

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 LAKE COUNTRY, BRITISH COLUMBIA

BETWEEN:

EUGENE LEVEQUE AND OTHERS

COMPLAINANTS

AND:

SALVATORE TANGARO

RESPONDENT

AND:

BC FRUIT GROWERS' ASSOCIATION
OKANAGAN KOOTENAY CHERRY GROWERS' ASSOCIATION

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine Elsaesser, Vice Chair
(Panel Chair)
Karen Webster, Member
Wayne Wickens, Member

For the Complainants

Eugene Leveque

For the Respondent

Salvatore Tangaro

For the Interveners

BC Fruit Growers' Association

Peter Waterman

Okanagan Kootenay Cherry Growers'
Association

David Stirling

Date of Hearing

February 18, 2004

Place of Hearing

Kelowna, 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 is dismissed. If the practice is not a normal farm practice, the Provincial board can order the farmer to cease or modify the practice.
2. By letter of June 23, 2003, Ms. Kim Becker wrote to the Provincial board advising that the Lacresta Road residents (the “Complainants”) wished to proceed to a hearing. They seek a determination as to whether the use of bird scare devices during the 2003 season by Salvatore Tangaro (the “Respondent”) in his cherry orchard located within the Agricultural Land Reserve (the “ALR”) was normal farm practice. Eugene Leveque acted as spokesperson for the Complainants at the hearing.
3. A representative for the Daniel Drive residences located on the hillcrest above a 20-acre orchard leased by the Respondent (and lying southeast of the Lacresta Road residences) also appeared at the hearing in support of the Complainants. They fear that they may have similar complaints once this orchard comes into production.
4. Mr. Tangaro appeared on his own behalf. He maintains that he is following the Wildlife Damage Control guidelines for bird scare devices established by the British Columbia Ministry of Agriculture, Food and Fisheries (“MAFF”) and as such is using normal farm practices.
5. The British Columbia Fruit Growers’ Association (the “BCFGA”) and the Okanagan Kootenay Cherry Growers’ Association (the “OKCGA”) applied for and were granted intervener status. Peter Waterman spoke on behalf of the BCFGA and David Stirling spoke on behalf of the OKCGA.
6. 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 Stan Combs, Land Use Agrologist, MAFF.

¹ Note that, effective November 1, 2003, the membership of the Farm Practices Board was fully merged with that of the British Columbia Marketing Board, 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.

7. Prior to the hearing, the Panel drove through the neighbourhood, including along Lacresta Road and Daniel Drive and past the orchards owned or leased by Mr. Tangaro.

ISSUE

8. Did the Respondent follow normal farm practice in his use of bird scare devices for controlling bird predation in his orchard during the 2003 season and if not, what remedy should be granted by the Provincial board?

FACTS

9. The Complainants live on Lacresta Road on a hillcrest above and to the southwest of the Respondent's orchard. Most of the Complainants have lived in the neighbourhood for many years amongst the many long time orchards. A municipal map prepared in 1988 shows that the configuration of residences and orchards remains the same today. However, it is apparent that the type of fruit grown in the orchards has changed over time. The Tangaro orchard, formerly an apple orchard, has only recently been planted in cherries.
10. Mr. Tangaro owns and leases a number of properties in the area. He owns the 22-acre cherry orchard at issue in this complaint and an 8-acre parcel of land at 1090 Camp Road which will also be converted to cherries. He leases one acre from a Mr. Rudy Weins at 10850 Okanagan Centre Road East and 20 acres from Jason Mehring. This last orchard, although it has been planted in cherries, is not yet in full production but is the source of concern to the Daniel Drive residences.
11. In February 2002, MAFF issued its Wildlife Damage Control guidelines (the "2002 Guidelines"). These Guidelines made the following recommendations for the use of audible bird scare devices (such as propane cannons and bird distress calls):

Farmers:

- should operate devices only between 6:00 a.m. ... and 8:00 p.m. local time or dawn to dusk, whichever is of lesser duration;
- should operate no more than one device per two hectares of cropland at any one time;
- should try to alternate or relocate devices being used on a farm operation at least every 4 days;
- should maintain devices, including timing mechanisms, to ensure they operate properly and not outside the recommended hours of operation;
- should use devices only as part of a wildlife predation management plan;
- should legibly mark devices with the operator's name and 24 hour phone number;
- should establish a local contact person for each farm where the owner/operator does not live within a reasonable distance of the farm where devices are used; and
- may use devices for the protection of crops.

12. For the use of Category B devices such as bird distress calls (but not propane cannons), the 2002 Guidelines recommend:

Farmers:

- should maintain a 100 meter separation distance between a device and a neighbouring residence. Where written permission from the owner of a neighbouring residence is obtained, the separation distance can be waived; and
- should maintain a 200 meter separation distance between a device and an urban-residential/ALR edge.

13. On August 14, 2002, Mr. Leveque wrote to the Lake Country Bylaw Enforcement Officer, John Mellor requesting that Mr. Tangaro be required to mitigate the impact of the noise from his bird scare devices through volume control and placement.
14. On November 18, 2002, Ms. Becker complained to MAFF about the Respondent's use of bird scare devices. On December 13, 2002, Mr. Combs of MAFF spoke by phone with Mr. Tangaro. In his follow-up letter to the parties dated December 18, 2002, Mr. Combs advised that Mr. Tangaro had agreed to use bird control devices in the 2003 season as follows:
 1. Noisemakers will be used only between the hours of 06:00 and 20:00.
 2. His "Bird Guard" distress callers will sound for 1 minute at random intervals of 10-15 minutes.
 3. When propane cannons are used, they will discharge no more frequently than every 5 minutes.
 4. Fixed noisemakers will be moved every 4 days to another location in the orchard.
 5. Fixed noisemakers will be located at least 200 metres from the boundaries of the Agricultural Land Reserve with urban/residential areas, and 100 metres from residences outside his orchard.
 6. There will be no more than 1 fixed noisemaker per 2 hectares of cherries.
15. In Mr. Combs' opinion, these undertakings were consistent with the 2002 Guidelines in place when the complaint was first initiated. However, in April 2003 after consultation with the BCFGA, the OKCGA and the British Columbia Independent Grapegrowers' Association on issues particular to the dry interior valleys, this publication was revised (the "2003 Interior Guidelines"). The significant changes are to limit the time of use of devices from one half hour before sunrise and 7:00PM local time or dusk whichever is of lesser duration and to restrict use to between May 15 and November 15. The setback distances found in the 2002 Guidelines were removed and replaced with the more general guideline that farmers locate devices in a manner to minimise the impact on surrounding residences while maintaining bird control effectiveness and to relocate "on a frequent basis to maintain effectiveness".
16. On March 14, 2003, Sharon Leveque wrote to the Lake Country Detachment of the RCMP to complain about a number of incidents involving Mr. Tangaro. On June 8, 2003, the Complainants met with Constable Holly of the RCMP and Bylaw Enforcement Officer Mellor. However, both officials felt that they did not have the authority to enforce the undertakings in Mr. Combs' letter.

17. On June 23, 2003, Ms. Becker filed the complaint with the Provincial board indicating the Complainants desire to proceed to hearing. The complaint was heard on February 18, 2004.

SUBMISSION OF THE COMPLAINANTS

18. The Complainants are long time residents of the area. They have long enjoyed a peaceful and quiet lifestyle amid orchards. However, since Mr. Tangaro has inserted his cherry orchard into their neighbourhood, their lifestyles have drastically changed. Unlike the former orchardists, who showed a concern for their neighbours, the Complainants allege that Mr. Tangaro does not care and shows no consideration. He runs his bird scare devices continuously, at a loud volume, from early morning until the evening, from the end of June until late August or September. The noise is unbearable, going on and on. The Complainants argue that in this urban/rural interface “a noise assault like this cannot be considered normal farm practice for this orchard”.
19. The Complainants observe that MAFF has recognised the potential for problems in urban/rural interfaces and has developed Guidelines for the use of bird scare devices. These Guidelines suggest that farmers communicate their integrated pest management plan to promote understanding between a farm and its neighbours, and also recommend using different devices in a variety of ways so that birds do not acclimatise to the tactics. The Complainants maintain that Mr. Tangaro has done neither. They have not seen an integrated pest management plan and the continuous noise for 15 hours a day from the same location indicates that Mr. Tangaro does not vary his approach. Mr. Leveque does concede that he has never been into Mr. Tangaro’s orchard and has never approached him with his concerns.
20. Looking at the 2002 season, Mr. Tangaro used bird scare devices from 4:30AM to 10:30PM. The noise disturbance resulted in some Complainants wearing earplugs when working in their gardens or sleeping. As a result of this noise, the neighbours made their August 2002 complaint to Bylaw Enforcement Officer Mellor. However, Mr. Mellor was of the view that because of the *Act* there was little he could do.
21. Ms. Becker’s discussions with Mr. Combs resulted in his letter of December 2002 where Mr. Tangaro agreed to six undertakings for the operation of the bird scare devices in the 2003 season. The Complainants argue that Mr. Tangaro has not lived up to his agreement. Mr. Tangaro began operating bird scare devices on June 18, 2003. Again the noise was “loud, high-pitched, obnoxious, penetrating”, and it “went on and on and on”. Mr. Leveque maintains that the bird scare devices started at approximately 5:30AM (not 6:00AM or after) and would often be left on after 8:00PM. However, as he “did not keep a daily log”, Mr. Leveque is unsure of the dates when this happened.

22. The Complainants felt that their only option was to file a complaint with the Provincial board. On July 28, 2003, Jim Collins, a staff member of the Provincial board and Gordon Taylor, a contractor for the Provincial board, met with the Complainants and, afterwards, with Mr. Tangaro. The Complainants allege that on this day, Mr. Tangaro turned down the volume of his bird scare devices so that Mr. Collins and Mr. Taylor did not get an accurate impression of how loud and obnoxious the bird scare devices actually were.
23. The Complainants recognise that Mr. Tangaro has invested in new agricultural production and should be congratulated. He works long, hard hours. While it is not their intention to tell Mr. Tangaro how to operate his orchard or what to grow, his method of operation has filled the Complainants with “suspicion and resentment” and his operation is considered the “farm from hell”. The Complainants have lost their previously quiet lifestyle and they have been driven inside during the summer. The Beckers moved because of the noise.
24. The Complainants argue that even if Mr. Tangaro complies with the undertakings in the December 2002 letter, they will not return to their previous lifestyle but compliance would make living near the orchard tolerable. The Complainants are concerned about the ability to sell their properties as realtors have advised of the responsibility to disclose the noise problem to potential purchasers.
25. The Complainants are afraid of Mr. Tangaro. They suspect that since their complaint, he has retaliated by directing the bird scare device speakers at their neighbourhood with the volume at maximum. The Complainants believe their suspicions were confirmed when Mr. Tangaro verbally assaulted another neighbour because she signed a petition protesting his use of bird scare devices.
26. The Complainants understand why the *Act* is required, but argue that it gives farmers privileges that go beyond the rights of ordinary citizens. A complaint about a noisy house party will result in police action. But noise from one house party is tame in comparison to endless bird distress calls. Privileges can be lost when they are abused. The Complainants argue that the noise assault on their neighbourhood is in every sense an abuse of the privilege granted under the *Act*.
27. By way of remedy, Mr. Leveque asked the Panel to consider ordering the installation of a buffer which would not destroy their view. He also urged the Panel to enforce the six undertakings in Mr. Combs’ letter and also consider additional remedies such as:
 - a) definitive guidelines on the use of propane cannons;
 - b) guidelines confining orchard pistol use to the orchard;
 - c) “win/win” solutions to the noise issue perhaps involving neighbours installing bird traps on their properties;
 - d) disclosure of the Respondent’s wildlife management plan;

- e) development of a communication plan so that neighbours know what is going on in the orchard.
28. Finally, the Complainants want the Panel to be aware that Mr. Tangaro is developing a second cherry orchard directly below the Daniel Drive neighbourhood. If Mr. Tangaro operates that orchard in a similar fashion, the Complainants will be bombarded with loud, high pitched, obnoxious, penetrating noise from two directions.
29. Barbara Kempers, spoke on behalf of her mother and the other residents of Daniel Drive. As the Daniel Drive residents are aware that a decision reached by the Panel in this complaint may ultimately impact them, they want to be pro-active and attempt to reach an agreement and understanding with Mr. Tangaro prior to installation of bird scare devices in the orchard below them. The Daniel Drive residents recognise that increasingly farms and residential areas co-exist in the Okanagan but they want to ensure that Mr. Tangaro will respect their neighbourhood while at the same time being able to have a productive farm.

SUBMISSION OF THE RESPONDENT

30. Mr. Tangaro spoke on his own behalf. He has been growing sweet cherries such as Rainier, Lapin, Sweetheart and Staccato since 1999. Unfortunately, these types of cherries attract birds in droves and as such orchardists must use bird scare devices to protect their crops. Mr. Tangaro exports all of his cherries to Europe and Asia, using his own packing plant and the fruit must be perfect. Cull rates due to bird damage vary across his orchard – 25 to 30% in the top corner closest to the trees and to the Complainant's residences but averaging about 5% overall.
31. Contrary to what Mr. Leveque has said, Mr Tangaro maintains that he complies with the 2003 Interior Guidelines. While it is not always possible, he does try to please his neighbours. However, as a farmer he must be allowed to make decisions regarding the operation of his orchard and the viability of his farm. He does not want to be dictated to by his neighbours.
32. In 1999, Mr. Tangaro's first crop of cherries was totally destroyed due to bird predation. In 2000, his one bird scare device was stolen mid-season resulting in a small crop. In 2001, he operated bird scare devices from sunup to sundown with no complaints. In 2002, the complaints began after the crop was harvested. After speaking with Mr. Combs in November 2002, Mr. Tangaro acknowledged that he was not aware of the 2002 Guidelines but followed the practices of his neighbours – turning the devices on at sunup and off at sundown. Following Mr. Combs December 2002 letter, Mr. Tangaro agreed to try the six undertakings in the 2003 season. With respect to these undertakings, Mr Tangaro reports:
- a) Noisemakers will be used between the hours of 06:00 and 20:00.
 - This guideline was followed.

- b) "Bird Guard" distress callers will sound for 1 minute at random intervals of 10 – 15 minutes.
 - The long setting is used so that the device sounds randomly for one minute every 5 – 10 minutes. As the devices emit random calls, the calls cannot be set to sound at the same time. Using the extra long setting of 10 – 30 minutes was totally ineffective.
 - c) When propane cannons are used they will discharge no more frequently than every 5 minutes.
 - Mr. Tangaro used the cannon sporadically, directed into the orchard. When in use, it fires maybe three times an hour.
 - d) Fixed noisemakers will be moved every four days to another location in the orchard.
 - Two of the bird scare devices are fixed as they are far enough away from the residences. The two different locations tried for the third device were not as effective as the location 100 feet from the house in the orchard and 100 feet from the edge of the property. Had it been placed where it would be most effective – closest to the power lines, trees and the Complainants (without a setback as per the 2003 Guidelines) – the response would have been worse. Turning off two of the speakers, as suggested by Mr. Taylor, was ineffective.
 - e) Fixed noisemakers will be located at least 200 metres from the boundaries of the ALR with urban/residential areas, and 100 metres from residences outside his orchard.
 - This guideline was met.
 - f) There will be no more than 1 fixed noisemaker per two hectares of cherries.
 - For 18 acres of cherries and 3 acres of apples, there are three devices.²
33. Bird control in the cherry orchard begins in June and ends when the crop is finished approximately eight weeks later. In 2003, the bird scare devices were shut off on August 18. Mr. Tangaro advises that the heaviest bird damage occurs before 6:00AM. Currently, Mr. Tangaro uses three bird scare devices, of two different types, located randomly in the orchard in locations where the most damage occurs. Both types emit the same decibel level, but the one that uses two different types of bird calls may be more irritating so it is placed furthest away from the residences. Each bird scare device has four directional speakers placed above the tree canopy.
34. Mr. Tangaro states that he is very familiar with the noise from the bird scare devices as he lives in the orchard for the four weeks of harvest. He is not the only grower in the area using bird scare devices and on a number of occasions after turning his devices off before 8:00PM, he has heard devices going off in other orchards. As for the allegation that he leaves his devices on after 8:00PM, Mr. Tangaro says that this happened once on July 17, 2003 when the device was not shut off until 9:05PM. On that occasion, he was delayed spraying in another

² Given that there are approximately 2.47 acres to a hectare, Mr. Tangaro is under the recommended number of devices per hectare set out in both Guidelines.

field and as he was concerned, he notified Mr. Combs. In his evidence, Mr. Combs recalled this telephone call and expressed surprise that Mr. Tangaro had been so conscientious.

35. Mr. Tangaro denies turning down the volume of the bird scare device when Mr. Collins and Mr. Taylor from the Provincial board visited his farm as alleged by Mr. Leveque. He points to Mr. Collins' letter of October 22, 2003 indicating that upon inspection the volume control on the devices were set at the highest level.
36. Mr. Tangaro periodically uses an orchard pistol. At all times, Mr. Tangaro fires this pistol into the orchard. He states that he would never nor has he ever fired it at anyone as he was accused of doing by Mrs. Leveque in her March 14, 2003 letter to the RCMP. Mr. Tangaro has experimented with a number of alternative bird control methods and found them largely ineffective. Bird traps for starlings caught only four birds over the course of the season as other food sources are readily available in the orchard. However, he expressed a willingness to try traps again. Netting and birds of prey are cost prohibitive and are potentially harmful to pets and migratory birds.
37. Mr. Tangaro feels that part of the reason why his farm is subject to complaints while others in the area are not may relate to his aggressive personality. However, he is not deranged as suggested by Mrs. Leveque in her letter to the RCMP. Mr. Tangaro states that none of the Complainants have ever approached him. Had they, he could have addressed some of their concerns. He could have shown Mr. Leveque the volume control on his bird scare device and how he had moved the device further into the orchard. He feels that more communication between neighbours would be helpful. Mr. Tangaro says he is "a simple farmer", with the right to grow the best crop possible in accordance with the Guidelines.
38. Mr. Tangaro has never had any complaints from the neighbours that reside closest to and directly above his orchard – Donna Culshaw, Dr. Derek Townsend and John Madsen. Ms. Culshaw attended the hearing in support of Mr. Tangaro. She was born and raised in a farming area and has lived on acreages and farms all of her married life. Her current home is located in the centre of the 3.89-acre property on a comparable level to the neighbours. She is on the property continuously during cherry harvest yet has no problem with the bird distress calls; they do not affect her quality of life. She hears the devices but does not pay any attention to them. The Culshaws have cleared out a number of pine trees at the bottom of the property nearest Mr. Tangaro's orchard and planted small trees that offer no buffer effect. As such, she does not see any reason why the noise on her property would be any different than on the Complainants' properties. One bird scare device is located approximately the same distance from her home as from Mr. Leveque's home. In her opinion, Mr. Tangaro is not malicious and has not tried to cause strife in the neighbourhood.

39. Andrew Gambell, an orchardist, also gave evidence on behalf of Mr. Tangaro. He has two orchards, one located directly across Okanagan Centre Road from Mr. Tangaro's orchard and the other located southwest of the Complainants on Bond Road. The Okanagan Centre Road orchard has cherry and apple trees and a fruit stand. Mr. Gambell uses an orchard pistol for bird control in this orchard but expects to install some type of bird scare device as birds devoured the crop from 15 to 20 trees in 2003. Mr. Gambell works in the fruit stand during the cherry harvest season, and although he can hear Mr. Tangaro's bird scare devices, he pays no attention to them. Some visitors mistake the noise for real birds chirping. The Bond Road orchard with Saskatoon bushes has a fixed bird scare device; similar to Mr. Tangaro's except with a single speaker and a solar setting. Mr. Gambell lives on this orchard and hears bird scare devices but, as there are several nearby in a grape orchard, he is unsure if he hears Mr. Tangaro's devices.
40. Jason Mehring owns the orchard below and directly east of the Daniel Drive residents and operates it in partnership with Mr. Tangaro. When Mr. Mehring purchased the orchard about two and a half years ago, it was planted in old apple trees. Since then, Mr. Tangaro has replanted Lapin and Sweetheart cherries. A 25-foot corridor was left on the edge of the property, closest to Daniel Drive, to allay any concerns about over spray. Mr. Mehring considered planting a poplar tree buffer in that area but his neighbours prefer their view. For the past two years, one bird scare device has operated from 6:00AM until evening. Mr. Mehring lives on the orchard so he hears the bird scare device; however, he got used to it just as he got used to the planes flying over head. His real estate agent made him aware that he was moving into a farming community and to expect farm noises.
41. Mr. Mehring and Mr. Tangaro have discussed ways to minimise the noise for the community. They have tried setting the volume on the bird scare device lower and increasing the time span between sounds but this resulted in immediate bird damage. They have discussed alternative methods of bird control and will try using a bird of prey. Netting would be cost-prohibitive because of the slope and different grades in the orchard. They are willing to try different techniques, but the only proven techniques now are the bird scare devices and propane cannons.
42. Mr. Mehring and Mr. Tangaro plan to get involved with the community and provide information about the operation of the orchard in a variety of ways, including a web site, installing a weather station, use of lights to notify neighbours about when and what they are spraying, and publishing a newsletter informing the community about what is happening on the orchard.
43. Mr. Tangaro tendered letters from two other residents in the area. Rudy Wiens lives on two acres at 10850 Okanagan Centre Road East, about two miles from the Tangaro orchard. He leases one acre to Mr. Tangaro for cherry production. He has a bird scare device about 70 feet from his residence. Mr. Wiens describes the noise as a "slight inconvenience" and "a small price to pay for living in a rural setting". Walter Frank is a tree fruit grower living on a 10-acre property southwest of the

Tangaro orchard. He states that he has confused the recorded distress calls with natural bird chatter and has “no objections”. Mr. Frank also uses a propane cannon located about 200 feet from his residence, firing two – four times per hour, and coloured tape to deal with bird predation.

44. Mr. Tangaro also mentioned the nearby Eden cherry orchard. The Edens choose not to use any bird scare devices to protect their old cherry trees and as a result massive numbers of birds roost there. These birds then move into Mr. Tangaro’s orchard and feed on his cherries undermining his efforts to protect his cherries. A better result could be achieved if all farmers actively tried to deter birds so that the birds leave the neighbourhood entirely.
45. Mr. Tangaro argues that since 1991, the provincial government has encouraged orchardists to replant to be less reliant on government subsidies. He has done this and expects to have all his orchards replanted with cherries by 2005. He has not tried to remove his land from the ALR and has made sound farming decisions to produce a crop that he and the District of Lake Country can be proud of. He purchased a packing plant so that he can be self-sufficient and not rely on government handouts. Mr. Tangaro states that he adheres to the Guidelines; he is a good farmer and a good member of the community. He does not believe he is breaking any rules but is sorry the noise of the bird scare devices causes so much trouble for the Complainants.

SUBMISSIONS OF THE INTERVENERS

a) BCFG A

46. Peter Waterman spoke on behalf of the BCFG A, an organisation that represents 620 commercial tree fruit growers in the Okanagan with a crop value of \$130,000,000. For the past 14 years Mr. Waterman has been producing cherries and working as a consultant in spray technology, nurseries, cherry and apple production. Formerly he worked with MAFF for 22 years, primarily as a horticultural advisor, and as a field representative for a packinghouse in Oliver.
47. Over the past several years, government programs encouraged growers to replant old orchards into higher value, more viable crops, such as sweet cherries. Cherries are high-risk as they are susceptible to damage from various sources resulting in cullage. Cullage reduces margins considerably and results in severe financial hardship for producers and economic loss to the industry. When cullage due to wind, hail, rain, brown rot or birds reaches 30 – 40%, a grower may decide not to pick at all because removing culls requires a tremendous effort. Sprayed juice and bird faeces can result in otherwise unharmed cherries being culled. Currently the returns for cherry production are good. However, as the market becomes saturated with cherries from all over the world, it becomes tougher and tougher to maintain a position in the world market. To be successful, cherry producers must grow

extremely high quality, large cherries.

48. The BCFGA supports the 2003 Interior Guidelines established for fruit farms in the interior of BC. They recognise that while auditory and visual predatory bird deterrents are part of normal farm practice, they can have a negative impact on neighbours. For their part, the BCFGA encourages producers to co-operate in minimising negative impacts while protecting their crops, encouraging compromise and better communication on both sides.
49. The BCFGA recognises the need to reduce the conflict over what is normal farm practice for orchards and to find a solution to bird damage. Generally neither residents nor farmers are to blame for these conflicts as they often arise from poor planning and development decisions. To address these issues, the BCFGA participated in the development of the 2003 Interior Guidelines. They also hope to establish a peer advisory mediation service approved by regional districts. They have implemented a pilot project to test starling traps and are also considering other solutions involving deterring birds from entering orchards with noise and visual scare techniques. Netting may work well in limited circumstances, where trees or vines are less than 15 feet high or where there is little if any slope to the land. However, it is extremely costly.
50. The BCFGA encourages its growers to go “high-tech, high density”. Mr. Waterman has been to Mr. Tangaro’s farm and is impressed with the condition of his well-structured trees and his good sized, high quality, award-winning cherries. As a cherry producer himself, Mr. Waterman is aware that harvest is a very intense, stressful period trying to protect the cherries from bird damage long enough to ripen and be picked.

b) OKCGA

51. David Stirling spoke on behalf of the OKCGA, an organisation representing 90 – 100 cherry growers throughout the Okanagan and Creston areas. The OKCGA sponsors cherry research at the Summerland Research Station and serves as a political lobby group on behalf of cherry growers sharing its views on issues such as the urban/rural interface and possible solutions.
52. Mr. Stirling has a horticulture degree and has been farming since 1989. He owns, leases and manages a total of 60 acres. Like Mr. Tangaro, he is replanting from apples to cherries. Cherry production is on the increase in BC and in Washington State. Unfortunately birds love cherries as much as people do, feeding early in the morning and late in the evening. There is “no quick fix” or easy way to deter them. Mr. Stirling has tried a number of techniques, including mylar tape, electronic bird scare devices, propane cannons, traps, plastic hawk kites, owl decoys, shotguns, hand-held screamers and bangers similar to an orchard pistol, kids playing or riding motorcycles, and scarecrows. A neighbour has tried strobe lights and Mr. Stirling is considering trying model planes and falconry which have had some success in

blueberry crops in the Lower Mainland. None of the above bird deterrents is a solution in itself but must be used in varied combinations to be effective. As for netting, it is not a proven practice and it is very expensive. Cherry trees are about 16 feet high and often grown on hillsides, as in both the Stirling and Tangaro orchards, making netting difficult.

53. Mr. Stirling would like the Panel to consider the “big picture” rather than a specific problem of neighbours unhappy with the new sound of their neighbourhood and a farmer trying to protect his crop. Looking at the map of the area, these types of urban/rural interface issues will only increase.

EVIDENCE OF A KNOWLEDGEABLE PERSON

54. Stan Combs is a Land Use Agrologist with MAFF. He works in the Strengthening Farming Program, working with local governments to improve land use planning to avoid urban/rural conflicts and dealing with complaints in an attempt to find solutions without recourse to hearings.
55. Bird scare devices are a major source of conflict between farmers and neighbours in the Okanagan. As the fruit season has lengthened, there are more complaints. Previously June was the cherry season, now it has extended into August. As well, sweet varieties of apples such as Fujis and Galas now attract birds. Wine grape season extends into October and grapes for ice wine are picked in February.
56. The Strengthening Farming Program has two objectives, to give farmers freedom to choose the type of crop and method of production in the ALR while at the same time minimising urban/rural conflicts by encouraging good farming practices. Several factors complicate urban/rural conflicts. Local governments, in the past, looked on the ALR as future urban land and allowed subdivisions to abut farmland. While nothing can be done about the past, a large part of Mr. Combs’ current role is working with local governments to improve planning to avoid such conflicts. Secondly, the farming industry responds to changing market demands and production techniques. A person who purchased a residence next to an old apple orchard requiring limited bird control or spraying, may find themselves suddenly next to a cherry orchard where spraying occurs weekly and bird scare devices are in use throughout the summer. Thirdly, people may purchase a residence adjacent to a farm without making themselves aware of the noise associated with the type of production on the land.
57. Mr. Combs became involved with the Respondent after receiving a complaint from Ms. Becker on November 18, 2002. Mr. Combs contacted Bylaw Enforcement Officer Mellor who indicated there was not a lot the District could do in regards to this issue. Mr. Combs then contacted Mr. Tangaro to review the complaint and the 2002 Guidelines. Mr. Tangaro agreed to follow the six undertakings outlined in Mr. Combs’s December 18, 2002 letter.

58. On April 4, 2003, Mr. Combs and RCMP Constable Holly, from the Lake Country detachment, visited Mr. Tangaro's orchard. On July 10, 2003 Mr. Combs visited the orchard to hear the "noisemakers" and tour the orchard with Mr. Tangaro. Mr. Combs describes Mr. Tangaro as very co-operative on his two visits. Mr. Combs noted the location of the bird scare devices and the propane cannon. He did not find the bird scare devices annoying and in fact, did not realise they were turned on. The propane cannon only went off every 30 minutes. Mr. Combs concedes that he is not a specialist in bird control and as such makes no comment on the practices used on Mr. Tangaro's orchard as compared to others in the area. However, he was satisfied that Mr. Tangaro was following all the undertakings in his letter except for #5 dealing with the placement of bird scare devices.
59. On this point, Mr. Combs points out that the 2003 Interior Guidelines are more flexible, allowing a farmer to locate the device in a manner to minimise impact on surrounding residences while still maintaining bird control effectiveness. The 2003 Interior Guidelines also limit hours of operation to one-half hour before sunrise and 7:00PM or dusk, whichever is lesser and only between May 15 and November 15 (2002 Guidelines – 6:00AM to 8:00PM).

DECISION

60. 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, involving both the local police detachment and the District by-law department, and the proximity of the Complainants to the Respondent's 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 Respondent's use of bird scare devices result from normal farm practice.
61. 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).

62. In determining what is meant by "normal farm practice", the inquiry is fact specific and site specific. 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 will involve a contextual analysis where industry practices are examined and weighed with other factors such as the proximity and impact on neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, the size and type of the operation subject to complaint, the nature of the disturbance and the relative timing of the establishment of the farming operation and the occupancy of those who complain.

63. In this case, the Complainants' evidence regarding industry standards as it factors into the test of "normal farm practice" was limited. There were however, allegations that the Respondent operated his bird scare devices outside the times set in either the 2002 or 2003 Guidelines or the December 2002 undertakings. However, apart from the one date in which Mr. Tangaro conceded he was late in turning off his device, the Complainants did not satisfy the Panel of breaches as they were unable to provide dates or times of alleged infractions.
64. The Panel had the benefit of hearing from Mr. Waterman and Mr. Stirling. Both gentlemen were of the opinion that Mr. Tangaro was a good orchardist who produced high quality cherries. The bird scare tactics employed by Mr. Tangaro were similar to those employed by these gentlemen on their respective orchards. Both gentlemen appeared to be very concerned that this Panel not order netting as a potential remedy to the bird predation problem as was done in an earlier complaint: *Wright v. Lubchynski*, August 12, 2002. Both gentlemen also recognised the importance that communication plays in being a good neighbour.
65. The Panel also heard from Mr. Combs, Land Use Agrologist with MAFF. Although Mr. Combs was careful to point out that he was not an expert in bird predation, he felt that Mr. Tangaro was a good orchardist operating within the scope of the 2003 Interior Guidelines. In his visits to the orchard, he did not find the use of bird distress calls annoying and in fact was unaware the devices were on until so advised. In his opinion, propane cannons, which Mr. Tangaro uses only selectively, are much more invasive.
66. With respect to impact and the nature of the disturbance, not all of Mr. Tangaro's neighbours take issue with his use of bird scare devices. His three closest neighbours have not complained. One of these neighbours, Ms. Culshaw, appeared at the hearing in support of Mr. Tangaro. Not surprisingly, the Panel also heard from orchardist neighbours who use bird scare devices and support Mr. Tangaro's right to do so.
67. In general, the use of bird scare devices such as electronic bird distress calls and propane cannons to combat bird predation of an agricultural crop is a common industry practice. However, as was recognised by the Provincial board in the *Lubchynski* decision, *supra*, whether it will be a 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”.

68. Looking at the neighbourhood out of which this complaint arises, there are many long time orchards located within the ALR. These orchards are slowly being converted from old fashioned apples to higher value cherry and dwarf apple varieties. The Complainants reside in a residential neighbourhood which was inserted into this orchard area approximately thirty years ago. As long as the orchards were the old apple varieties, the proximity of residences to the orchards did not pose a problem. However, as orchards are converted to cherries, bird scare devices are more prevalent in the neighbourhood. The fact that this conversion has taken place in the context of an established neighbourhood is a factor we have taken into account.
69. It should be pointed out at the same time that the noise complained of here is not the same type of disturbance complained of in *Lubchynski*. The noise here is not the loud blasts from a propane cannon; rather the noise is what is termed a bird distress call intended to mimic the sound of an injured bird. While some people find this noise less invasive, it is clear that the Complainants do not. We in no way minimise their evidence regarding impact, but we do find that, on the evidence as a whole, the impact is not as serious as the impacts described from the propane cannon under consideration by the Provincial board in the *Lubchynski* decision.
70. Having weighed all the relevant circumstances, the Panel finds that for the Respondent’s orchard, the “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances” to follow are the 2003 Interior Guidelines which were revised with special consideration for the narrow, dry Okanagan Valley. It is well recognised that these hours of operation are a compromise which are designed to show consideration for neighbours. The farmer’s crops are unprotected for a period of time, in order that the neighbour has a period of relief from distress calls. Given the geography and proximity of neighbours to the Respondent’s orchard, the Panel accepts that “normal farm practice” for this farm is compliance with the hours of operation found in the 2003 Interior Guidelines. The Complainants have not demonstrated sufficient circumstances warranting a deviation from the hours of operation or the other practices set out in these Guidelines. Indeed the Complainants agreed that if Mr. Tangaro met the Guidelines, their lives would be more tolerable.
71. The 2003 Interior Guidelines also recognise the merit in a farmer developing an integrated predation management plan and communicating that plan with neighbours. The more information the neighbours are given the more they will be able to plan their lives around potentially disruptive orchard activities. It was clear from the submissions of all parties that communication has been lacking. The Complainants never approached Mr. Tangaro with their concerns but rather took their concerns to the municipal by-law department and to the RCMP. Mr. Tangaro’s hostile reaction to being reported to the authorities is

understandable. He feels bullied and harassed for simply trying to be a good farmer. However, Mr. Tangaro must appreciate that he earns his livelihood where his neighbours live and sleep. Somehow both interests have to be respected.

72. To this end, the Panel endorses the suggestions made by Mr. Mehring to improve communication with the neighbourhood, such as web sites, neighbourhood publications and on-farm signals. The Panel agrees that any methods which improve communication will assist in long term solutions. The entire neighbourhood would benefit from knowing when spraying is occurring, what types of sprays are being used and what predation management program will be employed. If Mr. Tangaro chooses to try birds of prey, neighbours would appreciate notice of this fact so that they could take appropriate steps.
73. Accordingly the Panel finds that it is “normal farm practice” for the Respondent to:
 - a) Determine through the use of a predation management plan when a bird scare device is required for the protection of crops and to use that device only when a problem is evident;
 - b) To operate bird scare devices between one half hour before sunrise and 7:00PM local time or dusk, whichever is of lesser duration;
 - c) To use no more than one device per two hectares of cropland at any one time;
 - d) To locate the device in a manner to minimise the impact on surrounding residences while maintaining bird control effectiveness;
 - e) Operate devices on an intermittent basis so that sound is not continuous.
74. One issue which arose during the hearing was whether a buffer or screen might assist in containing the noise on the orchard. As there was no evidence offered as to whether this is “normal farm practice” in the Okanagan or elsewhere, the Panel cannot direct that such a buffer or screen be installed. However, the Panel recommends that the Respondent work with the BCFGA and the OKCGA to consider the viability of this option. Given the potential for a buffer to interfere with the neighbours’ views, 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”.

ORDER

75. 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.

76. The only element of the Respondent's bird scaring practices which the evidence shows was not consistent with normal farm practice as described in paragraph 73 above is that the Respondent has not prepared a proper predation management plan to be communicated to neighbours. The Panel therefore orders the Respondent to modify his practices in future by preparing such a plan and communicating it to the Complainants within 30 days from the issuance of this decision.
77. We issue no order with respect to the other elements in paragraph 73 because it has not been demonstrated that the Respondent breached them apart from the one isolated incident discussed in paragraph 34. This having been said, we wish to make clear to the farmer that the elements in paragraph 73 are not discretionary. They are, for him, normal farm practice. This Board expects his full and ongoing compliance with them.

Dated at Victoria, British Columbia, this 11th day of June 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by)

Christine Elsaesser, Vice Chair
Karen Webster, Member
Wayne Wickens, Member