



**THE NUISANCE ACT AND
THE FARM PRACTICES PROTECTION ACT**

REPORT FOR CONSULTATION

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CONSULTATION

This is a consultation paper outlining provisional recommendations for reform of *The Nuisance Act* and *The Farm Practices Protection Act*. The Commission welcomes your comments on its provisional recommendations. The Commission will consider all comments when making its final recommendations. Your comments may be quoted or referred to in the final report. If you do not wish to have your comments quoted or referred to, please request confidentiality when submitting your comments.

The deadline for submissions is **November 30, 2012**.

Please forward your comments to the Commission at: mail@manitobalawreform.ca, or by writing to:

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CHAPTER 1

INTRODUCTION

A. BACKGROUND

Professor Philip Osborne of the University of Manitoba, Faculty of Law suggested that the Manitoba Law Reform Commission review *The Nuisance Act*.¹ This legislation, unique to Manitoba, restricts the availability of common law nuisance actions in respect of activities creating offensive odours. In the course of examining the history and purpose of *The Nuisance Act*, the Commission has also identified a need for reform of *The Farm Practices Protection Act*² (the “*FPPA*”), successor to *The Nuisance Act*. The *FPPA* immunizes agricultural operators from liability in nuisance in connection with a wide range of agricultural activities.

For centuries, the common law of nuisance has served to resolve conflicts between neighbours over incompatible land use.³ *The Nuisance Act* and the *FPPA*, enacted in 1976 and 1992 respectively, restrict the role of the common law of nuisance in resolving such disputes. This legislation has important implications for the environment and the exercise of individual property rights, and in that respect merits careful consideration.

This report begins with a discussion of the common law action in nuisance, the significance of the law of nuisance in the modern legal context and some factors to be considered when derogating from the common law by statute. A review of the historic role and principal features of the common law of nuisance will place *The Nuisance Act* and the *FPPA* in context, and provide a background to many of the Commission’s recommendations for reform.

Chapter 3 of this report examines the legislative history of *The Nuisance Act* and its role in Manitoba’s legal system, and concludes with a recommendation for the Act’s repeal.

Chapter 4 examines the *FPPA* and the operations of The Farm Practices Protection Board, the administrative tribunal charged with applying the Act. In this chapter, the Commission sets out a series of recommendations for reform of the *FPPA* with a view to clarifying and enhancing the effectiveness of the legislation.

¹ CCSM c. N120, see Appendix A.

² CCSM c. F45, see Appendix B.

³ For a detailed history of the tort of nuisance, see Gregory Pun & Margaret Hall, *The Law of Nuisance in Canada* (Markham: Lexis Nexis, 2010) [Pun] at 18-32, in a section authored by Christopher Harvey.

B. ACKNOWLEDGEMENTS

The Commission extends its thanks to Professor Philip Osborne for suggesting the review of *The Nuisance Act*. Many thanks also to the staff of the University of Manitoba, Faculty of Law Library and the Manitoba Legislative Libraries for their able assistance. The Commission also appreciates the cooperation and assistance of the Farm Practices Protection Board.

CHAPTER 2

THE COMMON LAW OF NUISANCE

A. THE TORTS OF PRIVATE NUISANCE AND PUBLIC NUISANCE

Although the term “nuisance” applies to a variety of legal proceedings, including criminal prosecutions in nuisance and statutory nuisance,¹ this report is focused on the common law tort of nuisance. Nuisance is one of five torts that protect a proprietary or possessory interest in land.² It has been invoked to provide a remedy in a vast range of circumstances, from crowing roosters to objectionable public behaviour.³

Perhaps due to this fluidity, there is a “general agreement that [nuisance] is incapable of any exact or comprehensive definition”⁴ and that the tort is easier to describe than to define.

There is an important distinction between actions in private nuisance and those in public nuisance. Private nuisance typically concerns disputes between individual landowners about conflicting land use, while public nuisance refers to activities which affect the public welfare.

1. Principal Features of the Tort of Private Nuisance

A leading Canadian case endorsed the following proposition, outlining the essential principles of the tort of private nuisance:

A person, then may be said to have committed the tort of private nuisance when he is held to be responsible for an act directly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.⁵

A variation of this definition has been adopted in a long line of Canadian authority.

Interference can take the form of actual physical damage to the land, as in the case of flooding or structural damage, or intangible interference with the claimant’s enjoyment and

¹ Ann Cullingham, “Chapter 17, Nuisance” in Rainaldi ed., *Remedies in Tort* looseleaf (consulted on October 15, 2012)(Scarborough: Thomson Reuters Canada Ltd., 1987) [Cullingham] vol. 3 at 17-14. The author identifies five different legal proceedings to which the term “nuisance” can apply: a tort action for private nuisance; a private tort suit for public nuisance; an action for public nuisance; criminal proceedings for nuisance and statutory nuisance.

² The others are negligence, the rule in *Rylands v. Fletcher*; waste; and trespass.

³ For a description of the wide range of circumstances addressed in the law of nuisance see J. Fleming, *The Law of Torts*, 9th ed (Sydney, N.S.W.: LBC Information Services 1998) at 457.

⁴ *St. Pierre v. Ontario (Minister of Transportation)* (1983), 43 O.R. (2d) 767 (Ont CA), aff’d, [1987] 1 S.C.R. 906, at 18.

⁵ *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756 at 760 (BCCA), citing Street, *Law of Torts*, at 215.

comfort of the land. The focus is on the harm done to the claimant's interest in his land, rather than any particular conduct on the part of the defendant.⁶

In deciding whether a given interference constitutes a legal nuisance, courts have asked if the defendant is using his property reasonably having regard to the fact that he or she has a neighbour.⁷ In other instances, the courts have questioned whether in the circumstances it is reasonable to deny compensation to the aggrieved party.⁸ These various formulations of the test highlight the importance of balancing the parties' interests, and the highly fact-specific nature of the inquiry.

The role of nuisance law in achieving a balance among competing interests is by no means an exclusively modern phenomenon. The elaboration of common law nuisance principles has taken place over the course of many centuries. From as early as the 13th century, people have brought law suits in nuisance against their neighbours in connection with offensive odours, excessive noise, and air and water pollution. The subject matter of many of these early cases will be familiar to the modern reader. A significant 17th century case, for example, concerned odours emanating from a pig sty. The claimant raised arguments about the effect of such odour on the natural environment and health of nearby residents, and, in his defence, the defendant relied on the social benefits of raising pigs.⁹

The Ontario Court of Appeal's recent decision in *Antrim Truck Centre*¹⁰ articulates a two-part test for determining whether an interference constitutes an actionable nuisance: (1) is the interference substantial and (2) is the interference unreasonable? The first part of the test derives from lengthy authority to the effect that the law will not provide a remedy for trivial annoyances, and that "the very existence of organized society depends on a generous application of "give and take, live and let live".¹¹

In determining whether the interference is unreasonable, courts generally refer to four main factors:

- (1) The severity of the interference;
- (2) The character of the neighbourhood;
- (3) The utility of the defendant's conduct; and

⁶ These principles are confirmed in a long line of authority including the Supreme Court of Canada's decision in *St. Lawrence Cement v. Barrette* [2008] 3 S.C.R. 392 at para 77. Although the court was deciding on the interpretation of Quebec's *Civil Code*, the judgment includes a description of the principal features of the common law tort of private nuisance.

⁷ Sappideen and Vines eds., *Fleming's The Law of Torts*, 10th ed. (Sydney:ThomsonReuters, 2011) at 500, citing *Pugliese v. Canada (National Capital Commission)*, 17 O.R. (2d) 139 (Ont CA), varied on other grounds [1979] 2 S.C.R. 104.

⁸ *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181.

⁹ *Aldred's Case* (1610) 77 E.R. 816 [1558-1794] as cited in Pun, *supra* note 3 at 24.

¹⁰ *Antrim Truck Centre Ltd. v. Ontario (Transportation)* (2011) ONCA 419, leave to appeal to SCC granted, 34413 (February 2, 2012).

¹¹ *Tock*, *supra* note 8, citing Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849, and Bramwell B. in *Bamford v. Turnel* (1862) 122 E.R. 27.

(4) The sensitivity of the plaintiff.¹²

Historically, the extent to which these factors are applied and their relative weight has depended on whether the nuisance complained of caused physical damage to the claimant's land. In almost all circumstances, the courts have found that physical damage to land is an unreasonable interference and actionable nuisance, without giving extensive consideration to the factors identified above. These factors are much more significant in cases involving interferences with the use and enjoyment of land, in which courts are generally more reluctant to find liability and more inclined to engage in a balancing exercise.¹³

Nuisance is frequently described as a strict liability tort, on the basis that:

Liability does not depend upon the nature of the defendant's conduct or on any proof of intention or negligence. It depends primarily upon the nature and extent of the interference caused to the plaintiff.¹⁴

However, most commentators now identify a drift in the law of nuisance away from its strict liability origins. A leading authority states that "while there is an "aura" of strict liability in nuisance actions, in most cases there is no liability without some fault."¹⁵ Fault in this context has been interpreted as a quite neutral concept, signifying the defendant's involvement in the creation of an annoyance.¹⁶

The notion of fault in private nuisance analysis has led to some blurring of the line between nuisance and negligence.¹⁷ And while the same set of facts may often give rise to both causes of action, there are important differences between the two. Unlike in negligence, the focus in nuisance is on the harm suffered by the plaintiff rather than on the defendant's conduct. In nuisance, the defendant cannot defeat the action solely by establishing that he or she exercised all reasonable care.¹⁸

Perhaps most significantly, in nuisance the initial onus is on the plaintiff to prove damage resulting from the defendant's activity or a significant degree of discomfort or inconvenience. The onus then shifts to the defendant to prove that the interference was not unreasonable.¹⁹ By contrast, in a negligence action, the plaintiff must prove that the defendant did not exercise reasonable care.

¹² *Supra* note 10 at para. 83. Malice on the part of the defendant may also be a factor in some cases: see *Christie v. Davey* [1893] 1 Ch 316.

¹³ See discussion in Philip Osborne, *The Law of Torts* 4th ed. (Toronto:Irwin Law, 2011) at 378, 380.

¹⁴ *Ibid* at 378.

¹⁵ Sappideen and Vines, *supra* note 7. See also the statement of the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty* (The Wagon Mound No. 2) [1967] 1 A.C. 617: "although negligence may not be necessary, fault of some kind is almost always necessary".

¹⁶ Gregory Pun & Margaret Hall, *The Law of Nuisance in Canada* (Markham: Lexis Nexis, 2010) [Pun] at 8.

¹⁷ Some commentators argue that nuisance has been subsumed by the doctrine of negligence: L. Halper, "Untangling the Nuisance Knot" (1998) 26 B.C. Env'tl. Aff. L. Rev. 89; J. F. Brenner, "Nuisance Law and the Industrial Revolution" (1974) 3 J. Legal Stud. 403.

¹⁸ Cullingham, *supra* note 1 at 17-13.

¹⁹ See Allen Linden & Bruce Feldthusen, *Canadian Tort Law* (Markham: LexisNexis, 2011) at 579.

While there are four principal defences to an action in private nuisance, in practice the most significant are those of statutory immunity and statutory authority.²⁰

The defence of statutory immunity is available when legislation expressly defines certain activity as non-tortious, or bars a law suit in respect of particular activities. *The Nuisance Act* and the *FPPA* are examples of statutes providing a defence of statutory immunity.

The defence of statutory authority operates to preclude a finding of liability if the defendant's activity is authorized by statute, and the defendant proves that that the disturbance to others is the inevitable result of exercising the statutory authority. Courts have given a very narrow interpretation to this defence, placing the onus on the defendant to prove not only that the activity was authorized by statute, but that there were no alternative methods of carrying out the work, and that it was practically impossible to avoid the nuisance.²¹

Canadian law does not recognize a defence of coming to the nuisance whereby a defendant is absolved of liability if he was engaged in the activity complained of before the plaintiff moved into the area.²² Courts will not necessarily give priority to first-in-time land use, although some such considerations may enter into a nuisance analysis under the category of "the character of the neighbourhood".

There are two remedies available for a successful action in private nuisance: an injunction and an award of damages. Although injunctions are typically awarded in cases of continuing nuisance, courts have begun to demonstrate flexibility in this regard, giving consideration to the hardship to the defendant or to the public in deciding whether to grant an injunction.²³ Damages are an appropriate remedy in cases "where the harm is small, where adequate damages are easily estimated, and where an injunction would create intolerable hardship for the defendant."²⁴

2. Public Nuisance

Private nuisance and public nuisance are separate concepts, and are generally thought to have quite distinct origins.²⁵ Private nuisance has historically been a tool for resolving private disputes about conflicting land usage. Public nuisance has its origins in the criminal law and concerns interference with public rights, not necessarily connected with the use or enjoyment of land.

In *Ryan v. Victoria (City)*, the Supreme Court of Canada summarized the principal features of public nuisance:

²⁰ The others are prescription and consent, both described in Osborne, *supra* note 13 at 394-395.

²¹ *Ryan v. Victoria (City)* [1999] 1 S.C.R. 201, at para. 55.

²² *O'Regan v. Bresson* (1977), 3 C.C.L.T. 214; *Russell Transport Ltd. v. Ontario Malleable Iron Co.* [1952] O.R. 621; *Sturges v. Bridgman* [1879] 11 Ch D852. This is in contrast with U.S. law which has historically given priority to land use that is first in time. This principle is embodied in much of the US right-to-farm legislation.

²³ See discussion in Lewis Klar, *Tort Law*, 4th ed. (Scarborough: Thomson Carswell, 2008) at 744.

²⁴ Osborne, *supra* note 13 at 396.

²⁵ For the prevailing view, see Klar, *supra* note 23 at 716.

A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience. Essentially, the conduct complained of must amount to an attack on the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. An individual may bring a private action in public nuisance by pleading and proving special damage. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway.²⁶ [citations omitted]

The state may initiate criminal proceedings in respect of public nuisance under the provisions of the *Criminal Code*.²⁷ The attorney general may also seek an injunction or damages for public nuisance in a civil proceeding. Individuals may bring an action in public nuisance only if they can demonstrate that they have suffered special damage as distinct from the inconvenience and loss suffered by members of the general public. Such special damage will ordinarily consist of personal injury, property damage or economic loss.²⁸

3. Nuisance in the Modern Legal Context

There is now a multitude of municipal, provincial and federal instruments regulating subject matter which was traditionally within the purview of the common law of nuisance, including noise, odour, and obstruction of public spaces.²⁹ This proliferation of legislation and regulation, and the overlap between nuisance and negligence, has caused some commentators to question the continued relevance of the common law of nuisance and to suggest that it has “come close to being merely a troubled footnote in the history of law.”³⁰

A better view is that both common law nuisance and statute law are necessary components in the effective regulation of such matters as environmental protection and the resolution of land-use conflicts. Indeed, in many cases the interpretation and application of legislation depends on an understanding of the common law. Statutes such as *The Nuisance Act* and the *FPPA*, for example, use the term “nuisance” but do not define it. Thus, there are often important gaps in the statutory schemes governing nuisance-related activities that must be filled by common law principles.

In addition, the common law actions may provide relief where statutory schemes do not, allowing parties to vindicate private rights. There is no right to sue for breach of a municipal by-

²⁶ Ryan, *supra* note 21 at para 52.

²⁷ RSC 1985, c. C-46, s. 180(2). This section defines a common nuisance as any act or omission that endangers the lives, safety health, property or comfort of the public; or obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

²⁸ Cullingham, *supra* note 1 at 17-46.

²⁹ These include municipal by-laws, provincial environmental and public health legislation, standards and guidelines, and land use planning legislation.

³⁰ Pun, *supra* note 16 at 2.

law,³¹ and environmental and public health legislation offer very little scope for private action.³² An action in nuisance may be the only way for an aggrieved individual to receive compensation, thereby fulfilling one of tort law's most significant policy objectives.³³

The common law of nuisance continues to play an important role in environmental litigation and the law of expropriation.³⁴ Recent comments from the Supreme Court of Canada have suggested the possibility of an expanded role for the law of nuisance in environmental protection.³⁵ In the United States, state attorneys general have brought actions in public nuisance against product manufacturers alleging interference with public health,³⁶ and against emitters of greenhouse gases, contending that global warming is a public nuisance.³⁷ Although these attempts have been largely unsuccessful, and subject to some academic criticism,³⁸ they help to demonstrate the lasting influence of the ancient tort of nuisance.

4. Derogating from Common Law by Statute

The importance of private property rights in the common law system is well documented. The law has long recognized an individual's right to acquire, possess, control, enjoy and transfer interests in real and personal property. In his *Commentaries*, Sir William Blackstone described the right of property as absolute, subject to control or diminution only by the laws of the land.³⁹

In the chapters that follow, the Commission will make recommendations for reform of *The Nuisance Act* and *The Farm Practices Protection Act*. These statutes curtail a plaintiff's right to bring an action in nuisance in certain circumstances, and in so doing, restrict the plaintiff's right to enjoy his or her property without interference.

In the Canadian system, legislation is enacted and interpreted within the context of the common law, and important principles of interpretation have evolved to govern the interaction of these sources of law. In particular, statutes which derogate from the common law and restrict common law rights attract special considerations.

³¹ *Gosse v. Terrace (City)* 2008 BCCA 210.

³² A person may lay an information in respect of a breach of environmental or public health legislation, pursuant to section 507.1(2) of the *Criminal Code*, but the Attorney General may intervene in a private prosecution and may conduct the prosecution or withdraw the charges. Even if a private prosecution proceeds, there is no compensation available to the complainant.

³³ See Linden, *supra* note 19 at 4: "First and foremost, tort law is a compensator. A successful action puts money into the pocket of the claimant. This payment is supposed to reimburse the claimant for the economic and psychic damages suffered at the hands of the defendant."

³⁴ See for example: *Smith v. Inco*; 2010 ONSC 4749, rev'd on appeal 2012 ONCA 628, leave to appeal to SCC dismissed 34561(April 26, 2012); *Antrim Truck Centre, supra* note 10.

³⁵ See for example *British Columbia v. Canadian Forest Products Ltd.* [2004] 2 S.C.R. 74; *St. Lawrence Cement Inc. v. Barrette* [2008] 3 S.C.R. 392.

³⁶ *Diamond v. General Motors Corp.* 97 Cal. Rptr. 639, 639 (Ct. App. 1971).

³⁷ *Connecticut et al. v. American Electric Power Company Inc. et al.* (appeal to the USSC dismissed July 22, 2011).

³⁸ Victor Schwartz and Phil Goldberg (2006), "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort", 45 Washburn Law Journal 541.

³⁹ (1765-9, Bk 1, Ch 1:134)

One such consideration is the presumption against abolishing or interfering with individuals' rights. As a leading authority on statutory interpretation explains:

It is presumed that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail the rights that may be enjoyed by citizens or residents is strictly construed.⁴⁰

The same principles of interpretation apply in respect of legislation restricting a right of action,⁴¹ and legislation which interferes with private property rights.⁴²

These presumptions are rooted not only in the common law's concern with private property rights, but also in significant rule of law considerations. The stability and certainty of law is enhanced by avoiding interpretations which interfere with established legal rights and principles, and by requiring the legislature to be clear and specific about its intentions.⁴³

These principles of interpretation have been attenuated in the modern legal context, as courts are more prepared to weigh the importance of individual common law rights against broader social values and legislative goals. Nevertheless, they remain an important feature of the legal landscape, reflecting the common law's age-old concern with the sanctity of private property rights.

In the context of this report, these principles serve as a reminder of the importance the Canadian legal system attaches to common law private property rights. On a more practical level, they also highlight the importance of drafting statutes such as *The Nuisance Act* and *The Farm Practices Protection Act* as unambiguously as possible, to give full effect to the legislature's intentions.

With these considerations in mind, the following chapters will analyze and make recommendations for reform of *The Nuisance Act* and the *FPPA*.

⁴⁰ Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed (Markham:LexisNexis, 2008) at 477.

⁴¹ *Berardinelli v. Ontario Housing Corp.* [1978] 1 S.C.R. 275; *Ukrainian (Fort William) Credit Union Ltd. v. Nesbitt, Burns Ltd.* (1997), 152 D.L.R. (4th) 640.

⁴² Sullivan, *supra* note 40 at 479.

⁴³ *Ibid.*

CHAPTER 3

THE NUISANCE ACT

*The Nuisance Act*¹ restricts a person's right to sue a business in nuisance for odour-related disturbances. It has been called Canada's first right-to-farm legislation,² and its legislative history confirms that it was originally intended to protect agricultural operators from nuisance suits in respect of odour. Enacted in 1976, it has since received very little judicial or academic consideration.

A. THE ACT

The Nuisance Act is brief and is reproduced in its entirety at Appendix A.

The Act originally applied to both agricultural and non-agricultural businesses. With the enactment of *The Farm Practices Protection Act* ("FPPA") in 1992, *The Nuisance Act* was amended to exclude agricultural operations from its application. A subsequent housekeeping amendment, in 2010, updated references to *The Environment Act* in the legislation.³

B. LEGISLATIVE HISTORY AND PURPOSE

Before 1976, there were no legislative restrictions in Manitoba on a person's right to bring an action in nuisance in respect of odour caused by a defendant's use of land.

The Nuisance Act was enacted in response to the unreported 1975 decision of the Manitoba Court of Queen's Bench in *Lisoway v. Springfield Hog Ranch Ltd.*⁴ In that case, the plaintiff sued in nuisance in respect of odours emanating from the defendant hog ranch. After reviewing the common law of nuisance, the court concluded that there had been an unreasonable interference with the plaintiff's use and enjoyment of his land, awarding damages of \$10,000 and ordering an injunction.

The sponsor of the bill which became *The Nuisance Act* presented the legislation as a way to protect defendants such as those in *Lisoway* from nuisance lawsuits.⁵

Legislators at the time also commented on the need to introduce proper land-use planning legislation. Appropriate comprehensive planning legislation, they felt, would eventually render *The Nuisance Act* unnecessary.⁶

¹ CCSM c. N45.

² Patrick McCormally "Right to Farm legislation in Canada" online: (2007) Environment Probe, <<<http://www.probeinternational.org/envirowaterarticles/righttofarmcanada.pdf>>> .

³ S.M. 2010, c. 33, s. 42.

⁴ M.J. No. 188.

⁵ Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 30th Leg., 3rd Sess., No. 131 (May 31, 1976) at 4455 (Hon. Howard Pawley).

⁶ *Ibid.*

During the 1992 debates on *The Farm Practices Protection and Consequential Amendments Act*, that Bill's sponsor made the following remark in respect of *The Nuisance Act*:

The existing Nuisance Act will be changed with a consequential amendment to exclude agricultural operations. However, it will be left in place to protect other businesses from nuisance suit due to odour.⁷

This is the only statement made in respect of amendments to *The Nuisance Act* during the 1992 debates. The record does not reveal which businesses were felt to require protection from nuisance suits due to odour, or the policy basis on which such protection was justified.

C. CASE-LAW

A review of Manitoba case-law suggests that there had in fact been very few nuisance actions brought in respect of odour prior to the enactment of *The Nuisance Act* in 1976.

The earliest reported Manitoba odour nuisance case is a 1925 decision of the King's Bench in which the Municipality of St. Vital was found liable for dumping manure on the banks of the Seine River.⁸

In 1952, the Manitoba Court of Appeal upheld a decision awarding damages in nuisance against a defendant in respect of a variety of disturbances, including odour, emanating from an animal hospital.⁹

In the 1960s, Manitoba courts ruled on a series of cases concerning nuisance caused by municipal works authorized by statute. In *B.C. Pea Growers v. City of Portage la Prairie*,¹⁰ the defence of statutory authority applied to relieve the defendant of liability in nuisance caused by odour emanating from a lagoon.¹¹

In the 1992 decision in *MacGregor v. Penner*,¹² the Court of Queen's Bench considered an odour-related complaint in nuisance arising from smells emanating from a hog farm. The court analyzed the common law principles of nuisance, emphasizing the need to consider the characteristics of the neighbourhood in which the nuisance occurred. It found that, while there had been an interference with the plaintiff's enjoyment of land, it was not unreasonable and therefore not actionable. Having so concluded, there was no need to consider the defence of statutory immunity afforded by *The Nuisance Act*.

⁷ Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg., 3rd Sess., No. 65 (May 13, 1992) at 3325-26 (Hon. Glen Findlay).

⁸ *Still v. Rural Municipality of St. Vital*, [1925] 2 W.W.R. 78.

⁹ *Macieviech et al. v. Anderson et al.* (1952), 4 D.L.R. 507.

¹⁰ [1963] M.J. No. 83, aff'd (1965), 50 WWR415 (Man CA); aff'd [1966] SCR150; see also *Roberts v. City of Portage la Prairie* (1969), 6 DLR (3d) 96 (Man CA), aff'd [1971] SCR 481; and *Goertzen v. Winkler* [1970] M.J. No. 118.

¹¹ In *B.C. Pea Growers*, the defendant was found liable in nuisance for the flow of water and effluent from the lagoon on to the plaintiff's land.

¹² [1993] 1 W.W.R. 245; aff'd [1994] 2 W.W.R. 251 (Man CA).

The Act has itself been judicially considered only once since *MacGregor*, in a motion for summary judgment in *College of Registered Psychiatric Nurses of Manitoba v. Dalco*.¹³ In this case, the defendant argued that *The Nuisance Act* gave him a defence against breach of contract, despite a tenancy agreement which was in apparent conflict with the Act. The Court found that it was a genuine issue for trial as to whether *The Nuisance Act* could displace an agreement between the parties.

D. THE CASE FOR REPEAL OF *THE NUISANCE ACT*

Two important points emerge from the jurisprudence in Manitoba. First, there were very few odour-related common law nuisance actions in Manitoba before the enactment of *The Nuisance Act*, and the Act itself has rarely been used in practice.

Second, as illustrated in *MacGregor*, the common law of nuisance is not necessarily inimical to the defendant's interests. The balancing process inherent in a nuisance analysis considers the location and utility of the defendants' conduct. These factors will often favour defendants, particularly in agricultural settings.

Indeed, commentators have remarked that Canadian judges have on the whole been sympathetic to farmers' interests, and are "particularly cautious in respect of agricultural operations such as hog farming and other animal husbandry that carry an unavoidable odour..."¹⁴

It is clear that lawmakers in 1976 were more concerned with the potential for litigation than with the actual number of nuisance lawsuits brought against farmers and other businesses. The Act has been criticized as a somewhat reactionary response to an isolated case,¹⁵ displaying little consideration for the existing state of the law or the competing interests at stake.

The Nuisance Act was enacted in a hurry,¹⁶ and, perhaps for this reason, it contains a number of troubling features which argue in favour of its repeal.

First, the Act is unnecessarily broad in its application. The principal legislative purpose identified in the debates was the protection of farmers against actions in nuisance. Despite this focus on agricultural concerns, the Act originally offered immunity to all businesses, both urban and rural. It was amended in 1992 to exclude agricultural operations from its ambit, but continues to apply to businesses of all descriptions. It was much broader than necessary to achieve its original legislative purpose, which is now fulfilled in any event by a separate statute, *The Farm Practices Protection Act*.

¹³ (2010) MBQB.

¹⁴ Phillip Osborne, *The Law of Torts* 4th ed (Toronto: Irwin Law, 2011) at 333.

¹⁵ Charles Framingham, "The Right to Farm: A Bandaid for a Heart Attack" in D. Buckingham and K. Norman eds., *Law Agriculture and the Farm Crisis* (Saskatoon: Purich Publishing, 1992).

¹⁶ It was the subject of debate on May 31, 1976 and June 1, 1976 and proceeded through the committee stage without discussion or amendment.

The Act was retained in 1992 to protect non-agricultural businesses from nuisance law suits. However, neither the case-law nor the legislative debates indicate which businesses required protection and what the policy justifications were for such immunity. Law-makers in 1976 were not concerned with a proliferation of nuisance actions against non-agricultural businesses. At a minimum, this speaks to the need to re-examine the policy behind the Act and consider whether it addresses legitimate modern-day concerns.

Finally, the Act places significant restrictions on a person's common law right of action in nuisance without providing an alternative dispute resolution mechanism. Law-makers have recognized this shortcoming, citing it as a justification for the introduction of *The Farm Practices Protection Act* in 1992.¹⁷

The absence of an alternative dispute resolution mechanism is all the more significant in light of *The Nuisance Act's* provisions respecting onus of proof. To bring a law suit in odour-related nuisance against a non-agricultural business in Manitoba, a plaintiff must prove a violation *The Environment Act*, *The Public Health Act* or a land use control law.¹⁸ These statutes, however, offer very little scope for private investigation or action.¹⁹ The factual elements required to prove a violation of these statutes are under the control of the defendant or of a government agency.

Without government cooperation, the plaintiff has little possibility of meeting the evidentiary burden imposed by *The Nuisance Act*, and is therefore effectively denied access to the courts. And since the Act creates no alternative mechanism for resolving these types of disputes, individual plaintiffs would generally be unable to obtain relief in respect of potentially significant land-use disturbances.²⁰ In the Commission's view, this represents an unacceptably broad encroachment on traditional common law rights.

To summarize, *The Nuisance Act* is rarely invoked in practice, and significantly restricts common law rights without a discernible policy justification. For these reasons, the Commission concludes that *The Nuisance Act* no longer has any practical utility in Manitoba's legal system, cannot be defended on legal principles and should be repealed.

¹⁷ Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg., 3rd Sess., No. 65 (May 13, 1992) at 3325 (Hon. Glen Findlay). See also Manitoba Agriculture, Soils and Crops Branch, *Discussion Paper Towards a Farm Practices Bill* (1989).

¹⁸ *The Nuisance Act*, s. 3.

¹⁹ Although an individual may lay a private information under *The Environment Act* or *The Public Health Act*, the Attorney-General may take over a private prosecution at any time, and may therefore withdraw the prosecution or stay charges.

²⁰ Individuals may complain to their local municipalities about odour, but are dependent on the municipality to prosecute violations of any applicable odour by-law. Manitoba Conservation has an Odour Nuisance Management Strategy in place for developments regulated under the *Environment Act* or the *Dangerous Goods Handling and Transportation Act*. This strategy requires the government to investigate if it receives at least five odour complaints from individuals living in separate households within a period of 90 days. Neither of these approaches would result in compensation for the individual complainant.

PROVISIONAL RECOMMENDATION 1

The Nuisance Act *should be repealed.*

CHAPTER 4

THE FARM PRACTICES PROTECTION ACT

A. PRELIMINARY COMMENTS ABOUT *THE FARM PRACTICES PROTECTION ACT*

Manitoba's *Farm Practices Protection Act*¹ (the "FPPA") immunizes agricultural operators who are engaged in normal farm practices from liability in nuisance. Nearly all other Canadian provinces and American states have enacted comparable statutes, often generically referred to as "right-to-farm" legislation.

The FPPA covers disturbances related not only to odour, but also to noise, dust, smoke or other disturbance arising from an agricultural operation. It also establishes the Farm Practices Protection Board,² an administrative tribunal with jurisdiction to determine what constitutes a normal farm practice under the Act.

The regulatory scheme has many merits. As Professor Osborne has noted, the common law of nuisance "... is not an entirely satisfactory device with which to resolve these kinds of disputes"³ due to its inherent uncertainty and traditionally inflexible remedies. Even some critics of right-to-farm legislation agree that, in principle, it serves a legitimate purpose:

The concept underlying "right to farm" laws has some merit. The concept is based on the assumption that (1) some degree of nuisance from farming practices is unavoidable and, (2) where this is the case, the right to earn a living should prevail over the right to be free from nuisances which offend the senses or occasionally interfere with the use and enjoyment of property but pose no threat to human health or the environment.⁴

Perhaps the Act's most significant improvement over the common law is in the creation of the Farm Practices Protection Board which offers a low-cost and accessible alternative to litigation in the courts.

Despite its merits, right-to-farm legislation remains controversial. In this regard, it is important to recognize the many competing legal and social interests at stake in this legislation. Commentators have raised questions about the equity of right to farm legislation and its effect on environmental issues and private property rights.⁵

¹ CCSM c. F45, s. 2(1). See Appendix B.

² *Ibid.*, s. 3(1).

³ Philip Osborne, "A Review of Tort Decisions in Manitoba 1990-1993" (1993), 22 Man. L.J. 191 at para. 84.

⁴ John Swaigen, "The "Right-to-Farm Movement and Environmental Protection", (1988) 4 C.E.L.R. (N.S.) 121 at 122.

⁵ See for example, Elizabeth Brubaker, *Greener Pastures, Decentralizing the Regulation of Agricultural Pollution* (University of Toronto Centre for Public Management Monograph Series, 2009); Swaigen, *ibid.*

In its decision in *Pyke v. Tri Gro Enterprises*, the Ontario Court of Appeal commented on this aspect of right-to-farm legislation:

This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.⁶

With rapid changes in technology and the science of farming, other commentators suggest that renewed consideration should be given to excluding certain types of agricultural enterprises from the operation of the Act.⁷

American literature in this area, in particular, emphasizes the need to routinely re-evaluate the equitable justification for right-to-farm legislation, and to ensure that it continues to attract public support.⁸

The Commission does not propose to attempt to answer these various concerns. This can only be done through a thorough inter-disciplinary review, which exceeds the scope of this project. Nevertheless, the Commission suggests that a legislative scheme which restricts long-standing common law rights should be reviewed regularly to ensure that it achieves a balance among the various interests involved, and is consistent with entrenched legal principles and values.

The Commission's proposed recommendation in this regard is that the government should conduct a review of the policies underlying the *FPPA* and the manner in which the Act has operated in Manitoba. To ensure the fullest possible participation in this process, the Commission also recommends that the legislative review be done with public consultation.

⁶ *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 O.R. (3d) 257 at para. 75 (Ont CA), leave to appeal to SCC refused (2001) no. 493. Similar considerations led Iowa's highest court to find that state's right-to-farm legislation unconstitutional on the basis that it effects a taking of private property: *Gacke v. Pork Xtra L.L.C.*, 684 N.W. 2d 168, 173-174 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W. 2d 309, 321 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999).

⁷ Martin Phillipson and Marie-Ann Bowden, "Environmental Assessment and Agriculture: An Ounce of Prevention is Worth a Pound of Manure" (1999), 62 Sask. L. Rev. 415-435; National Farmers Union "Submission to the Ontario Ministry of Agriculture, Food and Rural Affairs and the Ontario Ministry of Environment and Energy on Intensive Agricultural Operations in Rural Ontario" online (2000) <<http: [www.nfu.ca/intensive agric. htm](http://www.nfu.ca/intensive_agric.htm)>>.

⁸ See for example, Neil D. Hamilton, "Right-To Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances may be Ineffective" (1998), 3 Drake J. Agric. L. 103 at 106; Alexander Reinert, "The Right-to-Farm: Hog Tied and Nuisance Bound (1998) 73 N.Y.U. L. Rev. 1694.

PROVISIONAL RECOMMENDATION 2

The Department of Agriculture, Food and Rural Initiatives should conduct a public consultation and inter-disciplinary review of the policies underlying The Farm Practices Protection Act and its relationship with other environmental and land-use planning legislation and regulations in Manitoba.

The Commission's remaining recommendations are for reform to the existing *Farm Practices Protection Act*. Several Canadian provincial legislatures and American states have deemed it worthwhile to revise their right-to-farm statutes periodically⁹ and, after 18 years of service, Manitoba's Act is due for modernization.

The Commission's authority is found in section 6 of *The Manitoba Law Reform Commission Act*,¹⁰ which authorizes the Commission to make recommendations for the improvement, modernization and reform of the law. Its recommendations can touch on the maintenance and improvement of the administration of justice; the review of judicial and quasi-judicial procedures under any Manitoba Act; and the development of new approaches to law in keeping with the changing needs of society and of individual members of society.

Consistent with this statutory authority, the Commission will make recommendations for reform of *The Farm Practices Protection Act* within the following four categories:

- Recommendations to maintain balance;
- Recommendations to enhance certainty;
- Recommendations to improve accessibility;
- Recommendations to improve transparency.

By way of context, the Commission will first review the legislative history and overall scheme of the Act, and provide a general overview of the Farm Practices Protection Board's operations.

B. THE ACT

1. The Legislative History of the Act

Beginning in the late 1980s, Manitoba's policy makers recognized the deficiencies of *The Nuisance Act* as a mechanism for resolving land-use conflicts.¹¹ Many other Canadian

⁹ In Canada, the provinces of British Columbia, Alberta, Ontario and Nova Scotia have enacted successive versions of their right-to-farm statutes.

¹⁰ CCSM c. L 95.

¹¹ Manitoba Agriculture, Soils and Crops Branch, *A Discussion Paper Towards a Farm Practices Bill* (1989).

provinces first introduced right-to-farm legislation at this time, providing further impetus to enact a more modern and comprehensive regulatory scheme for Manitoba.

*The Farm Practices Protection and Consequential Amendments Act*¹² was enacted in 1992 and came into force in 1994.

The Act was amended in 1997 to give the Farm Practices Protection Board specific enforcement powers.¹³ Before 1997, the Act provided that an order made by the board could be filed in the court and enforced as if it were a judgment of the court.¹⁴ This section authorized a party to board proceedings to take enforcement measures in respect of board orders. The 1997 amendment removed the power of a party to enforce board orders, and gave this authority to the board exclusively.¹⁵

The *FPPA* was again amended in 2001 to remove time limits for appointments to the board and to authorize the board to review its orders on application by one of the parties.¹⁶ A 2005 amendment gives immunity to board members against liability in the performance of their duties under the Act.¹⁷

2. The Scheme of the Act

The principal scheme of the Act is expressed in Section 2(1) as follows:

- 2(1) A person who carries on an agricultural operation, and who, in respect of that operation,
- (a) Uses normal farm practices; and
 - (b) Does not violate
 - (i) A land use control law,
 - (ii) The Environment Act or a regulation or order made under that Act,
- or
- (iii) The Public Health Act or a regulation or order made under that Act;

is not liable in nuisance to any person for any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation, and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, noise, dust, smoke or other disturbance.

This immunity survives despite changes in municipal land-use by-laws, the ownership of the land, or the uses of neighbouring land.¹⁸ Immunity is not dependent on the agricultural

¹² S.M. 1992, c. 41.

¹³ *The Farm Practices Protection Amendment Act*, S.M. 1997, c. 30.

¹⁴ *Supra* note 12, s. 12(4).

¹⁵ *Supra* note 13, 3(2).

¹⁶ *The Farm Practices Protection Amendment Act*, S.M. 2001, c. 12.

¹⁷ *The Farm Practices Protection Amendment Act*, S.M. 2005, c. 54.

¹⁸ *Supra* note 1, s. 2(2).

operation being first-in-time. Changes in the type, scale or intensity of an operation are arguably irrelevant under the Act, so long as the operations continue to meet the statutory standards.¹⁹

The Act establishes the Farm Practices Protection Board and creates a mechanism whereby a person may complain about a disturbance resulting from an agricultural operation. The board's task is to determine whether the disturbance results from a normal farm practice.²⁰ A person aggrieved by an agricultural disturbance must first file a complaint with the board, and wait 90 days before bringing an action in nuisance.²¹ The board's decision respecting an agricultural operation must be considered by the court in any subsequent nuisance action.²²

The Manitoba Act shares many of its features with the right-to-farm statutes of other Canadian provinces. The most significant differences will be discussed in the sections that follow, where they are relevant to the Commission's recommendations.

3. Overview of Proceedings Before the Farm Practices Protection Board

Sections 3 to 13 of the Act describe the authority of the Farm Practices Protection Board.

A person who is aggrieved by any odour, noise, dust, smoke or other disturbance may apply to the board for a determination about whether the disturbance results from a normal farm practice.

The board may refuse to consider an application if it is found to be trivial; frivolous, vexatious or not in good faith; or if the applicant does not have a sufficient personal interest in the subject matter of the application.²³ Board records indicate that it has exercised this power only five times in 18 years, usually in cases where the board does not believe it has authority to act.²⁴

Once the board takes jurisdiction over a complaint, an employee of the Department of Agriculture inspects the site where the alleged disturbance is taking place and produces a report for the board's consideration. The board issues guidelines about the suggested contents of this investigative report, which include information about the disturbance, the nature of the respondent's operation, complaints from other neighbours, and the respondent's action in response to complaints.

The board frequently recommends that the parties attempt to resolve their dispute through mediation. Mediation is performed by employees of the Department of Agriculture,

¹⁹ Jonathan Kalkamoff, "The Right to Farm?: A Survey of Farm Practices Protection Legislation in Canada" (1999), 62 Sask. L. Rev. 225-268, at para. 32.

²⁰ *Supra* note 1, s. 9(1). In making this determination, the Board must have regard to certain Farm Practices Guidelines published by Manitoba Agriculture, Food and Rural Initiatives: Man. Reg. 20/2004.

²¹ *Supra* note 1, s. 9(5).

²² *Supra* note 1, s. 12(3).

²³ *Supra* note 1, s. 11(1).

²⁴ Farm Practices Protection Board, *Complaints Received and Decisions Rendered* (February 2011); Information received from representatives of the Farm Practices Protection Board at meeting on July 26, 2012.

Food and Rural Initiatives. If the parties' dispute cannot be resolved through mediation, the board may hear the complaint and make a determination about whether the disturbance arises from a normal farm practice.

If the board determines that the respondent is engaged in a normal farm practice, the complaint is dismissed.

If the board determines that the respondent is not engaged in a normal farm practice, it may order modifications to bring the respondent's practice in line with normal farm practice, as defined in the legislation.

Either party may appeal the board's decision to the Manitoba Court of Queen's Bench.

The board has been in operation since 1994. Board records indicate that it has received 84 complaints since that time, 65 of which have concerned odour-related disturbances. The majority of these complaints have resulted in an order for modification, with a small number being mediated²⁵ or dismissed outright.²⁶

The number of complaints filed with the board has steadily declined since 1994. Board representatives estimate that the board has received approximately one complaint per year over the past several years.²⁷

C. RECOMMENDATIONS TO MAINTAIN BALANCE

Although the Act's principal purpose is to provide agricultural operators with immunity from liability in nuisance, it was never intended that such immunity be absolute.

The Act puts into effect a regulatory scheme which suggests a second important legislative purpose: the need to balance agricultural interests with the public's environmental and health concerns. Statutory immunity is conditional on compliance with land use control laws, *The Environment Act* and *The Public Health Act*. Other Canadian right-to-farm legislation has been more explicit in identifying the balancing function in the legislation.²⁸

²⁵ *Ibid.* Board records indicate that as of February 2011, 18 complaints had been mediated or withdrawn.

²⁶ *Ibid.* Board records indicate that as of February 2011, 8 complaints had been dismissed because the disturbance arose from a normal farm practice.

²⁷ Information received from Board representatives at a meeting on July 26, 2012.

²⁸ The preamble to Ontario's *Farming and Food Production Protection Act, 1998*, SO 1998 c.1 provides: "It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial, health, safety and environmental concerns." See also Bill 34, *An Act to Amend the Farm Practices Act*, 2nd session, 64th General Assembly, Prince Edward Island, which contains the same language.

The legislative debates at the time of enactment confirm the law-makers' intention that unlawful conduct should not benefit from immunity under the Act, reflecting the need to strike an appropriate balance between agricultural and other interests.²⁹

And while the Act is clearly meant to promote agricultural interests, the Commission is also mindful of the significant private property rights at stake in this legislation. The right to use and enjoy one's land is a fundamental principle of the Anglo-Canadian legal system. Although legislatures may limit the enjoyment of individual property rights to accomplish a specific purpose, the Commission suggests that this ought to be done as equitably as possible. The following comments of the Ontario Court of Appeal highlight the importance the judiciary attaches to a balance of private property rights and other competing legislative purposes in right-to-farm legislation:

It is of course open to the legislature to limit individual property rights in order to achieve a social objective. On the other hand, it is well established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights... There is also authority for the proposition that a court will lean against an interpretation that would allow one party to appropriate the party of another. .. When interpreting such statutes, the courts still have a role in achieving an appropriate balance. 'The focus is on striking an appropriate balance between individual property rights, which remain important, and legislative goals[citations omitted].'³⁰

Similar considerations lead the Commission to conclude that the Act would benefit from a more express recognition and balancing of the various legitimate interests at stake in the regulatory scheme.

1. The Title of the Act

The Commission's first recommendation in this regard concerns the title of the legislation.

The legislative debates at the time of enactment reveal a belief that farmers were in need of protection from newcomers who object to disturbances caused by long-standing agricultural practices. However, a review of reported decisions prior to the *FPPA*'s enactment indicates very few agricultural cases in which nuisance is the sole cause of action.³¹

²⁹ Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg., 3rd Sess., No. 65 (May 13, 1992) at 3325 (Hon. Glen Findlay). "To be afforded protection under the act, operations must be legally established and legally operating in an area in which they are located. Operations may not contravene other legislation, regulations land use laws or by-laws."

³⁰ *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 OR (3d) 257 at paras. 76-78, appeal to SCC refused (2001) no. 493, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 373.

³¹ The more common causes of action against agricultural operators are negligence, trespass and strict liability.

Moreover, the tenor of the debates suggests that nuisance suits are generally unwarranted and that farmers require protection from unfair treatment at the hands of plaintiffs and the courts.³² Again, this disregards the important private property rights engaged in the common law of nuisance, and long-standing principles developed in the common law which in many instances favour the defendant.

Finally, the legislative debates reflect an understanding that actions in nuisance against farmers are typically brought by suburban newcomers to a previously rural neighbourhood.³³ And while this may have been the original impetus for the legislation, empirical evidence from the United States suggests that the majority of complaints about agricultural disturbances are launched by other farmers.³⁴ Casting the legislation in the light of a rural-urban conflict is an over-simplification, and may contribute to an adversarial attitude which does little to promote effective dispute resolution.

The use of the term “protection” in the Act’s title has a rhetorical effect which reinforces many of these misconceptions and calls into question the neutrality of the regulatory scheme. The role of the Farm Practices Protection Board is to decide what constitutes a normal farm practice, not to offer protection to one of the parties appearing before it. The Commission suggests that a more instructive and objective title would be *The Farm Practices Act*, and that the board be re-named the Farm Practices Board. This is consistent with several Canadian right-to-farm statutes which omit the word “protection” from the title.³⁵

PROVISIONAL RECOMMENDATION 3

The title of the Act should be amended to *The Farm Practices Act*, and the *Farm Practices Protection Board* should be renamed the *Farm Practices Board*.

³² *Supra*, note 29 at 3325: “Agriculture is an important multibillion dollar industry in Manitoba and farmers require protection and assurances that they will be fairly treated. Bill 82 will provide protection from unwarranted nuisance suits.”

³³ *Supra* note 29, at 3325: “Farmers have become the minority in many rural municipalities and have increasingly come into conflict with their neighbours.”

³⁴ Margaret Grossman and Thomas Fischer, “Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer” (1983) Wis. L. Rev. 95 at 101, 112. See also Alexander Reinert, “The Right to Farm: Hog-Tied and Nuisance-Bound” (1998) 73 N.Y. U. L. Rev. 1694 at 1695. The Manitoba Farm Practices Protection Board does not keep statistics in this regard, but Board representatives agree that complaints are made by both farmers and non-farmers. According to the 2004 article, Chris Tait, “An Analysis of Bill 16, The Farm Practices Protection Amendment Act” (2004) 3 Manitoba Law Journal, Underneath the Golden Boy, 1 at 4: “...most of the complaints the board deals with are from long-term residents – often other farmers who have lived in the area for generations...”.

³⁵ The Prince Edward Island, Nova Scotia and New Brunswick right-to-farm statutes are entitled *The Farm Practices Act*. The Alberta and Saskatchewan statutes are entitled *The Agricultural Operations Act*.

2. The Definition of Normal Farm Practice

Under the Act, an agricultural operator is immune from liability in nuisance if he or she is engaged in a normal farm practice. The meaning of the term “normal farm practice” is central to the application of the Act and is a key component in establishing an appropriate balance among competing interests.

Section 1 of the Act defines a normal farm practice as follows:

“normal farm practice” means a practice that is conducted

- (a) In a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices, and
- (b) in conformity with any standards set out in the regulations:

The definition reveals a three pronged test for determining whether a practice is a normal farm practice under the Act. To begin, the practice must be consistent with proper and accepted customs and standards. Next, the customs and standards must be followed by similar agricultural operations under similar circumstances. And finally, the practice must conform to any standards set out in the regulations.

Much of the Canadian academic literature in this area focuses on whether the legislation should offer protection to “normal” farm practices that are not reasonable, necessary or environmentally sound. Many argue that the protection of “normal” farm practices, defined with reference to accepted standards and customs, does not achieve an appropriate balance between agricultural interests and environmental concerns.³⁶

The following passage highlights some of the concerns in this regard:

The entire industry may have adopted slipshod methods in order to save money; therefore there is no guarantee that an accepted practice will be reasonable. Accordingly, a farm practice may be protected because it is normal or accepted, notwithstanding that it is outmoded, unreasonable, inefficient or unnecessary.³⁷

Thus, requiring compliance with “accepted” standards and customs may perpetuate the status quo rather than encourage the implementation of new farming techniques and technologies that are more environmentally neutral, and that create fewer disturbances. It also risks allowing the agricultural industry to effectively set its own standards.³⁸

³⁶ Swaigen, *supra* note 4, at 123, referring to Ontario’s Bill 83, the Farm Practices Protection Act (1988): “ ..most farming groups agreed with environmentalists that farming practices that are normal, but neither necessary nor reasonable, should not be protected.”

³⁷ Jonathan Kalkamoff, *supra* note 19 at para. 34.

³⁸ Pyke, *supra* note 30 at para. 81.

Nearly all Canadian legislation defines a normal farm practice as one which is consistent with accepted customs and standards. The exception is Ontario, where the *Farming and Food Production Protection Act, 1998* refers instead to “acceptable” customs and standards. Ontario’s courts have interpreted the term “acceptable” in this definition as a requirement that the board and the courts consider the impugned practice within a very broad context, having regard to the circumstances of each individual case.³⁹

New York State’s legislation offers an alternative formulation. It requires producers to employ sound agricultural practices in order to benefit from immunity under the statute. Sound practices are defined as those which are necessary for the on-farm production, preparation and marketing of agricultural commodities. The soundness of the practice is evaluated on a case- by- case basis.⁴⁰

Some Canadian academic opinion has also promoted a focus on “sound” farming practices rather than “accepted” farming practices”, as in the following passage:

...a more appropriate focus for right to farm law might be “sound” agricultural practices rather than “accepted” agricultural practices. This could include practices that maintain ecosystem stability, so that land and other agricultural resources are not destroyed or degraded.⁴¹

A third option for reform comes from Ontario where, during the consultation process leading to Ontario’s 1988 Act, the Canadian Bar Association recommended that the Act refer to “reasonable” customs and standards.⁴² The advantage of referring to reasonable customs and standards is that it implies a broad-based evaluative approach reminiscent of the balancing that occurs in a common law nuisance action. The disadvantage is that a standard of “reasonableness” may not provide the desired level of certainty for parties affected by the Act.

Overall, the Commission favours an amendment to the definition of normal farm practices to require compliance with proper and acceptable customs and standards. There is precedent for this in Ontario’s legislation and that province’s courts have provided some guidance about the interpretation of the term “acceptable” in this context.

PROVISIONAL RECOMMENDATION 4

The definition of “normal farm practice” in section 1 of the Act should be amended to replace the term “accepted” with the term “acceptable”.

³⁹ *Ibid.*

⁴⁰ *New York Agriculture and Markets Law*, art. 308(1)(b).

⁴¹ Kalkamoff, *supra* note 19 at para. 36.

⁴² Ontario Bar Association, *Submission on the Farm Practices Protection Act 1987* (1987-1988).

3. Compliance with Other Legislation

Section 2(1) of the FPPA provides that an agricultural operator cannot benefit from the statutory immunity if he or she is in violation of a land use control law, *The Environment Act* or its regulations, or *The Public Health Act* or its regulations.

This requirement is consistent with the legislative intention that a farmer must be acting lawfully in order to benefit from statutory immunity, and reflects the need to balance the public's interests in the environment and public health with the requirements of the agricultural industry.

The Commission has considered whether this section adequately promotes compliance with environmental and health standards.

Significantly, the Act requires compliance with *The Environment Act* and its regulations, but is silent on the obligation to comply with a variety of other provincial statutes designed to protect the environment. *The Water Protection Act*,⁴³ *The Ground Water and Water Well Act*,⁴⁴ *The Drinking Water Safety Act*,⁴⁵ *The Water Rights Act*,⁴⁶ *The Noxious Weeds Act*,⁴⁷ and *The Pesticides and Fertilizers Control Act*⁴⁸ are just a few of Manitoba's many statutes governing environmental matters that may also apply to agricultural activities.

This gap is all the more significant because agricultural activities are only partially governed by *The Environment Act*. Not all agricultural operations are subject to the environmental assessment and licensing process under the Act, for example.⁴⁹ More importantly, *The Environment Act*'s prohibition on releasing a pollutant into the air does not apply if the release is otherwise lawful and occurs as a result of a normal farm practice.⁵⁰

It also bears repeating that *The Environment Act*, *The Public Health Act* and land-use control laws offer very little scope for private action. Only government inspectors are authorized to investigate possible violations of *The Environment Act* and *The Public Health Act*. To prove a violation of this legislation, an individual complainant is therefore almost entirely reliant on government cooperation and intervention. Without such intervention, the plaintiff is effectively denied a remedy in nuisance in cases where the agricultural operation is found to be a normal farm practice. There are many reasons why the province may not be able or willing to participate in investigations and prosecutions under these Acts, not least of which are a lack of resources and the existence of more pressing priorities.

⁴³ CCSM c. W65.

⁴⁴ CCSM c. G110.

⁴⁵ CCSM c. D101.

⁴⁶ CCSM c. W80.

⁴⁷ CCSM c. N110.

⁴⁸ CCSM c. P40.

⁴⁹ Pursuant to section 10 of *The Environment Act* and section 2 of *The Classes of Development Regulation*, Man. Reg. 164/88, the only agricultural developments that require licensing are: dairy plants, feedmills, food processing plants, grain elevators, meat processing and slaughter plants, rendering plants and seed cleaning plants. *The Environment Act* also contains rules governing some aspects of confined livestock areas, manure storage facilities, and winter spreading of manure.

⁵⁰ *The Environment Act*, s. 30.1(2).

The Commission concludes that it is more consistent with the overall legislative purpose of the *FPPA* to make immunity from nuisance actions conditional on compliance with all provincial and federal enactments.⁵¹

Farmers would still be expected to comply with *The Environment Act*, *The Public Health Act* and land use control laws, but must also ensure that their activities are lawful in a more general sense.

The immunity offered under the statute is a far-reaching encroachment on established common law rights, and the Commission is not aware of valid policy reasons to justify this extraordinary protection for those who are in breach of the law.

It is a clear intention of the legislature that unlawful activities, and more specifically those that harm the environment or public health, are not protected under the Act. The Commission's proposed amendment gives meaningful effect to that intention.

PROVISIONAL RECOMMENDATION 5

Section 2(1)(b) of the Act should be repealed and replaced with the following:

2(1)

(b) does not violate an Act of the Legislative Assembly of Manitoba or of the Parliament of Canada or any regulation under an Act of the Legislative Assembly of Manitoba or of the Parliament of Canada.

D. RECOMMENDATIONS TO ENHANCE CERTAINTY

There are two principal aspects of the *Farm Practices Protection Act* that create the possibility of uncertainty. The first is the use of the term “nuisance” in the Act, and the second is the inclusion of the category of “other disturbance” in section 2(1) of the Act.

1. The Meaning of “Nuisance”

The Act does not define the term “nuisance”. As discussed in Chapter 2, nuisance in common law can apply in a wide variety of circumstances. There are important distinctions between public nuisance, private nuisance dealing with interference with the use and enjoyment of land, and private nuisance dealing with damage to property.

⁵¹ This approach is similar though not identical to that taken in the Nova Scotia, New Brunswick and Newfoundland right-to-farm statutes. Section 2(2) of the *Brunswick Agricultural Operations Act*, RSNB 2011, c. 107 is an example: “2(2) Subsection (1) shall not be construed so as to exempt any person from compliance with any Act of the Legislature or of the Parliament of Canada or any regulation under an Act of the Legislature or of the Parliament of Canada.”

The broadest reading of the Act would support the view that it provides immunity in respect of all actions in nuisance. However, some commentators have questioned whether the legislature could have intended to restrict the Attorney General's right of action in public nuisance, and whether actions in private nuisance concerning property damage are captured by the legislation.⁵²

While all Canadian right-to-farm legislation gives immunity in respect of nuisance actions, only the Alberta legislation defines the term "nuisance".⁵³

The Commission recommends that the *FPPA* be amended to define the term "nuisance". Without a definition, the term is broad enough to capture a wide range of activities, many likely outside the contemplation of the legislature at the time of enactment. In addition, the rules of statutory construction discussed in Chapter 2 dictate that legislative exceptions to the common law should be narrow, and expressed in unambiguous terms.

The list of disturbances in section 2 of the Act appears to contemplate activities that interfere with a complainant's use and enjoyment of land, giving rise to an action in private nuisance. Important policy considerations dictate against extending immunity in respect of private nuisance actions concerning property damage, and to public nuisance actions. Such a reading would unduly restrict a claimant's property rights and the state's ability to enforce public environmental and health interests.

Accordingly, the Commission recommends that the term nuisance be defined in the Act to clarify that it refers solely to the types of disturbances which give rise to an action in private nuisance at common law in respect of the unreasonable interference with another person's use and enjoyment of his or her land.

PROVISIONAL RECOMMENDATION 6

The Act should be amended to include the following definition:

"nuisance" means an unreasonable interference with another person's use or enjoyment of his or her land.

⁵² See for example, Osborne, *supra* note 3 at paras. 81-82.

⁵³ *Agricultural Operations Practices Act*, RSA 2000, c A-7, s. 1(e):

"nuisance includes an activity that

- (i) Arises from unreasonable, unwarranted or unlawful use by a person of the person's own property which causes obstruction or injury to the right of another person or to the public and procures such major annoyance, inconvenience and discomfort that damage will result,
- (ii) Creates smoke, odour, noise or vibration that interferes with the reasonable and comfortable enjoyment of a person's property, or
- (iii) Is found to be a nuisance at common law.

2. “Other Disturbance”

Section 2 of the Act provides immunity from liability in nuisance in respect of disturbances created by odour, noise, dust, smoke or other disturbance. The inclusion of the catch-all phrase “other disturbance” is unduly broad, and has led to problems of interpretation in Manitoba’s courts.

The Manitoba Court of Queen’s Bench has twice considered whether flooding on the plaintiff’s land caused by the defendant’s farming practices constitutes an “other disturbance” within the meaning of the Act. In *Hiebert v. Jochum*, the court remarked in obiter that the plaintiff’s action in nuisance was subject to the operation of *The Farm Practices Protection Act*, implying that the flooding constituted an “other disturbance” under the Act.⁵⁴

By contrast, in *Lacoste v. Hutlet*, the court expressly found that flooding of the type experienced by the plaintiff was not a disturbance within the meaning of the Act. The Court noted that the Act did not specifically mention flooding or drainage, and that *The Water Rights Act* creates a separate regulatory scheme in this regard.⁵⁵

These conflicting decisions highlight the importance of clarifying the scope of the Act. The term “other disturbance” may be subject to widely divergent interpretations, creating uncertainty for persons affected by the Act.

Most comparable Canadian legislation includes a reference to “other disturbance”. The exceptions are the Saskatchewan Act which does not identify any specific disturbances, and Ontario’s Act which confines disturbances to the following: “odours, dust, flies, light, smoke, noise and vibration”.⁵⁶

The legislature has considered the specific types of disturbances intended to be addressed in this legislation by enumerating odour, noise, smoke and dust. The inclusion of the term “other disturbance” broadens the potential application of the Act unacceptably, and produces uncertainty in both interpretation and result.

A review of the Farm Practices Protection Board Complaints Received and Decisions Rendered⁵⁷ document indicates that the large majority of complaints filed with the board concern odour, noise, dust, and smoke. The Commission recommends that the Act be amended to limit its scope to these four disturbances.

PROVISIONAL RECOMMENDATION 7

The Commission recommends that section 2(1) of the Act be amended to delete the words “and other disturbance”.

⁵⁴ 2002 MBQB 170 at para. 35.

⁵⁵ 2005 MBQB 188 paras. 22-25.

⁵⁶ *Farming and Food Production Protection Act*, 1998, S.O. 1998, s. 1(1).

⁵⁷ *Supra* note 28.

E. RECOMMENDATIONS TO IMPROVE ACCESSIBILITY

With the creation of the Farm Practices Protection Board, the Act introduced a low-cost, informal complaint resolution mechanism. The principal merit of an administrative dispute resolution process is to enhance the public's access to justice under the Act. In keeping with this purpose, and consistent with considerations of administrative fairness, the Commission takes the view that the Act should provide for the fullest possible access to justice to those who feel aggrieved by an agricultural disturbance.

Access to justice implies more than the availability of a complaint mechanism. In its broader sense, it also involves the question of whether appropriate, meaningful relief is available to a successful complainant. And in this regard the Commission believes that improvements can be made to the *FPPA* in terms of both remedies and enforcement.

The Commission's recommendations regarding accessibility fall under three separate headings: 1.) The board's power to refuse an application; 2.) Remedies; and 3.) Enforcement.

1. The Board's Power to Refuse to Consider an Application

Under section 11(1) of the Act, the board may refuse to consider an application if it is frivolous, vexatious or an abuse of process, or if the applicant does not have sufficient personal interest in the subject-matter. The board has exercised this power approximately five times during its history.

It is reasonable that the board be authorized to refuse a complaint without a full hearing of the matter. This is critical to preserving scarce tribunal resources. Nevertheless, the Act gives the board considerable discretion in this regard, and the grounds on which the board may refuse to consider an application are ambiguous. This is particularly true of the requirement that the applicant have sufficient personal interest in the subject-matter, which can be interpreted in a variety of ways. The Commission believes that certain amendments to the Act would help to enhance transparency and fairness in this process.

First, the Commission recommends that the applicant have an opportunity to make submissions to the board about whether the complaint falls within section 11(1) of the Act. The right to be heard is a fundamental principle of natural justice, and should be provided expressly in the Act. This is a feature of several statutes governing administrative justice in Canada,⁵⁸ and contributes to the transparency of proceedings before the board.

The Act should also be amended to clarify that a decision to refuse to consider an application under section 11(1) is subject to the board's review power under section 13.1, and subject to appeal under section 13.

⁵⁸ See for example the *Statutory Powers Procedures Act*, RSO 1990 c. S22, s. 4.6; *Administrative Tribunals Act*, RSBC c. 45 s. 31(3); *Administrative Procedures and Jurisdiction Act*, RSA c. A-3, s. 4.

PROVISIONAL RECOMMENDATION 8

Section of the Act should be amended to include the following provisions:

11.1 Before making a decision under section 11, the board shall notify the applicant of its concern and provide an opportunity to respond in such manner as the tribunal directs.

13. Any party to an application may appeal an order of the board, or a decision made under section 11, on a question of law to the court within 30 days after the making of the order or decision.

13.1 (1) Subject to subsection (5), the board may review an order it has made, or a decision it has made under section 11, if a party or another person who is affected by the order or decision applies.

2. Remedies

Section 12 of the Act describes the decisions that the board is entitled to make in respect of a complaint:

12 (1) If the board is unable to resolve the dispute between the aggrieved person and the owner or operator of the agricultural operation, the board shall

- (a) Dismiss the complaint if the board is of the opinion that the disturbance complained of results from a normal farm practice; or
- (b) Order the owner or operator of the agricultural operation to cease the practice causing the odour, noise, dust, smoke or other disturbance if it is not a normal farm practice or to modify the practice in the manner set out in the order to be consistent with normal farm practices.

There is no financial compensation available to a claimant in proceedings before the board. To obtain compensation, the claimant must bring a successful action in nuisance, with the expense and time that such a proceeding entails. Indeed, there is no record of a claimant having filed an action in nuisance following a board proceeding in Manitoba.

There is an argument in favour of giving the board more extensive remedial powers. One of the benefits of an administrative process is to provide for more responsive, flexible approaches to conflict resolution than could be achieved in a common law nuisance action. An expanded remedial power could give better effect to the advantages of this regulatory scheme, and enhance access to justice under the Act.

Recent Canadian decisions awarding damages in nuisance cases suggest a possible range of compensation of up to \$10,000.⁵⁹ In cases where the complainant felt under-compensated

⁵⁹ In *Aschenbrenner v. Yahemech* 2010 BCSC, the British Columbia Supreme Court awarded \$5,500 in general damages for odour and noise disturbances. In *Boucher v. Lavigne* 2008 NBQB 128, New Brunswick's Court of

despite receiving a board order for compensation, he or she would still be entitled to proceed to court and sue for damages in nuisance.

PROVISIONAL RECOMMENDATION 9

Section 12 of the Act should be amended to give the board authority to order the respondent to pay the complainant compensation of up to \$10,000 in cases of a successful complaint.

3. Enforcement

The board routinely orders modifications of respondents' farming practices to make them consistent with normal farm practice. Indeed, of the 25 board decisions made available to the Commission for review, only one did not result in an order for modification.

Employees of the Department of Agriculture, Food and Rural Initiatives conduct annual site inspections to determine compliance with board orders. The board does not keep statistics on compliance, but board representatives estimate that approximately 80% of its orders are complied with fully.⁶⁰

If the annual site inspection reveals non-compliance, the board corresponds with the respondents, reminding them of their obligation to modify their farm practices.⁶¹

Section 12(4) of the Act also gives the board the authority to file its order in court, at which time the order may be enforced as though it were a judgment of the court. Enforcement might include contempt proceedings, or other relief. The board has never exercised this authority.

Enforcement of board orders is clearly a priority of the legislature, as reflected in the legislative debates leading to the 1997 amendment. After commenting that there "have been several instances where a farm operator has refused to comply with the findings of the board",⁶² the amending Bill's sponsor concluded:

What this bill represents is this government's concern about the facts that these kinds of operations be conducted and carried on in Manitoba in a manner that is acceptable environmentally speaking, that is acceptable to neighbours who

Queen's Bench awarded general damages of \$2,000 for odour and noise disturbances. In *Pyke v. Tri-Gro*, *supra* note 30, the Ontario Court of Appeal upheld awards of damages ranging from \$7,500 to \$35,000 in respect of odours emanating from a mushroom farm. The specific award depended on such factors as the frequency and intensity of the odour, the amount of time exposed to the odour, and the individual characteristics and circumstances of the complainant.

⁶⁰ Information received from Board representatives at a meeting on July 26, 2012.

⁶¹ *Ibid.*

⁶² Manitoba, Legislative Assembly, *Official Report of Debate (Hansard)* 35th Leg., 3rd Sess., No. 46A (May 15, 1997) at 2809 (Hon. Harry Enns).

have to live on the same landscape with these farming operations, and to ensure the long-term sustainability of these farm operations...⁶³

The enforcement of board orders is central to questions of access to appropriate relief under the Act. In cases of non-compliance, the complainant will continue to suffer the disturbance, with an action in nuisance being the only available recourse. The rule of law is also enhanced when legal orders are consistently and appropriately enforced, particularly in an area of law affecting items of significant public interest such as the environment and public health.

In its report on *Environmental Sustainability and Hog Production in Manitoba*, the Clean Environment Commission identified the absence of enforcement mechanisms as a shortcoming in the *FPPA*.⁶⁴ In this regard, the CEC recommended that Manitoba Conservation Environment Officers be given the authority to enforce orders of the Farm Practices Protection Board under their powers under *The Environment Act*.⁶⁵

In discussions with the Commission, board representatives also identified a need to improve enforcement mechanisms under the Act.⁶⁶

Comparable Canadian legislation offers few alternative models for enforcement. Some statutes are silent on the issue, while several others permit a board order to be filed in court for enforcement purposes.

In Nova Scotia, a person who violates an order of the Farm Practices Board is guilty of an offence and liable to a fine not exceeding two thousand dollars, and a possible term of imprisonment not exceeding six months.⁶⁷

While the Commission agrees that board orders ought to be more actively enforced, it is not persuaded that attaching criminal penalties and appointing enforcement officers is a necessary or efficient solution. This approach has not been adopted in most Canadian jurisdictions, and would involve significant changes in the administration of the Act. The small number of complaints to the board and the relatively high estimated rates of compliance do not appear to warrant extensive changes in this regard.

The board is already authorized to enforce its own orders, and should be encouraged to do so in appropriate cases.

The Commission also suggests that the Act be amended to permit a complainant to file a board order in court and move for its enforcement as though it were a judgment of the court.

⁶³ *Ibid* at 2810.

⁶⁴ Manitoba Clean Environment Commission, *Environmental Sustainability and Hog Production in Manitoba* (2007) at 124.

⁶⁵ *Ibid.* at 126.

⁶⁶ Board representatives identified a need for improved enforcement at two stages in the proceedings: the initial investigation stage, and once an order has been issued. They identified only one instance in which a respondent refused to cooperate with the initial investigation.

⁶⁷ *Farm Practices Act*, SNS 2000, c. 3, s. 14.

This power existed previously in the Act, but was removed in the 1997 amendment. This provision appears in several Canadian right-to-farm statutes,⁶⁸ and gives complainants more meaningful opportunity to obtain relief under the Act.

PROVISIONAL RECOMMENDATION 10

Section 12(4) should be repealed and replaced with the following:

12(4) A party in whose favour the board makes an order under section 12(1), or the board, may file a certified copy of the order with the Court of Queen's Bench of Manitoba.

Section 12(5) of the Act should be repealed and replaced with the following:

12(5) An order filed under section 12(4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

F. RECOMMENDATIONS TO IMPROVE TRANSPARENCY

The following recommendations are intended to improve the transparency of proceedings before the board, and to enhance the administration of justice under the Act.

The Commission will address three principal subjects: 1.) the composition of the board; 2.) the conduct of hearings in public; and, 3.) the distribution of reasons for decision.

1. Composition of the Board

Section 3(1) of the Act creates the Farm Practices Protection Board, consisting of not less than three members appointed by the Lieutenant Governor in Council.

In Manitoba, the composition of the board is at the discretion of the Lieutenant Governor in Council. Board representatives confirm that all of its current members have a farming background.⁶⁹

Comparable statutes in Nova Scotia, New Brunswick and Prince Edward Island contain provisions more specifically prescribing the composition their farm practices boards. In Nova Scotia, for example, the legislation provides that the board must consist of two members

⁶⁸ *Farm Practices Act*, RSPEI 1988, c. F-4.1, s. 11(5); *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c. 131, s. 6.1; *Farm Practices Protection Act*, SNL 2001, c. F-4.1, s. 15(5); *Statutory Powers Procedure Act*, RSO 1990, c. S22, s. 19 (orders of Ontario's Normal Farm Practices Board are enforceable under this section).

⁶⁹ Information received from Board representatives at meeting July 26, 2012.

recommended by the provincial federation of agriculture, one member recommended by the provincial federation of municipalities and four members at large.⁷⁰

The Commission approves the approach taken in the Nova Scotia, New Brunswick and Prince Edward Island statutes in this regard. This provision increases transparency in the decision-making process, and helps to ensure adequate representation of the various interests engaged by a complaint under the Act.

The board has the benefit of an investigation report prepared by an agricultural expert in every complaint and, thus, a farming background should not necessarily be a strict requirement. A representation of non-farming interests on the board would, in the Commission's view, contribute to the appearance of fairness which is critical in any hearing before an administrative tribunal. This approach has been adopted for several of Manitoba's Boards, Agencies and Commissions where a representation of varied interests and expertise is important, including the Appeal Commission,⁷¹ the Mental Health Review Board,⁷² and the Residential Tenancies Commission.⁷³

The Commission does not propose to recommend a specific ratio of farming to non-farming interests in the composition of the board but only to suggest that there ought to be an adequate representation of both.

PROVISIONAL RECOMMENDATION 11

The Act should be amended to provide that the board be composed of members with both farming and non-farming backgrounds.

2. The Conduct of Hearings in Public

Hearings before the board are not open to the public.⁷⁴ In the Commission's view, this is inconsistent with a basic principle of natural justice in administrative law. A leading Canadian textbook on the subject explains the principle as follows:

It is a basic principle that all hearings should be held in public. The public has an interest in seeing that proceedings are properly conducted and that parties are treated fairly. In the absence of express statutory authority to exclude the public, they must be admitted. The onus is always on the person requesting privacy who must establish the claim with evidence of the harm that could result from permitting the public to attend.⁷⁵

⁷⁰ *Farm Practices Act*, SNS 2000, c. 3, s. 5(2).

⁷¹ *The Workers Compensation Board Act*, CCSM c.W200, s. 60.2(1).

⁷² *The Mental Health Act*, CCSM c. M110, s. 49.

⁷³ *The Residential Tenancies Act*, CCSM c. R119, s. 145(2).

⁷⁴ Information received from representatives of the board on July 26, 2012.

⁷⁵ Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011) at 57.

This passage identifies rule of law considerations that are all the more compelling when matters of public interest and long-standing property rights are at stake, as in the case of right-to-farm legislation.

The presumption of open hearings is codified in Ontario's *Statutory Powers Procedure Act*⁷⁶ and British Columbia's *Administrative Tribunals Act*.⁷⁷ The Nova Scotia and Prince Edward Island right-to-farm regulations also specify that hearings before their farm practices boards are presumptively open to the public.⁷⁸ Several Canadian law reform agencies have recommended that hearings before administrative tribunals be open to the public unless exceptional circumstances exist.⁷⁹

There are no obvious policy reasons to justify a blanket prohibition on the public's right to attend a hearing before the board. The subject matter of complaints typically does not touch on sensitive personal or financial matters that might warrant a closed hearing. The Commission suggests that, in most cases, the principles of natural justice favouring open hearings will outweigh privacy concerns in this context.

The Commission recommends that the legislation be amended to expressly provide for the conduct of hearings in public except where the board finds that matters may be disclosed of such a nature that harm could result to one or both parties, or to a member of the public.

PROVISIONAL RECOMMENDATION 12

The Act should be amended to include the following provision:

12.1 (a) Subject to subsection (b), hearings shall be open to the public;

(b) the board may exclude the public from part or all of a hearing where it is of the opinion that the possibility of serious harm or injustice to any person outweighs the public interest in disclosure.

3. Reasons for Decision

(a) Publication of Reasons for Decision

Under section 12(2) of the Act, the board must give a copy of its decision to each of the parties, together with written reasons for the decision. The board's practice is to not provide copies of its reasons for decision to any person other than a party to the proceeding.

⁷⁶ RSO 1990, c. S22 s. 9.

⁷⁷ RSBC c. 45 s. 41.

⁷⁸ Farm Practices Board Regulations, N.S. Reg. 153/2001, s. 10(3); PEI Reg. EC505/99, s. 19.

⁷⁹ ALRI, *Powers and Procedures for Administrative Tribunals in Alberta* (Final Report No. 79, 1999) at 100; Law Reform Commission of Saskatchewan, *Model Code of Procedure for Administrative Tribunals* (2003), recommendation 2.3; Uniform Law Conference of Canada, *Model Administrative Procedures Code*, s. 17.

This practice stands in contrast to that of some other Canadian farm practices boards, which make their reasons for decision widely available.⁸⁰

Rule of law considerations suggest that the board's decisions should be made available to the public. Having access to the reasons for decision gives people notice of how the legal system interprets laws and regulations, and how it provides relief to the injured. The Supreme Court of Canada has described written reasons for decision as the "primary form of accountability of the decision-maker to the applicant, to the public and to the reviewing court."⁸¹

Publication of the board's written reasons for decision would help to provide guidance and direction to those persons affected by the Act. Without access to board decisions, rural residents of Manitoba and their advisors have no way of knowing what practices are generally considered to be normal farm practices or what principles the board applies in its decision-making process.⁸²

The determination as to what constitutes a normal farm practice under the Act also has implications in other legal circumstances, including land-use planning and the application of other provincial legislation. Section 30 of Manitoba's *Environment Act*, for example, excludes normal farm practices from the prohibition against pollution. Similarly, section 2(3) of *The Animal Liability Act* provides a defence in respect of damage caused as a result of a generally accepted agricultural practice.⁸³ Public access to the board's reasons for decision would help to ensure consistency in the interpretation of the term "normal farm practice" and related concepts within the legal system.

Citing the Supreme Court of Canada's decision in *R. v. R.E.M.*,⁸⁴ Manitoba's Court of Appeal recently identified three principal purposes for written reasons for decision in the administrative law context:

- 1.) to tell the parties and others why the agency made the decision it did;
- 2.) to provide public accountability with a view to justice done and being seen to be done; and
- 3.) to permit effective judicial review.⁸⁵

In the Commission's view, the only way to fulfill these purposes is to make tribunal decisions available to the public.

The Commission recommends that the legislation be amended to provide that the board's written reasons for decision be available to the public.⁸⁶ Where the public has been excluded

⁸⁰ The Ontario and British Columbia boards publish decisions on their websites.

⁸¹ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 63.

⁸² See discussion in Patrick McNormally, "Right to Farm Legislation in Canada" (2007), Environment Probe, online:<< <http://www.probeinternational.org/envirowaterarticles/righttofarmcanada.pdf>>> .

⁸³ CCSM c. A95.

⁸⁴ 2008 SCC 51.

⁸⁵ *Friesen Dental Corp. v. Director of Companies Office (Man.)*, 2011 MBCA20 at para. 91.

from a hearing pursuant to the provision set out in Recommendation 10, the reasons for decision should be restricted to the parties.

PROVISIONAL RECOMMENDATION 13

The Act should be amended to provide as follows:

12(2.1)

- (a) *Subsection to subsection (b) a decision of the board shall be available to the public;*
- (b) *Where the conditions for privacy under section 12.1 have been met, the relevant private information shall be deleted from the reasons.*

(b) Content of Reasons for Decision

Perhaps because they are not intended for a wider audience, the board's reasons for decision typically do not contain a summary of the evidence introduced at the hearing, the principles applied in the decision-making process or the basis for the board's conclusions. The board takes the view that the reasons for decision simply represent a summary of its decision and its authority to make the decision.⁸⁷

A statutory duty to provide reasons is only met if the reasons are sufficient.⁸⁸ There is a significant body of case-law relating to the sufficiency of written reasons for decision in the context of administrative tribunals. Although the question of what constitutes sufficient reasons for decision will vary from case to case, the case-law does provide some guidance about general principles.⁸⁹

Significantly, the duty is not fulfilled by a mere recitation of facts and conclusions.⁹⁰ Reasons should explain to the reader how the tribunal arrived at its conclusion, and should demonstrate that the tribunal considered all of the factors it is required to take into account. They should permit meaningful appellate review.

The Ontario Divisional Court recently considered the adequacy of the Normal Farm Practices Protection Board's written reasons, in *Oakville (Town) v. Read (C.O.B. Read Farms)*. The Court found the reasons for decision to be so below the common law standards as to amount to no reasons at all:

Beyond summarizing the evidence and reciting the arguments of the parties, the reasons are nothing more than bald conclusions in the words of the

⁸⁶ This is consistent with the recommendations of the Saskatchewan Law Reform Commission, *supra* note 78, recommendation 3.1, and of ALRI, *supra* note 78, at 141.

⁸⁷ Information received from Board representatives on July 26, 2012.

⁸⁸ *Via Rail v. National Transportation Agency*, [2001] 2 FC 25 at para. 21.

⁸⁹ Many of these principles are summarized in the ALRI report, *supra* note 78 at 137.

⁹⁰ *Northwestern Utilities Ltd. et al. v. City of Edmonton* [1979] 1 SCR 684 at 706.

requirements of the Act that communicate nothing of the reasoning process leading to the majority to the conclusion it reached. The pathway to the result is neither apparent nor implicit.⁹¹

The Court concluded that the board had denied natural justice to the complainant on this basis.

Upholding this decision on appeal, the Ontario Court of Appeal remarked that, “the majority of the reasons of the board are merely conclusory and lack any analysis of the evidence, the relevant statutory provisions and the issues.”⁹²

While this is not a matter for legislative amendment, the Commission recommends that the board produce guidelines for the content of its written reasons for decision that are consistent with the common law standards of sufficiency.

PROVISIONAL RECOMMENDATION 14

The board should produce guidelines for the content of its reasons for decision, having regard to the common law principles regarding sufficiency of written reasons for decision.

⁹¹ 2010 ONSC 170 at para. 34.

⁹² 2011 ONCA 22 at para. 20.

CHAPTER 5

CONCLUSION

In this report, the Commission makes recommendations for reform of *The Nuisance Act* and *The Farm Practices Protection Act*.

Both statutes significantly restrict the availability of remedies in the common law of nuisance, in agricultural and other settings. The common law of nuisance provides important remedies in the context of environmental law and in the vindication of private property rights. Access to justice and rule of law considerations suggest that a private citizen's right to a remedy in the law of nuisance should be restricted only to the extent necessary to achieve legitimate policy goals. The Commission offers its recommendations with these considerations in mind.

The Nuisance Act is almost never used in practice and its original legislative purpose has now been largely overtaken by *The Farm Practices Protection Act*. One of the Commission's functions is to identify obsolete statutes which add uncertainty to the law of Manitoba. The Commission suggests that *The Nuisance Act* is one such statute, and recommends its repeal.

The Farm Practices Protection Act immunizes agricultural operators from liability in nuisance in respect of certain agricultural disturbances caused by normal farm practices. While the Commission does not review the policies underlying the Act, it identifies some of the criticisms that have been levelled against right to farm legislation. It makes a series of recommendations to improve balance, certainty, accessibility and transparency in the administration of justice under the Act.

The Commission recommends that these reforms be enacted with a view to modernizing the regulatory scheme governing land-use conflicts throughout Manitoba.

CHAPTER 6

LIST OF PROVISIONAL RECOMMENDATIONS

1. *The Nuisance Act* should be repealed. (p. 14)
2. The Department of Agriculture, Food and Rural Initiatives should conduct a public consultation and inter-disciplinary review of the policies underlying *The Farm Practices Protection Act* and its relationship with other environmental and land-use planning legislation and regulations in Manitoba. (p. 17)
3. The title of the Act should be amended to *The Farm Practices Act*, and the Farm Practices Protection Board should be renamed the Farm Practices Board. (p. 22)
4. The definition of “normal farm practice” in section 1 of the Act should be amended to replace the term “accepted” with the term “acceptable”. (p. 24)
5. Section 2(1)(b) of the Act should be repealed and replaced with the following:
2(1)
(b) does not violate an Act of the Legislative Assembly of Manitoba or of the Parliament of Canada or any regulation under an Act of the Legislative Assembly of Manitoba or of the Parliament of Canada. (p. 26)
6. The Act should be amended to include the following definition:
“nuisance” means an unreasonable interference with another person’s use or enjoyment of his or her land (p. 27)
7. The Commission recommends that section 2(1) of the Act be amended to delete the words “and other disturbance”. (p. 28)
8. Section 11 of the Act should be amended to include the following provisions:

11.1 Before making a decision under section 11, the board shall notify the applicant of its concern and provide an opportunity to respond in such manner as the tribunal directs.

13. Any party to an application may appeal an order of the board, or a decision made under section 11, on a question of law to the court within 30 days after the making of the order or decision.

13.1 (1) Subject to subsection (5), the board may review an order it has made, or a decision it has made under section 11, if a party or another person who is affected by the order or decision applies. (p. 30)

9. Section 12(1) of the Act should be amended to give the board authority to order the respondent to pay the complainant compensation of up to \$10,000 in cases of a successful complaint. (p. 31)
10. Section 12(4) should be repealed and replaced with the following:

12(4) A party in whose favour the board makes an order under section 12(1), or the board, may file a certified copy of the order with the Court of Queen's Bench of Manitoba.

Section 12(5) of the Act should be repealed and replaced with the following:

12(5) An order filed under section 12(4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court. (p. 33)
11. The Act should be amended to provide that the board be composed of members with both farming and non-farming backgrounds. (p. 34)
12. The Act should be amended to include the following provision:

12.1 (a) Subject to subsection (b), hearings shall be open to the public;

(b) the board may exclude the public from part or all of a hearing where it is of the opinion that the possibility of serious harm or injustice to any person outweighs the public interest in disclosure. (p. 35)
13. The Act should be amended to provide as follows:

12(2.1)

(a) Subsection to subsection (b) a decision of the board shall be available to the public on request;

(b) Where the conditions for privacy under section 12.1 have been met, the relevant private information shall be deleted from the reasons. (p. 37)
14. The board should produce guidelines for the content of its reasons for decision, having regard to the common law principles regarding sufficiency of written reasons for decision. (p. 38)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c.L95.

“Original Signed by”

Cameron Harvey, President

“Original Signed by”

John C. Irvine, Commissioner

“Original Signed by”

Gerald O. Jewers, Commissioner

“Original Signed by”

Perry W. Schulman, Commissioner

“Original Signed by”

Myrna Phillips, Commissioner

“Original Signed by”

Jacqueline Collins, Commissioner

“Original Signed by”

Michelle Gallant, Commissioner

APPENDIX A

THE NUISANCE ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act

"**business**" means any business, industry, undertaking, profession, process or operation, other than an agricultural operation under *The Farm Practices Protection Act*, carried on for gain or reward or the hope or expectation of gain or reward; (« entreprise »)

"**land use control law**" means any Act of the Legislature, regulation, planning scheme or by-law that restricts or prescribes the use to which land or premises may be put or the nature of businesses that may be carried on on any land or premises. (« loi régissant l'usage d'un bien-fonds »)

Relief from nuisance for odour

2 A person who carries on a business and who, in respect of that business, does not violate

- (a) any land use control law;
- (b) *The Public Health Act*;
- (c) any regulation under *The Public Health Act* that deals specifically with the carrying on of that class or type of business;
- (d) *The Environment Act*;
- (e) an order or licence made or issued under *The Environment Act* in respect of the business; or
- (f) any regulation under *The Environment Act* that deals specifically with the carrying on of that class or type of business;

is not liable in nuisance to any person for any odour resulting from the business and shall not be prevented by injunction or other order of a court from carrying on the business because it causes or creates an odour that constitutes a nuisance.

Onus of proof

3 Where a plaintiff or claimant in an action or proceeding against a person who carries on a business claims

- (a) damages in nuisance for an odour resulting from the business; or
- (b) an injunction or other order of a court preventing the carrying on of the business because it causes or creates an odour that constitutes a nuisance;

the onus of proving that the defendant violated any land use control law, or any Act, regulation, order or licence set out in section 2 lies on the plaintiff or claimant.

APPENDIX B

THE FARM PRACTICES PROTECTION ACT

(Assented to June 24, 1992)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

DEFINITIONS

Definitions

1 In this Act,

"agricultural operation" means an agricultural, aquacultural, horticultural or silvicultural operation that is carried on in the expectation of gain or reward, and includes

- (a) the tillage of land,
- (b) the production of agricultural crops, including hay and forages,
- (c) the production of horticultural crops, including vegetables, fruit, mushrooms, sod, trees, shrubs and greenhouse crops,
- (d) the raising of livestock, including poultry,
- (e) the production of eggs, milk and honey,
- (f) the raising of game animals, fur-bearing animals, game birds, bees and fish,
- (g) the operation of agricultural machinery and equipment,
- (h) the process necessary to prepare a farm product for distribution from the farm gate,
- (i) the application of fertilizers, manure, soil amendments and pesticides, including ground and aerial application, and
- (j) the storage, use or disposal of organic wastes for farm purposes; (« exploitation agricole »)

"board" means the Farm Practices Protection Board established under section 3; (« Commission »)

"court" means the Court of Queen's Bench; (« tribunal »)

"land use control law" means any Act of the Legislature, regulation, plan or by-law that restricts or prescribes the use to which land or premises may be put or the nature of business or activities that may be carried on on any land or premises; (« loi de réglementation en matière d'utilisation du sol »)

"minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act; (« ministre »)

"normal farm practice" means a practice that is conducted

- (a) in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices, and
- (b) in conformity with any standards set out in the regulations; (« pratique agricole normale »)

"person" includes an unincorporated association, partnership or cooperative. (« personne »)

PROTECTION FROM NUISANCE CLAIMS

Protection from nuisance claims

2(1) A person who carries on an agricultural operation, and who, in respect of that operation,

- (a) uses normal farm practices; and

- (b) does not violate
 - (i) a land use control law,
 - (ii) *The Environment Act* or a regulation or order made under that Act, or
 - (iii) *The Public Health Act* or a regulation or order made under that Act;

is not liable in nuisance to any person for any odour, noise, dust, smoke or other disturbance resulting from the agricultural operation, and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, noise, dust, smoke or other disturbance.

Protection continues despite change in by-law, etc.

[2\(2\)](#) Subsection (1) applies notwithstanding the occurrence of one or more of the following:

- (a) the land use by-law of the municipality in which the agricultural operation is carried on changes or the agricultural operation becomes a non-conforming use;
- (b) the ownership of the 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 near to the land on which the agricultural operation is carried on changes.

FARM PRACTICES PROTECTION BOARD

Farm Practices Protection Board established

[3\(1\)](#) The "Farm Practices Protection Board" is established and shall consist of not less than three members appointed by the Lieutenant Governor in Council.

Chairperson and vice-chairperson

[3\(2\)](#) The Lieutenant Governor in Council shall designate one of the members of the board as chairperson and another as vice-chairperson.

Duties of chairperson

[3\(3\)](#) The chairperson is responsible for the general supervision and direction of the conduct of the affairs of the board and, if he or she is absent or unable to act, the vice-chairperson shall have the powers of the chairperson.

[3\(4\)](#) Repealed, S.M. 2001, c. 12, s. 2.

Remuneration and expenses

[3\(5\)](#) The members of the board shall be paid such remuneration and receive such expenses as the Lieutenant Governor in Council determines.

Acting board members

[4\(1\)](#) The minister may from time to time nominate one or more persons from among whom acting members of the board may be selected.

Selection of acting board members

[4\(2\)](#) When in the opinion of the chairperson it is necessary or desirable for the proper performance of the board's duties, the chairperson may select not more than three persons nominated under subsection (1) as acting members of the board for a period of time or for the purpose of any matter before the board.

Powers and duties of acting member

[4\(3\)](#) An acting member has and may exercise and perform the powers and duties of a member of the board.

Remuneration and expenses

[4\(4\)](#) An acting member is entitled to be paid such remuneration and receive such expenses as the minister determines.

Quorum

[5](#) Three members of the board, of whom at least two are members appointed under subsection 3(1), constitute a quorum and are sufficient for the exercise of all of the jurisdiction and powers of the board.

Management and procedural rules

[6\(1\)](#) The board may make rules for the management of its affairs and for the practice and procedure to be observed in matters before it. The rules may also authorize the chairperson or another officer or member to sign board documents.

Information and representations from parties

[6\(2\)](#) In any matter before it, the board shall give full opportunity to the parties to present information and make representations.

Part V of Evidence Act powers

[7](#) The members of the board have the powers of commissioners under Part V of *The Manitoba Evidence Act*.

Board to conduct studies

[8\(1\)](#) The minister may direct the board to study any matter related to farm practices and the board shall conduct the study and report its findings and recommendations to the minister.

Professional assistance

[8\(2\)](#) The board may appoint one or more persons having technical or special knowledge of any matter to assist the board in any capacity in respect of a matter before it.

Protection from liability

[8.1](#) No action or proceeding may be brought against the board, a member or acting member of the board or any other person acting under the authority of this Act for anything done or not done, or for any neglect,

- (a) in the performance or intended performance of a duty under this Act or the regulations; or
- (b) in the exercise or intended exercise of a power under this Act or the regulations;

unless the board or the person was acting in bad faith.

COMPLAINTS

Application for determination

[9\(1\)](#) A person who is aggrieved by any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation may apply in writing to the board for a determination as to whether the disturbance results from a normal farm practice.

Contents of application

[9\(2\)](#) An application under subsection (1) shall contain a statement of the nature of the complaint, the name and address of the person making the application and the name and address of the agricultural operation, and shall be in a form acceptable to the board.

Notices

[9\(3\)](#) The board may require that an applicant give written notice, in such form and manner that the board specifies, to the persons that the board specifies.

Parties

[9\(4\)](#) The parties to an application are the applicant, the owner or operator of the agricultural operation and any person added as a party by the board.

No action commenced unless application made

[9\(5\)](#) A person shall not commence an action in nuisance for any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation unless the person has, at least 90 days previously, applied to the board under this section for a determination as to whether the disturbance complained of results from a normal farm practice.

Subsequent nuisance action not required

[9\(6\)](#) A person may apply to the board for a determination under this section whether or not an action in nuisance is subsequently commenced.

Investigation and resolution of dispute

[10](#) On receiving an application, the board may inquire into and endeavour to resolve a dispute between the aggrieved person and the owner or operator of the agricultural operation and may determine what constitutes a normal farm practice in respect of that agricultural operation.

Refusal to consider application

[11\(1\)](#) The board may refuse to consider an application or to make a decision if in its opinion,

- (a) the subject-matter of the application is trivial;
- (b) the application is frivolous or vexatious or is not made in good faith; or
- (c) the applicant does not have a sufficient personal interest in the subject-matter of the application.

Decision given to parties

[11\(2\)](#) The board shall notify the parties of its refusal to consider an application or to make a decision under subsection (1), and give them written reasons for its action.

Decision of the board

[12\(1\)](#) If the board is unable to resolve the dispute between the aggrieved person and the owner or operator of the agricultural operation, the board shall

- (a) dismiss the complaint if the board is of the opinion that the disturbance complained of results from a normal farm practice; or
- (b) order the owner or operator of the agricultural operation to cease the practice causing the odour, noise, dust, smoke or other disturbance if it is not a normal farm practice or to modify the practice in the manner set out in the order to be consistent with normal farm practices.

Decision given to parties

[12\(2\)](#) The board shall give a copy of its decision to each of the parties together with written reasons for the decision.

Decision shall be considered by court

[12\(3\)](#) A decision of the board under this section respecting an agricultural operation shall be considered by the court in any subsequent action in nuisance taken in respect of that operation.

Order of board may be filed in court

[12\(4\)](#) Where a person has failed to comply with an order of the board made under subsection (1) and the time for an appeal against the order has expired, the board may file a copy of the order, certified by the chairperson or secretary of the board to be a true copy, in court.

Board may apply to court

[12\(5\)](#) Upon filing under subsection 12(4), the order shall be deemed to be a judgment of the court in favour of the board and the board may apply to a judge of the court for an order requiring the person to comply with the judgment and the judge may also make one or more of the following orders:

- (a) a contempt order against the person;
- (b) an order respecting costs;
- (c) any other order that may be necessary to give effect to the judgment or that the judge considers just.

Appeal

[13](#) Any party to an application may appeal an order of the board on a question of law to the court within 30 days after the making of the order.

Board may review orders

[13.1\(1\)](#) Subject to subsection (5), the board may review an order it has made, if a party or another person who is affected by the order applies.

Disposition by the board

[13.1\(2\)](#) After the review, the board may, by further order, dismiss the application or change, revoke or replace the order.

Membership of board on review

[13.1\(3\)](#) The members of the board who review the order may be different from the members who made it.

Application of certain previous provisions

[13.1\(4\)](#) Subsections 9(2) to (4) and sections 10 to 13 apply, with necessary changes, to an application or order made under this section.

Limitations on review power

[13.1\(5\)](#) The board shall not review an order

- (a) before the end of the appeal period set out in section 13;
- (b) after an appeal has been made under section 13 but before it is determined or withdrawn; or
- (c) after the order has been filed in court under subsection 12(4).

Injunction proceedings in abeyance

[14\(1\)](#) When an agricultural operation is the subject of an application under subsection 9(1), no injunction proceedings may be commenced or continued in respect of that agricultural operation until the board has made a decision under subsection 12(1) or has refused to hear the application.

Exception

[14 \(2\)](#) Subsection (1) does not apply to proceedings taken under *The Environment Act* or *The Public Health Act*.

GENERAL PROVISIONS

Regulations

[15](#) The Lieutenant Governor in Council may make regulations

- (a) prescribing fees payable in respect of applications made under subsection 9(1) or 13.1(1);
- (b) respecting the nomination and selection of acting members of the board;
- (c) respecting standards for the purpose of the definition of "normal farm practice";
- (c.1) respecting matters that the board must have regard to in determining what constitutes a normal farm practice for agricultural operations;
- (d) respecting any other matter or thing necessary or advisable for carrying out the purposes of this Act.

[16](#)

NOTE: This section contained consequential amendments to *The Nuisance Act* which are now included in that Act.

C.C.S.M. reference

[17](#) This Act may be cited as *The Farm Practices Protection Act* and referred to as chapter F45 of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

[18](#) This Act comes into force on a day fixed by proclamation.

NOTE: S.M. 1992, c. 41 was proclaimed in force January 31, 1994.