SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF AGRICULTURE, FOOD AND RURAL AFFAIRS ON THE DRAFT DISCUSSION PAPER ON THE FARM PRACTICES PROTECTION ACT

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By Donna Bigelow
Student-at-Law
Canadian Environmental Law Association

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Prepared by Donna Bigelow[1]

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

The purpose of this brief is to respond to the draft discussion paper on the Farm Practices Protection Act[2] (FPPA) recently released by the Ministry of Agriculture, Food and Rural Affairs and posted on the Environmental Bill of Rights (EBR) electronic registry (EBR Registry Number: AC70001.P). CELA's comments focus on the two broad components of the discussion paper:

- the scope of the Farm Practices Protection Board; and
- balancing the right to farm with rural development.

CELA's recommendations regarding the Farm Practices Protection Act discussion paper may be summarized as follows:

RECOMMENDATION #1: **The FPPA should be repealed in its entirety.**

RECOMMENDATION #2: **If left intact, the FPPA should not be expanded to include more farm practices, nor should the Minister be given the authority to add to the list of "nuisances" under the Act. Nuisance complaints should be dealt with only by the courts.**

RECOMMENDATION #3: **The FPPA should not be given a more detailed**

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[1]Student-at-Law, Canadian Environmental Law Association.

[2]*Farm Practices Protection Act*, R.S.O. 1990, c. F-6.

definition of "normal farming practice", nor should the scope of "agricultural operation" be expanded to include such things as tree and turf grass farms or the operation of saw mills. The focus of the legislation should not be on whether a farming practice is "normal", but if it is "necessary" and "reasonable". The aim of the legislation should be to protect agricultural "land", not "practices" or "operations". If the FPPA is not repealed, section 1(h) of the Act should be removed as this part of the definition of an agricultural operation extends protection to commercial sprayers of pesticides as well as farmers.

RECOMMENDATION #4: **The parties involved in a board hearing should be able to recoup costs of hiring legal and technical assistance. The Board should have guidelines to follow when assessing costs.**

RECOMMENDATION #5: **The Board should not have more authority to enforce its orders when a farm operator refuses to carry out orders or parts of them.**

RECOMMENDATION #6: **Farmers should not be compensated if they are not allowed to use a normal farming practice.**

RECOMMENDATION #7: **It is reasonable that farm practices be restricted by local by-laws. Changes should not be made to the Municipal and Planning Acts, nor to the FPPA to allow farmers to appeal a municipal by-law that restricts farming practices. The Farm Practices Protection Board should not have the power to hold a hearing regarding a municipal by-law with respect to whether that the by-law restricts "normal farming practices", nor should they have the power to make a by-law be null and void, nor should all farmers in that municipality be given an exemption from the by-law. Farmers' rights and the rights of the general public can be balanced most efficiently through the common law of nuisance and existing avenues under the Planning Act.**

RECOMMENDATION #8: **No additional legislation should be referenced in the FPPA.**

The rationale for each of these recommendations is outlined below at Part III.

PART II - CELA's SUBMISSION ON THE ACT RESPECTING THE PROTECTION OF FARM PRACTICES, BILL 83 (1988)[3]

CELA made submissions to the Standing Committee on Resource Development regarding Bill 83, an Act respecting the Protection of Farm Practices, in December 1988. CELA recommended that the Bill be withdrawn, or that in the alternative, the Bill proceed only with substantial amendments.

In its Bill 83 submissions, CELA submitted that a farmer is best protected by the laws of nuisance, both from encroaching urban development, and from the nuisance impacts of his/her fellow farmers, rather than by "right to farm" legislation. CELA submitted that Bill 83 would expose farmers to nuisances without giving them recourse to the law for a remedy and that even if farmers were being constantly pursued in court to defend against nuisance claims (which they are not), and they were losing (which they are not), Bill 83 would not protect farmers from suits based on the common law of trespass for dust, noise or claims based on the laws of negligence. CELA also submitted that Bill 83 would give no new protection to farmers, but would rather remove their best protection, the law of nuisance.

CELA's fundamental objection to the FPPA should not be interpreted as being "anti-farmer" or "anti-agriculture". To the contrary, many of CELA's past and present clients are farmers, and CELA has been extensively involved in the fight to strengthen the protection of agricultural lands and specialty crop lands under Ontario's land use planning regime. Foe example, CELA represented organic farmers who successfully used the common law of nuisance to permanently shut down a nearby landfill site that was adversely impacting their agricultural operations.[4] The result in this case amply demonstrates the point made throughout this brief: the common law of nuisance provides considerable protection of farming interests, and it should not be modified or altered by the unnecessary provisions of the FPPA.

It would appear that CELA's concerns and recommendations regarding Bill 83 remain valid and relevant to the present proposal to expand the scope of the FPPA.

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[3]Submission by the Canadian Environmental Law Association to the Standing Committee on Resource Development Regarding Bill 83, Barry Mandelker, Student-at-Law, December 6, 1988.

[4]*Nippa* v. *C.H. Lewis (Lucan) Limited* (1991), 7 C.E.L.R. (N.S.) 149 (Ont. Ct. Gen. Div.).

PART III - CRITIQUE OF THE DRAFT DISCUSSION PAPER ON THE FARM PRACTICES PROCEDURE ACT

Before reviewing the specific questions posed in the draft discussion paper, it may be helpful to lay out the broad concerns CELA has with respect to the FPPA, the Farm Practices Protection Board and the proposed changes.

CELA did not support the FPPA in 1988 and recommended that it be withdrawn, along with the proposal for the Farm Practices Protection Board. Nothing has occurred since that time to change CELA's position and, in fact, quite the opposite has occurred. Upon an examination of the number of hearings before the Farm Practices Protection Board and the scope of these hearings, and in light of the recent cutbacks with respect to other agencies, boards and commissions in the province, CELA's original 1988 position to withdraw the FPPA and dismantle the Board is reinforced.

The Farm Practices Protection Board has heard only 12 cases since it was established in 1988. That means the Board hears an average of only 1 or 2 cases every year. How can the costs associated with the continued operation of this Board be justified, especially in light of the cutbacks that are occurring with respect to other tribunals and in light of the extensive government cutbacks in general?

The FPPA and the Farm Practices Protection Board have not accomplished what they were intended to accomplish, namely the protection of agricultural lands. The legislation and its associated Board is an inadequate method in which to protect farmland. The removal of common law rights cannot prevent the loss of agricultural land to industrial, commercial and residential development. The problem that the FPPA attempts to address, nuisance suits against farmers, is only a symptom of a much larger problem. The real crisis facing Ontario agriculture is the failure to implement stringent municipal and provincial land use laws, guidelines and policies. As suggested in 1988, CELA submits that a better method to protect farmland is to use a systematic planning and zoning approach.

In addition, there is no evidence of the need to broaden the scope of the FPPA or the Board. Why does the Board require the ability to enforce its orders when there is currently no evidence of non-compliance? Why do the definitions of "normal farm practice" and "agricultural operation" need to expanded when there is no evidence of the need for such change. Has there been a sudden and drastic increase in nuisance suits against turf grass farmers or against farmers for nuisances related to light? The suggestions for change in the draft discussion paper appear to offer solutions to problems that currently do not exit and as such, CELA cannot support the broadening of the scope of the FPPA or the Board.

Although advocates of "right-to-farm" legislation have stressed the fear of actions sounding in nuisance as a justification for such laws, there is little evidence that such actions are common in Ontario. The cost of using the civil courts is a strong deterrent to litigation. Moreover, where the nuisance complained of is a loss of enjoyment of property, rather than physical damage to

the property, the court must take into account the character of the area in determining whether to grant a remedy. Residents who come to an area of existing farms, therefore, would have little likelihood of success unless the farming practice was negligent.[5]

In CELA's view, the FPPA should be repealed in its entirety. There is no reason to take the important area of nuisance law out of the supervision of the courts. Any legislation that seeks to amend the law of nuisance can be better served through the courts' lengthy experience with balancing the rights and obligation of individuals with social facts and legislative initiatives in a manner that is fair and impartial.

RECOMMENDATION #1: **The FPPA should be repealed in its entirety.**

ISSUES RAISED BY THE DRAFT DISCUSSION PAPER:

1) Should the FPPA be expanded to include more farm practices other than those which create noise, odour or dust (NODs) problems?

The draft discussion paper suggests that the FPPA should be changed to allow the Board to hear complaints against all farm practices that do not contravene provincial statutes. It suggests an expanded list of farm practices, which would include light, vibration, smoke, rodents, and flies. It also suggests the FPPA be expanded to provide protection against all nuisance complaints involving farm practices. The draft discussion paper poses three questions:

1. Should the Act be amended to cover more nuisances than those resulting from farm activities that generate noise, odour or dust?
2. If the Act cannot be expanded, how should complaints about other farming practices be handled?
3. Should the Minister be given the authority within the legislation to add to the list of "nuisances"?

RECOMMENDATION #2: **If left intact, the FPPA should not be expanded to include more farm practices, nor should the Minister be given the authority to add to the list of "nuisances" under the Act. Nuisance complaints should be dealt with only by the courts.**

The right to sue at common law is an important individual right which should not be taken away. The loss of this right is a significant threat to environmental quality and individual liberty.

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[5]Swaigen, John, *The Right-to-Farm Movement and Environmental Protection*, 4 C.E.L.R. (N.S.) 121.

The law of private nuisance provides that no person may use his or her land in a manner that interferes unreasonably with a neighbour's use and enjoyment of his or her land.[6] Unreasonableness refers to the degree of interference the neighbour suffers and is determined by a number of factors, principally the character of the area in question[7]. The key question in most litigation involving nuisance is the issue of reasonable use. The value of the two conflicting uses are balanced against each other and numerous factors are considered, such as: the type, extent and duration of interference; the social value attached to the conduct of both the plaintiff and defendant; the practicality of either preventing the harm on the part of the source and avoiding the harm on the part of the complainant; and the appropriateness of the land use[8]. Locale is often decisive in determining whether the behaviour in question is indeed a nuisance and normal farm noise, odour or dust will rarely be seen to be unreasonable in an agricultural community.[9] Indeed, there have been very few cases in which normal farm practices have been deemed to be a nuisance.[10] In fact, the law of nuisance actually works in favour of farmers. As such, the FPPA is not necessary and should be repealed. In no circumstance should the FPPA be expanded to include other nuisances such as light, vibration or flies.

2) Should the term "normal farming practice" be given a more detailed definition?

The draft discussion paper suggests that the definition of "normal farm practice" be redefined to include tobacco, maple syrup, tree and turf grass farms, honey bees, and such on-farm operations as grain dryers, refrigeration units, saw mills, road-side market stands, game farming and the raising of exotic animals and birds. Five questions were posed in the discussion paper:

1. Should the legislation more clearly define "normal farming practices"?
2. Should codes of practice be developed as part of the "normal farming practices" definition?
3 Can the Board be expected to determine whether the practice is "normal" if there are no codes, standards or guidelines written into the legislation? Is flexibility more important?
4. Should the definition of "agricultural operation" be updated?
5. Should the Minister have the authority to rule on what is a "normal farming practice" or an "agricultural operation"?

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[6]Linden, A.M., Klar, L.N., *Canadian Tort Law: Cases, Notes and Materials*, 10th edition, (Butterworths, 1994).

[7]*Appleby* v. *Erie Tobacco Co.* (1910), 22 O.L.R. 533 (S.C.).

[8]Supra note 3.

[9]Supra note 3.

[10]Supra note 3.

RECOMMENDATION #3: **The FPPA should not be given a more detailed definition of "normal farming practice", nor should the scope of "agricultural operation" be expanded to include such things as tree and turf grass farms or the operation of saw mills. The focus of the legislation should not be on whether a farming practice is "normal", but if it is "necessary" and "reasonable". The aim of the legislation should be to protect agricultural "land", not "practices" or "operations". If the FPPA is not repealed, section 1(h) of the Act should be removed as this part of the definition of an agricultural operation extends protection to commercial sprayers of pesticides as well as farmers.**

The definition of "normal farm practice" should be changed to provide for the consideration of whether a practice is "reasonable" and "necessary", instead of whether the practice is "normal". As well, the definition should include the element of environmental soundness. As the definition stands now, an unreasonable, unnecessary and environmentally irresponsible farm practice may be found to be "normal" and thus a complainant would have no recourse to the law. For example[11], farmers often store manure in holes in the ground as this a far cheaper storage method than building a concrete or metal enclosure. However, manure stored in the ground may result in odour problems, in ground water contamination and in the contamination of waterways through runoff. If most farmers in a particular area use this ground method to store manure, it may be found to be a "normal farm practice" under the Act, even though it is unnecessary (the alternative is enclosed metal or concrete containers), unreasonable (as there is an alternative storage method) and environmentally irresponsible. As such, the practice would be protected by the FPPA.

In addition, the definition of "agricultural operation" is too broad. It includes, at section 1(h) "the application of fertilizers, conditioners and pesticides, including ground and aerial spraying", which extends protection of the Act to commercial pesticide applicators, as well as farmers. The FPPA should be aimed at addressing annoyances rather than pollutants that are harmful to health. This is apparent in the discussions that were held before the Standing Committee when it reviewed Bill 83. Then Standing Committee member, and now Minister of Agriculture, Noble Villeneuve, stated that the Bill was never enacted to allow farmers to pollute.[12]

As such, part (h) of the definition of "agricultural operation" must be removed to ensure that chemical spraying will not enter the protected categories of odour, noise or dust.[13]

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[11] Supra note 5.

[12] Supra note 5.

[13] Supra note 3.

The prime purpose of the FPPA should be to protect agricultural land, not agricultural practices or related commercial undertakings.

In addition, the purpose of right to farm legislation is the protection of food production. It is unnecessary then to expand the definition of "agricultural operation" to include such things as trees and turf grass farms, or the operation of saw mills, etc.

3) Should the parties involved in a Board hearing be able to recoup costs of hiring legal and technical assistance?

The draft discussion paper suggests that the Board should have the authority to award part or all of the costs incurred at a Board hearing. It poses four questions:

1. Should the Board be given the authority to assess costs against either or both parties of a hearing?
2. How important is the assessment of costs when the Board already has the authority to refuse to hear an application if, in its opinion: the matter is trivial; the application is frivolous or not made out in good faith; or the complaint does not have a personal interest in the issue?
3. Should the Board have guidelines to follow when assessing costs?
4. Should the Board have the authority to recover costs including legal fees, expert fees, witness fees, fees for preparation of evidence, travel and accommodation costs?

RECOMMENDATION #4: **The parties involved in a board hearing should be able to recoup costs of hiring legal and technical assistance. The Board should have guidelines to follow when assessing costs.**

If the Board is given the power to award costs, it should have guidelines to follow. A good model for cost guidelines is the Environmental Assessment Board's cost guidelines. Some of the principles found in the EA Board's guidelines that the Farm Practices Protection Board should consider include the following:[14]

1. In assessing cost eligibility, the Board will, among other things, consider whether the party substantially contributed to the hearing, and whether the party acted reasonably, responsibly and cooperatively.

2. The hearing outcome does not determine cost eligibility; however, parties should not

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[14]Lindgren, Richard, *Cost Awards in Environmental Assessment Hearings: Principles, Practice and Procedure*, Canadian Environmental Law Association, October 1996.

assume that they will be fully indemnified for their hearing costs.

3. Where a party initiates a hearing but then abruptly terminates the hearing or otherwise abuses the hearing process, that party bears responsibility for other parties' legitimate hearing costs, including reasonable and necessary pre-hearing preparations and, where appropriate, solicitor-client costs.

4. Costs may be reduced or denied for expert witnesses whose fees are excessive or whose work duplicated evidence from other parties.

5. Costs may be awarded for participation in settlement meetings where such meetings are an integral part of the proceedings and each party had a clear and ascertainable interest in the meetings.

6. Costs may be awarded for motions brought before the Board.

7. A failure or refusal by a party to participate in the pre-hearing process or to bring a motion for early dismissal of the proponent's case may reduce the quantum of costs awarded to the party.

8. Parties should to take all reasonable steps to avoid unnecessary motions or other actions which delay proceedings. If a motion, or opposition to a motion, is frivolous, vexatious or without merit, costs may be awarded against the party bringing or opposing the motion.

9. A "party" to the proceeding may claim costs or be liable for costs, while a "participant" in the hearing may not claim costs or be liable for costs.

The Farm Practices Protection Board should also set out what types of expenses are recoverable through a costs award. Possibilities, as outlined in the EA Board's guidelines, include:[15]

1. legal, consulting and expert fees;

2. travel and related expenses;

3. transcripts, photocopying, facsimile, delivery costs, applicable taxes; and

4. other necessary and reasonable disbursements.

If the Farm Practices Protection Board is given the power to award costs, this power should not be used as a means to create a barrier to the hearing process. Complainants must not view the Board's cost power as a threat against those who challenge the practices of farmers.

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[15]Supra note 14.

4) Should the Board have more authority to enforce its orders when a farm operator refuses to carry out orders or parts of them?

When the Board currently rules that a practice is not a "normal farm practice", it then has the power to make an order, which can be filed in court to be enforced. The draft discussion paper suggests that the Board should be given the authority to enforce the orders it makes at a hearing itself. The paper poses three questions:

1. Should the Board be given more authority to enforce the orders that it makes at a hearing?
2. Is it appropriate for the Board to enforce orders against farmers, particularly as the Act is designed to protect a farmer's right to farm?
3. How should the Board enforce orders (fines, etc)?

RECOMMENDATION #5: **The Board should not have more authority to enforce its orders when a farm operator refuses to carry out orders or parts of them.**

It is unclear whether there have been frequent examples of non-compliance with Board orders. In addition, the Farm Practices Protection Board is subject to the Statutory Powers Procedure Act[16] (SPPA) and pursuant to section 19 of that Act, the Board's decision or order in a proceeding may be filed in the Ontario Court (General Division) by the Board or by a party to the proceedings, and upon filing, the decision or order is deemed to be an order of the court and is enforceable as such. Thus, there is no need for the Board to be given the authority to enforce the orders that it makes at a hearing.

5) Should farmers be compensated if, for a valid reason, they are not allowed to use a normal farm practice?

In some circumstances, normal farming practices may need to be restricted for the public good. The draft discussion paper suggests that affected farmers should be given annual compensation for such interference. It poses four questions:

1. Should farmers be entitled to compensation for not being able to use a normal farming practice?
2. Under what circumstances should compensation be considered?
3. How would the compensation level be determined? Who would determine the level?
4. Who would pay the costs of compensation?

RECOMMENDATION #6: **Farmers should not be compensated if they are not allowed to use a normal farming practice.**

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[16] *Statutory Powers of Procedure Act*, R.S.O. 1990, c. S-22 (as amended).

Landowners who are subject to zoning or land use restrictions under the Planning Act do not generally receive compensation. Why should farmers receive preferential treatment or compensation if their operations are restricted in the public interest? In CELA's view, compensation is a slippery slope that should be avoided under the FPPA.

In addition, the threat of having to pay compensation to a farmer who is not allowed to use a normal farming practice acts as a deterrent to a complainant in bringing an action before the Board.

6) How can a balance between farmers' rights and the general public's rights be ensured?

The draft discussion paper suggests that municipal by-laws should not restrict normal farm practices. It poses five questions:

1. Is it reasonable that normal farm practices be restricted by local by-laws?
2. Should changes be made to the Municipal and Planning Acts and to the FPPA to allow farmers to appeal a municipal by-law that restricts farming practices?
3. Since the OMB is in place, is a duplicate appeal process for by-laws under the Planning Act appropriate?
4. If the Farm Practices Protection Board did have power to hold a hearing regarding a municipal by-law and found that the by-law did restrict "normal farming practices", should the by-law be made null and void, or should all farmers in that municipality be given an exemption from the by-law?
5. How can a balance between farmers' and the general public's rights be ensured?

RECOMMENDATION #7: **It is reasonable for farm practices to be restricted by local by-laws. Changes should not be made to the Municipal and Planning Acts, nor to the FPPA to allow farmers to appeal a municipal by-law that restricts farming practices. The Farm Practices Protection Board should not have the power to hold a hearing regarding a municipal by-law with respect to whether that the by-law restricts "normal farming practices", nor should they have the power to declare a by-law null and void, nor should all farmers in that municipality be given an exemption from the by-law. Farmers' rights and the rights of the general public can be balanced most efficiently through the common law of nuisance and existing avenues under the Planning Act.**

The Farm Practices Protection Board does not have the expertise to deal with municipal planning, zoning or other related activities. As well, the Ontario Municipal Board already exercises this

function. Granting the Farm Practices Protection Board the power to hold hearings or declare by-laws null and void would result in a duplication of processes.

7) What specific OMAFRA legislation needs to be referenced in a new right to farm legislation?

The draft discussion paper suggests that other legislation needs to be referenced in the FPPA, such as the Environmental Protection Act, the Ontario Water Resources Act, the Pesticides Act, the Game and Fish Act, the Ocean and Fisheries Act, the Lakes and Rivers Improvement Act, the Municipal Act, and the Planning Act, as they are currently affecting the rights of farmers to farm.

RECOMMENDATION #8: No additional legislation should be referenced in the FPPA.

PART IV - CONCLUSIONS

CELA did not support the FPPA in 1988 and nothing has occurred since that time to change CELA's position. The Farm Practices Protection Board has only heard a dozen cases since it was established and, as such, CELA submits that the costs associated with the continued operation of this Board cannot be justified.

The FPPA and its associated Board is an inadequate means by which to protect farmland as the removal of common law rights cannot prevent the loss of agricultural land to industrial, commercial and residential development. The problem that the FPPA attempts to address, nuisance suits against farmers, is only a symptom of a much larger problem. The real crisis facing Ontario agriculture is the lack of stringent municipal and provincial land use laws, guidelines and policies. As well, there is little evidence that nuisance suits against framers are common in Ontario.

There is no evidence of the need to broaden the scope of the FPPA or the Board. The suggestions for change in the draft discussion paper appear to offer solutions to problems that currently do not exit and as such, CELA cannot support the broadening of the scope of the FPPA or the Board.

In CELA's view, the FPPA should be repealed in its entirety. There is no reason to take the important area of nuisance law out of the supervision of the courts. Any legislation that seeks to amend the law of nuisance can be better served through the courts' lengthy experience with balancing the rights and obligation of individuals with social facts and legislative initiatives in a manner that is fair and impartial.

SOURCES

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