

Are You Losing Your Right to Farm?

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■ Take Home Messages

- ▶ Neighbours to a livestock farm have the legal right to shut a farm down and be paid damages if the farm interferes with the neighbours' use and enjoyment of their property;
- ▶ Statute laws seek to limit the neighbours' rights and provide right to farm protections to farmers;
- ▶ Farmers facing complaints and the risk of being sued need to be proactive in responding to the legal complaint and protecting their farm; and
- ▶ Farmers should adopt a good-neighbour policy to avoid the risk of being sued.

■ Introduction

Farming operations can cause odours, dust, and noise. These inconveniences often go hand-in-hand with farming and livestock production. What rights do you have when new neighbours discover they do not like the odours, dust, or noise coming from your farm? Can they force you to change the way you operate, or even have your farm shut down? What safeguards do you have to protect your farm?

It may come as a surprise but there is a principle in Canadian law that gives neighbouring property owners the right to sue you if they think your farm operations interfere with the enjoyment of their property. The principle is called the 'law of nuisance'. It is a 'common law principle' that has been around since the 1880s.¹ In those court cases where the neighbours have won, courts have awarded damages and injunctions against the farmer. The good news is that most provincial governments have passed statute laws to

¹ B. Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) and *Rylands v. Fletcher* House of Lords (1868), L.R. 3 H.L. 330; 37 L.J. Ex. 161

protect the farmer's right to farm.

■ Trends in Land Use Conflict

Alberta and other provinces in Canada are experiencing increasing country residential development in regions that have been traditionally used for agricultural production. Country residential developments tend to come in two forms: conversion of a quarter section or more of farm land into a country residential subdivision with multiple lots of an acre or more in size; or, isolated single parcel residential development on a portion of farm land. In either case, those moving into the country may be seeking fresh air, quiet, and scenery. The expectations of new country residents can come into conflict with agriculture when they experience the realities of modern agricultural production.

Livestock production can generate odours from manure, flies and noise. Similarly, grain and silage farming involves dusty and noisy field preparations in the spring that often go late into the night. After the crop is seeded and begins to grow, the farmer will be in the field again this time spraying the crop to protect it from weeds and pests. Those farmers producing forage crops can be in the fields at various times in the summer haying or taking off silage. In the fall, harvest begins and can create dust and noise as farmers rush late into the night to harvest their crops before frost and winter set in.

All of these activities can be unwelcome to the new country resident who may seek the rustic beauty of looking at the fields of crops or the cattle pasturing but not wanting to smell or otherwise be disturbed by the farming activities.

■ Legal Foundation to Right to Farm

Here is some legal background: There are two sources of law in Canada. First, there is the category known as statute law. It includes laws passed by elected government bodies such as statutes and regulations passed by federal parliament or provincial legislatures. There are also rules and bylaws passed by municipal councils. The second source of law is the 'common law'. The common law is comprised of the rules and principles set out by the Courts in their written decisions. These principles become precedents that can be applied in future cases. Examples of common law principles include 'negligence', 'defamation', 'breach of contract', 'trespass', and, of course, 'nuisance'. It is important to keep in mind that statute laws always trump common laws. This means that if the parliament or a legislature do not like a common law principle that the courts have developed, the parliament or legislature can override the common law through passing a new statute or

regulation.

■ Farmers Shut Down for Nuisance

In 1985, a New Brunswick hog producer was sued by his neighbours for causing a nuisance. After raising hogs for a number of years, he had new neighbours move into the area. They didn't like the smell, went to court, and obtained a judgement against the farmer. The court said it didn't matter that the farm was there first, or that the neighbours knew about the hog barn when they moved in. In ruling that the hog barn interfered with the neighbours' right to enjoy their property, the court ordered the farmer to pay damages to each of the neighbours. The court awarded \$30,500 in damages and further indicated that an injunction would have been granted against the hog farm had it not burned down prior to completion of the trial.²

There was a similar case in Ontario in 1967. A poultry operation was shut down because the neighbours complained of odours. In 2000, the Ontario courts awarded neighbours of a mushroom farm over \$260,000 in damages for the smell caused by the farm's composting operations.³

The same type of odours that led to problems for these farmers can be created by dairy producers. Grain farmers are not immune either. Problems can arise when urban sub-divisions encroach on farm land. The new neighbours may not like the dust that comes with seeding or harvesting, and they might not welcome aerial spraying, or the noise from seeding or harvesting late into the night.

■ Emerging Trends in the United States

The United States also adopts the common law principle of nuisance. A concerning trend has been developing in the US with respect to nuisance law suits against American farmers. The damage awards are escalating. For example, in 2002 the Iowa courts awarded \$962,000 in damages against a livestock farm for odours and reduced property values.⁴ In 2006, a Missouri jury ordered a livestock producer to pay three neighbouring families \$1.5

² *Desrosiers et al. v. Sullivan and Sullivan Farms Ltd.* (1986), 66 N.B.R. (2d) 243 (Q.B.). *Sullivan and Sullivan Farms Ltd. v. Desrosiers et al.* (1987), 76 N.B.R. (2d) 271 (C.A.).

³ *Pyke v. TriGro Enterprises Ltd.* [1999] O.J. No. 3217.

⁴ *Blass, McKnight, Hendrickson, Langbein v. Iowa Select Farms*

million each for a total of \$4.5 million in damages based on 'nuisance'.⁵

■ Increased Potential for Nuisance Complaints

National trends of urban sprawl combined with the popularity of country residential subdivisions have increased the risk of nuisance lawsuits for Canadian farmers. In response to this threat, provincial governments across Canada have introduced right-to-farm statutes in an effort to override the common law of nuisance as it applies to farming. For example, Alberta brought in the *Agriculture Operation Practices Act* in 1987, and Ontario passed the *Farm Practices Protection Act* in 1988. Manitoba, Saskatchewan, and British Columbia have all followed with similar laws.

The right-to-farm laws are designed to protect farmers from nuisance suits provided you meet certain conditions. If you farm or ranch, you must follow provincial laws on the environment, water, and public health to have protection from nuisance suits. Another important condition to receiving right-to-farm protection is the requirement that the farmer follow "generally accepted practices".

■ How Right-to-Farm Laws Work

First, these laws prevent a court from awarding damages or granting injunctions against a farmer based on nuisance complaints unless the neighbour can prove to the court that the farmer is not following "generally accepted practices". Each of the provinces has a provision in their right-to-farm laws that reads like this:

The owner or operator of an agricultural operation is not liable to any person in nuisance with respect to the carrying on of the agricultural operation, and may not be prevented by injunction or other order of any court from carrying on the agricultural operation on the grounds of nuisance where the owner or operator uses generally accepted practices with respect to the agricultural operation.

The key provision of the Alberta Act is as follows:

Nuisance claims

2 (1) A person who carries on an agricultural operation and who, in respect of that operation, does not contravene

⁵ *Turner, Arnold, and Gwin v. Premium Standard Farms Inc.*

- (a) the land use bylaw of the municipality or Metis settlement in which the agricultural operation is carried on,
- (b) the regulations or an approval, registration or authorization, or
- (c) the generally accepted agricultural practice

is not liable to any person in an action in nuisance resulting from the agricultural operation and is not to be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates a nuisance.

(1.1) If subsection (1)(a) is contravened but the contravention is authorized by an approval, authorization or registration; the approval, authorization or registration prevails over the land use bylaw with which it conflicts.

(2) Subsection (1) continues to apply notwithstanding that one or more of the following occur:

- (a) the land use bylaw of the municipality or Metis settlement in which the agricultural operation is carried on changes;
- (b) the ownership of the agricultural land on which the agricultural operation is carried on changes;
- (c) the agricultural operation is carried on by other persons;
- (d) the use of land adjacent to the land on which the agricultural operation is carried on changes.

The Act also places the onus on the person complaining about the farm to prove that the farmer is not following generally accepted practices or his approval:

2(3) Where a plaintiff or claimant in a proceeding against a person who carries on an agricultural operation

- (a) claims damages in nuisance resulting from the agricultural operation, or
- (b) applies for an injunction or other order of a court preventing or restricting the carrying on of the agricultural operation because it causes or creates a nuisance, the onus of proving that the defendant

contravened the land use bylaw, regulation, approval, registration, authorization or practice referred to in subsection (1) is on the plaintiff or claimant, as the case may be.

The Act also reveals an intention by the Alberta Legislature to discourage people from initiating a nuisance action. The Act invites the court to order security for costs against the person who initiates the suit:

(4) In an action in nuisance against a person who carries on an agricultural operation, a court may

(a) order the party that commenced the action to furnish security for costs in any amount the court considers proper;

(b) award party and party costs and solicitor and client costs or either of them.

■ What are Generally Accepted Practices and Who Decides

The Act defines generally accepted practices as follows:

"generally accepted agricultural practice" means a practice that is conducted in a manner consistent with appropriate and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, and without restricting the generality of the foregoing includes the use of innovative technology used with advanced management practices.

If a person believes that a farmer is causing a nuisance and that person also believes that the farmer is not following generally accepted practices, the person can apply to the Minister of Agriculture under section 3 of the Act and request that the complaint be reviewed by a "practice review committee". If the committee rules that the farmer is not following generally accepted practices or that the farmer is otherwise not in compliance with his approval, it clears the way for the complainant to proceed with the nuisance lawsuit in the courts, effectively lifting the statutory bar imposed by the Act. Conversely, if the committee rules that the farmer is following generally accepted practices, initiation of a nuisance suit is likely futile in the face of the committee ruling.

The features of Alberta's right-to-farm laws are consistent with the features of the laws enacted in British Columbia, Manitoba, Ontario and elsewhere. Each province uses slightly different terminology but all have the three key

elements of creating a statutory bar linked to generally accepted practices with adjudication of whether those practices are being followed determined by a quasi-judicial administrative panel.

■ Criticisms of Right to Farm Laws

Some environmental groups and opponents of modern livestock production have criticized right-to-farm laws as giving farmers a right to pollute and otherwise interfere with neighbours' rights to enjoy their property. A 1999 article by J. Kalmakoff published in the *Saskatchewan Law Review* described the purpose of right-to-farm laws as follows:

In exchange for acting as steward of our common physical and biological environment, the farmer is rewarded certain privileges within his or her own immediate social environment. Far from granting farmers an "environmental exemption", right to farm law should be viewed as an incentive against pollution.⁶

Alberta's *Agricultural Operation Practices Act* recognizes that farming creates nuisances and that country residents and others may be impacted by the nuisances inherent in farming. However, the Act seeks to achieve a balance in the interface between agriculture and country residential development. This balance was described by J. Kalmakoff as follows:

Generally speaking, well-managed farms that operate according to generally accepted agricultural practices, and that do not pollute or otherwise threaten public health and safety, are granted immunity from common-law nuisance liability. As well, in several provinces this immunity is extended against restrictive local by-laws. The intent is to create an environment conducive to continued agricultural production by restricting interference from those who object to the unavoidable effects of normal farming practices. In this sense, right-to-farm law redefines the balance between conflicting claims to undisturbed use and enjoyment of land on the one hand and freedom of action on the other.⁷

⁶ J. Kalmakoff, "The Right to Farm: A Survey of Farm Practices Protection Legislation in Canada", *Saskatchewan Law Review*, 1999, .62.

⁷ Ibid.

■ Steps Producers Can Take to Avoid Being Sued In Nuisance

Here are some tips for producers to avoid being sued in nuisance:

- ▶ know your neighbours, meet with them, and sincerely respond to any of their concerns;
- ▶ meet or exceed all legal operating requirements;
- ▶ design and construct your operation to minimize the impact on neighbours;
- ▶ stay current on new technology and management practices;
- ▶ use management practices to reduce odour;
- ▶ inject or incorporate manure whenever possible;
- ▶ apply manure as far from concerned neighbours as possible;
- ▶ avoid manure on roads as much as possible;
- ▶ notify sensitive neighbours before manure application;
- ▶ consider wind, temperature and other weather conditions when applying manure;
- ▶ apply manure as few times as possible;
- ▶ if more land is needed for application, consider offering manure to neighbours;
- ▶ consider ownership of neighboring residences or purchasing and reselling with nuisance covenants; and
- ▶ keep good records.

If you have a complaint filed against your farm that triggers a review under the Act or you are sued, treat it as a serious matter. The law expects you to defend your farm and what you are doing. No one else will do it for you, particularly not government. By being proactive within the legal process you can reduce the risk of being shut down and increase the likelihood that the complaint will be dismissed in the early stages of the legal process.

■ Conclusion

The interface between farmers and country residential development can lead to conflicts. The common law favours country residential development under


the doctrine of nuisance. However, the provincial legislatures of Canada decided in the mid-1980s that the common law would lead to harsh results for farmers. As a result, right-to-farm laws have been enacted that seek to provide a better balance between the realities of farming and the desires of country residents to enjoy their rural setting.

Keith Wilson is an agricultural lawyer with the Alberta-based firm of Wilson Law Office. This article is for information only and should not be relied upon as legal advice. You should consult a lawyer, as the facts of your situation may change your legal rights or the law may change



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