IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060810
Docket: S16527
Registry: Chilliwack

Between:

Anita Ollenberger (Geertsma)

APPELLANT

And:

Farm Practices Board
and
Alan Farm Ltd.

RESPONDENTS

Before: The Honourable Mr. Justice Brine

Oral Reasons for Judgment

August 10, 2006

Counsel for the Appellant	R.A. Wattie
Counsel for the Respondents	R. Younger, P. Sellinger
Place of Trial/Hearing:	Chilliwack, B.C.

[1] **THE COURT:** This is an appeal of a decision of the BC Farm Industry Review Board, "the Board," dated November 18, 2005.

[2] There is no issue that the standard of review of such decisions is "patent unreasonableness."

[3] On February 13, 2004, pursuant to s. 3 of the *Farm Practices Protection (Right to Farm) Act* RSBC 1996, c. 131, which I will call, "the Act," the appellant filed the complaint with the Board regarding the poultry operations of Alan Farm Ltd., which I will call, "the Farm," which is a neighbouring farm. The substance of the complaint was that the odour, noise, dust and certain flooding from the Farm were not the result of normal farm practice and should be enjoined.

[4] A hearing was held commencing May 16, 2005, which took some three days. Several witnesses were heard, a site viewing took place, and an investigation by a knowledgeable person was obtained by the Board to review and report on the situation.

[5] The Board concluded that the appellant was "aggrieved" within the meaning of the Act and further found a breach of the Act had occurred insofar as the practices complained of resulted in odour, noise, dust and flooding, and ordered certain modifications to these practices, in order for the farm operations to be consistent with normal farm practice.

[6] The narrow issue on this appeal is whether the Board's failure to order a cessation or modification of chicken catching and shipping from the west end of the north barn was in error.

[7] A brief statement of the factual background is necessary.

[8] The appellant has lived in the home since 1996. She has spent a considerable sum in landscaping, with the intention of using her property and home for receptions and a B and B. Due to the odour, noise and dust she is not able to use the property as she had intended. The appellant's house is located 9 metres from the property line closest to the northerly of the two barns on the farm. The master bedroom window overlooks the barns.

[9] The farm was started in 2002 and is located on a ten-acre parcel. Barns were built for a broiler chicken operation. They run east to west. The two barns are parallel to each other. The west end of both barns is located at the minimum allowable setback for such structures, 20 metres.

[10] The farming operation had been conducted entirely from the west end of the barns. This included chicken catching and shipping every 38 or 39 days, and the cleaning out and hauling away of manure. Catching and shipping of birds takes place at night, a usual and appropriate practice. There is no doubt that the operation has caused a certain amount of odour, noise and dust, as well as some flooding.

[11] The Board heard from a number of witnesses called by each party, as well as from an engineer who had investigated the properties and the poultry operation and prepared a report with a number of organizations.

[12] Following five months of deliberation the Board ordered certain remedies to be implemented by the farmer, which were intended to mitigate the effects of the odour, noise, dust and flooding.

[13] The appeal is brought pursuant to s. 8(1) of the Act. The relevant portions of the Act are as follows.

[14] Section 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.

[15] Section 6(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 normal farm practice, or to modify the practice in the manner set out in the order to be consistent with normal farm practice.

[16] Section 8(1):

> Within 60 days after receiving written notice in accordance with s. 6(5) of the decision of the Chair or a Panel of the Board made under s. 6 of the complaint, the complainant or farmer affected by the decision may

> appeal the decision to the Supreme Court on a question of law or jurisdiction.

[17] The appellant complained in accordance with the procedure set out in the Act. A Panel of the Board was duly appointed and a hearing was held pursuant to s. 6(1) of the Act.

[18] In the decision of ***Lubchynski et al v. Farm Practices Board***, (2004) BCSC 657, Madam Justice Beames considered the standard of review to be applied upon an appeal from the Board. She concluded that the appropriate standard was that the decision must be "patently unreasonable" in order for it to be reviewed by the Court.

[19] She also found that the "determination of normal farm practice is not a matter of statutory interpretation." She further considered that, "If the Board finds that a farmer's practice is not normal farm practice they may order the farmer to modify his practice in a specified manner, including in manners not available by way of remedy which could be granted by the Court."

[20] While the above references were made in relation to the degree of deference that courts ought to afford such tribunals, they are instructive as to a description of the broad powers such a board has to order or implement changes to farming practices.

[21] The Board, while considering whether the effects of odour, noise and dust arose from "normal farm practices" considered in its analysis that such practices must show "some threshold of consideration for one's neighbours."

[22] In *Lubchynski* , Madam Justice Beames, said the following at paragraphs 16 through 18:

> The Act expressly gives the Board power to make orders requiring modification to a practice. That jurisdiction is limited only by the requirement that the ordered modification be consistent with normal farm practice. The Board's decision on such an issue is, because of the Board's expertise, entitled to significant deference. The test on review is not whether this court would have arrived at the same conclusion. I conclude that unless the Board's decision is patently unreasonable, for example if it were completely unsupported by any evidence, this court cannot simply substitute its discretion for the Board's discretion, nor re-weigh and re-evaluate the evidence heard by the Board for the purpose of reaching its own conclusion.

[23] She went on:

> I am satisfied that the Board was not clearly wrong in determining that, if the appellants were going to use a propane cannon, they had to use the cannon in a specified manner and in conjunction with other specified methods of bird predation. There was some evidence from which the Board could reach its conclusion. The Court has not, in its original decision nor in its supplementary decision, directed the appellants to net their entire crop. The Board has, indeed, left it open for the appellants to design their own program and then to re-attend before the Board to have the proposed netting program assessed.
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> The Board was clearly, in hearing this matter and issuing its decisions, engaged in the very task the legislation envisions, namely attempting to find a balance between the needs of the farmers on the one hand and the needs of the surrounding residential neighbours on the other. In finding that balance the Board was, I find, less prescriptive in its decision than it could have been. There was evidence to support the decision and the decision was, I am satisfied, squarely within the Board's jurisdiction.

[24] I agree with those remarks of Madam Justice Beames.

[25] Here, the Board considered that the location of the barns near to the property line, together with the level of activity and the location of the bulk of that activity at the west end of the barns, created a situation which exceeded the tolerance limits of normal farm practice, requiring the farm to implement some mitigating steps. Those steps were ordered by the Board and have now been carried out.

[26] Mr. Wattie submits that once the Board has concluded that the farming practices located at the west end of the barns are not normal farming practice, it must order a cessation or a mitigation of that activity at the west end of each of the barns. In other words, an order of cessation of activities at the west end of one barn only is, in his submission, insufficient and amounts to clear error of not complying with the requirements of s. 6(1)(b) of the Act.

[27] Put simply, Mr. Wattie says that by failing to order the cessation of chicken gathering and shipping at the west end of the north barn, as it did with respect to the west end of the south barn, it did neither of those things it was required to do pursuant to s. 6(1)(b).

[28] I cannot accept that submission. Section 3(1) of the Act provides that where a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation, as part of a farm business, the Board must determine whether the odour, noise, dust or other disturbance results from normal farm practice.

[29] If the Board determines that the practices that cause the odour, noise, dust or other disturbance is **not**, and I add emphasis there, a normal farm practice, it must order a farmer to cease the practice, or to modify the practice, to be consistent with

normal farm practice. It is fair to say that the starting point is that the farming practices, even normal farming practices, can and do cause a certain amount of odour, noise, dust or other disturbances. The Board recognized this in its decision.

[30] The appellant says that she was aggrieved by the odour, noise, and dust as a result of the farming practices of the farm. The Board considered the complaint, as well as the farming practices, concluded that overall, given the circumstances of this particular situation, the activities exceeded the tolerance levels of what would be considered to be normal farm practice, and ordered steps to be taken to mitigate those effects.

[31] The Board did not purport to, nor was it required to order an elimination of all of the effects. The Act does not require the Board to either cease or mitigate every specific activity complained of. Rather, it is required to order the cessation or modification of the overall farm practice causing the odour, noise or dust to be consistent with normal farm practice.

[32] Making orders that resulted in the "bulk of that activity" to no longer be located at the west end of the barns, the Board did modify the practice to be consistent with, in its view, normal farm practice. In so doing the Board undertook the precise task required by the Act, that is to seek a balance between the needs of farmers to farm and the desires of surrounding residential neighbours to enjoy their property.

[33] It must also be noticed that the purpose of the Act is to protect farm practices. The Act provides a dispute resolution mechanism where conflicts arise, as they

inevitably do with urban growth, between the interests of the farmers and the interests of homeowners.

[34] In the case at bar, while the actual practice of the farm had been normal farm practice, the Board's more expansive view is to require modifications of those practices on the basis of what might be called a "good neighbour" principle. This, I find, is consistent with the purpose of the Act.

[35] I am unable to conclude that the Board was clearly wrong in determining how best to alleviate the concerns raised by the appellant, neither am I able to find an error of law or jurisdiction by the Board in reaching the decision it did. Accordingly, the appeal is dismissed.

[36] I propose to allow costs of Scale 3 to the farm, with no costs of the appeal to the Board, unless there are submissions on that point by counsel.

[37] UNIDENTIFIED SPEAKER: No, that's fine.

[38] THE COURT: All right.

Brine J.