

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM THE OPERATION OF A CHERRY ORCHARD
IN WYNNDEL, BRITISH COLUMBIA

BETWEEN:

GORDON and PRISCILLA JUDD

COMPLAINANTS

AND:

WADE and MICHELE WEBBER

RESPONDENTS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine Elsaesser, Vice Chair (Panel Chair) Richard Bullock, Member Barbara Buchanan, Member
For the Complainants	Gordon and Priscilla Judd
For the Respondents	Wade and Michele Webber
Date of Hearing	February 5, 2004
Place of Hearing	Cranbrook, British Columbia

INTRODUCTION

1. Under the *Farm Practices Protection (Right to Farm) Act* (the “Act”), a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to the British Columbia Farm Industry Review Board (the “Provincial board”) for a determination as to whether the disturbance results from a normal farm practice.¹ If, after a hearing, the Provincial board is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, the complaint must be dismissed. If the practice is found not to be a normal farm practice, the Provincial board must order the farmer to cease or modify the practice.
2. The Complainants, Gordon and Priscilla Judd initially filed their complaint with the Provincial board by an eight page submission received September 24, 2003 taking issue with a number of farm practices in 2001, 2002 and 2003 occurring on the orchard adjacent to their property. Their complaints were many, extending to noise, use of machinery including helicopters, over spraying, dust, disposal of pesticides and flooding. Although the Judds have expressed their concerns to the Respondents, Wade and Michele Webber, they feel that there has been a lack of co-operation and very little attempt to reduce noise or modify farm practices. The Judds maintain that they do not seek to shut down the Webbers’ operation but rather want certain practices modified.
3. Wade and Michele Webber appeared on their own behalf. They argue that they *do* follow normal farm practices on their orchard and in some cases have implemented practices over and above what is required in an attempt to appease the Judds. They feel that nothing they do will satisfy the Judds and as such seek a determination that the practices complained of are normal farm practices and thus protected under the *Act*.
4. In order to ensure that all necessary evidence was before the Panel, the Provincial board issued a summons requiring the attendance at the hearing of Don Low, Industry Specialist/Economist with the Industry Competitiveness Branch of the British Columbia Ministry of Agriculture, Food and Fisheries (“MAFF”).

ISSUE

5. Did the Respondents follow normal farm practice in their orchard during the 2001, 2002 and 2003 seasons? If not, the Complainants seek an order from the Provincial board directing the Respondents to cease or modify their farm practices.

¹ Note that, effective November 1, 2003, the membership of the Farm Practices Board (“FPB”) was fully merged with that of the British Columbia Marketing Board (“BCMB”), and both tribunals were renamed the British Columbia Farm Industry Review Board: see *Miscellaneous Statutes Amendment Act*, SBC 2003 c. 7 and BC Reg. 350/2003.

6. The Complainants particularised the grounds of their complaint as follows:
 - a) audio bird scare devices located within 100 feet of residential properties (2001);
 - b) the use of a helicopter to dry cherries (2001);
 - c) increase in frequency of pesticide spray application (2001);
 - d) pesticide drift across the Complainants' property (2002);
 - e) refusal to provide warning before firing orchard pistol (2002);
 - f) orchard irrigation water flowing onto the Complainants' property (2002);
 - g) inappropriate operations for a small orchard in a residential zone (2003);
 - h) increased use of machinery, including a wind machine (2003);
 - i) lack of co-operation (2003);
 - j) inappropriate use of orchard pistol (2003); and
 - k) no attempts to reduce noise (2003).

7. The Complainants have the following additional concerns:
 - a) application of chemical sprays next to a penned animal;
 - b) limited use of Complainants' property during pesticide application and other intrusive orchard activities;
 - c) application of chemical sprays with an industrial sprayer;
 - d) airborne dust from lawn mowing when toxic chemicals are applied; and
 - e) disposal of pesticides on the ground in an area of French (gravel trench) drains.

FACTS

8. In 1997, the Judds purchased their small acreage in Wynndel, part of the Regional District of Central Kootenay and began building their home. The zoning in the area is country residential and lots can be no smaller than 2.47 acres. At that point in time, cattle were being grazed on the Respondents' property. However, the cattle were moved in the fall of 1997 and the Webbers advised the Judds of their intention to plant approximately two acres in sweet cherries. The orchard was planted in high yield dwarf cherry trees in 1998 and came into commercial production in 2001.

9. The cherry orchard borders the northern portion of the Judds' property. The trees run in rows perpendicular to the Judd property. Between the end of the rows and the property lines is a narrow tractor lane.

10. Currently old orchards and available pasture lands in the Okanagan and Creston Valleys are being replanted into sweet cherries primarily destined for the lucrative Asian and European markets.

11. Initially, the Webbers and the Judds enjoyed an amicable neighbourly relationship. Mrs. Judd gave music lessons to Mrs. Webber and her children. The Judds periodically looked after the Webbers' dog. The Webbers gave the Judds a couple of cherry trees to plant in their yard. Unfortunately, as the cherry orchard has

matured and gone into commercial production, the relationship between the Judds and the Webbers has soured. The Judds retained a lawyer and on August 8, 2002, commenced a Supreme Court action in nuisance against the Webbers.

12. In August 2002, the Judds also contacted the Creston Conservation Officer Service to complain about pesticide spray drift from the Webbers' orchard. On August 8, 2002, Conservation Officer James Barber spoke to Mrs. Webber who explained that they had tried working things out with the Judds but that was not possible. She also explained that spraying had ended for the year as their cherries were soon to be harvested.
13. On August 21, 2002, Mrs. Judd advised CO Barber that they had retained a lawyer and not to pursue the matter until after their lawsuit concluded. However, in January 2003, Mrs. Judd again expressed concern about the spraying of pesticides. As a result, in March 2003, CO Barber issued a warning to Mr. Webber regarding the spraying of pesticides in 2002, stating that any future violations would result in charges.
14. On October 29, 2002, the Judds made a settlement proposal to the Webbers to resolve the legal action. The terms of settlement proposed numerous on-farm management practices including application of pesticides, notice of application, use of an anemometer, insect traps, netting and a consultant as well as the planting of shrubs and forage crops and the cessation of orchard pistol use. No settlement was ever reached.
15. The Judds dismissed their lawyer and in May 2003 wrote to Mr. Webber requesting 48-hour notification of any spraying of the orchard, stopping the fan on the sprayer at the end of each row, cessation of orchard pistol use or alternatively firing at a pre-arranged time or the use of an advance warning whistle, and directing the blast of the pistol away from their property. They also asked for implementation of "neighbour friendly bird control devices".
16. On September 24, 2003, the Judds filed their complaint with the Provincial board.
17. In January 2004, Mrs. Judd wrote to MAFF complaining about Mr. Webber's use of an orchard pistol. In response, Mrs. Judd was given a copy of an e-mail from Wray McDonnell, Regional Manager South summarising the advice she had been given by MAFF in 2003 suggesting she take her complaint to the Provincial board.
18. The complaint proceeded to hearing in Cranbrook, BC on February 5, 2004.

SUBMISSION OF THE COMPLAINANTS

19. This complaint comprises numerous farm practices occurring over three years of farm production, 2001, 2002 and 2003. In general, the Complainants take issue with farm practices which might be suitable in an agricultural area but which they

maintain are not suitable for the area where this farm is located. They argue that practices appropriate for an orchard located in the Agricultural Land Reserve (“ALR”) are not appropriate in their neighbourhood. These practices include the use of an industrial airblast sprayer, application of chemicals in close proximity to pets and people, without any buffer and in an area of natural water drainage.

20. The Complainants argue that this area was not intended for commercial agricultural production. It is not part of the ALR, having been expressly removed some years ago. Rather the farm is located on land zoned “country residential”. While agriculture is a permitted use, it is not the primary use. The primary use is for rural residential housing. The Complainants argue that while agriculture is permitted, it should not be conducted in such a fashion as to impair homeowners from the use and enjoyment of their land.
21. In support of their claim, the Complainants provided numerous photographs and videotape depictions of the many impugned practices.
22. The Complainants have numerous specific complaints:
 - a) location of audio bird scare devices – In 2001, the Webbers placed a stationary bird scare device within 100 feet of the property line. It went off continuously every 10 minutes from dawn until dusk in the narrowest part of the orchard. In 2002 and 2003, the Judds concede that the device was operated in an appropriate manner. However, they seek assurances that it will not be operated “to spite” them as in 2001.
 - b) use of helicopter – In 2001, the Webbers used a helicopter on two separate occasions to dry their cherries after a rain. The Complainants argue that this practice is highly intrusive and hazardous. The down wash from the helicopter rotors flattened plants. They are concerned that the down wash may damage their gazebo. They seek a warning if the helicopter is to be used in order for them to gather up anything loose in their yard; their preference is that helicopter use be prohibited at this orchard.
 - c) increased use of sprays and spray drift – The Complainants first identified their concern with respect to spray drift in 2001. In 2001 and 2002, they observed and documented pesticide use and numerous instances of spray drift onto their property. They attribute the cause of the over spray to a number of factors:
 - the orientation of the cherry tree rows north-south perpendicular to the Judds’ property line maximises over spray;
 - spraying early in the morning when the prevailing wind direction is towards the Judds’ property;

- using an industrial airblast sprayer too large for this orchard operation and improperly calibrated, resulting in spray being discharged above the canopy;
 - spraying when the presence of a windbreak located on the property actually adds to the turbulent conditions and worsens the potential over spray;
 - the increased use of pesticides since 2001 in an area inhabited by people.
- d) other complaints related to pesticide use
- spraying pesticide next to a penned animal (apparently a neighbour's dog);
 - pesticide application and other intrusive orchard activities limit the Judds' use of their property;
 - mowing after chemicals are applied results in airborne "toxic dust";
 - Mr. Webber's disposal of pesticides on the ground near French (gravel trench) drains is indicative of the need for training in the proper handling of pesticides.
- e) orchard pistol use – The Complainants take issue with the Webber's use of an orchard pistol. They find the noise startling and have requested a warning before its use so that they can take cover or protect themselves.
- After purchasing the pistol in June 2002, Mr. Webber began using it June 8, 2002. Using an orchard pistol outside harvest is without precedent and not normal farm practice.
 - The Webbers have refused to co-operate by providing a warning as they claim that in order to be an effective deterrent, the pistol must be fired when birds are present. MAFF employee, Mr. Low, stated that he saw no reason why a warning could not be given and in fact, his wife insists on a warning when he fires a pistol in his own orchard;
 - The pistol is being used when birds are not present;
 - The 36 bangers and screamers used by Mr. Webber in the 2003 season were excessive when compared to the orchardists who wrote in support of the Webbers (Jim Francis uses his pistol 3-5 times a season and Al Luesink stopped using his pistol on one side of his farm as it disturbed his neighbours).
- f) over irrigation – Since the development of the orchard, the Complainants have observed an increase in ponding of water in their yard.
- They do not believe there is a natural source for this water as suggested by the Webbers and the Wynndel Irrigation District as their septic system would not have been approved if that were the case;
 - Rather they believe that the Webber's irrigation system has increased the flow of water onto their property;

- If there are natural springs in the area the Webbers should be precluded from spraying pesticides within ten meters of any spring as set out in the MAFF Environmental Guidelines.
- g) use of wind machine – In 2003, the Webbers installed a wind machine in their orchard to dry cherries and eliminate frost pockets.
- It is not normal farm practice to use a wind machine in an orchard of this size and in such close proximity to neighbours;
 - The wind machine forces air into every crack and crevice in the Complainants’ house, through the bathroom and dryer vent and under their doors. They worry about stress of this wind on their house;
 - Frost control should be achieved by site selection and proper pruning;
 - Removing the windbreak could alleviate frost pooling without the need for a wind machine.
- h) increased use of machinery (2003) – This complaint is related to the use of the wind machine as well as increased tractor use.
- i) no attempt to reduce noise – The Complainants argue that the Webbers have deliberately tried to use farm practices in a “campaign of harassment”, they take issue with the following:
- use of a motorcycle;
 - refusing to accept such “good ideas” to use less noisy bird scare devices such as kites, wind whirly gigs, scare crows, scare tape, laser guns, cap guns, horns and whistles and hanging a dead crow in the orchard;
 - increasing the volume on the bird scare device when Mr. Judd is in his yard; and
 - in addition, at the hearing the Judds complained of a whine from the irrigation system.

SUBMISSION OF THE RESPONDENTS

23. The Webbers take issue with the way they have been characterised by the Judds. Farming is their livelihood and they would not jeopardise that livelihood by farming irresponsibly. They maintain that they followed normal farm practices in the past and that their practices will only improve as a result of having to meet the European Retail Produce Good Agricultural Practices (EurepGAP) standards required for exporters of cherries into Europe. Recently, their cherry operation received 93% when certified under the BC Good Agricultural Practices Program.
24. Generally in response to this complaint, the Webbers concede that there was room for improvement in some of their early farm practices. However, they have sought the assistance of knowledgeable persons such as Bill Truscott of Cherries Kokanee Inc. (“Cherries Kokanee”) and Mr. Low of MAFF.

25. Mr. Truscott testified on behalf of the Webbers. His business, Cherries Kokanee operates a packing facility and sells irrigation supplies, fertiliser, and chemicals. Mr. Webber has been shipping to Cherries Kokanee since 2001. During that time, Mr. Truscott has offered his professional opinion to Mr. Webber. Cherries Kokanee has developed certification programs so that all their growers meet EurepGAP standards. They have developed policy and procedure manuals dealing with workers, complaints, irrigation, spraying, notification and environmental sustainability. Mr. Truscott describes Mr. Webber as a valued grower member who is meticulous and in the top tier of growers in farming practices. His cherries have received an award for their size and high quality. With respect to the issues on this complaint, Mr. Truscott testified as follows:

- a) audio bird scare devices – In 2001, Mr. Webber had a problem with robins damaging his cherries. He bought an Av-Alarm from Cherries Kokanee. The device emits pre-recorded bird distress calls and can be set at different frequencies and volumes. Initially, Mr. Webber installed the device with batteries, put it in his orchard and turned it on. He has since learned how to set up the device properly. In 2002, he used 110 amp service and varied the volume, frequency and speaker position. Variety of disturbance is key in bird control. Mr. Webber now uses a motorcycle as well as an orchard pistol to manage bird populations.
- b) use of helicopter – Helicopters were first used in the Creston Valley in 2001. The helicopter was used only twice at the Webber orchard. As their orchard is about seven miles away from Creston and the majority of orchards, it was not a cost-effective method of drying cherries. It has not been used since.
- c) increased use of sprays and spray drift – As the orchard has matured, spraying has increased. In the Creston Valley, fungal brown rot and cherry fruit fly must be managed. Under Agriculture Canada regulations cherries infested with cherry fruit fly can not be marketed making a regular protectant spray program necessary. However, growers shipping into the European market are limited to “softer” chemicals which must be sprayed with greater frequency. Mr. Webber has chosen to not use restricted pesticides because of his location and his circumstances with his neighbours. The type of crop and its potential market determines the frequency of application. Weather is also a factor, as some sprays require a rain-free period, others are influenced by the sun. It is very common for growers to spray in the early morning and late evening. Mr. Webber has offered to post spray notices at the property line for the benefit of the Judds (in addition to the required notices at points of entry).

As for pesticide spray drift, Mr. Webber uses a Florida sprayer with a 100 gallon tank; it is not an industrial sprayer. It does not generate as high wind speeds or move such high volumes of air as those used in large orchards. Most orchardists use 400-gallon turbo-mist sprayers that move massive air

volumes and have wind speeds of 180 mph. Mr. Webber's sprayer is effective in his small orchard and it is well maintained. It is normal and appropriate to use an airblast sprayer in an orchard; it is the only way to penetrate dense foliage. To accommodate his neighbours and minimise drift, Mr. Webber has chosen to spray in only one direction (away from the Judd property) at considerable additional expense.

- d) orchard pistol use – Mr. Webber purchased the pistol and ammunition from Cherries Kokanee. Given that Mr. Webber uses less than one case of 50 rounds per year, his use is not excessive. Mr. Truscott is pleased that Mr. Webber has offered to give some warning prior to firing the pistol.
- e) over irrigation of orchard – Mr. Webber's irrigation system was designed with the assistance of Cherries Kokanee. Mr. Webber uses a drip system unusual to the Creston area. This system does not put out a huge amount of water. However, through meticulous attention, Mr. Webber is able to get the required amount of water to his trees. Mr. Truscott does not believe Mr. Webber is over irrigating as alleged, rather if anything he under waters. The fact that he has not lost trees to “wet feet” is indicative that excessive water is not being applied. The more likely cause of the water problems on the Judds' property is attributable to the previous owner's earth-moving activity changing the natural flow of water.
- f) netting – The Judds suggest netting as an alternative to bird distress calls. A netting system for tall, central leader trees would need to be approximately 24 feet high and be installed prior to harvest for a two to three-week period. The support structure would be extensive and for the level of bird damage seen in the Creston Valley (incidental damage as opposed to entire blocks being wiped out by starlings) it is not cost-effective (\$25,000-\$35,000/acre).
- g) wind machine – Frost damage is a significant risk to late harvest cherry growers and can take 60% of the crop, resulting in significant losses to the industry. There are nine or ten wind machines installed in the Creston Valley. The other options, irrigation and supplemental heating are not feasible. The Webbers lack the capacity to pump the required 50 gallons/acre/minute. In addition, their heavier soils would result in drainage problems downslope. Supplemental heating (smudge pots and natural gas heaters) is not viable here due to the cost of the energy and the huge problems associated with diesel smell, black smoke and particulates. Mr. Truscott operates a wind machine in his orchard which is adjacent to a 70 unit trailer park, a large subdivision, two houses and a small orchard. The wind machine he uses has an 18-foot blade and a 390 Ford V8 engine with no mufflers. In contrast, Mr. Webber's machine has a muffler, installed to minimise impact on his neighbours and a smaller, quieter blade. By installing a wind machine, Mr. Webber also supplants the need for a helicopter to dry off his cherries.

- h) buffers – Conflicts arise at the interface between urban and rural properties. Mr. Webber has proposed sharing the cost of planting a poplar tree buffer with the Judds. This is appropriate and would address the issue of spray drift. However, a better option would be the installation of a wind screen on the south end of the orchard. It could be opened and closed to deal with frost and heavy orchard activity. It could also serve as a deer buffer in combination with a deer fence. If the parties are willing to co-operate in its installation, it may resolve much of the drift and noise issues.
- i) Wynndel as an agricultural area – Wynndel has been an agricultural area for more than 100 years. Wynndel Co-op Fruit Packers was one of the finest fruit co-operatives in the valley. Across the road from the Judd and Webber properties was a plum, prune and pear orchard. Wynndel has wonderful growing conditions for tree fruit and its growing season is one of the latest in the valley. Two or three more cherry orchards are currently being developed in Wynndel and over the next ten years, another 100 acres of cherries is anticipated.
- j) increased use of machinery – Machinery use on the orchard has increased as the trees have matured and in part as a result of attempts to modify farm practices in response to the Judds' complaints. The use of motorcycles and ATV's is normal farm practice. Weed spraying, mowing and harvest all involve machinery. Mr. Webber's practices in this regard are exactly the same as other orchardists.

26. Mr. Truscott believes that this dispute has taken a huge personal toll on the Webbers. He also feels badly for the Judds as the issues could have been averted through communication and co-operation.
27. Carl Allen testified in support of the Webbers. He too is a neighbour residing adjacent to the orchard. Prior to moving into his home two years ago, Mr. Allen knew this was an agriculture area. He does not take issue with any of Mr. Webber's farming practices and describes him as a good neighbour. Mr. Webber usually gives notice before spraying. Orchard pistols are only used when necessary. The wind machine is used very seldom and only for short periods of time. With respect to over irrigation, on the one occasion when a little bit of water entered his garage from a broken dripper, Mr. Webber fixed the problem immediately. As for water on the property, water does run onto Mr. Allen's property from the Judds' as a result of their ditching. A portion of his yard remains spongy and cannot be mowed. He concluded his comments by saying:

To sum this up, if I did not look out at the orchard from time to time I would never know there is such a beautiful thing there, and I personally feel that it is an asset to the community.

28. Other neighbours, Rudi and Robin Quaedvlieg wrote a letter in support of the Webbers. They too live next to the cherry orchard and were there before the trees were planted. Like Mr. Allen they see Mr. Webber as a good neighbour. He gives

notice about when and what he is going to spray. He is always concerned about the time of day and the wind direction. The wind machine is not a problem, it is used rarely and helps keep frost from their trees as well. The orchard pistol is also only used when necessary. In conclusion, they state:

We see the cherry orchard as a positive for this community, as it brings employment to the valley & also some nice scenery. We enjoy having Webbers as neighbours & wish them the best in the future!

29. In response to the Judds' specific complaints, the Webbers' position is as follows:
- a) audio bird scare devices – The use of a bird scare device is normal farm practice in the Creston Valley.
 - The bird alarm has never been pointed towards the Judd property or turned louder to create more of a disturbance.
 - Since 2002, care has been taken to position the alarm over 100 m from the Judds' home and it is only used at half volume.
 - The Judds conceded at the hearing that in 2002 and 2003, the bird scare device was not an issue.
 - b) helicopter use – Cherry producers in the Creston Valley use helicopters when necessary to dry cherries. The down draft is not that intrusive as it is insufficient to knock the cherries off the trees.
 - The helicopter was used in 2001 for two 15 minute intervals.
 - The Webbers do not intend to use helicopters again as the wind machine can be used to dry the cherries.
 - c) spraying of pesticides – The Webbers admit that in 2001 and 2002, mistakes may have been made in spray application. However, it was their belief that spraying in the calm conditions present in the early morning avoided potential spray drift.
 - Subsequent modifications were made to specifically avoid spray drift. Mr. Webber now sprays the trees at the end of the rows nearest the Judds' property, and then sprays each row away from the Judds, shutting off the sprayer at each row end and deadheading back down the row. This takes twice as long and has resulted in complaints from the Judds about more noise and more machinery use!
 - With the assistance of Mr. Low, adjustments were made to the spray nozzles and the height of the sprayer to minimise spray drift.
 - Mr. Webber denies improperly disposing of chemicals and states that what the Judds observed and videotaped was Mr. Webber putting water in his tank, spraying the trees to clean out the lines then dumping the remaining water.

- With respect to the allegation of spraying near Mr. Allen's penned dog, Mr. Webber states that the wind was blowing away from the dog pen. However, at Mr. Webber's request, Mr. Allen moved his dog.
- d) use of wind machine – The wind machine was installed and used for the first time in 2003. Other cherry producers in the Creston Valley use wind machines to prevent frost damage.
- The machine was only used 5 times in May 2003.
 - The wind machine is very effective at pulling warmer air down to prevent frost damage.
- e) orchard pistol use – In all, the orchard pistol was used approximately 37 times in each of 2002 and 2003. This is not extreme and averages out to less than once per day.
- The orchard pistol is used in a similar fashion to other orchardists, for the spot scaring of birds.
 - The pistol has never been pointed at or aimed at the Judds or their property.
 - The Judds' video demonstrates that the pistol is shot from the north end of the tree rows over 100 feet from the property line.
 - Despite the fact that the Webbers believe they use their orchard pistol in an appropriate fashion, they have offered to blow a whistle in advance of its use.
- f) noise – The Webbers deny making unusual or unnecessary noises on their orchard.
30. In summary, the Webbers feel totally harassed by the many complaints from the Judds. Despite the Webbers' attempts to rectify these complaints, the Judds are never satisfied. The list of issues and complaints continues to grow. Mrs. Judd states that she does not like it when she is not in control of her environment. However, her kind of control is unreasonable. The Judds have had disputes with most of their neighbours, following the similar pattern of phoning every conceivable authority to complain. This type of behaviour makes it difficult to remain on friendly terms and still pursue farming as a livelihood.

SUBMISSION OF A KNOWLEDGEABLE PERSON

31. Mr. Low, is an industry specialist/economist with the Industry Competitiveness Branch of MAFF. He also has a 14-acre cherry orchard and has shipped cherries to Cherries Kokanee for three out of the last six years. He chairs the Creston local of the Okanagan Kootenay Cherry Growers Association. Mr. Low has been to the Webbers' orchard approximately four or five times since it came into production.
32. Initially, Mr. Webber called Mr. Low for advice with pruning. After the complaints to the Conservation Officer, Mr. Low suggested modifications to the

sprayer calibration (nozzle choice and appropriate volumes of water) to prevent the spray going too high above the tree canopy. He also recommended spraying only when the wind was blowing away from the neighbour's property as wind direction is far more important than buffers in avoiding spray drift. Now that Mr. Webber has properly adjusted his sprayer, Mr. Low is comfortable that with some change in spraying practices (spraying when the wind was coming up the valley rather than down the hill) the spray drift problem should be remedied. Mr. Low has had discussions with Mr. Webber about what was required as far as posting notices for spray. Although there is no requirement to post a notice unless there are workers coming on the property, Mr. Webber agreed to post a notice for the Judds' benefit.

33. Mr. Low has spoken to Mrs. Judd about the nature of pesticide sprays and what happens to them after spraying. With respect to Mrs. Judd's concerns about toxic dust, he explained that growers must try to keep spray on their property and to follow the instructions set by the Canadian Food Inspection Agency for safe application. The types of herbicides used in orchards are inactive when they hit soil and they dissipate through photo-chemical degradation.
34. As for the Judds' complaints raised at the hearing, Mr. Low states that it is not normal farm practice for growers to protect their ears from bird scare devices. As for Mr. Judd's suggestion that the devices are used when no birds are present, Mr. Low stated that the number of birds seen is irrelevant. The bird damage in this area comes primarily from robins and finches that enter the orchard from the ground; they are rarely visible. Crows are not the culprits.
35. With respect to the orchard pistol, Mr. Low does see merit in blowing a warning whistle ten seconds to a minute before firing. Mr. Low does this in his own orchard at the request of his wife.
36. As for wind machines, Mr. Low says they are by nature intrusive. However, frost damage can affect 50% or more of a crop. They are installed on a site-specific basis. While it is true that most of the installations in the Creston area are on larger five to ten acre blocks, usually the frost problem being addressed is in a small area within the block.
37. With respect to helicopters, Mr. Low agrees that they are very intrusive. However, they are used very infrequently, when it is necessary to dry the cherries to prevent splitting. In Mr. Low's opinion the farmer can and should warn his neighbour.
38. Mr. Judd suggested that the Webbers should employ netting. However, netting is not that effective for robins and finches that enter the orchard from the ground up. Where netting might be an option is at the bottom of the property to reduce wind as opposed to some sort of planted buffer of shrubs or a forage crop (as suggested by Mr. Judd). Wind nets are used in southern Alberta to reduce wind velocities. In this case, a wind net may also reduce spray drift.

39. Mr. Low feels sorry for both of these parties. The Judds bought a property in a pastoral setting, not understanding the meaning of “country residential” zoning or what that zoning allows. This same situation happens time and time again. People do not understand what can happen if a horticultural or livestock operation permitted under that zoning is developed. Mr. Low believes that people should try to dig a little more so that they understand what can happen in their neighbourhood. In addition, the Regional District needs to be more forthright about potential development. The Webbers invested in an operation that provides them a good income, yet they too suffer grief because of the issues with their neighbours. With some co-operation however, Mr. Low believes that these neighbours can co-exist. A combination of spraying under the proper conditions, blowing the whistle before firing the orchard pistol and putting up wind netting could resolve a lot of the issues. As for the suggestion of over irrigation, there are devices to monitor the amount of water getting to the trees. However, that does not prevent low-lying areas naturally being re-charge areas.

DECISION

40. Resolving a complaint under the *Act* requires the Panel to undertake a two-step analysis. As to the threshold question of whether the Complainants are aggrieved by odour, dust, noise or some other disturbance emanating from a farm operation, the Panel finds that the Complainants have satisfied their evidentiary burden. The ongoing nature of the complaint and the proximity of the Complainants to the Respondents’ orchard operation, satisfies the Panel that the Complainants have sufficient personal interest in the subject matter of this complaint. Having found the threshold question met, the Panel must determine whether the complained of practices result from normal farm practice
41. Section 1 defines “normal farm practice” as follows:
- "normal farm practice"** means a practice that is conducted by a farm business in a manner consistent with
- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
 - (b) any standards prescribed by the Lieutenant Governor in Council,
- and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).
42. In determining what is meant by “normal farm practice”, the Panel looks to whether a particular practice is consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. This is a contextual analysis where industry practices are examined and weighed along with other factors such as the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, and the size and type of the operation subject to complaint.

43. In this case, although the complaints were many, the Complainants introduced little evidence with respect to “normal farm practice” of similar farms in similar circumstances. Their primary submission is that as this orchard is not in the ALR, and is in an area zoned country residential, different standards should apply. Their complaints encompass many aspects of the management of the operation.
44. The Panel specifically rejects the Complainants’ argument that, as a matter of principle, this farm by virtue of where it is located should be held to a higher standard than currently employed by the farmer. It is very clear that the farmer has already considered his neighbours in his on-farm management. He has recognised that the close proximity of neighbours requires modified practices and these practices continue to evolve.
45. The Panel had the benefit of hearing from Mr. Truscott and reviewing letters submitted by five other orchardists in the area as well as letters from adjacent neighbours. In addition, the Panel also heard from Mr. Low of MAFF. Based on their helpful testimony, the Panel has concluded that with two exceptions the operations being carried out by Mr. Webber are “normal farm practices” and as such are protected by the *Act*.
46. The evidence is clear that in the initial start up period in 2001, the Webbers did not operate the bird distress device in a proper fashion (it was left on from dawn to dusk at high volume without variation). In the same time frame, the Webbers had some difficulty with spray drift onto the Judds’ property.
47. In general, the use of bird scare devices such as audio bird distress calls and orchard pistols to combat bird predation is a common industry practice. However, as was recognised by the Provincial board in the *Wright v. Lubchynski Complaint*, August 12, 2002 at paragraph 33, whether their use will be considered normal farm practice under the *Act*, account must be taken of the fact that “the management of the [bird scare device], that is placement, number, direction, time and frequency of firing, can be affected by the proximity of neighbouring residences or the geography of the areas”. The Panel accepts that when the audio bird distress device was first placed in the orchard in 2001, the manner in which it was operated was not consistent with normal farm practice. In this aspect, the complaint has been made out. However, the Complainants do concede that in 2002 and 2003, the device was operated in an appropriate manner. Accordingly, the Panel finds that Mr. Webber has taken into account the relevant factors and now operates his bird scare devices in a fashion consistent with “normal farm practices”.
48. With respect to pesticide use, the Complainants allege numerous instances of spray drift onto their property in 2001 and 2002. Their testimony as well as their photographs and videotapes confirm that over spray did occur. Accordingly, the Panel does accept that for 2001 and 2002, the manner in which the pesticide sprayer was used was not consistent with normal farm practice. However, it should be pointed out that since that time, Mr. Webber has sought advice on proper

calibrations for his machine and techniques to minimise over spray. Whether this change was driven by the visit from the Conservation Officer is not material; the point is that changes have been made. Mr. Webber now uses an anemometer to check wind speed and direction, sprays later in the morning when the wind direction has changed and has modified the spray pattern of his orchard. The Complainants concede that in 2003, there were substantial positive changes in the way the orchard was sprayed. Mr. Judd stated with respect to spray drift “it's definitely a lot less and the volume and the pattern of the spray is lower and seems to be more appropriate to the tree canopy”.

49. As for the remainder of the complaints, the Panel finds that these arise out of normal farm practices and as such are protected under the *Act*. We make the following comments and observations:
- a) use of helicopter – Given that they now have a wind machine, the Webbers do not propose to use a helicopter again to dry their cherries. However, the use of a helicopter for this purpose is normal farm practice in this area but a farmer should notify his neighbours of his intention to use a helicopter so that precautions can be taken.
 - b) increased use of sprays/ improper usage – As an orchard matures, pesticide use increases. This too is normal farm practice. The evidence is that Mr. Webber meticulously follows the application schedule set by Cherries Kokanee in order to ensure marketability of his cherries. As for improper usage and disposal, the Panel finds that Complainants have not made out this complaint. The certification procedures used by Cherries Kokanee ensure that its growers understand and employ safe application techniques. As for “toxic dust” being blown by the tractor, there is no evidence that the dust caused by occasional mowing is toxic. In fact the evidence of Mr. Low is that the types of herbicides and pesticides used in orchards become inactive upon hitting the soil and degrade in sunlight. In any event, the occasional dust complained of results from mowing of the orchard, which this Panel finds to be a normal farm practice.
 - c) over irrigation – The evidence supports that Mr. Webber under waters his orchard. There is no evidence to support the Complaints’ allegation that the orchard is responsible for the soggy area on their property.
 - d) netting – It has not been demonstrated that netting would be effective in dealing with the particular type of bird predation found on the Webber orchard. The Panel finds that it is not normal farm practice for this farm to use netting.
 - e) visual bird scare devices – The Complainants seek a direction that the Webbers use visual bird scare devices in their orchard such as kites, wind whirly gigs, scare crows, scare tape, laser guns, cap guns, horns and whistles

and hanging a dead crow in the orchard. The Panel is satisfied that the Webbers monitor their bird predation and use what works in their orchard. Devices such as kites, wind whirly gigs, scare crows and tape may be moderately effective at scaring birds that enter the orchard from above such as starlings, sparrows and crows. However, there was no evidence at this hearing that these devices have any effect at all where as here the main predatory birds are finches and robins that enter the orchard from the ground. Accordingly, the Panel is not prepared to make this direction.

- f) use of wind machine – Wind machines are used in the Creston Valley in response to frost or rain conditions. Their use is periodic and dictated by low temperatures during spring bud or rain during harvest. While the occasional use of a wind machine may be invasive, it is necessary to protect a crop from damage. The Complainants were concerned that the wind machine might cause structural damage to their home; the evidence was that the wind speeds generated would be approximately 30 km/h by the time they reached the Judd residence, well within the realm of normally encountered winds.
- g) increased use of machinery/no attempt to reduce noise – As the orchard has matured, machinery use has increased. This is normal farm practice. However, it should be pointed out that some of the Judds’ complaints have led to more machine use, as modifications to minimise spray drift involves spraying only one way down each row and deadheading back. Occasional use of motorcycles in the orchard is an accepted practice to deal with bird predation. With respect to attempts to minimise noise, the evidence has demonstrated that the Webbers have tried to accommodate the Complainants through selective use of their orchard pistol, turning down the volume of their bird distress device and modifying their wind machine to reduce noise. The amount and type of noise coming from this operation falls within normal farm practice.
- h) buffers – It was suggested that a poplar or fabric buffer be installed. The poplar buffer is not ideal as it creates roosts for birds and shade which reduces crop production. Fabric wind screens are used in Southern Alberta. However, there was no evidence offered as to whether this is “normal farm practice” in the Creston area. Therefore, the Panel cannot direct that such a buffer or screen be installed. However, the Panel recommends that the Webbers work with MAFF and Cherries Kokanee to consider the viability of this option. The Complainants should be consulted before any buffer is installed. If a buffer does prove feasible, the Complainants should consider cost sharing these improvements as they go beyond current “normal farm practice”.

50. At the hearing, there was a new complaint regarding the “whine” from the Webbers’ irrigation system. This does not form part of the formal complaint but

the Panel finds that noises incidental to irrigation would be normal farm practice on an orchard. The Panel is concerned however, that having dismissed the bulk of the complaints raised at this hearing, the Complainants may simply look for new issues to raise a new complaint. We caution against this approach, as the Panel finding in this case is that the Webbers' farming practices either meet or exceed the practices of other orchards in similar circumstances. While we understand the Complainants' desire to obtain rulings to determine whether this orchard has followed normal farm practices in the past and present, we do note that the Complainants have pressed on with this complaint despite the fact that the Webbers have been responsive to their concerns. Further, the fact that the Webbers choose to sell their cherries into a market with very stringent requirements on how that fruit is grown ensures that their practices will continue at this high level. The Complainants' fears about a return to earlier, more invasive practices are unfounded as to do so would directly impact on the Webbers' ability to market their fruit.

51. This situation is unlike the typical complaint before the Provincial board where an entire neighbourhood is up in arms over the management practices of a farm. In such cases, often the farm complained of is under capitalised and the farmer has resorted to the lowest cost approach to management, often no management at all. Here, with the exception of the Judds, the consensus of the neighbours, other orchardists and the knowledgeable person is that this farm is well operated, meeting the rigorous standards imposed on this industry. How then to explain the number and extent of these complaints. Are the Complainants more sensitive than the rest of their neighbours? Is there a geographical explanation? The Panel is unsure. However, the *Act* does not require a farmer to employ farm practices sufficient to satisfy the most discriminating or sensitive neighbour, rather it protects "normal farm practices" employed by "similar farm businesses in similar circumstances". In this case, and as stated above, the Panel finds that the Webbers have been reasonable neighbours, taking into account the proximity of their neighbours and modifying their farm practices accordingly.
52. At this juncture some comments should be made about communication. The Wildlife Damage Control Guidelines issued by MAFF in 2002 and 2003 recognise the merit in a farmer communicating with neighbours. The message appears to be that the more information neighbours have, the better they can plan their lives around potentially disruptive orchard activities. It was clear that communication has been lacking here. This problem was exacerbated by the Judds retaining a lawyer and commencing legal action. The Webbers feel bullied and harassed for simply trying to be good farmers and earn a living. However, the Complainants do have a right to enjoy their property. Somehow both interests have to be respected and balanced.
53. To this end, the Panel endorses the suggestions made by Mr. Truscott and Mr. Low that to improve communication, the Webbers should post notices indicating when spraying will occur, advise neighbours when a helicopter will be used and blow a

warning whistle before using the orchard pistol. The Panel agrees that improved communication could assist in long term solutions to these issues.

ORDER

54. Section 6 of the *Act* provides that a Panel must dismiss a complaint if it is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, and must order a farmer to cease the practice that causes the odour, noise, dust 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 practice.
55. As mentioned in paragraphs 45-48, the only elements of the Respondents' farming practices which the evidence shows were not consistent with normal farm practice was the Respondents' use of their bird distress call in 2001 and spraying practices in 2001 and 2002. These practices have since been modified to be compliant with normal farm practices. Accordingly, the Panel orders the Respondents to continue with these modified practices in the future.
56. During the course of the hearing, Mr. Webber consented to employ certain practices to assist with communication, therefore the Panel orders:
 - a) the Respondents to blow a whistle or give some alternative form of warning before using the orchard pistol, the form of warning which will be used is to be communicated to the Complainants immediately;
 - b) the Respondents to give reasonable notice to the Complainants of any intention to use a helicopter in future; and
 - c) the Respondents to post a sign on the fence line between the adjoining properties notifying the Complainants of any spray application.
57. As set out in paragraph 49(h) above, the Panel recommends that the Respondents work with MAFF and Cherries Kokanee to consider the viability of a wind screen buffer. The Complainants should be consulted before any buffer is installed. If a buffer does prove feasible, the Complainants should consider cost sharing these improvements as they go beyond current "normal farm practice" in the Creston Valley.
58. Finally, the Panel acknowledges, and apologises to all parties for the time it has taken to consider and release this decision. Several extraordinary circumstances have arisen for the Provincial board over the past several months requiring us to address several complex, time-consuming and unexpected matters.

Dated at Victoria, British Columbia, this 17th day of November 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by)

Christine Elsaesser

Richard Bullock

Barbara Buchanan