

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 COMPOSTING OPERATION
IN CENTRAL SAANICH, BRITISH COLUMBIA

BETWEEN:

ROGER PENIUK

COMPLAINANT

AND:

WILMER & VERNON MICHELL
DOING BUSINESS AS
MICHELL FARMS

RESPONDENTS

DECISION

APPEARANCES:

For the Farm Practices Board	Christine Elsaesser, Vice Chair (Panel Chair) Karen Webster, Member Hamish Bruce, Member
For the Complainant	Roger Peniuk
For the Respondent	Terry Michell, Operator
Date of Hearing	October 8, 2003
Place of Hearing	Central Saanich, 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 Provincial board¹ for a determination as to whether the disturbance results from a normal farm practice. 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 is empowered to order the farmer to cease or modify the practice.
2. By letter dated November 7, 2002, Roger Peniuk (the “Complainant”) applied to the Provincial board for relief from odour, noise, vibration and the general unsightliness of a composting operation located on Lochside Drive in the District of Central Saanich (“Central Saanich”).
3. The Michells (the “Respondents”) own the composting operation. Mr. Terry Michell runs the operation and represented the Respondents in these proceedings. They take the position that they are entitled to operate a composting operation on this site and that in so doing they are following normal and accepted farm practices.
4. This matter was scheduled to proceed to hearing on October 8, 2003. On September 24, 2003, Mr. Peniuk contacted Provincial board staff and advised that he did not want to answer questions from or ask questions of Mr. Michell at the hearing. On October 1, 2003, Mr. Peniuk further advised staff that he did not wish to be in the same room as Mr. Michell or any member of the Michell family. By letter from Jim Collins, then Manager, Dispute Resolution Services, dated October 6, 2003, Mr. Peniuk was advised:

... You are under no obligation to answer or ask questions, however this may have a negative impact on your case.

With respect to the first point, I repeat my earlier advice. Both parties must be able to hear all the evidence as part of a fair hearing. That is the process followed by the Farm Practices Board.

I must also advise you that a failure on your part to appear and participate in the hearing may result in your complaint being dismissed summarily by the Panel. I strongly encourage you to attend the hearing and present all the argument and evidence you can in support of your complaint.

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 (“FIRB”): see *Miscellaneous Statutes Amendment Act*, SBC 2003 c. 7 and BC Reg. 350/2003. For legal reasons connected to the complex system of federal-provincial inter-delegations and agreements present in regulated marketing, both boards will also continue to be known by the BCMB’s other longstanding legal name “the Provincial board”. This single board continues to administer the *Natural Products Marketing (BC) Act*, the *Agricultural Produce Grading Act* and the *Farm Practices Protection (Right to Farm) Act*. It is noted as well that the November 1, 2003 amendments effected other amendments to the *Act*, but those amendments do not relate to the points on issue in this complaint.

5. Prior to commencement of the hearing on October 8, 2003, the three Panel members (Ms. Elsaesser, Ms. Webster and Mr. Bruce) and Mr. Collins attended first at the residence of Mr. Peniuk located at 6775 Pat Bay Highway and then at the Michell composting operation on Lochside Drive. At Mr. Peniuk's request, Mr. Michell was not present when the Panel toured the Peniuk property. Mr. Peniuk also declined to attend the site visit to the composting operation. During the course of our visit, Mr. Peniuk reiterated his earlier position that he had no intention of attending at the hearing as long as any member of the Michell family was present. The Panel Chair confirmed that Mr. Michell had a right to hear any allegations of improper farming practices, to cross-examine any witnesses and then to respond. The Panel Chair also advised Mr. Peniuk that an adverse inference could be drawn if he refused to attend at the hearing and present any evidence to support his complaint. Given that the Panel makes its decision based on the evidence received during the hearing, Mr. Peniuk was advised that if he refused to attend, the Panel would only have the Respondent's evidence upon which to render its decision. Mr. Peniuk acknowledged that he understood but still refused to attend the hearing.
6. The Panel and Mr. Collins attended the Michell's composting operation with Mr. Michell. The Panel Chair advised Mr. Michell that Mr. Peniuk would not be attending the hearing but in the interest of fairness and finality, the hearing would proceed and the Panel would render a decision as to whether the practices complained of fell within the definition of "normal farm practice". Mr. Michell consented to this procedure. The Panel also advised Mr. Michell, that any statements or allegations made by Mr. Peniuk while the Panel was at his residence would be put to Mr. Michell during the course of the hearing in order to allow him an opportunity to respond.
7. Since the hearing of this complaint and as of December 1, 2003, the appointment of Panel Member Hamish Bruce has expired. However, s. 7(4) of the *Act* authorises the remaining two Panel members to "exercise and perform all the jurisdiction, powers and duties of the panel".

ISSUE

8. During the pre-hearing proceedings, the following issue was identified for the hearing of this complaint:
 - a) is it normal farm practice for this type of composting operation to be sited in such close proximity to a neighbour?
9. Mr. Peniuk's complaint includes noise and vibration from equipment used at the composting operation, odour emanating from the operation and the general unsightliness of the operation including but not limited to, the height and location of the compost piles. Mr. Peniuk identified his underlying concern as to the reasonableness and morality of siting a composting operation so close to his home. In terms of a remedy, he seeks an order restraining the Michells from using the Lochside Drive property to compost materials and a direction that the composting operation be relocated elsewhere.

FACTS

10. Mr. Peniuk resides at 6775 Pat Bay Highway. He purchased the property in 1997 and built his current home. The property consists of approximately 10 acres located east of the highway. The house is situated on the hillside with the property gently sloping down to an unmaintained pasture. The yard has several sheds used for storing heavy equipment, old vehicles and firewood. Mr. Peniuk has logged some of the trees on the property, some in the area near the compost piles. Mr. Peniuk's house is approximately 300 feet from the nearest compost pile.
11. The Michells are a long time farming family in Central Saanich, having farmed in the area since 1868. Over the years, the farm has grown significantly; it now produces approximately 2500 tonnes of vegetables from 30 different crops and 150 tonnes of fruit. It employs 50-55 seasonal employees and 20 full time employees.
12. The Michells began adding chicken manure and herring to their farmland in the 60's and 70's in an attempt to replace organic material in the soils. However by the late 80's and early 90's, the farm had a shortage of the necessary organic materials required to enhance their soil and as a result, productivity on the farm declined.
13. In the late 1990's, the Agricultural Land Commission or "ALC" (then the Land Reserve Commission), the Ministry of Agriculture, Food and Fisheries or "MAFF" (then the Ministry of Agriculture and Food) and the Ministry of Water, Land and Air Protection (then Ministry of Environment, Land and Parks or "MELP") began to promote composting as an acceptable practice to condition soil and supplement manure. In August 1999, the Michells began composting on the home farm located at 3063 and 3047 Island View Road. However, soon after commencing operations, they were contacted by a by-law enforcement officer for Central Saanich who advised that as they lacked a fill permit to dump the compost, the Michells would have to cease operations. Central Saanich also took issue with the composting operation as it was occurring on non-Agricultural Land Reserve ("ALR") land. Even though the Michells believed they were entitled to compost on the property they had farmed for forty years, uncertain as to their legal position, they agreed to move their composting operations to a site within the ALR.
14. In November 1999, compost was first delivered to the 10-acre Lochside Drive site located within the ALR. The site is immediately adjacent to the Peniuk property. The compost piles are centrally located, lying south-east and downhill from Mr. Peniuk's residence at the western end of the Peniuk property. Access to the site is off Lochside Drive. There has been no opposition to this move by either Central Saanich or MELP. In its first year of operation, November 1999 until fall of 2000, approximately 1700 tonnes of material was composted.
15. The Lochside Drive site is advantageous to the Michells as it is located on nematode free land. Apparently on the Saanich Peninsula, there is a real issue with the Golden Nematode and the federal Department of Agriculture has issued a quarantine order. As a result, there are strict restrictions on the movement of fill and equipment from land within the quarantine

area. Land is categorised as either A, B or C. Category A land means land where nematode cysts have been found. Category B land has been exposed to infestation or is suspected of infestation by virtue of its association with Category A land. Category C land is all land other than Category A or Category B land. Thus, fill and equipment from Category C land can move freely within the quarantine area. The Michell's composting operation is located on Category C land and as such they have flexibility as to where they can haul compost. They can move compost onto partially controlled and fully controlled nematode lands. They also are not required to clean the tub grinder and other equipment that comes on and off the site resulting in considerable savings in both time and money.

16. Shortly after commencing composting operations at the Lochside Drive location, Mr. Michell's wife received a phone call from a very upset Mr. Peniuk. He was complaining about excessive noise and vibration from the composting equipment (tub grinder and excavator). He wanted the composting operation to be stopped immediately and moved elsewhere. Approximately one week later, Mr. Michell visited Mr. Peniuk at his residence in an attempt to resolve the complaint. The conversation was heated and very brief. It ended with Mr. Peniuk ordering Mr. Michell from his property.
17. In January 2001, the Michells entered into a contract with the District of Saanich to receive green materials for composting. This material consists of prunings, lawn clippings and removed shrubs. As material is delivered, it is weighed on-site and the District of Saanich is charged for each load. In addition, the Michells compost some of their own vegetables and cuttings on-site. The composting operation is not a profit centre, as the fees paid by the District of Saanich do not cover the full cost of composting. The Michells hire an operator to bring a tub grinder to the site to grind larger materials. The windrows of compost must be regularly turned using an excavator and when finished, the compost must be loaded and hauled off-site to various fields. None of this compost is sold; it is used as a valuable input required by the Michell's farming operations.

SUBMISSION OF COMPLAINANT

18. In the Panel's meeting with Mr. Peniuk at his residence, he advised that he has owned his property since 1997. He built his two-story home and although Mr. Peniuk originally lived upstairs, he has moved into the basement to minimise highway noise. Since the fall of 1999, Mr. Peniuk has been bothered by the Respondents' composting operation. The compost operation is visible from his property and at times, Mr. Peniuk alleges that the compost piles have exceeded 30 feet. Mr. Peniuk finds the compost piles unsightly but did however acknowledge removing some trees along the property line between his house and the composting operation.
19. Mr. Peniuk takes issue with the odour from the compost operation. On the day of the Panel's visit, there was a mild earthy odour present. When asked if that was the particular odour that he took offence to, Mr. Peniuk stated that he could not smell anything. He believes that the prevalence of the composting odour has made him less able to detect the odour. In addition to odour, Mr. Peniuk complains that the noise and vibration from the

grinding equipment on the composting site continues well into the evening and often interferes with his sleep.

20. Mr. Peniuk states that he telephoned the Michells and advised them of his dissatisfaction with the composting operation being sited next to his property. Mr. Michell did come to discuss the matter at Mr. Peniuk's home in the fall of 1999 but nothing was resolved. Mr. Peniuk asked Mr. Michell to leave his property and not return. Mr. Peniuk states that on one other occasion, he attended at the composting site to talk to Mr. Michell. Nothing was resolved as Mr. Michell refused to talk to him and turned his back to walk away.
21. Mr. Peniuk acknowledges that he has made complaints to Central Saanich and to other government agencies. To date, he has not received any satisfactory response. He does not believe that the Provincial board will properly deal with his complaint, as it is a "kangaroo court". Mr. Peniuk believes that his property values have suffered and that he would not be able to sell his house. When asked whether any of his neighbours were unhappy with the composting operation, Mr. Peniuk suggested that there were others but they were afraid of possible repercussions.
22. Mr. Peniuk made it clear that he wants the composting operation shut down and relocated. He maintains that the decision to site the compost operation so close to his house is immoral and unreasonable.

SUBMISSION OF RESPONDENTS

23. The Respondents are long time farmers on the Saanich peninsula. They argue that they require the compost produced at the Lochside Drive location to condition and enhance their land in order to allow them to continue to grow many diverse crops. MELP has supported on-farm composting as an appropriate and necessary practice. In addition, the Court of Appeal has recognised that composting is important to the husbandry of plants and animals and it can be an incidental or essential part of any agricultural use.²
24. MAFF has produced guidelines for composting operations; these guidelines deal with the composting process, storage of raw materials, blending and grinding, curing and storage and receiving and shipping. Mr. Michell states that he is aware of these guidelines and has tried to incorporate them into his compost management practices. The ALC regulates on-farm composting. Under these regulations, the Michell's operation is considered to be within Category 3 – Farm Composting, which includes the composting of wastes originating on and off the farm for the purposes of the farm operation. This type of composting is also subject to regulation under the *Waste Management Act* and the *Health Act*.

² In the March 8, 2002 Court of Appeal decision, *District of Central Saanich v. Jopp et al*, the decision of the lower court enjoining a farm from operating an on-farm composting facility because composting was a manufacturing process and not an agricultural use, was overturned. The Court of Appeal found that the fact that all the compost is needed and will be used on the farm requires the conclusion that composting is an integral part of farming and thus a permitted use.

25. In order to stay abreast of any regulatory obligations, Mr. Michell sought out the expertise of Mr. Al Spidel, a former MELP employee with considerable experience in managing composting operations. He now consults with farmers on compost-related issues. Mr. Spidel began assisting the Michells with their composting operation well before Mr. Peniuk's complaint.
26. Mr. Michell maintains that he is operating his composting operation in accordance with accepted practices and published government guidelines. There is on-going revision to composting regulations and the purpose behind hiring Mr. Spidel was to ensure that his operation complied with existing regulations but was managed in such a way that any impending changes to regulations could readily be incorporated.
27. As to the specific complaints raised by Mr. Peniuk, Mr. Michell does concede that initially there were some problems with the tub grinder. It was old and needed an overhaul. Approximately 3-4 weeks after beginning work at the Lochside Drive site, the contractor spent approximately \$25,000 repairing the machine, the motor was rebuilt and mufflers were replaced. Since that time, the machine has been noticeably quieter with less vibration. Mr. Michell is aware that the grinder is used at several other locations, including a site near the Victoria General Hospital off Helmcken Road. The contractor has not received any complaints regarding the machine from nearby residents at any other site.
28. As for the times of operation, in peak season, equipment at the site operates from 8:30 a.m. – 5:30 p.m. on Friday and Saturday. On occasion, a tractor spreader may operate until 6:30 or 7:00 p.m. but composting equipment is not operated late at night.
29. As for odour, Mr. Michell states that certain organic materials are worse than others. Grass clippings can emit a musky odour and must be properly managed. However, the regular turning of the windrows promotes aerobic decomposition and thereby controls odours. One of Mr. Spidel's tasks is to ensure proper management systems are in place on-site to minimise odour concerns. Proper management includes regular turning of compost piles and elimination of pooling water and standing leachate. In addition, compost piles have to be managed to eliminate any hot spots to avoid smoking and charring. According to Mr. Spidel, the Michells have a well-managed composting operation, run in a similar fashion to others he has seen.
30. Mr. Michell concedes that some land clearing and levelling was done before the composting began at the Lochside Drive site. Initially, in response to Mr. Peniuk's complaints, Mr. Michell offered to build a berm between their properties. However, Mr. Peniuk was not satisfied; he wanted the operation stopped altogether. Mr. Spidel does not believe a berm would assist in reducing odour at the Peniuk residence and feels it may in fact make things worse by acting as a "ramp" forcing the odour uphill. Increased vegetation may assist in mitigating the impact of odour. To this end, he states that Mr. Peniuk may have made the situation worse by removing trees from the area between the compost operation and the Peniuk residence.

31. As for unsightliness, Mr. Michell denies that the compost piles have ever exceeded 15 feet and that they have never been the 30 feet alleged by Mr. Peniuk.
32. Finally, Mr. Michell does not recall Mr. Peniuk ever speaking with him on site nor does he recall abruptly breaking off the conversation and walking away.
33. Other than the complaints of Mr. Peniuk, Mr. Michell is not aware of any other complaints regarding his composting operation. His family runs a very busy farmer's market not too far from the composting operation that is frequented by residents from the surrounding area. No complaints have been received from these non-farmers. In fact, some people have asked if they could contribute materials for composting. Mr. Michell has denied these requests.

DECISION

34. A complaint under the *Act* involves a two-step analysis. First, a panel must be satisfied that the complainant is aggrieved by odour, dust, noise or some other disturbance emanating from a farm operation. If the complainant fails to establish that he is aggrieved, the complaint must be dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice. If however, the panel finds that the initial threshold question has been met, it must go on to make a determination as to whether the grievance(s) results from normal farm practice.
35. 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).

36. The meaning of "normal farm practice" and "proper and accepted customs and standards as established by similar farm businesses under similar circumstances" has been considered by the Provincial board on a number of occasions. The accepted approach in determining whether a complained of practice falls within the definition of "normal farm practice" is to determine whether it is consistent with "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". In performing this analysis, a panel must closely examine and weigh industry practice, but in light of words like "proper" and "circumstances", it must also evaluate the context out of which the complaint arises. Depending on the practice under review, the context may be broad, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands.
37. On the initial threshold question as to whether Mr. Peniuk is aggrieved by odour, dust, noise or some other disturbance emanating from a farm operation, Mr. Peniuk's refusal to

participate in the hearing process has made it considerably more difficult for the Panel to arrive at a conclusion on this question. However, based on our review of the correspondence and history and based on his statements to us at the site visit, we are satisfied that in the present circumstances he meets this threshold, that he has a sufficient personal interest in the subject matter of the complaint and that his complaint was not made for an improper purpose. We will therefore proceed to determine whether the odour, noise, vibration and general unsightliness of which Mr. Peniuk complains result from normal farm practice.

38. In the ordinary course, once a complainant has proven that he is aggrieved, he must provide sufficient evidence in support of his complaint to allow the panel to enter into a proper inquiry as to whether the practice complained of is inconsistent with “normal farm practice” as defined in s. 1 of the *Act* - i.e., that it was not conducted in a manner consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. Given that Mr. Peniuk did not attend this hearing, this evidentiary burden was not met and on this basis alone the complaint would properly be dismissed. However, the Panel has proceeded on the basis that a *prima facie* case was made out. Mr. Michell and his witness, Mr. Spidel, were prepared to respond to the allegations and did so at the hearing.
39. Determining whether a practice falls within the definition of “normal farm practice” involves a consideration of relevant site-specific circumstances which may include the location of the operation, the surrounding geographical features, the proximity of neighbours and their use of their lands, the zoning of the farm land and the neighbouring lands, the timing of the introduction of the operation to the area, weather features of the area and any other factors which may bear on the potential impact, if any, of the farm practice.
40. In general, composting is an accepted practice used by farmers and gardeners the world over. Farmers have for centuries added waste organic material to their soil to restore soil fertility and productivity. The practice of composting allows farmers to speed up the decomposition of organic material before it is added to soil, thus increasing and expediting its restorative effect. However, given the potential for composting operations to become anaerobic and the presence of leachate from organic materials, there has been a move towards increased regulation of such operations by both municipal and provincial governments. As mentioned by Mr. Michell, his compost operation must comply with the *Waste Management Act* and the *Health Act*. The protections afforded by our *Act* expressly do not apply to circumstances where farm practices are conducted in contravention of the *Health Act*, *Pesticide Control Act* or the *Waste Management Act* or any regulations enacted under those Acts.
41. The Panel had the benefit of hearing from Mr. Spidel, previously an employee with the Waste Management Branch of MELP and now a consultant on composting related issues. During his career, Mr. Spidel has visited many on-farm composting operations in BC. He advises that as composting operations are subject to regulation both at the local and

provincial level, farmers must be very diligent in their management systems. Written management plans and careful record keeping are a must.

42. Mr. Spidel initially became involved with the Michell's composting operation at the request of the Capital Regional District. He has since been retained by Mr. Michell to provide on-going assistance in developing management plans and staying within any regulatory requirements. Mr. Spidel was very frank. He stated that while the Michell's operation was not perfect and that there remained some room for improvement, in his opinion it was a well-managed operation. "Well-managed" means a composting operation with odour, leachate and vector management plans. Compost materials must be turned regularly to avoid anaerobic conditions leading to odour or charring. Potential sources of leachate must be controlled to prevent run-off into surface ditches. Tarps need to be used, when appropriate, to minimise water drainage issues. Mr. Michell has implemented systems to control the foregoing and as issues arise, he makes the necessary changes to ensure a well-run operation that is within all regulatory requirements.
43. Mr. Spidel's opinions were supported by the Panel's brief site visit. The composting operation was not unsightly but rather neatly organised. The piles of materials to be composted were separated in an orderly fashion; the windrows were approximately 15 feet high. There were no noticeable puddles or visible leachate. There were no strong odours observed at the site, just a mild earthy smell.
44. In his evidence, Mr. Michell testified of his intention to continue working on his on-site compost management. New regulations may soon be coming into force and Mr. Michell has every intention of meeting those requirements. If Mr. Spidel proposes further management changes, these too will be implemented. The farm needs the compost from this operation for its many different crops and Mr. Michell has no intention of not complying with any regulation.
45. The Panel accepts Mr. Spidel's opinions and finds that the degree of disturbance created by the Michell's composting operation is well within the norm of what is to be expected from composting operations in the area. Apart from Mr. Peniuk, no other complaints of any kind have been received from other neighbours. Mr. Michell has management plans to deal with odour and leachate and the Panel is satisfied that he follows those plans. Concerns about noise and vibration were addressed by servicing the tub grinder. The Michells do not allow equipment to be operated late at night and as such, there should not be any concerns about late night operations disturbing anyone's sleep.
46. Finally, we have considered what if anything should be made of the fact that the Michells began their composting operation on Lochside Drive after Mr. Peniuk built his house? The timing of the transformation of the subject property from its previous ALR use to the use complained of is a relevant consideration and has been considered by other Farm Practices tribunals and courts in Canada. It has been held that an automatic "first in time, first in right" approach is not warranted and would unduly limit the establishment of new farming operations. The relative timing of the establishment of the farm operation and the occupancy of the neighbour is just one factor to be considered. In this case, Mr. Peniuk built

his residence in an agricultural area. Mr. Peniuk's land is located within the ALR but he does not use his property for any agricultural purpose.

47. The composting site is also located in the ALR and composting is a permitted use. Further, the compost operation is located on Category C (nematode free) land and thus allows maximum flexibility and efficiency as to equipment use and as to where compost can be hauled. Moving the compost operation is not as simple as just finding another piece of land. The restrictions on fill movement caused by the nematode quarantine limit the number of available sites in the area. Looking to the region generally, this part of Central Saanich is predominantly agricultural with large land holdings under cultivation. There are nurseries, livestock, broiler chicken and commercial layer operations in the area. Siting a composting operation on Lochside Drive was a reasonable decision, as it does not significantly alter the characteristics of what is primarily an area of commercial agricultural operations. A person who decides to build a residence in this area must expect some impact from the various surrounding commercial agricultural operations.
48. Even if the composting operation can be viewed as creating a nuisance either through noise, vibration, odour or general unsightliness, the Panel is satisfied that the farm practices leading to any potential nuisance fall within the definition of "normal farm practice" and as such are protected under the *Act*. It is normal farm practice to compost for on-farm use and the Respondents' operation is entirely consistent with normal farm practice.

ORDER

49. The complaint is dismissed.

Dated at Victoria, British Columbia, this 9th day of January 2004.

FARM PRACTICES BOARD
Per

(Original signed by)

Christine Elsaesser, Vice Chair
Karen Webster, Member