

Right-to-Farm Legislation in Canada

Patrick McCormally
Environment Probe
July 2007

Every Canadian province has enacted some form of “right-to-farm” legislation. These laws aim to protect the farming industry by making it largely immune from nuisance lawsuits brought by neighbours who are adversely affected by farming operations. A nuisance occurs when someone or something unreasonably interferes with another person’s ability to use or enjoy his property. Nuisances are often disturbances such as loud noises, offensive odours, smoke, dust, vibration, or even light.

Manitoba passed the first right-to-farm law in Canada in 1976 with the *Nuisance Act*, which it replaced in 1992 with the *Farm Practices Protection Act*. Quebec followed suit in 1978 with an *Act to Preserve Agricultural Land*, since replaced by an *Act Respecting the Preservation of Agricultural Land and Agricultural Activities*. In 1986, New Brunswick passed its *Agricultural Operation Practices Act*; a new law of the same name came into force in 2003. Nova Scotia also passed its *Agricultural Operations Protection Act* in 1986; the act has since been replaced by the *Farm Practices Act*. Alberta passed the *Agricultural Operation Practices Act* in 1987 and amended it in subsequent years. Ontario’s right-to-farm provisions first appeared in the 1988 *Farm Practices Protection Act* and are now contained in the *Farming and Food Production Protection Act*. British Columbia enacted the *Agriculture Protection Act* in 1989; the act has since been replaced by the *Farm Practices Protection (Right to Farm) Act*. Saskatchewan’s *Agricultural Operations Act* passed in 1995, and Prince Edward Island passed the *Farm Practices Act* in 1998. Finally, Newfoundland and Labrador passed the *Farm Practices Protection Act* in 2001; the law came into force in 2003.

Before the passage of these right-to-farm laws, someone who had a nuisance claim against a neighbouring farmer could ask a court to issue an injunction – an enforceable order to permanently cease the disturbance. The plaintiff could also seek monetary damages as compensation for harms suffered. The guiding principle behind nuisance law is the maxim that one must not use one’s property in such a way as to harm that of another. That is, one can do as he please on his own land, so long as he does not adversely affect his neighbour or his neighbour’s land.

Courts in Canada have generally adhered to this rule, and when they have found an activity to unreasonably interfere with a landowner’s use and enjoyment of his property they have enjoined its practice and/or awarded damages.¹ This has been the case even if the person creating the nuisance has done everything possible to prevent the nuisance² and even if the complained-about activity was going on before the aggrieved neighbour moved in and made a complaint.³ Similarly, courts have traditionally not allowed nuisances to continue simply because the practice that created them contributed to some common societal interest. For example, under the customary common law, a court may have required a factory to cease operating if it spewed smoke and dust onto a neighbour’s land, even if the factory provided jobs and goods that were valuable to society. Such has been the importance of individual property rights in the common law.⁴

Right-to-farm legislation exempts farmers from the basic duty not to harm others by sheltering them from nuisance actions that arise from “normal” or “acceptable” farming practices. A nuisance that would traditionally allow an affected neighbour to sue for an injunction or damages will not be actionable if the disruption of the neighbour’s use and enjoyment of his property was caused by a normal farming practice. Though the goal of this legislation is to protect farmers, many times the complainants themselves are neighbouring farmers who may find themselves without a remedy.

The definition of what constitutes a normal or acceptable farming practice varies slightly from province to province. The definition from British Columbia’s *Farm Practices Protection (Right-to-farm) Act* is indicative of the general theme:

“normal farm practice” means a practice that is conducted by a farm business in a manner consistent with

- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
- (b) any standards prescribed by the Lieutenant Governor in Council, and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b)⁵

Most of the provinces include in their right-to-farm legislation a requirement that for a farm practice to be acceptable, it must not violate other laws or regulations, such as environmental protection acts, health acts, etc. For example, the Prince Edward Island *Farm Practices Act* reads:

A farmer who

- (a) uses normal farm practices; and
- (b) complies with the *Environmental Protection Act* R.S.P.E.I. 1988, Cap. E-9, *Pesticides Control Act* R.S.P.E.I. 1988, Cap. P-4, *Public Health Act* R.S.P.E.I. 1988, Cap. P-30, *Planning Act* R.S.P.E.I. 1988, Cap. P-8, *Agricultural Crop Rotation Act* R.S.P.E.I. 1988, Cap. A-8.01 and the regulations made pursuant to those Acts

is not liable for damages in nuisance to any person for any noise, odour, dust, vibration, light, smoke or other disturbance resulting from an agricultural operation and shall not be prevented, by injunction or other order, from conducting an agricultural operation because it causes or creates any noise, odour, dust, vibration, light, smoke or other disturbance.⁶

Quebec’s right-to-farm legislation contains no requirement for a farming practice to be normal for a farmer to be sheltered from a nuisance complaint for dust, odour, or noise. Instead, the farmer must be in compliance with that province’s *Environment Quality Act*. Quebec’s law protects farmers operating in agricultural zones. It also includes a “first in time, first in right” provision protecting farmers whose nuisances predate their neighbours.⁷

To determine whether a particular nuisance is the result of a normal farming practice, right-to-farm legislation usually allows for the creation of a farm practice review board.⁸ In Ontario, complaints go before the Normal Farm Practices Protection Board; in Manitoba, there is the Farm Practices Protection Board; British Columbia and Newfoundland and Labrador have Farm Industry Review Boards; Saskatchewan has the Agricultural Operations Review Board; New Brunswick has the Farm Practices Review Board; and Nova Scotia has the Farm Practices Board. Nuisance complaints in Alberta are dealt with by the Natural Resources Conservation Board, the Farmers' Advocate Office, and Practice Review Committees.⁹ British Columbia's *Farm Practices Protection Act* describes the purpose of that province's review board:

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.¹⁰

If the board determines that the nuisance results from a normal farming activity, the farmer cannot be liable for the nuisance, and a court cannot issue an injunction against him forcing him to stop the activity.¹¹

Decisions of the practice review boards can usually be appealed to provincial courts, but those courts have to take the decisions of the review boards into consideration.¹² Courts often defer to the boards' decisions on what constitute normal farm practices because of their specialized knowledge on the subject and their ability to hear first hand evidence at their hearings.¹³

The review boards are normally composed partly of current or former farmers and others involved in the agriculture industry. Sometimes the composition of the boards is determined by statute. For example, in New Brunswick, the *Agricultural Operation Practices Act* stipulates that four members of the Farm Practices Review Board be recommended by farm organizations, and that two members of the board must not carry on agricultural operations.¹⁴ Nova Scotia, Newfoundland and Labrador, and Prince Edward Island have similar statutory requirements.¹⁵ In British Columbia and Ontario, where there are no background requirements for board membership, the majority of board members come from agricultural backgrounds. British Columbia's Farm Industry Review Board as of this writing was made up of six individuals with agricultural backgrounds and two lawyers.¹⁶ Similarly, in Ontario in 2004, the Normal Farm Practices Protection Board was made up of two lawyers, two dairy farmers, one swine farmer, one beef farmer and one poultry farmer.¹⁷ In Alberta, only one of the four members of the Natural Resources Conservation Board was a farmer as of this writing.¹⁸ However, in Alberta, the determination of what constitutes a normal farm practice can be made by a Practice Review Committee consisting of three members – two of whom must have experience in the type of farming operation complained of – who are appointed as needed for a specific case.¹⁹

There is no cost to apply to the board for a review in Alberta or Ontario, but other provinces charge fees ranging from \$25 in Newfoundland to \$100 in British Columbia to \$250 in Nova Scotia. Legal representation is allowed but not required; even so, the costs

of taking a complaint before a board can be prohibitive. In some provinces, a complainant must attempt to resolve a dispute with a farmer through mediation or arbitration before taking a complaint to the board. Only if no agreement can be made in arbitration will he be allowed to do so. A large number of complaints are dealt with in the mediation/ arbitration stage.

The review boards rarely order farmers to completely cease disputed practices. When the boards find practices to be non-normal or not acceptable, they often order farmers to make modifications to bring them into the realm of normal farm practices instead of ordering them to cease the practices. Sometimes the modifications ordered by the boards will have the effect of eliminating the nuisances, but more often they simply reduce their frequency or intensity, offering only partial relief to the aggrieved parties.

As an example, in *Ollenberger (Geertsma) v. Breukelman*, a case before British Columbia's Farm Industry Review Board in 2005, Mr. and Mrs. Geertsma alleged that their property could not be used for weddings, graduation celebrations, or as a bed and breakfast because of a neighboring chicken farm operation. The neighboring farmer built barns for 60,000 chickens just 20 metres from the Geertsmas' property line (the minimum distance required by law to separate a chicken farm operation from a residential area). The catching of the birds for shipment to the processor and the cleaning of manure from the barns was done on the side of the barns nearest the Geertsmas' property. The noise of chickens being caught and shipped – often late at night – prevented Mrs. Geertsma from sleeping. After the chickens were caught, the odour and dust from the cleaning of the barns were unbearable. Mrs. Geertsma suffered from a sore throat, sinus problems, and watery eyes which she attributed to dust from the barns. She and her husband also claimed that the construction of the barns interfered with drainage and resulted in standing water on their property most of the year.

The board found that the level of activity close to the property line was not a normal farm practice and required the farmer to take steps to mitigate the dust, odour, and noise. It ordered the farmer to modify his practice by erecting a barrier between his barns and the Geertsmas' property, to correct the flooding problem, to give notice of when shipping and cleaning would occur, and to clean out the barns and ship the chickens from the end of the barns furthest from the Geertsmas' property. No order was made to prevent the farmer from catching and shipping the chickens late at night. While the modifications ordered by the board may mitigate the nuisance suffered by the Geertsmas, they likely will not offer the type of relief normally available under the traditional common law – a complete cessation of the disturbance. Such compromise typifies the resolution of many cases before farm practice review boards.

In Manitoba, 47 of the 75 formal complaints handled by the Farm Practices Protection Board between 1994 and 2007 resulted in board-ordered modifications. Fifteen were mediated or were withdrawn by the complainant; the board refused to hear four and dismissed seven. In only one case was a farmer ordered to cease a practice. (One case is pending as of this writing.) In Ontario, of the 45 complaints the Normal Farm Practices Protection Board reviewed between 1990 and 2007, 17 resulted in orders of at least partial modifications, 12 were found to be the result of normal farming practices, and the remaining 15 were either found to be non-normal or were withdrawn, mediated, or otherwise disposed of.

In Manitoba, the majority of the complaints before the Farm Practices Protection Board concern odours produced by livestock operations. The three modifications that the board most often orders farmers to make to reduce their smells are 1) covering manure storage areas (since the board never says with what they should be covered, farmers generally choose straw) 2) planting shelter belts (rows of trees or other foliage that will act as wind barriers), and 3) injecting manure into the ground instead of spreading it on the surface of the soil.²⁰

In addition to formal complaints that go before review boards, each province also receives a number of informal complaints that never make it to a full hearing. For example, in Alberta in 2006-2007 there were 751 complaints made about 241 livestock operations; however, only 10 complainants ended up requesting a board review.²¹ In British Columbia in the same time period there were 32 informal complaints but only three formal applications for board review filed with the Farm Industry Review Board.²² New Brunswick's Farm Practices Review Board has held only one hearing since it was established in January 2003, but receives about two dozen complaints per year.²³ In Ontario, only one percent (41) of the approximately 4,050 complaints made between 1998 and 2004 became applications to the Normal Farm Practices Protection Board, of which only 23 went to a hearing in front of the board.²⁴

In 2006, Ontario's Ministry of Agriculture, Farming and Rural Affairs (OMAFRA) received only 89 complaints about farm operations, down from an average of approximately 675 complaints per year. The drop was due in large part to the passing of the *Nutrient Management Act* and the establishment of the Nutrient Management Information Line, a contact centre that handles complaints about, among other things, manure spreading and obnoxious smells – the most common complaints about farming operations.

Of the 89 complaints received by OMAFRA, only three went to a full hearing before the Normal Farm Practices Protection Board. In one case, the use of a propane cannon (also called a “bird banger”) to scare birds was found to be a normal farm practice; however, the board required the farmer to restrict the use of the cannons to certain times. In another case, the use of a tractor that caused disturbances of noise, light, and vibration in the early morning hours was found not to be a normal farming practice. The board ordered that the farmer modify his practices by refraining from using the tractor on county roads between 10pm and 7am, with exceptions for necessary snow removal. The third case was dismissed; the board found it did not have jurisdiction to review the case because the property in question was not owned by an agricultural operation.

The majority of the cases that have come before Alberta's Natural Resources Conservation Board since 2004 have concerned applications that farmers have made to expand or alter the operation of their farms. Either a farmer has appealed the denial of an application or, less frequently, a group of neighbors has appealed the approval of an application, citing problems with nuisance, odour, etc. In the hearings, the board has rarely considered what is a normal farm practice. Most often, the board has looked to whether regulations laid down in the *Agricultural Operation Practices Act* have been followed.

In Alberta, the Farmers' Advocate Office has the responsibility under the *Agricultural Operation Practices Act* to initiate a Practice Review Committee to conduct a hearing to determine if a particular agricultural operation is following “generally accepted”

agricultural practices. Only once since the act went into effect in 2002 has a Practice Review Committee been called to determine if a practice was generally accepted. That case involved a complaint about odour and manure management practices on a hog farm located near a small community. The Practice Review Committee concluded that the farmer was using generally accepted agricultural practices at the time.

In Newfoundland, there has been only one formal complaint before the Farm Industry Review Board since it replaced the Farm Protection Board and the Agricultural Products Marketing Board in 2005. The board receives between 10 and 15 informal complaints per year, most of which are resolved through its mediation efforts.²⁵ There were slightly fewer informal complaints in 2005-06 than there were in 2006-07, due in part to proactive steps taken by the farmers in the former year. The farmers initiated a media drive to make people aware of what they were doing and why. They made radio spots informing the populace of when manure would be spread, why it needed to be spread, and how long they were going to be spreading it. They explained that they were trying to confine spreading to as short a period as possible and apologized in advance for any disturbance. These media efforts were not repeated in 2006-07.

Because not all review boards make their decisions public, it is not always possible to examine current methods of resolving disputes about farming, identify the principles governing the decisions, or determine which farming practices are generally acceptable. Many provinces do make the decisions of their farm practice review boards public. British Columbia, for example, posts full decisions on the web; Ontario posts summaries and makes full decisions available upon request. In contrast, some provinces, such as Manitoba and Saskatchewan, release decisions only to affected parties.²⁶ This absence of transparency contrasts unfavourably with the common-law system that right-to-farm laws have replaced. Having access to the decisions of courts – an important aspect of the common law – gives people notice of how the legal system interprets laws and regulations, and how it provides relief to those who are injured. Farmers without notice of what practices have been deemed normal by review boards and what modifications have been required lack information with which to plan their own operations. Those with nuisance complaints against neighboring farms lack information on the legitimacy or strength of their cases. Without access to board decisions, both farmers and their neighbors lose an element of predictability about outcomes. The more predictable a system is, the more efficiently it runs, with less time and money wasted on pursuing or defending losing claims.

Even full transparency and predictability, however, cannot redeem the right-to-farm regimes that have taken the place of the common law. The desire to support farmers is understandable; however, right-to-farm legislation is a flawed means by which to attain that goal. Allowing farmers to harm others as long as the harm results from normal practices tramples upon a long-standing common-law tradition designed to protect individual property rights – one that, for centuries, protected rural residents from harmful odours, dust, noise, and an array of other environmental disturbances.

Notes

¹ See *Walker v. McKinnon Industries Ltd.*, [1949] 4 D.L.R. 739 (Ont. H.C.), aff'd [1950] 3 D.L.R. 159 (Ont. C.A.), aff'd [1951] 3 D.L.R. 577 (P.C.); *Lisoway v. Springfield Hog Ranch Ltd.*, [1975] M.J. No. 188, Manitoba Court of Queen's Bench, Wilson J., 24 November 1975.

² See *Russell Transp. Ltd. et al. v. Ontario Malleable Iron Co. Ltd.*, (1952) 4 D.L.R. 719 (Ont. H.C.).

³ "Coming to the nuisance" as a defence to a nuisance action has been largely rejected by Canadian courts. The principle behind the rejection is that no matter how long an activity has been going on, or under what circumstances, a person only has the right to use the land to which he holds title. Allowing a nuisance to continue would give a right to use property to someone who had not paid for it, while taking away an ability to use property from someone who had. See *Id.*

⁴ See *The Attorney-General v. The Council of the Borough of Birmingham* (1858), 4 K. & J. 528 (V. Ch.) (finding that benefit of having sewers did not justify Borough's dumping of sewage into local river); *Shelfer v. City of London Elec. Lighting Co.* (1894) 1 Ch. 287 (holding that even though an electric company is a public benefactor in that it provides electricity to a great number of people, it does not have license to infringe on individual property rights); *Trinidad Asphalt Co v. Ambard*, [1899] A.C. 594 at 603 (P.C.) (enjoining asphalt excavation site from operating despite possibility that doing so may have effect of hampering the local asphalt industry: "Whatever the result may be, rights of property must be respected, even when they conflict, or seem to conflict, with the interest of the community").

⁵ *Farm Practices Protection (Right-to-farm) Act*, R.S.B.C. 1996, c. 131, s. 1.

⁶ *Farm Practices Act*, S.P.E.I. 1998, c. 87, s. 4.

⁷ See *An Act Respecting the Preservation of Agricultural Land and Agricultural Activities*, R.S.Q. 1996, c. 26, s. 79.17-79.19.2 and s. 100.

⁸ The single exception is Quebec, which has no farm practice review board, only guidelines for courts to follow in nuisance cases involving farm operations. See *Id.*

⁹ Some of the review boards have informative websites: the British Columbia Farm Industry Review Board (<http://www.firb.gov.bc.ca>); in Alberta, the Natural Resources Conservation Board (<http://www.nrcb.gov.ab.ca>) and the Farmers' Advocate Office ([http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/ofa2621](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/ofa2621)); in Manitoba, the Farm Practices Protection Board (<http://web2.gov.mb.ca/agriculture/programs/index.php?name=aaa25s03>); in Nova Scotia, the Farm Practices Board (<http://www.gov.ns.ca/agri/legislation/fpb.shtml>); in Ontario, the Normal Farm Practices Protection Board (<http://www.omafra.gov.on.ca/english/engineer/nfppb/nfppb.htm>).

¹⁰ *Farm Practices Protection (Right-to-farm) Act*, R.S.B.C. 1996, c. 131, s. 3.

¹¹ *Id.* at s. 2. See also *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, section 2(1) http://www.qp.gov.ab.ca/documents/Acts/A07.cfm?frm_isbn=0779730593&type=htm.

¹² See, e.g., *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, section 23 ("A determination of the board respecting a complaint that is the subject of an application under section 13 shall be considered by the court in any subsequent action in nuisance in respect of that particular disturbance").

¹³ See *Lubchynski v. British Columbia (Farm Practices Board)*, (2004) 2004 BCSC 657 (B.C. S.C.) ("absent special circumstances, questions of whether, in the context of a nuisance action, a disturbance constitutes a 'normal farm practice' should generally be left to the Board to determine"). See also *Lone Pine Committee v. Alberta (Natural Resource Conservation Board)*, (2005) 18 CELR 3d 117 (Alberta Court of Appeals); *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 O.R. (3d) 257 (Ont. C.A.), at 278.

¹⁴ *Agricultural Operation Practices Act*, S.N.B. 1999, c. A-5.3, s. 3 (a-b).

¹⁵ In Nova Scotia, the *Farm Practices Act*, s. 5(2)(a-c) requires two members recommended by the Nova Scotia Federation of Agriculture and one recommended by the Union of Nova Scotia Municipalities, as well as four members appointed at large. In P.E.I., the *Farm Practices Act*, s. 3(1)(a-b), states there must be three non-farmers and six members of the board recommended by farm organizations in the province. Newfoundland and Labrador's board membership requirements are found in the *Natural Products Marketing Act*, R.S.N.L. 1990, ch. N-2, s. 3(3), and call for between five and seven members to be appointed by the Lieutenant-Governor in Council, one of whom must be nominated by the Newfoundland and Labrador Federation of Agriculture.

¹⁶ See <http://www.firb.gov.bc.ca/board.htm>.

¹⁷ See http://www.omafra.gov.on.ca/english/engineer/nfppb/annual_report2003.htm#member.

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- ¹⁸ See <http://www.nrcb.gov.ab.ca/weare/board.aspx> .
- ¹⁹ See *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 5(1)(b).
- ²⁰ Telephone Interview with Gordon MacKenzie, Director of Boards, Commissions and Legislation, Manitoba Agriculture, Food and Rural Initiatives in Toronto, Ontario, July 11, 2007.
- ²¹ See NRCB Quarterly Statistics 2006/2007. Third fiscal quarter, October 1 - December 31, 2005. <http://www.nrcb.gov.ab.ca/downloads/documentloader.aspx?id=3751> .
- ²² Statistics about complaints to the B.C. FIRB are available at http://www.firb.gov.bc.ca/Complaints/complaints_admin.htm , and should be updated soon to reflect 2006-2007 statistics, according to Gino Nasato at the FIRB.
- ²³ Information provided by Lynn Moore, Manager – Stewardship, Land and Environment Branch, New Brunswick Agriculture and Aquaculture.
- ²⁴ From the *Annual Report of the Normal Farm Practices Protection Board – April 1, 2003 to March 31, 2004* available at http://www.omafra.gov.on.ca/english/engineer/nfppb/annual_report2003.htm .
- ²⁵ Telephone interview with Reg King, Manager, Newfoundland Farm Industry Review Board, in Toronto, Ontario, June 27, 2007.
- ²⁶ Copies of decisions can be attained through provincial freedom of information acts, though there may be a fee.