



January 29, 2013

File #12-07 & #12-25

DELIVERED BY EMAIL

Richard S. Margetts, QC
Johns Southward Glazier Walton Margetts



Johnathan Alexander, Counsel
Cox & Taylor



Michele and David Bond
Windborne Stable



Dear Sirs/Mesdame:

PREHEARING APPLICATIONS – DECISION

INTRODUCTION

1. On March 1, 2012, the Farm Industry Review Board (BCFIRB) received a written complaint under the *Farm Practices Protection (Right to Farm Act)*, RSBC 1996, c. 131 (*FPPA*) from Lee Hardy regarding the farm practices of her neighbour, Stanhope Farm. The complainant alleged that the farm was making an unreasonable amount of noise as a result of its “industrial/commercial composting facility called Foundation Organics Limited, and Organico Waste Recovery”. In particular, she claimed that she was disturbed at all hours of the day by the sound of grinding materials, fans and other machinery as well as by vehicles delivering organic materials to and removing composted materials from the farm premises. The complainant also alleged that “a commercial trucking business known as ‘Finish Line’ Trucking” may be operating from the farm premises and questioned whether this was an allowable use of farm land.
2. On March 22, 2012, during a case management conference call, Ms. Hardy raised the issue of whether the composting operation on the Respondent farm was a “farm operation” conducted as part of a “farm business” as required pursuant to s. 3 of the *FPPA*. In other words, if the composting operation is not a farm operation, BCFIRB would not have jurisdiction to hear the

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complaint. Alternatively, she raised the issue of whether or not the noise from the composting and trucking operations was consistent with normal farm practices.

3. On August 10, 2012 a Knowledgeable Person's report ("KP Report") was prepared with respect to Ms. Hardy's complaint. In an accompanying letter from BCFIRB, Mr. Kilmury (the Chair) advised the respondent farm and the complainant that the KP Report was inconclusive as to whether the operations undertaken on the farm lands were farm operations conducted as part of a farm business. As a result, Mr. Kilmury directed that a panel would be convened and it would determine this issue after hearing oral evidence and argument.
4. On October 11, 2012, a Pre-Hearing Conference call was held regarding Ms Hardy's complaint with notice to Mr. Alexander, counsel for the respondent farm, however that respondent did not participate in the call. In a subsequent letter dated October 15, 2012 to BCFIRB and counsel for the respondent farm, counsel for Ms. Hardy identified the following persons and companies as potential respondents:

Gord Rendle, Karen Rendle, Rodd Rendle, Debbie Rendle, Stanhope Farms Ltd., Matt Mansell dba Finish Line Trucking, and Pheng Heng, Vittorio Cheli, Chris Gill and Scott Rendle dba Organico Waste Recovery Systems Ltd.
5. On October 29, 2012, BCFIRB received a written complaint from another neighbouring property owner, Michele Bond, regarding the farm practices of Stanhope's composting facility which she indicated used to be a dairy farm and "is now called Foundation Organics Limited, and Organico Waste Recovery". This complainant alleged that she was disturbed by the smell of composting materials being delivered by trucks to the farm as well as by smells coming from the composting operation on the farm site. This complainant also claimed that she was disturbed by the noise, vibrations and dust caused by "an excessive number of trucks" driving to and from the farm as well as the noise of vehicles and machinery being operated on the farm lands. She also questioned whether the composting facility was a legitimate farm use of agricultural land.
6. A case management conference call was held on November 29, 2012 with respect to Ms. Bond's complaint. Counsel for the respondent farm argued that the composting operation was a farm operation which was being conducted in accordance with normal farm practices. However, counsel for the respondent farm objected to a new KP Report being completed until the issue of jurisdiction was determined.
7. In a letter dated November 29, 2012, counsel for the respondent farm applied for a preliminary determination of BCFIRB's jurisdiction to hear the two complaints made against the farm and if so, a determination as to who are properly named as respondents.
8. On December 14, 2012, BCFIRB advised the parties that the two complaints regarding the respondent farm would be combined and heard at the same time

RESPONDENT FARM'S SUBMISSIONS

Jurisdiction

9. In his written submissions dated November 29, 2012 and January 10, 2013, counsel for the respondent farm argued that it appeared to be the complainants' positions that the composting and/or trucking operations on the respondent farm were "industrial activities" and not farm operations conducted as part of a farm business and accordingly the *FPPA* would not apply and the complaints against the respondent farm should be dismissed for lack of jurisdiction.
10. Counsel for the respondent farm also argued that BCFIRB has no jurisdiction to deal with those parts of the complaints involving noise, vibrations, dust and odours from the operation of trucks on public roads. Counsel for the respondent farm further argued that BCFIRB has no jurisdiction to make a determination as to whether the composting operation on the respondent farm complies with permitted land uses (or is an appropriate use of land in the agricultural land reserve).

Appropriate Parties

11. Counsel for the respondent farm stated that the registered owners of the farm land are Gordon James Rendle and Robert Roderick Rendle and the farm business is run by Stanhope Dairy Farm Ltd. Counsel for the respondent farm also indicated that the composting operation on the farm premises is undertaken by Foundation Organics Ltd. as part of the farm's business. Consequently, counsel for the respondent farm stated that all of these parties were properly named as respondents.
12. Counsel for the respondent farm stated that he was not acting for any other respondents (other than those named in the preceding clause) but argued that the others were not properly named as respondents because they were solicitors, directors, officers or shareholders of companies. Counsel for the respondent farm also argued that Finish Line Transport Limited and OrganiCo Waste Recovery Systems were not properly named as respondents because they were "service providers to the farm." Counsel argued that it was unnecessary to name these parties as respondents because pursuant to s. 6 of the *FPPA*, any order made against a farmer or the farm business would as a consequence affect any contractors involved in the farm operations.
13. Counsel for the respondent farm further argued that if the other proposed respondents were included as parties it would likely involve additional hearing time and costs.

COMPLAINANTS' SUBMISSIONS

Jurisdiction

14. In his written submissions, counsel for Ms. Hardy stated that it was Ms. Hardy's belief that a trucking and commercial composting and recycling business were "being conducted (on the farm) under the guise of a farming operation." However, counsel acknowledged that Ms. Hardy was not fully apprised of the nature of the businesses and operations being undertaken

on the respondent farm's land nor did she have sufficient information regarding the relationship between the parties using the farm land. Consequently, counsel postulated that it might be possible that some of the operations (such as composting) could be undertaken as farming operations while others (such as trucking) might not be but that this determination could only be made after hearing evidence during the course of a hearing.

15. Counsel for Ms. Hardy argued that by severing the issue of jurisdiction from the hearing, it would involve "a multiplicity of different proceedings in different forums" and accordingly the proper approach to take in circumstances such as this is the approach set out in *Maddalozzo v Pacific Coast Fruit Products*, BCFIRB (September 7, 2011).

Appropriate Parties

16. In his written submissions, Counsel for Ms. Hardy argued that "there is no evidence placed before the Board at this juncture to determine who may or may not be an appropriate party."
17. At page 7 of his written submissions, counsel for Ms. Hardy argued that, "the nature of the operation of the Farm is unclear. Who might constitute the owner or operator of the business activities being conducted on the farm is less clear but reasonably appears to include those individuals and corporations hereinbefore identified."
18. Counsel for Ms. Hardy pointed out for example, that according to company searches, Matthew Mansell is the sole director of Finish Line Transport Limited and is also named a co-director of Foundation Organics Ltd. with Robert Roderick Rendle. Counsel for Ms. Hardy also pointed out that there is a sole proprietorship called "Foundation Organics" which is described (in part) as "a sales agency for organic products" and Matthew Mansell is listed as a contact person for that entity. Counsel for Ms. Hardy further noted that the website for OrganiCo Waste Recovery Systems states that it is a "strategic partner" with Foundation Organics.
19. Consequently, counsel for Ms. Hardy argued that in addition to Stanhope Dairy Farm Ltd., Gordon James Rendle, Robert Roderick Rendle and Foundation Organics Ltd., the following other parties should be named as respondents given that there is "an apparent element of the recycling and composting activities undertaken on the lands:"

0916231 B.C. Ltd. carrying on business as OrganiCo Waste Recovery Systems,
Matthew Mansell carrying on business as Foundation Organics and
Finish Line Transport Limited.

20. Counsel for Ms. Hardy also stated that it was Ms. Hardy's view that "any person who may be affected by an order of the Board should be properly identified, be given notice of the proceeding and the opportunity to be heard."
21. In e-mail correspondence to BCFIRB dated January 8, 2013, the complainant, Michele Bond adopted the submissions of counsel for Ms. Hardy.

ANALYSIS

Jurisdiction

22. Section 3(1) of the FPPA states as follows:

“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.”

Consequently, before the board can make any orders as to whether a disturbance is the result of a normal farm practice, the board must first determine if the operation in question is a farm operation conducted as part of a farm business.

23. Counsel for the respondent farm argues that the complaints should be dismissed because they allege that the farm is not a farm operation conducted as part of a farm business but is instead a commercial or industrial operation. Counsel for the respondent farm also argues that the board has no jurisdiction to hear those parts of the complaints that refer to disturbances on public roads or to determine if an activity on the farm lands complies with land use by-laws or regulations.

24. Counsel for Ms. Hardy argues that there is insufficient evidence at this time to make a determination as to whether the composting and trucking operations undertaken on the respondent farm are farm operations conducted as part of a farm business.

25. In *Maddalozzo v Pacific Coast Fruit Products*, BCFIRB (September 7, 2011), the board was faced with a similar situation as in the instant case. In particular, the board found that the complaint raised an issue of whether the respondent was a farm operation or an industrial business and sought submissions from the parties on that issue. After having reviewed the parties' submissions, the board found that in the absence of any evidence from the respondent farm on the issue, a ruling on jurisdiction could not be made and directed as follows:

“In these circumstances, the appropriate course is to establish a panel to hear this complaint and once the panel has had the benefit of oral evidence and argument, it can make a determination as to whether this is a farm operation and if so, whether the on-farm activities complained of accord with normal farm practices.”

26. In this case, the panel similarly finds that there is insufficient evidence to make a ruling on jurisdiction. In particular, we find that there is little evidence of the nature or extent of the operations being undertaken on the farm lands that would warrant making a determination of jurisdiction at this time. Counsel for the respondent farm stated at a case management conference call on November 29, 2012 that the respondent farm's position was that it was a farm operation however no evidence has been provided with respect to that assertion. In the circumstances, the panel finds that it would be both premature and contrary to the rules of

natural justice to require the complainants to take a final position (rather than alternative positions) on jurisdiction prior to the hearing of this matter. Consequently, the panel finds that the issue of jurisdiction will be determined at the same time as the hearing into the complaints.

27. Counsel for the respondent farm also sought a pre-hearing ruling that the board has no jurisdiction to determine certain aspects of the complaints, namely those dealing with disturbances caused by trucks driving to and from the farm lands on public roads. However, the panel also finds that it cannot make such a determination in the absence of any evidence on the point and as a result the panel directs that a determination of this issue should be made only after hearing evidence, law and argument on the point at the hearing of the complaints.
28. Counsel for the respondent farm further sought a pre-hearing ruling that the board has no jurisdiction to determine if the undertakings carried out on the farm land comply with permitted uses under the regulations to the *Agricultural Land Commission Act* RSBC 2002, c. 36 or applicable zoning by-laws.
29. Section 3 of the *FPPA* requires the board to determine if the disturbances that are the subject of a complaint result from the normal farm practices of a farm operation conducted as part of a farm business. The *FPPA* does not give the board authority to determine if a farm operation complies with permitted uses under the regulations to the *Agricultural Land Commission Act* or applicable zoning by-laws. Those issues must be taken up with the appropriate agency or authority. However, it should be noted that compliance with other statutory requirements is one factor that a panel may take into account in its determination of normal farm practice.

Appropriate Parties

30. Section 6 (1) of the *FPPA* states as follows:

“The panel established to hear an application must hold a hearing and must:

- (a) Dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or
- (b) ***Order the farmer*** [emphasis added] 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.”

31. Section 1 of the *FPPA* includes the following definitions:

“**Farmer**” means the owner or operator of a farm business.

“**Farm business**” means a business in which one or more farm operations are conducted and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations.

32. The respondent farm and complainants agree to the following parties being named as Respondents: Stanhope Dairy Farm Ltd., Gordon James Rendle, Robert Roderick Rendle and Foundation Organics Ltd.
33. Counsel for the respondent farm also argued that it was unnecessary to include any other parties proposed by the complainants because they were either suppliers to the farm business or solicitors, shareholders or directors of companies and that in any event any contractors would be subject to any order made against the farmer pursuant to s. 6 of the *FPPA*.
34. The complainants argue that there is insufficient evidence at this time to warrant excluding other proposed respondents such as 0916231 B.C. Ltd. carrying on business as OrganiCo Waste Recovery Systems, Matthew Mansell carrying on business as Foundation Organics and Finish Line Transport Limited especially when they appear to have some connection “to the recycling and composting activities undertaken on the lands.”
35. The complainants appear to have abandoned the following other proposed respondents (set out in clause 4 above), namely: Karen Rendle, Debbie Rendle, Pheng Heng, Vittorio Cheli, Chris Gill and Scott Rendle.
36. The panel finds that there is insufficient evidence at this time to make a final determination as to who is an appropriate party to be named as a respondent. The documentary evidence provided by the complainants indicates that there may be some connection between the individuals and companies (identified by the complainants) with the operations being undertaken on the farm lands. The extent of the connection, if any, is a matter that can only be determined after giving each proposed party an opportunity to present evidence, law and argument at the hearing of the complaints.
37. The panel also finds that it is practical and necessary to take a broad approach with respect to naming respondents. Section 6 of the *FPPA* permits the board to make an order against a “farmer” only. A farmer is defined under s. 1 of the *FPPA* as the owner or operator of a farm business (not the owner of the farm lands). Consequently, if a farm land owner permits a 3rd party to operate a farm business on the farm’s lands and the 3rd party’s farm operations are found not to be in accordance with normal farm practices, under s. 6 of the *FPPA*, the board could not order the farm land owner to make the 3rd party comply. In other words, unless 3rd party users of the farm lands are properly named in the proceedings under the *FPPA*, there could be no basis upon which to issue orders against them to comply with the *FPPA*.
38. Consequently, the panel finds that the following parties will be named as respondents in this matter, namely:

Stanhope Dairy Farm Ltd.;
Gordon James Rendle;
Robert Roderick Rendle;
Foundation Organics Ltd.;
Matthew Mansell carrying on business as Foundation Organics;
Finish Line Transport Limited; and
0916231 B.C. Ltd. carrying on business as OrganiCo Waste Recovery Systems.

CONCLUSIONS

39. The respondent farm's application for a general ruling on the issue of jurisdiction is dismissed with leave to reapply at the hearing of the complaints in this matter. The respondent farm's application for a ruling on the issue of jurisdiction with respect to certain aspects of the complaints is granted in part and in particular, the panel finds that it has no jurisdiction under the *FPPA* to determine if the operations being undertaken on the respondent farm's lands comply with permitted uses under the regulations to the *Agricultural Land Commission Act* or applicable zoning by-laws. However, compliance with other acts and regulations may be relevant to the question of whether a farm is following normal farm practices in its operations.
40. In response to the respondent farm's application for a ruling on the issue of respondents, we find that at this time all those listed in paragraph 38 of this decision are properly named as respondents, with leave to the parties to reapply at the hearing for any further order. Those parties not previously identified as respondents are added as respondents to the two complaints and the notices of complaint are so amended. BCFIRB staff are instructed to give notice of the two complaints to all Respondents identified in paragraph 38, other than those represented by Mr. Alexander, together with a copy of this decision.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Suzanne K. Wiltshire, Presiding Member



Ronald Bertrand, Vice Chair



Carrie Manarin, Member