



September 2, 2011

File #11-10

**DELIVERED BY E-MAIL**

Caron Ridgeway  
[REDACTED]

Scott McLuckie  
[REDACTED]

Dear Sir/Madame:

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

On July 18, 2011 the BC Farm Industry Review Board (BCFIRB) received a formal complaint from Caron Ridgeway against noise generated from barking dogs owned by Scott McLuckie. The issue of jurisdiction was raised by the parties at the onset of the complaint and BCFIRB initiated a submission process to assist in determining whether the practice in question (barking dogs) results from a farm operation conducted as part of a farm business.

Section 6(2) of the *Farm Practices Protection (Right to Farm) Act (Act)* allows the chair of BCFIRB, after giving the parties an opportunity to be heard, to refuse to refer an application to a panel for the purposes of a hearing on various grounds. A complaint about a matter that is outside the scope of the *Act* would fall within these grounds.

In BCFIRB staff's July 19, 2011 letter the parties were referred to the *Hanson v. Asquini* (October 31, 2003) decision which confirms that where there is no underlying farm business, the *Act* has no application. The parties were also asked to provide submissions on whether the practice complained of relates to a farm business.

After receiving initial submissions from the parties, and after a July 27, 2011 email to Mr. McLuckie reminding him of information requirements, BCFIRB staff on August 17, 2011 sent a formal letter to Mr. McLuckie requesting he provide further information specifically related to the status of his property as a 'farm business' as this information was absent in his previous submissions. Ms. Ridgeway was given the opportunity to submit a final reply on any further submission received from Mr. McLuckie. Further submissions were received in response.

I have had the opportunity to review all the submissions submitted by both parties.

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Ms. Ridgeway made her first submission on July 19, 2011:

The Property 3480 Gates Road, West Kelowna B.C has 4 dogs and 6 sheep. As stated in my complaint to BCFIRB in regard to the barking and aggressive behavior by the dogs on the said property. I approached Central Okanagan Regional District to help solve my complaint. I was then told that it was not in their control as the said property was protected by "Farm Status" and that they could not help with the excessive barking from the dogs at night. They informed me that I need to get in touch with the Ministry of Agriculture in Kelowna. I was given the name of Carl Withler and a contact number. I contacted Carl Withler and explained my complaint and he told me he would visit the said property. Carl did and then informed me that I needed to file my complaint to the BCFIRB to help resolve this matter. I was not aware till then that the said property was protected under the "Right to Farm Act".

As stated in my complaint letter to BCFIRB I would appreciate this matter settled as to if the said property is "Normal Farm Practice" or not. If found not protected I wish to have this information forwarded to the Central Okanagan Regional District so that this matter can be resolved.

Mr. McLuckie responded on July 24, 2011:

In response to RE: RidgewayvsMcluckie. I would like to make it clear that I am using my property for which it is zoned, while the Ridgeway complainants do not.(they possess the same zoning.- country residential which allows for small scale agricultural endeavours.) I do not have four dogs - I have 3. I am presently raising sheep on my property - presently I have 2 ewes and three babies approx. 3 months old. I also have 3 ewes being bred on another sheep farm. I also have an industrial size greenhouse that is utilized growing food crops. Unfortunately the verbal abuse and harrasment I have been experiencing from the Ridgeways over the past year has caused me considerable stress which is affecting not only my health but my ability to properly manage my farm. I have sought legal counsel and will persue a civil suit if these people continue this harrassment. As it stands presently, I have had dog control over to inspect my property - I am in compliance with all bylaws with the regional district. I have also had the SPCA over to inspect the dogs and their living space and all was found proper. Further, Agriculture Canada sent an inspector to my farm , Mr, Carl Withers who has stated that I DO have a farm and quote: Your dogs can bark all night if livestock predators are in the area. So as it stands these people are attempting to hinder my ability to utilize the property for which it was zoned. The dogs are Not aggressive, they are simply doing the job they were bred for - guarding and protecting the livestock. In fact the Ridgeways Pitbull is a danger to other dogs as it has attacked the neighbors dog 2 or 3 times, resulting in Veternarian care. (Gordon and Trish Ficke) As far as the barking goes I try to manage it the best I can and am now in the process of muzzle training to keep the barking managable. What I find very interesting is up to the present date, no other neighbor has complained about my dogs, because I only allow one dog out at night and the barking is not excessive and if it does get excessive I bring the dog into the house or garage. I have a right to farm my property without hinderance from neighbours who do not utilize their property for which it is zoned. Therefore I am asking this farm practices review board to please dismiss this complaint and allow me to continue trying to operate my farm in accordance with proper farm practices. Thank you for this forum to resolve the situation. N.Scott Mcluckie

Ms. Ridgeway's August 8, 2011 reply submission stated in part:

As stated in my original complaint letter to BCFIRB, it is still unclear if the operation carried on by my neighbour is considered a "farm operation conducted as part of a farm business". It is also still unclear as to whose jurisdiction the property is under. These matters need to be determined in order to resolve this issue.

On August 18, 2011 Mr. McLuckie responded to BCFIRB's request for further information on the status of his property as a "farm business":

The following is the further information you have requested in order to resolve my livestock guardian dogs barking - A. As far as I am aware, there is no one else raising sheep in my neighborhood. B. My farm operation intends to operate on generating income through the sale of live sheep. C. Long term plans for my farm include utilizing the sheep waste and degraded hay to make a soil supplement/enhancer for public sale, as well as specializing in herbs and botanicals, as there is no money in raising food crops on the small acreage I own. D. The farm does not qualify for farm tax credit at this time. E. My farm does not hold any licenses except for a kennel license for the livestock guarding dogs (3- soon to be 2 as my oldest dog of 12 years will soon be deceased) F. The farm does not operate as farm education or research. I would also like to state that my dogs are in compliance with the regional district bylaws and are kenneled from 7pm to 7am unless there is a threat from predators, in which I let the dogs do the job they are supposed to do - protect the livestock from any threat from wild life, particularly coyotes,- further the dogs have a right to run free on my land and bark during the hours between 7am to 7pm. If the complainants would fence the back of their property this would help prevent wildlife from entering the property, thus mitigating the dogs barking - as it stands now, deer enter the complainants property on a regular basis which cause my dogs to bark. I would also like to state that there have been no other complaints from the other residents in the immediate area around my farm. I hope this information is of use to you in determining my right to farm - agriculture Canadas Mr. Carl Withers has inspected my property and has determined that it is a farm, so I trust that the farm review board will take this into account and make the proper ruling. Thank you for this forum to resolve this situation,

Ms. Ridgeway provided her final reply on August 22, 2011:

Mr. McLuckie replied that he intends to generate income based on selling sheep. Where is the support for this intention? It is an easy assertion to state that you intend to create an income. There is no current stated income. Has it ever been a viable farm operation? What is the basis for assuming that the farm will be profitable at any future point? The onus is on Mr. McLuckie to support this speculative assumption.

Mr. McLuckie replied that long term plans include the production of soil supplements for public sale, as well as a specialization in herbs and botanicals. Again, he provides no support for this claim. There should be some tangible evidence available to demonstrate that Mr. McLuckie has invested in the research and technology to back up these claims and is actively pursuing the same. How "long term" are the plans? Again, this appears to be purely speculative.

Does the farm qualify for farm tax credit under the Income Tax Act? No.

Section 3 of the (*Act*) provides for complaints to the board:

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.

Given that section 3 requires that a complaint arise out of a farm operation carried on by a farm business, the complaint must relate to a farm business. "Farm business" and "farm operation" are defined by the *Act*:

**"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 by 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
  - (i) the products of a farm owned or operated by the farmer, and
  - (ii) within limits prescribed by the minister, products not of that farm,

The "farm business" requirement makes it clear that the *Act* was never intended as redress for every complaint between neighbours involving practices relating to plants or animals on a piece of land.

Where the *Act* does apply, it has significant implications. It gives a neighbour a potentially powerful remedy, i.e., 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 (i.e., 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 *Act*, its drafters wanted to focus its scope, and its boundaries. This recognized that where the *Act* does *not* apply, the general law does, meaning that when neighbours cannot work things out in a neighbourly way have their usual remedies going to the municipality or to the courts to resolve their disputes.

In addressing the jurisdiction issue in this case, I adopt the approach set out by the BCFIRB panel in *Hanson v. Asquini*:

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 English Dictionary (1998) defines "business" amongst other things as "one's regular occupation, profession or trade". Black's Law Dictionary (7<sup>th</sup> ed. 1999) defines "business" as "(a) 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 his November 20, 2010 decision dismissing the *Hodge v. Eben* complaint, my predecessor made the following comments:

The analysis of this issue was hampered by Mr. Eben’s failure to produce any documents to support his claim that he indeed has a farm business. He has maintained that any documents provided to support his claim for farm classification are confidential by law. I disagree with this interpretation. The application documents do have a notation stating “the information on this form is confidential and will only be released if required by law”. However, what this means is the BC Assessment Authority cannot be compelled to release these documents in the absence of a court order. That does not mean that Mr. Eben is precluded from disclosing these documents or the information contained therein or even the actual assessment document which would confirm whether for assessment purposes the property has farm classification. Further, Mr. Eben could have disclosed invoices for feed, transport of livestock, slaughtering or documentation relating to sales. He claims to have had very recently processed 270 large meat birds. Presumably, there would be some form of documentation relating to the catching, processing and sale of these birds; none were provided. If he had vehicles with farm status, those records could have been disclosed. Given that Mr. Eben claims to work on his property full time, income tax records could also have been provided.

In his August 18, 2011 submission, Mr. McLuckie states that he “intends to operate on generating an income through the sale of live sheep”, that the “farm does not qualify for farm tax credit at this time” and that the farm “does not hold any licenses except for a kennel license for the livestock guarding dogs”. While I did not find the latter point necessary to arrive at my decision, I note that s. 1(n) of the *Act* excludes kennel operations.

It is clear from his correspondence that while Mr. McLuckie may generate at some point in the future an income from his farm operations, he has not provided any documented evidence supporting that intention or of his present status as a farm business. Nothing substantiated has been brought to my attention regarding the current or future nature of his business that could reasonably trigger the definitions in the *Act*.

The relevant facts of this case are that the respondent currently has two ewes with three lambs and three livestock protection dogs on his property. The disturbance complained of is barking dogs. On its face, the farm activity of raising sheep would appear to be a hobby, not a farm business. Further, despite being given an opportunity to demonstrate that this is a business, the respondent has failed to do so. An uncertain plan in the future to generate an income is not in my view sufficient to make this a farm business.

In the circumstances, it is my view that the only appropriate outcome is to refuse to refer this complaint to a panel as the *Act* does not apply. Accordingly, the complaint is dismissed.

Section 8 of the *Act* states:

**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

A handwritten signature in black ink, appearing to be 'Ron Kilmury', written over a horizontal line.

Ron Kilmury

Chair