Right-to-Farm Legislation in British Columbia

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**Introduction**

As their popular name suggests, “right-to-farm” laws are a form of statutory protection of farmers.¹ While laws vary from jurisdiction to jurisdiction, their main purpose is to protect farmers from lawsuits, primarily those based on nuisance. The first such legislation was enacted in the United States in 1963 to protect feedlots in Kansas. By 1994, every state had enacted some form of right-to-farm law.² Canadian provinces followed their lead, and eventually every province across Canada implemented some form of right-to-farm law [see Table 1]. British Columbia enacted its first right-to-farm law in 1989.

**Table 1. Current Right-to-Farm Legislation in Canada**

<table>
<thead>
<tr>
<th>Province</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>Farm Practices Protection (Right to Farm) Act, R.S.B.C. 1996, c. 131</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Farm Practices Protection Act, C.C.S.M. 1992, c. F45</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Farm Practices Protection Act, S.N.L. 2001, c. F-4.1</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Farm Practices Act, S.N.S. 2000, c.3</td>
</tr>
<tr>
<td>Ontario</td>
<td>Farming and Food Production Protection Act, S.O. 1998, c.1</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Farm Practices Act, R.S.P.E.I. 1988, c.F-4.01</td>
</tr>
<tr>
<td>Quebec</td>
<td>Act Respecting the Preservation of Agricultural Land and Agricultural Activities, R.S.Q. c.P-41.1</td>
</tr>
</tbody>
</table>

Historically under the common law, property owners had the right to the “reasonable use and enjoyment of their property.”³ The activities they could conduct on their property were limited to ones that did not harm their neighbours. This is summed up in the Latin maxim *sic utere tuo, ut alienum non laedus*, literally “use your own property so as not to harm another’s.” The principle underlying this maxim is thought to date to the mid-thirteenth century judge and scholar Henry of Bracton. These ideas would later serve as the foundation for nuisance law.⁴

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¹ Brubaker, E. *Greener Pastures: Decentralizing the Regulation of Agricultural Pollution*. (Toronto: University of Toronto Press, 2007)
⁴ Ibid at 41.
The classic nuisance case involved some kind of unreasonable interference with the enjoyment of land. This could include a host of disturbances, such as dust, smoke, odours, or noise. The standard to determine whether something constituted a disturbance was based on what a reasonable person would find disturbing. Historically, when nuisance cases were before the courts, judges issued injunctions, or orders requiring the defendants to stop the nuisances. This right to an injunction most famously arose in the *Shelfer* case.\(^5\) In that case, an electric generator was creating a nuisance; the court held that an injunction was the appropriate remedy, and that damages should be awarded instead of injunctions only in exceptional cases. A second remedy to nuisance suits arose in the United States and involved a “balancing of equity” as between the plaintiff and the defendant. In cases where defendants (most typically large companies) provided important socio-economic services to society, and the costs to prevent the nuisances would be too high, the courts awarded damages in lieu of injunctions. In both the United States and Britain, courts tended to give industry more leeway to pollute and afforded less protection to the rights of private property owners than they did in Canada.

Black *v. Canadian Copper Co.*\(^6\) represented a departure from traditional nuisance law decisions in Canada.\(^7\) In that case, farmers in Sudbury Ontario complained about crop losses from nearby copper and nickel smelters. Justice Middleton awarded a modest amount of damages but did not issue an injunction against the company. In part, this was because the mining industry supported much of the community. Following this case, the provincial government enacted the *Damage by Fumes Arbitration Act*,\(^8\) removing the remedy of injunction against the emitters of sulphur fumes.\(^9\)

Another famous Canadian nuisance case is that of *KVP Co. v. Mckie et al.*\(^10\) KVP operated a pulp and paper mill on the Spanish River. The waste from its operations was polluting the river downstream, killing fish and making the water unfit to drink. Property owners downstream of the mill, including tourist lodge operators, commercial fishermen and farmers, were directly impacted by waste. In contrast to Black *v. Canadian Copper*, the courts stuck to the traditional nuisance remedy and ordered an injunction requiring KVP to stop polluting the water. Initially the legislature amended the *Lakes and Rivers Improvement Act* to require judges to balance the interests of injured property owners with the socio-economic impact on the communities who depended on the pulp and paper industry. The amendment was too late to assist with the appeal. Following the Supreme Court decision against the mill owners, the government stepped in and enacted the *K.V.P.*

\(^5\) *Shelfer v. City of London Electric Lightning Company* [1895] 1 Ch. 287
\(^6\) *Black v. Canadian Copper Co.* (1917) 12 OWN 243
\(^8\) *Damage by Fumes Arbitration Act*, R.S.O. 1921, c.85
\(^9\) Supra Note 5 at 11.
Company Limited Act\textsuperscript{11} enabling KVP to continue to pollute the river. Clearly, farmers are not the only ones that governments have sought to protect from nuisance cases via statute.

Parallels are also seen between the statutory protection of the lumber industry in the nineteenth century with that of farmers now.\textsuperscript{12} Strong lobbyists within the lumber industry, such as the lumber barons of the Ottawa River, cited the importance of lumber to the economy and the costs of preventing sawdust from entering neighbouring streams. They urged the government to protect them from economic ruin.\textsuperscript{13} The Ontario government responded by enacting *An Act Respecting Sawmills on the Ottawa River*.\textsuperscript{14} The Act removed the threat of an injunction and allowed courts to order only damages when the industry adversely impacted private property rights. Eventually, increasing evidence of the pollution of the nation’s waterways by industry and its interference with other interests such as navigation and fisheries led to the enactment of environmental legislation. The social costs of industrialization began to be recognized, and there was an understanding that government support for industry came with a duty to protect the broader public interest.\textsuperscript{15}

The parliamentary debates in British Columbia leading up to the introduction of right-to-farm legislation highlight the similarities between government’s efforts to protect powerful industrialists in the nineteenth century and its efforts to protect farmers today. In particular, the emotional appeals about the economic struggles to survive as a farmer and the importance of farmers to society echo the industrialists’ claims.

**The Evolution of Right-to-Farm Laws in British Columbia**

*Agricultural Land Reserve Act*

Assistance to farmers in British Columbia began with efforts to set aside land for agricultural use.\textsuperscript{16} Reserving land for farming was considered particularly critical in British Columbia and it is not surprising that it was the first province to enact this type of legislation. The mountainous landscape meant there was a shortage of developable land, resulting in competition for land to meet both urban and agriculture needs. Less than five percent of land in British Columbia, concentrated in the valleys, is suitable for agriculture.\textsuperscript{17} Prime farmland (less than one percent of the land base) is found in the areas under most pressure for urbanization. In 1973, the *Agricultural Land Commission Act*,

\begin{itemize}
  \item \textsuperscript{11} *K.V.P. Company Limited Act* (1950, c. 33)
  \item \textsuperscript{13} Ibid at 224.
  \item \textsuperscript{14} Ibid at 204 and 224. *An Act Respecting Sawmills on the Ottawa River*, S.O. 1885, c. 24 s.1.
  \item \textsuperscript{15} Ibid at 255.
  \item \textsuperscript{17} Curran, D. 2007. British Columbia’s Agricultural Land Reserve: A Legal Review of the Question of Community Need, April 4, 2007. Smart Growth BC, Vancouver BC.
\end{itemize}
now known as the Agricultural Land Reserve Act (ALRA), was enacted. The ALRA allowed special zoning for agricultural land reserves (ALRs) to be created by the provincial government. Agricultural land reserves total about 4.7 million hectares, with slight fluctuations in total area since they were created in 1973. Since 2002, the Commission has begun to allow a broader range of uses on the ALRs based on community needs. The factors that are considered include the social, economic, environmental, and heritage needs of the community. These factors are currently incompatible with section 10 of the ALRA, whose focus is the preservation of agricultural land.

*Agriculture Protection Act*

The first right-to-farm legislation, the *Agriculture Protection Act*, was not enacted in British Columbia until 1989. The Act protected farmers from injunctions and damages as a result of nuisance claims, as long as the farmers were farming reasonably and complying with their permits. The Act did not impact municipal bylaw powers. The parliamentary debate on the Act was limited. The *Agriculture Protection Act* was introduced on June 2, 1989, by the Hon. John Savage, the agriculture minister for the ruling Social Credit party. One argument made by New Democratic Party MLA Mr. Glen Clark during the debates was that many complaints arise due to farmers breaking municipal bylaws. According to Mr. Clark bylaws are sometimes put in place once a conflict arises, reducing the farmer’s ability to farm. He did not see how the statute would protect the farmer in this situation. His colleague Mr. Dale Lovick raised concerns about aquaculture operations. The *Agriculture Protection Act* was replaced by the *Farm Practices Protection (Right to Farm) Act* in 1996.

*Farm Practices Protection Act (FPPA)*

The central feature of the FPPA is the protection of normal farm practices from nuisance suits. This is outlined in section 2 of the FPPA:

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.

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18 *Agricultural Land Reserve Act*, RSBC 1996, c. 10


(b) be conducted on, in or over land

(i) that is in an agricultural land reserve,

(ii) on which, under the \textit{Local Government Act}, farm use is allowed,

(iii) as permitted by a valid and subsisting licence, issued to that person under the \textit{Fisheries Act}, for aquaculture, or

(iv) that is Crown land designated as a farming area under subsection (2.1), and

(c) not be conducted in contravention of the \textit{Health Act}, \textit{Integrated Pest Management Act}, \textit{Environmental Management Act}, the regulations under those Acts or any land use regulation.

As noted above in s.2(b), the \textit{FPPA} only applies to land that is in the agricultural land reserve, land where farm use is allowed under the \textit{Local Government Act}, land licensed for aquaculture, and Crown land designated as a farming area. One of the unique features of the \textit{FPPA} when it was enacted in British Columbia compared to other provinces was that it linked the right-to-farm concept with reductions to local government powers over farming activities. This feature was later added to other legislation. The \textit{FPPA} overrides municipal bylaws related to nuisances from agriculture for most farms. However, it does not override such bylaws where farm use is allowed as a result of the \textit{Local Government Act}. This appears in section 2(3) of the \textit{FPPA}:

\begin{verbatim}
2 (3) The following apply 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 260 (3) [bylaw contraventions] of the Community Charter, a farmer does not contravene a bylaw made under the following provisions of the Community Charter only by conducting that farm operation:

section 8 (3) (d) [firecrackers, fireworks and explosives];

section 8 (3) (e) [weapons other than firearms];

section 8 (3) (h) [nuisances, disturbances and other situations];

section 8 (3) (k) [animals];

section 8 (5) [firearms];

(b) despite section 267 of the Local Government Act, a farmer does not contravene a bylaw made under the following provisions of the Local Government Act only by conducting that farm operation:

section 703 [animal control authority];

section 724 [noise control];

section 725 [nuisances and disturbances];

section 728 [fireworks];
\end{verbatim}
(c) despite section 274 [actions by municipality] of the Community Charter and section 281 [enforcement by regional district] of the Local Government Act, the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

The FPPA made certain amendments to the Local Government Act, R.S.B.C. 1996, c. 323, including:

- Section 963(5) (now s. 903(5)), which provides that the power to make zoning bylaws contained in the section cannot be exercised by a local government to prohibit or restrict the use of land for a farm business without the approval of the Minister of Agriculture, Fisheries and Foods (the “Minister”);

- Section 973.2 (now s. 916), which authorizes the Minister to publish farming standards to guide local governments in preparing bylaws;

- Section 973.3 (now s. 917), which provides that a local government may, subject to the Minister’s approval, make farming bylaws on matters such as the conduct of farm operations and types of buildings and equipment to be used in farm operations; and

- Both ss. 963(5) and 973.3 were made subject to s. 973.4 (now s. 918), which clarifies that they do not apply to a local government unless an Order in Council so declares.

Part 3 of the FPPA establishes an administrative tribunal, the Farm Industry Review Board (or FIRB), formerly known as the Farm Practices Board, to resolve disputes among landowners. The FIRB handles nuisance claims arising under the Act. The FIRB administers three statutes: the Natural Products Marketing (BC) Act (NPMA), the Agricultural Produce Grading Act (APGA), and the Farm Practices Protection Act (FPPA).

Originally the Board was chaired by and made up of members of the British Columbia Marketing Board, as well as not more than 10 additional members appointed by the Minister. However, this stipulation was repealed in July 2003 and now the Board is made up of seven members, including a Chair and Vice Chair.

The Board is effectively a merger of members of the BC Marketing Board and the Farm Practices Board. In November 2003, members appointed to those Boards continued their terms as members of the new FIRB. Appointments to the FIRB are made by the Lieutenant Governor-in-Council upon the recommendation of the Minister of Agriculture.

Parliamentary Debates Related to the FPPA

Examining the parliamentary debates, or “Hansards,” sheds some light on the political motivations that led to the enactment of the FPPA. Overall, most parties and speakers were in support of the bill, with only one Member of the Legislative Assembly (MLA) showing a strong dissenting opinion, although even he supported the bill. Many MLAs were looking for more protection of farmers. Members of the Legislative Assembly did
take issue with some of the details of the legislation, however. Among the principal arguments in support of the bill were:

- Agriculture’s importance to the provincial economy;
- Food as a basic need of humanity;
- Farms’ struggles to be economically viable;
- Removal of other income support programs and subsidies for farmers;
- Conflicts at the farm-urban interface and the need for an inexpensive way to resolve disputes;
- Recognition that farming is changing: farms are more industrialized and people need to accept these new methods; and
- The need to help farmers make ends meet if the uses to which they can put their land are restricted by government.

The Hon. David Zirnhelt, the MLA representing Cariboo South and a member of the ruling New Democratic Party, introduced the legislation (then Bill 22). It had its first reading on May 16, 1995, and its second reading on May 30, 1995. According to Mr. Zirnhelt, the legislation’s main purpose was to protect farmers. During the debates, most MLAs alluded to the perceived economic importance of agriculture as a reason for the legislation. Although figures cited by legislators as to the exact size of the industry varied, agriculture was described as a large economic sector in British Columbia, employing approximately 30,000 people and bringing in $1.5 billion dollars, while food processing accounted for another $4.0 billion dollars. (Given the high level of government subsidies to the industry, it is questionable how much agriculture in fact contributes to the economy. British Columbia provides the least subsidies to its farmers compared with other provinces; still, for every dollar earned, the government provided British Columbia’s farmers with nearly $2.00 in subsidies between 1991 and 2000.)

During the debates, most legislators also discussed food as a basic need and the ways in which the legislation would help farmers and local governments deal with disputes arising from food production.

Mr. John van Dongen, the Liberal MLA representing Abbotsford, while supportive of the Bill, was concerned that the Farm Practices Board would be made up of members of the BC Marketing Board rather than farmers. He was also concerned about nuisance actions brought under the *Health Act* related to sewage disposal and felt farmers were unfairly treated. He thought that something should be done to alleviate this issue for farmers as well.

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22 Note that the BC General Election was held on May 28, 1996. The New Democrat Party lost a substantial number of seats to the Liberals though still formed the government. The Social Credit party lost all its seats.
24 *Ibid*. Note the Canadian average was $3.76 between 1991 and 2000.
Ms. Jan Pullinger, the MLA from Cowichan-Ladysmith, noted “… there is not much that is more basic to us as a society than our ability to provide for ourselves – to grow food.”26 She also mentioned that the Liberal opposition leader (then Gordon Campbell) was calling for agricultural land to be managed locally. In her view, this legislation was key. Farmers, rather than depending only on the “goodwill of municipalities and local politicians,” needed an “arms-length adjudicator.”

Mr. Lyall Hanson from North Okanagan disagreed with the suggestion that the Act would create an “equal partnership” between the Ministry of Agriculture and local government. As he read the Act, it was clear that the final authority rested with the Ministry. The Minister retained considerable powers under the Act. The Act on its face created substantial power at the provincial level to control farming at the expense of municipalities, effectively reducing their efforts to plan locally and enact local bylaws.

Ms. Lynn Stephens, the MLA for Langley, noted in her statement that she had watched the transformation of the Fraser Valley “…primarily a farming community – grow into one of quite an urban setting.”27 She was particularly concerned that farmers under the Act would have to comply with environmental standards and not contaminate wells or waterways, which was an issue in her community.

Mr. Norm Lortie, from Delta North, stated that people needed to realize that farming has changed. For farmers to be competitive in the global market they needed to use the most up-to-date equipment, such as huge greenhouses and helicopters.28 He was among several MLAs who clearly saw this legislation as protecting industrial farming rather than just the family farm.

Mr. Fred Gingell, the Liberal MLA for Delta South, noted that “if the use of land is going to be tied up, then the owners of that land have to be protected and assured that the economic viability of their operation is sound.”29 One of the main reasons he supported the legislation was that farmers had suffered continued cuts in other areas. He felt that additional support should be given to farmers to ensure they were able to continue to farm. He was also concerned about the makeup of the Board, arguing that it should include members of the Agricultural Land Commission and local government, either municipal or regional. Furthermore, he felt that people needed to recognize that farming was changing and that farms were no longer family run and required farm workers. Many found it difficult to put in septic tanks for additional residences on their lands.

Even those MLAs who had concerns about the legislation supported it in principle. The main concern was that, although the legislation was called a “right-to-farm” act, this was a misnomer as it would not do enough to support farmers. Members noted that farming was no longer economically viable, particularly compared to farming south of the border.

26 Ibid at 10.
27 Ibid at 15.
28 Supra Note 22 at 16-17.
29 Supra Note 22 at 27.
due to the removal of income support programs to farmers and the increasing costs for water and taxes.

Mr. Cliff Serwa, the MLA for Okanagan West and a member of the Social Credit party, was one of the few to come out strongly against the Bill, although even he supported it in principle. The main reason he did not support it was because he felt the existing legislation – the *Agricultural Protection Act* introduced in 1989 – was sufficient and that this was just the same legislation under a new name.30 (Mr. Zirnholt’s response to this was that the old act differed significantly as it put the onus on the farmer to show his practice was reasonable.) Mr. Serwa felt that the current government was wasting taxpayers’ money and that the new Act was just political grandstanding. He did not think the government really supported farming given they had removed most of the support programs for farmers. These concerns were echoed by Mr. Allan Warnke. He also felt that the name “right-to-farm” created too many expectations given what the legislation would actually do.31

Mr. Gordon Wilson, the Progressive Democratic Alliance Leader (who had formerly led the Liberal party and later joined the New Democratic Party) and MLA for Powell River-Sunshine Coast, believed that the bill was more controversial than it appeared from the debate among the elected members.32 He envisioned problems arising from the definitions of a farm operation, particularly concerning aerial and chemical spraying, which he thought the province should be moving away from. He felt issues would arise related to the *Pesticide Control Act*. With farms so close to residential areas, there was drift of spray onto school yards as well as contamination of wells. The Board regulating the *Pesticide Control Act* was very pro-industry, he said, although he later went on to say that this Board should be merged with the Farm Practices Board, in part to prevent having two different tribunals deciding on the same matters. Mr. Wilson raised other concerns about the proposed composition of the Farm Practices Board, noting that the public would be justified in asking why they did not have a representative on the Board. He also raised issues related to aquaculture and what would be considered “normal” practice. As he stated, “...the right to farm is not the right to abuse that privilege…”

**The Farm Industry Review Board**

*Mandate of the Farm Industry Review Board*

The FIRB’s mission is to promote an agri-food industry that serves the public interest. The Board administers three statutes: the *Natural Products Marketing (BC) Act (NPMA)*, the *Agricultural Produce Grading Act (APGA)*, and the *Farm Practices Protection Act (FPPA)*. Under the *NPMA*, the Board supervises regulated marketing boards and hears appeals from their orders, and signs federal-provincial agreements related to supply-managed commodities. Under the *APGA*, the Board hears appeals related to grading

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30 Supra Note 22 at 32.
31 Supra Note 22 at 42-46.
32 Supra Note 22 at 47-50.
licenses. Under the FPPA, the Board hears complaints related to nuisances arising from agricultural activities and conducts studies and reports on farm practices.

Decisions of the Farm Industry Review Board

The FIRB hears a limited number of cases each year compared to some administrative tribunals (such as Worker’s Compensation Tribunals). The FIRB heard only three, nine, and four cases in each of 2004/05, 2005/06, and 2006/07 respectively related to the FPPA. The existing backlog of cases from previous years was reduced to four by 2007/8 [see Table 2.]. The formal complaints filed over the last four years range from three to eight. No clear pattern as to the resolution of formal complaints has emerged; for example, in 2007/8 the majority of cases settled, in 2006/07 nearly half were withdrawn, while in 2005/6 most cases were heard in a formal hearing. Aside from formal complaints, the FIRB also receives a number of informal complaints each year. For example, it received 32 complaints in 2006/07. The FIRB also administers marketing appeals under the NPMA; it handled 37, 38, and 28 in each of 2005/06, 2006/07, and 2007/08. While it is difficult to measure, right-to-farm legislation, by virtue of its name, may lead to a chilling effect. Plaintiffs may hesitate to bring their dispute forward knowing that they face an uphill battle and that farmers have the “right to farm.”

Table 2. Summary of Complaints Administered by the FIRB

<table>
<thead>
<tr>
<th></th>
<th>2004/05</th>
<th>2005/06</th>
<th>2006/07</th>
<th>2007/08*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carried over from previous fiscal year</td>
<td>11</td>
<td>12</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Filed</td>
<td>5</td>
<td>8</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Total Administered</td>
<td>16</td>
<td>20</td>
<td>12</td>
<td>10</td>
</tr>
<tr>
<td>Resolution</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Withdrawn</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Resolved by settlement/mediation</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Heard/Decided</td>
<td>3</td>
<td>9</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Total Complaints disposed</td>
<td>4</td>
<td>11</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Other – adjourned for FPPA section 11 (2) review</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

*As of April 2008

The complaints fall into a number of classic nuisance categories, including noise, odour, and dust [see Tables 3, 4 and 5]. They can be grouped most commonly into problems
with *noise*, typically from bird scaring devices, such as propane cannons on orchards (often cherry) and blueberry farms; and problems with *odours* from animal farming (mostly poultry, including chicken and ducks) and turf. As of April 2008, the six cases before the Board included one involving dust, one concerning noise from a propane cannon, three related to odour, and one unusual case related to boat access. Frequently more than one nuisance is a concern in any particular complaint.

Not surprisingly, nearly all of the disputes have occurred in either the Fraser River Valley or the Okanagan Valley, the heart of B.C.’s agricultural production. Isolated cases have arisen on Vancouver Island, the Gulf Islands, and in Central Kootenay region. Though the *FPPA* also covers forestry production, there has been no case before the FIRB involving forestry matters.

*Table 3. 2008 complaints filed as of April 2008*

<table>
<thead>
<tr>
<th>Issue</th>
<th># of Complaints</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cattle/Dust</td>
<td>1</td>
<td>Penticton, Okanagan</td>
</tr>
<tr>
<td>Blueberries/Propane cannon - noise</td>
<td>1</td>
<td>Abbotsford, S Fraser Valley</td>
</tr>
<tr>
<td>Turf Farming/Odour</td>
<td>1</td>
<td>Delta, S Fraser Valley</td>
</tr>
<tr>
<td>Turf Farming/Irrigation Pump - Odour/Noise</td>
<td>1</td>
<td>Delta, S Fraser Valley</td>
</tr>
<tr>
<td>Winery/Farm Gate Sales - Boat Access</td>
<td>1</td>
<td>Saturna Island, Gulf Islands</td>
</tr>
<tr>
<td>Chick Hatchery - Odour</td>
<td>1</td>
<td>Abbotsford, S Fraser Valley</td>
</tr>
</tbody>
</table>

Source: FIRB Statistics at http://firb.gov.bc.ca

Of the 10 hearings between 2004/5 and 2006/7, in four of the cases both the respondent and complainants were farmers [see Table 4]. This is not unusual given the way the ALR is distributed; farmers are often on adjacent land. Four of the cases in these years related to chicken farms, and another two related to other animals (horses and hogs). Three cases were from cherry farms, and one was from a turf farm.

*Table 4. Complaints 2004/5-2006/7*

<table>
<thead>
<tr>
<th>Issue</th>
<th>Farm</th>
<th># of Complaints</th>
<th>Location</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Noise, cannons</td>
<td>Cherry</td>
<td>2</td>
<td>Central Saanich; Okanagan</td>
<td>Modify practice, prepare wildlife predation mgmt plan</td>
</tr>
<tr>
<td>Dust, manure, odour</td>
<td>Chickens</td>
<td>2</td>
<td>S Fraser Valley; S Fraser Valley</td>
<td>No changes; modify practice</td>
</tr>
<tr>
<td>Flies, rats</td>
<td>Chickens</td>
<td>2</td>
<td>S Fraser Valley; Skeena River Valley</td>
<td>Modification ordered</td>
</tr>
<tr>
<td>Issue</td>
<td>Farm</td>
<td># of Complaints</td>
<td>Location</td>
<td>Outcome</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------</td>
<td>-----------------</td>
<td>-----------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Odour</td>
<td>Turf</td>
<td>1</td>
<td>Delta, S Fraser Valley</td>
<td>Supported farmer with minor modifications</td>
</tr>
<tr>
<td>Dust, manure, parasites</td>
<td>Horse</td>
<td>1</td>
<td>Oliver, Okanagan</td>
<td>Modification ordered</td>
</tr>
<tr>
<td>Odour, flies, manure</td>
<td>Hog</td>
<td>1</td>
<td>Nanaimo, Vancouver Island</td>
<td>Modification ordered</td>
</tr>
<tr>
<td>Noise, sprays, helicopter to dry</td>
<td>Cherry</td>
<td>1</td>
<td>Wynndel, Central Kootenay</td>
<td>Some modifications but farmer didn’t have to do exactly what plaintiff wanted – just what was reasonable</td>
</tr>
</tbody>
</table>

Source: Compiled from McNally Case Summaries and FIRB Online Decisions

Of the 10 hearings between 1997 and 2003/4, four cases related to propane cannons, another related to bird recording scare devices, four cases related to odours, and one related to pesticide use [see Table 5].

Table 5. Complaints 1997-2003/4

<table>
<thead>
<tr>
<th>Issue</th>
<th>Farm</th>
<th># of Complaints</th>
<th>Location</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Propane cannons, noise</td>
<td>Blueberry</td>
<td>2</td>
<td>Abbotsford (S Fraser Valley); Surrey (Fraser Valley)</td>
<td>No ruling; modifications ordered</td>
</tr>
<tr>
<td>Propane cannons, noise</td>
<td>Vineyard</td>
<td>1</td>
<td>Kelowna, Central Okanagan</td>
<td>Modifications ordered</td>
</tr>
<tr>
<td>Propane cannons, noise</td>
<td>Fruit Trees</td>
<td>1</td>
<td>Kamloops</td>
<td>No jurisdiction over hobby farms – dismissed</td>
</tr>
<tr>
<td></td>
<td>(hobby farm)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bird scare devices</td>
<td>Cherry</td>
<td>1</td>
<td>Okanagan</td>
<td>Prepare predation management plan</td>
</tr>
<tr>
<td>Odour, noise</td>
<td>Compost</td>
<td>1</td>
<td>Central Saanich</td>
<td>No modifications needed</td>
</tr>
<tr>
<td>Odours</td>
<td>Duck</td>
<td>1</td>
<td>Chilliwack, Fraser Valley</td>
<td>New complaint must be submitted</td>
</tr>
</tbody>
</table>
Odours Duck 1 Aldegrove, Fraser Valley

Stop farming until modifications made

Odours Chicken 1 Langley, Fraser Valley

Modifications ordered

Pesticides (water contamination), helicopters to dry Cherry 1 Wynndel, Central Kootenay

No further modifications ordered

Source: Compiled from Tsiplove Case Summaries 2004 and FIRB Online Decisions.

The Disempowerment of Municipalities

One important aspect of British Columbia’s right-to-farm legislation is the extent to which the province is reducing the ability of local governments to deal with land use and farming issues. Aside from the loss of municipal bylaw powers related to farming, another issue that has arisen is that a municipality cannot represent a body of constituents against farming interests at the Board.

With a growing population, disputes between farmers and urban development are likely to be an increasing phenomenon. As Madam Justice Newbury stated,

Perhaps more than in any other Canadian province, the subject of land use has become a subject of public debate and conflict in British Columbia. Environmentalists regularly risk contempt of court to protest logging and mining operations; aboriginal bands confront governments and private landowners in efforts to preserve a traditional way of life tied to the land; and even in urban centres, real estate developers often come into conflict with residents and others wishing to protect and enlarge green park areas. Not surprisingly, municipal councils have become one arena for controversies of this kind.33

The above quote was cited in Windset Greenhouses,

34 a recent case that highlighted the conflict between municipal bylaw powers and the powers of the province under the FPPA with respect to farming and zoning. Windset Ltd. purchased property in Delta to build large greenhouses. When Windset attempted to get building permits, the municipality indicated that a new by-law coming into force would require restrictive covenants related to wildlife habitat enhancement, lighting glare, and the heating of the greenhouses. When Windset attempted to get building permits, the municipality indicated that a new by-law coming into force would require restrictive covenants related to wildlife habitat enhancement, lighting glare, and the heating of the greenhouses. As noted in that decision, the Ministry of Agriculture in a letter to the municipality of Delta indicated that in light of the FPPA it did not think that Delta could impose conditions on the farmers.35 Delta aimed to regulate the land under the Property

35 Ibid at 10 and 11.
Law Act. At the British Columbia Supreme Court in 2003, this was found to be ultra vires municipal powers.

The Principles and Practices Governing the FIRB’s Decisions

Jurisdiction

In contrast to the common law, central to all of the FIRB’s decisions is the interpretation of the statute itself. An initial question in any case before the FIRB is whether or not the case falls within its jurisdiction. Sometimes it is obvious and so this is not considered. According to Hanson v. Asquini, complaints related to hobby farms are outside the FIRB’s jurisdiction and do not fall under the FPPA as such farms are not considered a “farm business.” In this case, since the farmer was not making money it was deemed that his activities were not covered by the Act.

In Deverell v. Morning Bay Vineyard, Ms. Deverell had grown an organic garden since 1974 known as the “Tree of Life Garden” on Pender Island, one of the Southern Gulf Islands. Not long after her neighbour established a vineyard, the Deverells began to have problems with excess water running onto their property. A number of trees on their property died as a result. There were also other issues such as, noise, smoke, dust, and spraying. The main issue before the Board was whether the water drainage used by the vineyard was a normal farming practice. The FIRB ordered Morning Bay Vineyard to complete an integrated water plan. While it found that the water management issues were within their jurisdiction, the actual position of the vineyard on the property was not (as this was considered a land use planning or zoning issue).

In Morgan Creek, the FIRB ruled that it had jurisdiction to hear complaints related to propane cannons even though s.24 (1) of the federal Migatory Bird Regulations allows people to put up devices to scare birds to protect crops and property. One of the reasons was the possibility of dual compliance with relevant federal and provincial legislation.

The Meaning of “Normal Farm Practices”

After jurisdiction issues are settled, the FIRB uses a two-step analysis in its decisions. First, the complainants must have met an evidentiary burden to show they are impacted by the farm’s activities. Then, the second question examined is whether the respondent farmer is following a “normal farm practice.” The aim of the FIRB is to determine if the practice follows accepted standards on similar farms under similar conditions.

A “normal farm practice” is defined in section 1 of the FPPA as:

a practice that is conducted by a farm business in a manner consistent with:

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36 Hanson v. Asquini, FIRB, October 31, 2003
37 Deverell v. Morning Bay Vineyard, FIRB, October 25, 2007
38 Morgan Creek Homeowners Associaton v. Sekhon, Preliminary Jurisdictional Issue, FIRB (March 2, 2000)
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 any standards prescribed under paragraph (b).

The FIRB website indicates that the main decision that defines the meaning of “normal farm practices” is the British Columbia Court of Appeal decision in Central Saanich (District) v. Kimoff. In that case, Kimoff had painted “Kimoff Farm” on a water tower on his property. This contravened a local bylaw, which said that no signs other than sandwich or municipal signs could be constructed. Kimoff applied for a sign permit but did not receive it. The Court of Appeal did not rule on the case as it said it was outside its jurisdiction. It is unclear why this case is referred to on the FIRB site, since the Court of Appeal did not rule on the case and there is not a written decision from the FIRB either.

The FIRB uses a contextual analysis when defining what normal farm practices are, and considers the specific factors of the case before it. Among the factors examined are: the proximity of the neighbours, their use of the lands, geographic or meteorological features, the type of farming in the area, and the size and type of the operation. The FIRB also considers the efforts made by farmers to adjust their practices and respect their neighbours, and the levels of disturbance. In the case of bird scare devices, as noted in Wright v. Lubchynski, the FIRB must consider that “…the management of the [bird scare device,] that is placement, number, direction, time and frequency of firing, can be affected by the proximity of neighbouring residences or the geography of the areas.”

The FIRB appears to be trying to create consistency among its decisions. While administrative tribunals are not bound by precedent, the FIRB seems to show good practice by attempting to lay out a consistent decision-making framework. For example, the Board looked back to Eason when deciding Ollenberger. Similarly in Judd, the FIRB considered its decision in Lubchynski.

An issue that doesn’t arise in the FIRB’s decisions is whether a normal practice should be deemed unacceptable even if it is very harmful. One sees the evolution in negligence cases in which courts, aside from looking at the standard or custom of the time to determine whether the acts of the defendant were reasonable, look beyond that to see whether the standard should be changed. Just because everyone in the industry is following the minimal standard doesn’t mean that it is reasonable. This was most famously outlined in the US case of T.J. Hooper. In that case, tug boat owners were held liable for sinking a barge after getting caught in a storm. The tug boat did not have radio receivers on board to enable it to receive weather reports. While some tug boats had

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39 Central Saanich (District) v. Kimoff, 2002 BCCA 169, (BC CA)
40 Judd v. Webber, FIRB, November 17, 2004 at 42
41 Wright v. Lubchynski August 12, 2002 at 33
42 Eason v. Outlander Poultry Farms Ltd., FIRB, (March 10, 200)
43 Ollenberger (Geertsma) v. Breukelman, FIRB (March 23, 2006)
44 Judd v. Webber, FIRB, November 17, 2004
45 Trimarco v. Klein 436 NE 2d 502 (NY CA 1982); The TJ Hooper 60 F2d 737 (2d Cir. 1932)
them, others did not and they could not yet be considered standard in the industry. Justice Learned Hand noted, “Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission…” 46 One wonders whether the FIRB would find a normal but very harmful farm practice acceptable, or whether such a case might create an incentive to raise the bar and increase standards.

Remedies

Section 6 of the FPPA sets out the remedies the FIRB can order: The Board can dismiss a complaint or order a farmer to cease or modify a practice so that it is consistent with normal farm practices. Of the cases that are heard, most of them result in the Board requiring the farmer accused of creating a nuisance to modify his practice in some way. Only rarely must the farmer cease the practice until he has made the modifications. Orders of the FIRB frequently request that the farmer come up with a management plan – for example, a wildlife predation management plan when the dispute concerns propane cannons. The farmer is asked to show what the actual predation problems are and, one would expect, to justify why he has chosen the control methods that he has. This is likely a means by which the FIRB can make a decision if the case appears again, and a way to determine if the farmer’s methods are reasonable given the conditions. These remedies contrast with the common law, where an injunction would normally be ordered if a particular practice was found to be harmful. In its decisions, the FIRB appears to be doing some balancing as between the plaintiff and the defendant that may be similar to the “balancing of equity” approach that arises in US decisions. The farmer is seen as providing an important contribution to the economy and this is balanced against the right of the private property owner to be free from nuisance.

Role of Intervention

Interveners are seen regularly at many hearings of the FIRB. Intervention at times can lead to imbalance at a hearing by allowing one side to lead more evidence than the other. This could be seen as a “double barreling” of the defence. At the same time, intervention can be a useful way for the Board to receive additional background information that might assist it in deciding the case before it and in judging whether a practice is “normal.” There have been numerous examples of intervention in cases where the interveners supported the position of the defendant farmer, including:

- BC Poultry Association (*Ollenberger*)
- BC Chicken Grower’s Association (*Laxton*)
- South Vancouver Island Direct Farm Marketing Association (*Mcleod*)
- BC Broiler Hatching Egg Producers’ Association (*Baran*)
- BC Blueberry Council (*Clapham 1997*)

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• BC Columbia Blueberry Council, BC Fruit Growers’ Association, Bhullar’s Blueberry Farm (*Morgan Creek 2000*)

There have been two cases in which municipalities have intervened to support the plaintiff’s position. However, these differed from interveners supporting the defense. In both cases, the municipalities complained initially, but were unable to obtain party status as they were not natural persons. As a result, a representative plaintiff brought the case forward with the municipalities acting as interveners. The two cases were:

- Corporation of Delta (*West Coast Instant Lawns*)
- City of Terrace (*Daybreak Farms*)

*Appeals*

While higher courts can and do review administrative decisions on questions of fact, law, or mixed questions of fact and law, courts show a great deal of deference to a tribunal’s decision, especially if it is related to the tribunal’s principal statute. There are several reasons for this but the principal one is parliamentary supremacy. Parliament has created the tribunal with a specific goal and purpose, and courts have to respect this. Another reason courts often defer to tribunal decisions is that the tribunal has specialized expertise. Courts will also tend to defer to questions that relate more to the facts as the initial trier-of-fact is deemed to have more understanding of the subtlety of the case, having observed all the witnesses firsthand.

The standard of review sets out when a court will overturn an administrative decision. Until recently, Canadian courts recognized three standards of review: patent unreasonableness, reasonableness simpliciter, and correctness. This changed in 2008 with the Supreme Court’s decision in *Dunsmuir*.\(^\text{47}\) The court established a two-step test for determining the standard of review, and set out just two standards of review for administrative decisions: reasonableness and correctness. When determining whether the decision made was reasonable, the court considers whether the tribunal considered irrelevant factors, whether it included all relevant factors, whether the statute was interpreted reasonably, and whether the decision was defensible given the facts and the law. A correctness standard applies for certain questions of law, such as constitutional questions, decisions that are outside the tribunal’s jurisdiction or expertise, or questions of central importance to the legal system. In these cases, the court will defer less to the tribunal’s findings.

Under section 8(1) of the *FPPA*, the appeal of FIRB decisions to the Supreme Court of British Columbia is limited to questions of law or jurisdiction; under section 8(2) of the *FPPA*, there is an appeal from a decision of the Supreme Court of British Columbia to the Court of Appeal with leave. In the case of the FIRB, the Board is made up of people involved in the agricultural industry. It has direct experience with the industry and is deemed the most able to make fair decisions. It also has arguably the most experience.

\(^{47}\) *Dunsmuir v. New Brunswick* (2008) SCC 9

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interpreting its home statutes and applying the same principles to cases. As a result of
these factors, one would expect the courts to show a great deal of deference to its
decisions. And indeed, in *Lubychynski v. Farm Practices Board*, the Supreme Court
defered to the FIRB and noted that it was within its jurisdiction to order a farmer to use
netting as opposed to cannons. Given the limitations on the appeal and the specialized
nature of the FIRB, questions of what constitutes a “normal farm practice” will often be
left to the Board.

While the FIRB members have specialized expertise related to farming, the composition
of the board also creates potential conflicts of interest. The FIRB recognizes this concern
in its strategic plan for 2008/9-2010/11. The first objective of the plan is to ensure
effective self-governance, which includes the development and implementation of a
conflict of interest policy.

**Conclusion**

The FIRB was created to deal with disputes between property owners. An overriding
feature of the ALR and the *FPPA* is the extent to which the province is protecting and
subsidizing agriculture at the expense of other land uses. Another important undercurrent
of the right-to-farm legislation is the extent to which the province is reducing the ability
of local governments to deal with land use and farming issues.

Given the size and strength of the lobbying power of the farming industry and its support
by legislators across the political parties, right-to-farm legislation will likely remain intact
for some time. In contrast to governments’ perverse subsidies to some other industries,
those to farmers will stay because of the simple fact that farmers “provide us with food.”
On an emotional level, farmers are considered more critical to society than some other
industries.

Aside from legislative changes, changing the composition of the FIRB is one way in
which decisions might be more balanced and the community voice might be heard more
clearly amid the many industry interests that are currently in place. Another force that
might moderate the “right to farm” is the public’s increasing concern about health and
about farming’s impacts on other resources, such as drinking water. Like food, safe
drinking water has deep emotional appeal and raises both community concerns and
political interest.

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49 FIRB Strategic Plan 2008/9 to 2010/11. Available at: http://www.firb.gov.bc.ca