIRB was copied on an email from the Mayor of Delta which was not relevant to the preliminary issues that were the subject of the submissions and as such, I did not take it into account in my deliberations.

In its response received December 23, 2015, Hothi Farms explains that it had been in business since 1999 and has grown many different types of vegetables during that time and its owner has many additional years of experience in farming. Hothi Farms moved to its current location in 2014 and signed a long-term lease.

Hothi Farms submits that it has experienced many difficulties in establishing its operations in its new location. In 2014, those difficulties included establishing sufficient storage capacity for its crop due to disputes with Delta over a building permit. Hothi Farms says this meant it needed to take “last minute” measures to store its potatoes and “most of its major equipment had to stay in the truck trailers” pending the construction of additional storage capacity.

In 2015, Hothi Farms planted 520 acres of various crops while still having issues outstanding with Delta in regards to a building permit, which it says required the use of two portable potato storage shelters. In response to concerns raised by Delta, Hothi Farms says it moved the trucks and trailers to a different part of its property but that in the complaint Delta is still raising concerns about “non-farm use equipment”.

Hothi Farms states that the temporary potato storage is necessary to its operations, that the excess “non-farm equipment” is “indeed related to farm use”, including as spare parts for machinery, and that the lack of storage space means that equipment has to be stored in the trailers. Hothi Farms also cites “constant interruptions” by various other agencies and problems with the leasing of another property as affecting its operations.

In its reply of January 6, 2016, Delta submits that Hothi Farms is raising issues that are beyond the scope of the complaint. Delta reiterates its position that the activities at Hothi Farms “which has resulted in the excessive and unsightly storage of vehicles, equipment, parts, scrap metal, and truck trailers, has significantly impact our ability to present responsible farming practices to our community in a positive light” and that those activities “have negatively impacted the local community’s outlook on farming practices in general”. BCFIRB should “take the steps necessary to resolve the disturbances” as “farming can, and should, be conducted responsibly without unduly disturbing and aggravating neighbours in the manner of Hothi Farms Inc.”.

Analysis

A complaint must meet the requirements of section 3 of the *FPPA* which provides “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”.

I am prepared to accept for the purposes of this decision that Delta’s complaint with respect to the visual impact of unsightly storage of vehicles, parts, scrap metal and potatoes relates to a farm operation carried on by a farm business as required by the *FPPA*. However, the issue related to the nature of the disturbance complained of is more problematic as it turns on whether the definition of “other disturbance” in section 3 is sufficiently broad to include complaints of a purely aesthetic nature, as outlined in *Hill v. Gauthier*.

Delta's notice of complaint focused on the "excessive and unsightly storage of vehicles, equipment, parts, scrap metal and truck trailers" (emphasis added). Despite being asked to address the issue identified in *Hill v. Gauthier*, Delta's submissions focused instead on the negative impact on agriculture that the "unsightly" activities of the farm would have on members of public

attending Hawthorne Grove Park. Further, Delta chose not to respond to the BCFIRB Executive Director's December 3, 2015 query as to whether there was an additional disturbance resulting from "odour arising from the potato storage bins" (i.e., a disturbance which would fit within the *FPPA*).

In the absence of any submissions from Delta to the contrary, I accept the former Chair's conclusions in *Hill v. Gauthier*, where after a review of the case law and authoritative texts, he held:

Based on the foregoing, I am of the view that common law of nuisance does not recognize interference with aesthetic appearance. To say this another way, the fact that a neighbor creates an eyesore does not create an action in nuisance. Given that the common law does not recognize interference with aesthetics as nuisance, I find that "other disturbance" (in the *FPPA*) cannot be interpreted so as to give a complainant the right to file a complaint based on the unattractive appearance of his neighbour's property.

I accept that the unsightly activities of Hothi Farm may be an "eyesore" in the eyes of some persons but an unattractive appearance does not fall within the definition of "other disturbance" and does not create a right of complaint under the *FPPA*. Despite being given an opportunity to do so, Delta has not identified any other disturbance (odour, noise, dust or other disturbance) which could form the basis of a complaint.

Accordingly, I find that the complaint by Delta does not meet the requirements of section 3 of the *FPPA* in that the disturbance complained of does not fall within the definition of an "other disturbance" under the *FPPA*.

Where a farmer engages in activities which would not otherwise trigger the common law of nuisance, the *FPPA* has no application. On this point, I note the comments made in [Shawlee v. Quails Gate Okanagan Valley](#), BCFIRB, June 30, 2015 which though made in the context of the "farm business" requirement have equal application to circumstances where the disturbance complained falls outside the scope of the *FPPA*:

The "farm business" requirement makes it clear that this legislation was never intended as redress for every complaint between neighbours involving practices on a piece of farm land. Where the *FPPA* does apply, it has significant implications. It gives a neighbour a potentially powerful remedy, namely the right to ask BCFIRB to require a farmer to cease or modify a farm practice. At the same time, it gives a farmer potentially significant protection where he acts in accordance with normal farm practice (the right to be protected against a nuisance action and the right to be protected against municipal bylaw enforcement). Given the significant effects of the *FPPA*, its drafters wanted to focus its scope and boundaries. This recognized that where the *FPPA* does not apply, the general law does, meaning that when neighbours cannot work things out in a neighbourly way they have the usual remedies of going to the *municipality* or to the courts to resolve their disputes.

[emphasis added]

Accordingly, the complaint is dismissed.

Section 8 of the *FPPA* provides for a right of appeal:

- 8** (1) Within 60 days after receiving written notice, in accordance with section 6 (5), of a decision of the chair or a panel of the board made under section 6, the complainant or farmer affected by the decision may appeal the decision to the Supreme Court on a question of law or jurisdiction.
- (2) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



John Les
Chair