



October 31, 2003

File: #03-04

DELIVERED BY COURIER

Mark Hanson
Corine LeBourdais

Carlo Asquini

Dear Sirs/Mesdames:

COMPLAINT FILED UNDER THE *FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT*

Introduction

This decision addresses a preliminary issue raised by the complaint filed by Mr. Hanson and Ms. LeBourdais dated July 16, 2003 against their neighbour Carlo Asquini under the *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c. 131 (the "Act").

On August 5, 2003, Jim Collins, Manager, Dispute Resolution Services for the Farm Practices Board (the "FPB"), met with the parties at their respective residences in the Cherry Creek neighbourhood outside Kamloops, BC. As a result of this site visit, Mr. Collins identified a preliminary issue concerning the "farm" status of the property owned by the Asquini's. In his letter of August 19, 2003, Mr. Collins wrote:

This issue concerns the "farm" status of the property owned by Mr. and Mrs. Asquini and on which the cannon is being used. As this relates to the Board's jurisdiction to consider this matter, any question as to farm status needs to be addressed prior to engaging knowledgeable persons or proceeding to a hearing on the merits. If the Asquinis are not conducting a farm business, then the *Farm Practices Protection (Right to Farm) Act* (the "Act") does not apply and a complaint cannot proceed.

Mr. Asquini provided the following information at the August 5 meeting:

1. The property totals 6.3 acres.
2. The property is in the Agricultural Land Reserve ("ALR").
3. There are 18 or 19 fruit trees (3-4 apricot, 1 pear, 3 cherry, 1 plum and 10 apple) on the property.
4. Growing tree fruits is the only agricultural operation on the property.

Farm Practices Board

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5. The fruit from the trees is not sold commercially through a packing house or a fruit stand. It is used by Mr. and Mrs. Asquini or given to family and friends. In some cases Mr. and Mrs. Asquini may receive a small payment for the fruit.
6. The property has “farm” status and has had such status since sometime in the 1970s.

Subsequent to the August 5 meetings, Board staff conducted some initial research into the status of the property. That research, as outlined in the enclosed BC Assessment Authority information, revealed the following:

1. The location of the property is described as:
 - 5080 Lazy Acres Road
 - Site 4, Comp 17
SS 2, Stn South Del Ctr
Kamloops, BC V2C 6C3
 - Lot A, Plan 9050, Section 4, Township 20, Range 19 Div of Yale Land District.
2. The property is 5.32 acres in size.
3. The property is in the ALR but is classed as “residential”.

The Chair of the FPB has referred the preliminary issue of farm status and jurisdiction to this Panel for decision. In coming to this decision, we have reviewed letters from Ms. LeBourdais and Mr. Hanson dated September 4 and 23, 2003 and documents received from Mr. Asquini, including an Owner’s Certificate of Insurance and Vehicle Licence and extracts from a General Ledger for a period commencing in December 1974.

Decision

The jurisdiction of the FPB is set out in the *Act*. Section 3 sets out the basis for a complaint to the FPB:

- 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.

In order to bring a complaint under the *Act*, a person must be aggrieved by “odour, noise, dust, or other disturbance resulting from a *farm operation* conducted as part of a *farm business*”. In this case, the source of the complaint is Mr. Asquini’s use of a propane cannon to limit bird predation on his fruit trees. The question for this Panel is whether Mr. Asquini’s use of the propane cannon is a farm operation conducted as part of a farm business.

If the answer to this question is “no”, then the *Act* does not apply, which would have two consequences for these parties:

- Mr. Hanson and Ms. LeBourdais would not be able to proceed with this complaint before the FPB for an order requiring Mr. Asquini to modify or stop the practice.

- On the other hand, Mr. Asquini would not have the *Act's* protection if he were taken to court for "nuisance" or breach of any local government noise by-law.

The latter consequence flows from the wording of section 2 of the *Act*, which states:

- 2 (1) If each of the requirements of subsection (2) is fulfilled in relation to a ***farm operation*** conducted as part of a ***farm business***,
- (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and
 - (b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.
- (2) The requirements referred to in subsection (1) are that the farm operation must
- (a) be conducted in accordance with normal farm practices,
 - (b) be conducted on, in or over land
 - (i) that is in an agricultural land reserve,
 - (ii) on which, under the *Local Government Act*, farm use is allowed...
 - (c) not to be conducted in contravention of the *Health Act*, *Pesticide Control Act*, *Waste Management Act*, the regulations under those Acts or any land use regulation.
- ...
- (3) If each of the requirements of subsection (2), except subsection (2)(b)(ii), is fulfilled in relation to a ***farm operation*** conducted as part of a ***farm business***,
- (a) despite section 267 of the *Local Government Act*, and despite section 794(5) of that Act under which section 267 is made applicable for the purposes of Part 24 of that Act, the farmer does not contravene a bylaw made under section 703, 704, 724, 725, 728 or 797.1(1)(c) or (d) of the *Local Government Act*, by the council of a municipality or by the board of a regional district, only because of conducting that farm operation, and
 - (b) despite section 281 of the *Local Government Act*, and despite section 847(1) of that Act under which section 281 is made applicable to a regional district and its board, the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

[emphasis added]

As noted above, the key question for this Panel is whether Mr. Asquini's use of the propane cannon is a farm operation conducted as part of a farm business. The relevant definitions in the *Act* are as follows:

"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;

"farm operation" means any of the following activities involved in carrying on a farm business:

- (a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals;
- (b) clearing, draining, irrigating or cultivating land;
- (c) using farm machinery, equipment, devices, materials and structures;
- (d) applying fertilizers, manure, pesticides and biological control agents, including ground and aerial spraying;
- (e) conducting any other agricultural activity on, in or over agricultural land...
- (k) processing or direct marketing by a farmer of one or both of...

“**farmer**” means the owner or operator of a farm business;

“**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...

Mr. Asquini is growing plants (fruit trees) and using a propane cannon, which in this case brings him within the meaning of “farm operation” in (a) and (c) of that definition. The key question in this instance however is whether Mr. Asquini conducts this operation as part of a “*farm business*” and is as such subject to the *Act*.

In determining whether a person is carrying out a “farm business”, a number of factors can be considered (this list is neither exhaustive nor exclusive, and not all factors are necessarily of equal weight):

- a) What is the location and magnitude of the farming operation in comparison to other operations producing similar agricultural products?
- b) Does the farm operation operate or intend to operate on the basis of generating income or profit?
- c) Do the farm operation’s plans clearly contemplate future commercial activities and is income anticipated as a result of defined development plans (such as plantings that may not be productive for several years)?
- d) Does the farm qualify for a farm tax credit under the *Income Tax Act*?
- e) Does the farm hold licences related to agricultural or aquacultural activities?
- f) Is the operation a farm education or farm research institution?

The *Canadian Oxford Dictionary* (1998) defines “business” amongst other things as “one’s regular occupation, profession or trade”. *Black’s Law Dictionary* (7th edition, 1999) defines “business” as: “(a) commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”.

Implicit in the definition of “business” as it is used in the *Act* is some aspect of an agricultural undertaking carried out for the purposes of generating income or profit (except perhaps in the special case of farm education and research institutions which, for obvious reasons, have also been given the *Act*’s protections). Thus, as a bare minimum, in order to establish that a farmer has a “farm business”, there should be documentation supporting revenue or an intention to generate income from recognised farming operations or activities.

In this case, we are not satisfied that Mr. Asquini generates, or intends to generate any income (let alone profit) from his tree fruit. In fact, the evidence is to the contrary. Mr. Asquini has stated that the fruit from the trees is not sold commercially. Rather, the fruit is for personal consumption or given to family and friends, though occasionally the Asquini’s may receive a small payment for their fruit. This is confirmed by the highlighted extracts Mr. Asquini has

provided us from his general ledger book. The ledger extracts show payments in and out of a “farm account” dating back to 1974. Three of the sheets relate primarily to 1975 and 1976. In that period, Mr. Asquini purchased feed out of his farm account. A further sheet appears to have information from 1981 and shows that Mr. Asquini was purchasing dog food out of his farm account. The final sheet has no dates on it. A review of the extracts does not show any obvious farm income or intention to generate such income. The only money into the account appears to be a periodic transfer or deposit from an unidentified source. The ledger sheets submitted by Mr. Asquini confirm his earlier statements to Mr. Collins that he does not sell his tree fruit or any product made from that tree fruit to generate income.

There being no evidence of an operation to generate income, our conclusion is not affected by Mr. Asquini’s decision to insure his 1958 flatbed pick up truck for “[f]arm use ...work vehicle not driven to or from or part way to or from work or school except farm use...Pleasure use included except vehicles licenced under a farm fleet licence”. Nor, in the circumstances here, is our conclusion affected by the fact that the Asquini’s property is located within the ALR. This factor, in and of itself, does not make the Asquini’s tree fruit operation a “farm business”. It is an unfortunate reality that many people reside on ALR land and yet do not carry out farming operations or farming businesses from their property. That Mr. Asquini owns a vehicle licenced for farm use and has land in the ALR is insufficient to outweigh the factors demonstrating that this operation is not conducted as a business.

After considering all the relevant factors in this case, we conclude that it is difficult to distinguish the Asquini’s “farm operation” from the large suburban gardens located in several residential areas of this province. One would not think that a person producing fruit and vegetables from a residential garden, and who gives most of the excess away to family and friends, is operating a “farm business”, nor would one expect that person to be protected under the *Act*. Likewise it is difficult to characterise the Asquini’s production of tree fruit as a “farm business”.

The Panel finds that there must be a distinction between practices carried out for the benefit of a household and those carried out as part of a farming business. The former will in general not be covered by the *Act* whereas the latter will be afforded protection if they are consistent with “proper and accepted customs and standards established and followed by similar farm businesses under similar circumstances”. In making this statement, the Panel leaves open to future consideration the proper characterisation of operations that have come to be known as “hobby farms”, which may well be covered by the *Act* depending on such factors as the nature and scale of the operation and the intention to generate revenue.

The *Act* recognises that farming has a role vital to British Columbia’s future. In balancing conflicts between farmers and their neighbours, the *Act* exempts responsible farmers using “normal farm practices” from nuisance actions and certain municipal by-laws. However, the exemption does not extend to persons carrying out farm operations not part of a farm business, even if they are in the ALR. The *Act* does not protect Mr Asquini’s use of a propane cannon to

limit bird predation on his fruit trees when his use of that cannon is not done as part of a farm business.

Conclusion

As Mr. Asquini is conducting a farm operation that is not part of a farm business, the *Act* does not apply to his use of a propane cannon. Accordingly, the complaint is dismissed. If this matter cannot be resolved in a neighbourly fashion, any remedies that the complainants wish to pursue against the cannon use will have to be advanced in some other forum.

Mr. Hanson and Ms. LeBourdais requested that if this Panel found that the FPB lacked jurisdiction to hear this complaint, their filing fee of \$100 should be refunded. Given that it was not possible for the FPB to summarily determine the issue of jurisdiction based on the complaint as filed, it was necessary to conduct a hearing albeit by written submissions to determine this issue. In such circumstances, the filing fee of \$100 is non-refundable.

Right of Appeal

Section 8(1) of the *Act* states:

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.

Note

Effective November 1, 2003, the FPB and the British Columbia Marketing Board are being consolidated into the British Columbia Farm Industry Review Board (the "FIRB"). The FPB's mandate will continue under the FIRB.

FARM PRACTICES BOARD

Per

(Original signed by)

Christine J. Elsaesser, Panel Chair
Hamish Bruce, Member
Wayne Wickens, Member