IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT BY
MORGAN CREEK HOMEOWNERS ASSOCIATION
REGARDING THE OPERATION OF PROPANE CANNONS AT A BLUEBERRY FARM
LOCATED AT 160th STREET AND 40thAVENUE, SURREY, BRITISH COLUMBIA

BETWEEN:

MORGAN CREEK HOMEOWNERS ASSOCIATION

COMPLAINANT

AND:

HIMMAT SEKHON

RESPONDENT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA
BRITISH COLUMBIA BLUEBERRY COUNCIL
ASSOCIATION OF BRITISH COLUMBIA GRAPE GROWERS
BRITISH COLUMBIA FRUIT GROWERS' ASSOCIATION

INTERVENORS

PRELIMINARY JURISDICTIONAL ISSUE
DECISION

APPEARANCES:

For the Farm Practices Board	Ms. Christine J. Elsaesser, Panel Chair Ms. Karen Webster, Member Mr. Allen Watson, Member
For the Complainant	Mr. Art Stasiuk, Association President No written submissions received
For the Respondent	Mr. Tarseam S. Bhullar, Counsel By written submission
For the Attorney General of British Columbia	Mr. R. Vick Farley By written submission
For the Industry Intervenors	No written submissions received

INTRODUCTION

1. On August 20, 1998, the Morgan Creek HomeOwners Association filed a Complaint with the Farm Practices Board (the "FPB") about noise resulting from the operation of propane cannons on a blueberry farm located at 160th Street and 40th Avenue in Surrey, British Columbia.

2. The parties were unable to resolve the dispute through an informal settlement process and accordingly, the matter was to proceed to a hearing before the FPB.

3. On August 20, 1999, Counsel for the Respondent farmer raised a preliminary issue as to the constitutional jurisdiction of the FPB to hear complaints relating to the operation of propane cannons. The Complainant declined the opportunity to make submissions on this issue. Although the Panel has granted Intervenor status in the Complaint to the BC Blueberry Council, the BC Fruit Growers' Association and the Association of BC Grape Growers, they declined to appear on this issue. The Attorney General of Canada was notified of the proceedings and also declined to make any submissions.

4. On November 19, 1999, the Attorney General of British Columbia (the "AG") filed written submissions in response to the Respondent's jurisdictional argument. There has been no Reply submission received from the Respondent.

ISSUE

5. Does the *Farm Practices Protection (Right to Farm) Act* (the "*Provincial Act*") empower the FPB to deal with complaints regarding propane powered cannons given section 24(1) of the *Migratory Birds Regulation*s, CRC c. 1035 (the "*Regulations*"), enacted pursuant to the *Migratory Birds Convention Act*, 1994 (the "*Federal Act*")?

ARGUMENT OF THE RESPONDENT

6. Section 24(1) of the *Regulations* provides as follows:

> Any person may, without a permit, use equipment, other than an aircraft or firearms, to scare migratory birds that are causing or are likely to cause damage to crops or other property.

7. The Respondent argues that the *Provincial Act* allows any farmer that engages in a normal farm practice to carry out that practice, and alternatively to cease that practice if it is not a normal farm practice. The *Provincial Act* defines normal farm practice as follows:

> s. 1 In this Act:
>
> "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).

8. The *Regulations* are federal legislation whereas the *Provincial Act* is provincial legislation. Given that two different jurisdictions purport to deal with the same problem, the question arises as to who has jurisdiction in this instance.

9. The Respondent argues that it is trite law that in a federal state where there is conflicting legislation, federal law prevails. The doctrine of paramountcy applies and federal law overrides the provincial legislation.

ARGUMENT OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

10. The AG argues that despite s. 24(1) of the *Regulations*, the FPB has jurisdiction to consider this Complaint. On a proper interpretation of that section and with a proper application of the doctrine of paramountcy, the federal provision does not purport to grant a dispensation from the operation of any other regulatory regime and it does not render the *Provincial Act* inoperative.

11. In the first step of the analysis, the AG compares the federal and provincial legislation. The *Provincial Act* protects normal farm practices. Section 2 provides that if the requirements of s. 2(2) are fulfilled (the operation is conducted in accordance with normal farm practices on land within the agricultural land reserve or zoned for farm use), then "the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation," and an injunction shall not be granted.

12. The *Provincial Act* creates a Board (s. 9) which hears complaints (s. 5) by persons aggrieved by odour, noise, dust, or other disturbance resulting from a normal farm practice (s. 3). "Normal farm practice" is defined in s. 1 (see paragraph 7 above). Section 6 sets out the FPB's jurisdiction to hear complaints:

(1) 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 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.

13. Section 8 of the *Provincial Act* provides for an appeal from the FPB's decision to the

British Columbia Supreme Court on a question of law or jurisdiction, and a further appeal to the Court of Appeal with leave.

14. The AG observes that the *Provincial Act* does not include any permitting or licensing provisions.

15. The AG then reviews the *Federal Act* under which the *Regulations* were enacted. The express purpose of the *Federal Act* is "…to implement the Convention by protecting migratory birds and nests" (s.4). "Convention" refers to the Migratory Birds Convention (the "Convention"), an Empire Treaty entered into in 1916 between the United States and Canada.

16. Under the Convention, the definition of "migratory birds" includes migratory game, insectivorous and non-game birds. The Convention protects migratory birds by having the contracting parties establish closed seasons for hunting, by prohibiting the taking of eggs of migratory birds and by prohibiting the international traffic in migratory birds or eggs taken contrary to law (Articles II-IV). Article VII provides for permits to kill migratory birds under extraordinary conditions where the birds become seriously injurious to agriculture or other interests.

17. The *Federal Act* implements the Convention by establishing a prohibition of possession of a migratory bird or nest, or buying, selling, exchanging or giving a migratory bird or nest in a commercial transaction (s. 5), except as authorised by the regulations. It also authorises game officers to enforce the *Federal Act* and *Regulations* (ss. 5, 6-11), and creates offences (ss. 13 et. seq.). Section 12 of the *Federal Act* authorises the Governor General in Council to make regulations to carry out the purposes of the *Federal Act* and Convention. The *Regulation*s were enacted pursuant to this power. These *Regulations* empower the Federal Minister of Environment to issue permits for a number of different purposes including migratory game hunting permits, agricultural permits and "Permits Regarding Birds Causing Damage or Danger". The *Regulations* creates a series of prohibitions, which are subject to exceptions or exceptions with conditions as authorised by permits.

18. "Permit" is defined in the *Regulations* as "a valid permit issued under these Regulations".

19. Having set out the legislative backdrop, the AG argues that the Respondent has proceeded on an incorrect interpretation of s. 24(1) of the *Regulations*. The Respondent appears to interpret s. 24(1) as authorising anyone to scare migratory birds which are likely to cause damage to crops or other property using equipment other than aircraft or a firearm, <u>free from regulation</u>. The AG argues that the proper interpretation is that a person does not need a permit "issued under these Regulations" in order to scare migratory birds with equipment other than aircraft and firearms.

20. The AG argues that the Respondent's suggested interpretation is inconsistent with the definition of permit in the *Regulations* and with the purposive approach to statutory

interpretation. This interpretation extends the *Regulations* beyond the Parliament's constitutional authority. The scheme of the *Federal Act* and *Regulations* is to prohibit harm to migratory birds subject to permitted exceptions. It is not its purpose to grant a license or authorisation to allow anything to be done to scare birds free from regulation as long as there is no express prohibition by the *Federal Act*.

21. Section 24(1) provides:

> Any person may, without a permit, use equipment, other than an aircraft or firearms, to scare migratory birds that are causing or are likely to cause damage to crops or other property.

22. The AG argues that this section should be interpreted as indicating that a permit under the *Federal Act* and *Regulations* is not required to engage in scaring migratory birds using equipment other than an aircraft of firearms. It should not be interpreted as a statutory dispensation rendering persons free from regulatory or common law constraint when scaring migratory birds.

23. The AG argues that the Respondent's interpretation would lead to the absurd result that a person living in an urban area could operate a propane cannon to scare birds free from an provincial, municipal or common law regulation of such conduct. This result could not have been intended by Parliament and the Governor General in Council.

24. The AG relies on the summary of the modern absurdity rule as described in Sullivan, *Driedger on the Construction of Statutes* (3rd ed.), 1994, and argues that the absurd result created by the Respondent's interpretation can be avoided by giving s. 24(1) an interpretation that the words can easily bear. That interpretation is simply that a person is free from regulatory permit requirements of the *Federal Act* when scaring migratory birds (other than with aircraft or firearms).

25. The AG also relies on *Driedger*, supra at p. 322-323 for the proposition that when interpreting a statute, a court should prefer the interpretation that upholds rather than defeats the initiative or is within rather than outside the enacting body's constitutional power. In this case, the ability for Parliament to enact the *Federal Act* is found within s. 132 of the *Constitution Act, 1867*, which empowers Parliament to enact laws to implement Empire Treaties and give effect to Canada's international obligations. The purpose of the Convention is the protection of migratory birds. The Convention does not purport to create obligations regarding the regulation of normal farm operations or the determination of what is or is not a nuisance. Those matters remain within the provincial jurisdiction and have not been displaced by the implementation of this Empire Treaty. The AG argues that the preferred interpretation is one that does not result in the *Regulations* being struck down for being beyond the authority of Parliament.

26. The AG also takes issue with the Respondent's application of the doctrine of paramountcy. The Respondent argues that the FPB does not have jurisdiction to deal with propane powered cannons in light of the *Regulations* as "it is trite law in a federal state that where

there is conflicting legislation federal laws will prevail."

27. The AG argues that this statement is both incomplete and incorrect. It is incomplete as it does not articulate the type of conflict required to make the doctrine applicable. It is incorrect in that it attempts to raise the "occupied field" theory of paramountcy. Under this theory, federal legislation may be interpreted as covering the field and therefore precluding any provincial law in that field, even if it does not contradict the federal law. This approach was rejected by the Supreme Court of Canada in *R v. Mann* [1966] S.C.R. 238. According to Hogg, *Constitutional Law of Canada* (Loose-leaf ed., p. 16-10), the "occupied field" test "no longer has any place in Canadian constitutional law."

28. The AG argues that the proper interpretation of the paramountcy doctrine recognises that federal and provincial laws may be within the authority of their respective orders of government and may apply to the same persons (i.e. they may operate in the same field). The laws may operate concurrently unless there is an "operational conflict" which requires a very clear inconsistency (Hogg, *supra* at p. 16-1). At p. 16-4 and 16-5, Professor Hogg describes an operational conflict as an "express contradiction" which occurs "when it is impossible for a person to obey both laws". This approach was recently approved by Mr. Justice E.R.A. Edwards in *Aeroguard Co*. v. *British Columbia (Attorney General)* (1998), 50 BCLR. (3d) 88 (S.C.).

29. The AG argues that where both laws can be complied with, as in this case, no express contradiction arises and there is no operational conflict. The *Federal Act* and *Regulations* state that a federal permit is not required to scare migratory birds. The *Provincial Act* does not provide for permits at all. Rather it empowers the FPB to consider complaints and determine whether the conduct complained of is a normal farm practice. It is possible to obey both laws; compliance with one does not breach the other.

30. Given the foregoing, the AG argues that the preliminary issue should be answered in the affirmative. The FPB is empowered to consider this Complaint notwithstanding s. 24(1) of the *Regulations.*

DECISION

31. The Panel is of the view that it has jurisdiction to consider this complaint.

32. The Respondent's argument implicitly depends on the following propositions:

    (a) Section 24(1) of the *Regulations* effectively confers a federal statutory "right" to use propane cannons to scare migratory birds.

    (b) This section conflicts with the *Provincial Act*, which purports to allow the FPB to order farmers to cease practices, including the use of equipment, which are not "normal farm practice".

(c) Therefore, the *Provincial Act* potentially conflicts with the *Regulations*, and is inapplicable to that extent by virture of the doctrine of "paramountcy".

33. The Panel is guided in its analysis by the approach taken to these issues by the Supreme Court of Canada, most recently in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] S.C.J. No. 4 [Q.L] at para. 17:

> Crucial to the argument is the scope and application of the federal … Act. Once that is determined, the provisions of the provincial Act must be examined to see whether "there would be an actual conflict in operation" when the two statutes purport to operate side by side. (See *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, per Dickson J. (as he then was) at p. 191). In the event of an express contradiction, the federal enactment prevails to the extent of the inconsistency.

34. The scope of the *Federal Act* will be dealt with first. In interpreting the *Federal Act*, the Panel is bound to apply the following principle adopted in *Re Rizzo & Rizzo Shoes*, [1998] 1 SCR 27 at para. 21:

> Today there is only one principle of interpretation, namely, the words in the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.

35. The Respondent's argument founders on the first proposition described above. The Panel agrees with the Attorney General's thorough submission that s. 24(1) of the *Regulations* does not, properly construed, confer an affirmative and unqualified "right" to use equipment to scare migratory birds. Properly understood in light of the purpose and context of the enabling federal statute, the section does no more or less than provide an exemption from obtaining a permit under the Regulations which would otherwise be required as part of the overall purpose of protecting migratory birds.

36. The *Regulations* are part of an overall federal scheme aimed at implementing treaty obligations to protect migratory birds. It is not aimed at entrenching local farming practices, and certainly does not purport to confer unqualified statutory rights to use equipment, regardless of the impact that equipment might have on others, to scare migratory birds. If it did purport to have such breathtaking sweep as to authorise intrusion into local matters, its constitutionality would be open to serious question. Legislation should be interpreted in a fashion that respects the dictates of the Constitution.

37. As noted in *Rizzo Shoes*, *supra*, at para. 27, legislation should also be interpreted in a fashion that avoids absurd results. To accept the Respondent's interpretation would mean that s. 27 would allow a person to use any type of equipment in any time, place or manner (including urban areas) – free from provincial, municipal or common law regulation - to

prevent migratory birds, such as woodpeckers, from damaging property. Such an absurd result cannot have been intended by Parliament. Nor is such interpretation, as we have noted, consistent with the language and context of s. 24(1), and the overall purpose of the legislation.

38. Having interpreted the federal legislation, we turn next to the *Provincial Act*. This Board's function under the *Provincial Act* is to hear complaints and to form opinions regarding whether a particular disturbance complained of is the product of a normal farm practice. If we conclude that the disturbance does result from a normal farm practice, the complaint will be dismissed. If we conclude that it is not a normal farm practice, we must order the farmer to cease or modify the practice.

39. Even if this Board were, for sake of argument, to order the farmer to cease or modify the use of propane cannons used in scaring migratory birds, there would be no constitutionally recognised conflict with s. 24(1) of the *Regulations.*

40. To make a successful "paramountcy" argument, it is not enough to identify that there is federal and provincial law dealing with the same problem and then argue that by virtue of paramountcy, federal law excludes the operation of any provincial law touching the subject. This approach has been out of favour with the Supreme Court of Canada since 1966. The "occupied field" test is no longer part of constitutional law in Canada. As noted above, the test is whether there is an express contradiction, which results in a breach of one law when complying with the other. Upon review, the Panel is unable to identify any such conflict or contradiction.

41. The provincial and federal laws can and do operate concurrently, without contradiction. Under the *Regulations,* a farmer does not need to obtain a permit to scare migratory birds unless he intends to use firearms or an aircraft. That does not mean that the farmer can operate that equipment without regard to municipal or provincial regulatory authority such as the *Provincial Act*. While a person does not need a permit under the *Regulations* in order to use equipment (other than an aircraft or firearms) to scare migratory birds that are likely to cause damage to crops or property, that exemption from a permit cannot be transformed into a positive right to be free from all other relevant regulation. Properly read, the statutes at issue here provide a perfect illustration of concurrency in constitutional law, where federal and provincial enactments touching a subject matter, each from their own "aspects", may operate concurrently.

42. Compliance with the *Provincial Act* does not entail defiance of the *Regulations*. The latter is merely an exemption from a permit requirement, all to the end of protecting birds. It is permissive, not mandatory; it does not confer unqualified "rights". Where the *Provincial Act* is stricter, both statutes can be complied with operationally by complying with the

Provincial Act. There is no "impossibility" of dual compliance. Nor does the legislative purpose of Parliament stand to be displaced in the event that the *Provincial Act* is complied with. Migratory birds will still be protected.

43. Given the foregoing interpretation, there is no inconsistency or contradiction between the *Regulations* and the *Provincial Act*. Both laws can co-exist without constitutional conflict.

44. Accordingly, the Panel finds that the FPB can hear the Complaint advanced by the Morgan Creek HomeOwners Association notwithstanding s. 24(1) of the *Regulations* and directs that this matter be set down for hearing.

Dated at Victoria British Columbia this 2nd day of March, 2000

FARM PRACTICES BOARD
Per

Original signed by

Christine J. Elsaesser, Panel Chair

Original signed by

Karen Webster, Member

Original signed by

Allen Watson, Member