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COURT OF APPEAL FOR ONTARIO

ABELLA, CHARRON and SHARPE JJ.A.

BETWEEN:	)	
	)	
CRAIG PYKE, PATRICIA PYKE, GARY YOUNG, ERLYNE YOUNG, KENNETH GILES, SALLY GILES, BERNICE GARDNER, JEAN GARDNER, DONALD WALKER, LESLIE WALKER, MARGARET DAVIS, RONALD CHAPMAN, GORDON DONNISON, KAREN DONNISON, JOHN LENNOX, NADIA LENNOX, CHRIS DOWNES, CHRISTA DOWNES, 1094581 ONTARIO LIMITED	)	**Raymond G. Colautti, for the appellants**
	)	
Plaintiffs (Respondents)	)	
	)	
- and -	)	**Donald R. Good, for the respondents**
TRI GRO ENTERPRISES LTD. and G.M.F. PART 2 carrying on business as GREENWOOD MUSHROOM FARM, BRENT TAYLOR HOLDINGS LTD., RICK CAMPBELL HOLDINGS LTD., SNOBELEN MUSHROOMS LTD. carrying on business as G.M.F. PART 2, MAC SNOBELEN HOLDINGS LTD., MALCOLM (MAC) ALEXANDER SNOBELEN, DORIS GRACE SNOBELEN, DAVID RICHARD CAMPBELL, CLAYTON RUSSELL TAYLOR, DONALD LESLIE VAN DUSEN, NICHOLAS VAN HALTEREN, WILLIAM JOHN WALRAVEN, DAVID BRENT TAYLOR	)	**Brian S. McCall, Robert G. Waters and Sheila C. Handler, for the intervener**
	)	**Heard: March 21, 2001**
Defendants (Appellants)	)	
	)	
- and -	)	
	)	
THE ONTARIO FEDERATION OF AGRICULTURE	)	
	)	
Intervener	)	

)

On appeal from the judgment of Justice Donald S. Ferguson dated April 11, 2000

CHARRON J.A. (Dissenting):

I. Overview

[1] The appellants are mushroom farmers who operate the Greenwood Mushroom Farm on Heron Road in the Town of Whitby, Ontario. [1] The respondents are property owners who reside in the vicinity of the appellants' mushroom farm. Ferguson J., by judgment dated August 23, 1999, found the appellants liable in nuisance to the respondents as a result of odours created by the operation of the mushroom farm. The sole issue on this appeal is whether the appellants' operation is exempt from liability in nuisance under the Farm Practices Protection Act, R.S.O. 1990, c. F.6 and the *Farming and Food Production Protection Act, 1998*. This issue turns on whether the odours that formed the subject-matter of the action resulted from an agricultural operation carried on as a "normal farm practice" within the meaning of both statutes.

[2] The Greenwood Mushroom Farm ("GMF") purchased the present Heron Road farm site in 1993 for 1.1 million dollars. The property had formerly been the site of non-farming manufacturing businesses. Since the purchase, GMF has invested over four million dollars in capital improvements and equipment. GMF has become the sixth largest of about 25 mushroom farms in Ontario. The property is situated in an area that is zoned agricultural and the operation of a mushroom farm is permitted by the zoning.

[3] The respondents are owners of properties on or near the farm operation. Their properties are also zoned agricultural. All but one of the respondents live on their properties, and most use their properties only for residential and recreational purposes although some lease parts to farmers. All but one of the respondents owned their properties before the arrival of the appellants' mushroom farm.

[4] GMF operates mostly indoors. However, the process for growing mushrooms starts outdoors with the making of compost or substrate to feed the mushrooms. There is no issue between the parties that the formulation and production of composting material forms an integral part of growing mushrooms. Unfortunately, as the evidence at trial showed, the composting process, even when carried out according to the current state-of-the-art techniques, generates significant odours that can be extremely unpleasant.

[5] The odours resulting from the composting process form the subject-matter of this litigation. In December 1995, the respondents commenced this action in negligence and nuisance seeking damages for mental distress, health problems, interference with the use

and enjoyment of their properties, and decrease in the value of their properties. They also sought injunctive relief.

[6] The appellants denied that their conduct breached any standard of care and pleaded the protection of the *Farm Practices Protection Act*, S.O. 1988, c. 62 ("the 1988 Act"). The pleadings were amended at trial to include a reference to *the Farming and Food Production Protection Act, 1998*, S.O. 1998, c. 1 ("the 1998 Act"), enacted subsequent to the commencement of the action. Both statutes exempt farmers from liability in nuisance in respect of certain adverse effects, including odours, resulting from a "normal farming practice".

[7] The trial judge found no negligence and, accordingly, dismissed that part of the claim. No appeal is taken from this finding. The trial judge held, however, that the odours constituted a nuisance. He held further that the appellants could not claim the statutory protection because their operation was commenced in an area where the nuisance it produced was completely out of character with the area and, as such, did not constitute a "normal farming practice" within the meaning of each statute. He therefore assessed damages for each individual respondent ranging from $7,500 to $35,000 for the unreasonable interference with the use and enjoyment of their property.

[8] The appellants do not appeal from the finding that the odours constitute a nuisance at law. Nor do they dispute any of the findings of fact made by the trial judge. They contend, however, that the trial judge erred in his interpretation of the two statutes, holding in effect that the statutory protection was limited to agricultural practices that pre-dated adjacent residential development in a particular area, or to new practices that are consistent with the character of the area in which they commence operations. They submit that this restricted interpretation is contrary to the broad purposes of the legislation. They submit that, based on the findings of fact made by the trial judge, their operation clearly falls within the scope of statutory exemption.

[9] The respondents disagree with the appellants' characterization of the trial judge's decision. They submit that the trial judge, in essence, found that the nuisance created by the appellants far exceeded the level of discomfort and inconvenience in respect of which the statutory protection can be claimed and that, consequently, he was correct in finding that the action was not barred by statute. They submit that the trial judge's decision was both reasonable and supported by the evidence, and that, consequently, the judgment should not be interfered with on appeal.

[10] In order to resolve the question raised on this appeal, it is necessary to consider the relevant statutory provisions and the findings of the trial judge, and then determine whether the statutory protection extends to the facts as determined at trial. In addition, the Ontario Federation of Agriculture, as intervener, submits that questions of this nature should be determined by the administrative tribunal created by the legislature for this

purpose rather than by the courts, and seeks direction from this court with respect to future cases.

II. Analysis

1. The Statutory Provision

a) The 1988 Act

[11] An issue arose at trial as to which statute should govern, the 1988 Act or the 1998 Act. The odours complained of in this case began in the fall of 1994 and continued to the time of trial in 1999. The trial judge held that the first statute applied to all claims based on facts occurring during the period when it was in force, and that the second statute applied to the facts occurring since its coming into force on May 11, 1998. The parties do not take issue with this finding.

[12] The 1988 Act was passed to protect persons who carried on an agricultural operation from liability under the common law of nuisance for any odour, noise or dust resulting from normal farming practices. An "agricultural operation", as defined in the 1988 Act, specifically included "the production of mushrooms". A "normal farm practice" was defined in s. 1 of the 1988 Act:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;

[13] In order to enjoy the protection from nuisance claims, farmers had to comply with any land use control law and other specified statutes:

> 2.(1) A person who carries on an agricultural operation and who, in respect of that agricultural operation, does not violate,
>
> (a) any land use control law;
>
> (b) the *Environmental Protection Act*;
>
> (c) the *Pesticides Act*;
>
> (d) the *Health Protection and Promotion Act, 1983*; or

(e) the *Ontario Water Resources Act*,

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

(2) Subsection (1) does not apply to an owner or operator of an agricultural operation that fails to obey an order of the Board made under clause 5 (3) (b).

[14] A person aggrieved by any odour, noise or dust resulting from an agricultural operation could bring an application before the Farm Practices Protection Board, a tribunal appointed by the Minister of Agriculture, Food and Rural Affairs, for a determination as to whether the odour, noise or dust resulted from a normal farm practice. If, after a review, the Board determined that the complaint resulted from a normal farm practice, the application was dismissed. If the practice was not normal, the Board was empowered to order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice. Any party to a hearing before the Board had a right to appeal an order of the Board on any question of fact or law or both to the Divisional Court.

[15] The 1988 Act further provided that any injunction proceedings in relation to a farm practice which was the subject of an application to the Board were to be held in abeyance pending the resolution of the application by the Board: s.6(1). This latter provision did not apply, however, in respect to proceedings taken under the *Environmental Protection Act*, the *Pesticides Act* or the *Ontario Water Resources Act*.

b) the 1998 Act

[16] The 1998 Act, which is currently in force, repealed the 1988 Act effective May 11, 1998. The 1998 Act increases the protection afforded to farmers in several respects. The definition of agricultural operation, which still includes the production of mushrooms, is expanded to include a wider variety of enterprises. The protection against nuisance claims is expanded to include complaints resulting not only from noise, odour and dust but also from light, vibration, smoke and flies arising from an agricultural operation carried on as a normal farm practice. Farmers who carry on a normal farm practice are also exempt from the application of municipal by-laws that restrict land use or vehicular transport. The Farm Practices Protection Board is continued under the name 'Normal Farm Practices Protection Board' and its jurisdiction is expanded to deal with the wider protection afforded under the 1998 Act. The following provisions of the 1998 Act are more particularly relevant to the question for consideration on this appeal.

[17] The preamble to the 1998 Act provides much assistance in this case to determine the intent of the Legislature. It echoes many of the statements made during the debates preceding the enactment of the legislation:

> It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products.
>
> Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.
>
> Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.
>
> It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

[18] The protection against nuisance claims is set out in s. 2:

> 2.(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.

[19] Compliance with other specified statutes is no longer a precondition to the application of the s. 2 protection against nuisance claims under the 1998 Act. However, s. 2(3) provides that the protection afforded to farmers by the 1998 Act does not preclude the making of orders or injunctions under the *Environmental Protection Act*, the *Pesticides Act*, the *Health Protection and Promotion Act*, or the *Ontario Water Resources Act*. The 1998 Act is also expressly subject to the *Environmental Protection Act*, the *Pesticides Act*, and the *Ontario Water Resources Act*: s. 2(5). Hence farmers are not exempt from compliance with those statutes.

[20] A “disturbance” and a “normal farm practice” are defined under s. 1:

> “disturbance” means odour, dust, flies, light, smoke, noise and vibration;
>
> “normal farm practice” means a practice that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

[21] The definition of “normal farm practice” reads substantially the same as it did under the earlier statute, except for the use of the word “acceptable customs and standards” as opposed to “accepted customs and standards” found in the 1988 Act, and the additional qualifier “proper” in the second part of the definition. The respondents submit that these amendments are significant. More will be said about this later.

[22] Three kinds of applications can be made to the Board under the 1998 Act: under s. 5, by a person affected by a disturbance; under s. 6, by a municipality or interested person in relation to municipal by-laws that restrict land use; and under s. 7, by a municipality or interested person in relation to municipal by-laws that restrict vehicular transport to and from an agricultural operation.

[23] Under s. 5, a person who is directly affected by a disturbance from an agricultural operation may apply to the Board for a determination as to whether the disturbance results from a normal farm practice. As in the earlier statute, if, after a review, the Board determines that the disturbance results from a normal farm practice, the application is dismissed. If the farm practice is not normal, the Board may order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice.

[24] The 1998 Act provides further protection to farmers in respect of municipal by-laws:

> 6.(1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.
>
> [25] Under s. 6(2), an application may be brought before the Board for a determination as to whether a practice is a normal farm practice for the purpose of the non-application of

> a municipal by-law. This application can be brought by a municipality or by the following persons:
>
> 6. (3) An application may be made by,
>
> (a) farmers who are directly affected by a municipal by-law that may have the effect of restricting a normal farm practice in connection with an agricultural operation; and
>
> (b) persons who want to engage in a normal farm practice as part of an agricultural operation on land in the municipality and have demonstrable plans for it.

[26] The 1998 Act provides for certain factors to be taken into account in determining whether the practice is a normal farm practice for the purpose of a s. 6 application:

> 6. (15) In determining whether a practice is a normal farm practice, the Board shall consider the following factors:
>
> 1. The purpose of the by-law that has the effect of restricting the farm practice.
>
> 2. The effect of the farm practice on abutting lands and neighbours.
>
> 3. Whether the by-law reflects a provincial interest as established under any other piece of legislation or policy statement.
>
> 4. The specific circumstances pertaining to the site.

[27] Section 7 provides that a municipal by-law that has the effect of restricting the times during which a vehicle may travel does not apply in certain specified circumstances related to agricultural operations. An application to the Board may be made under s. 7 by a municipality or interested person to determine whether the statutory conditions for the exemption have been met.

[28] Finally, the 1998 Act gives any party to a hearing under the Act a right of appeal from an order or a decision of the Board on any question of fact, law or jurisdiction to the Divisional Court within thirty days of the making of the order or decision: s. 8(2).

2. The Decision at Trial

[29] Extensive evidence was called at trial with respect to the appellants' agricultural operation and its effect on the respondents' use and enjoyment of their properties. During their final submissions at trial, the respondents took the position that the appellants had not proved that they were entitled to the statutory protection because they had not adduced sufficient evidence that their operation was conducted in a manner consistent to similar agricultural operations under "similar circumstances" within the meaning of the two Acts. The trial judge gave the appellants leave to call further evidence on this point. He ruled that such evidence could include evidence to show how the appellants' operation compared to other operations as to location, surrounding geographical features, proximity of neighbours and uses made of their lands, zoning, weather features of the area, and other factors that may bear on the potential effect, if any, of the operation on others. Further evidence was called accordingly.

[30] As indicated earlier, the parties take no issue with any of the findings of fact made by the trial judge. The material findings of fact may be summarized as follows:

> 1. The area within which the appellants' mushroom farm and the respondents' properties are situated is zoned agricultural. The mushroom farm is permitted by the zoning.
>
> 2. Phase one in the production of mushrooms involves the making of compost or substrate to feed the mushrooms. According to the existing technology, composting takes place outdoors.
>
> 3. The goal of the composting phase is to keep the process aerobic. If the process becomes anaerobic, it produces chemical compounds which are odorous. These odours can be most offensive. They have been described as rotten eggs, like a septic tank, like ammonia, like urine, putrid, nauseating, like decaying flesh, rancid, overpowering, like rotten fish, and worse than a hog farm. Even when the process is aerobic, it always has the potential of producing odours.
>
> 4. The problem of composting odours is becoming a significant issue world-wide and presents a problem for mushroom growers, especially those who compost in locations that are in proximity to areas zoned for residential purposes. There is no present solution to the problem.
>
> 5. The GMF started its operation in October 1994. Within a month, it was receiving complaints. As a result, the GMF took some action to remedy the problem and, since the spring

> of 1995, it has been using all the reasonable precautions possible in the current state of the art of mushroom composting to reduce the odours resulting from the process.
>
> 6. The composting operation of GMF, up until about the spring of 1995, was not carried out properly. Since the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry.
>
> 7. There is no material difference between the relationship of GMF to residential neighbours compared to other mushroom farms. There was no evidence that would enable the court to form any opinion as to whether the neighbours of other farms were more or less affected by offensive odours.
>
> 8. The GMF's composting process, with the resulting odours and haze it produces, has affected the physical well-being of the respondents to a significant degree and very substantially disrupted their use of their lands from the commencement of its operations. The interference caused by GMF is severe, unprecedented for the area, and intolerable to the respondents.

[31] The trial judge first determined whether the odours constituted a nuisance at common law, and then whether the appellants were entitled to the statutory protection.

[32] On the first question, the trial judge instructed himself on the law of nuisance as follows:

> The material claim of the plaintiffs is about odours. There is no doubt that odours can be the subject of a claim in nuisance.
>
> The fundamental issue in a nuisance claim is whether, taking into account all the circumstances, there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land.
>
> In this case the plaintiffs rely on the alleged injury to their health, comfort and convenience, and the alleged depreciation of the resale value of their lands.
>
> To establish nuisance, the plaintiffs must show substantial interference which would not be tolerated by the ordinary

> occupier in their location. The test is objective. The interference must be repeated or continuous.
>
> In considering the interference, the court must consider the type of interference, the severity, the duration, the character of the neighbourhood and the sensitivity of the plaintiffs' use of their lands. With respect to the severity of the interference, it is not actionable if it is a substantial interference only because of the plaintiff's special sensibilities. With respect to the character of the neighbourhood, the court should consider the zoning, whether the defendant's conduct changed the character of the neighbourhood and the reactions of other persons in the neighbourhood.
>
> The court must balance these considerations against the value of the defendant's enterprise to the public and the defendant's attitude toward its neighbour. The court must consider whether the defendant is using the property reasonably having regard to the fact that the defendant has neighbours. The court should consider whether the defendant took all reasonable precautions.

[33] The trial judge had no hesitation in concluding that the composting of material used to grow the mushrooms constituted a nuisance at common law from the commencement of the GMF's operations. His summary of the findings upon which this conclusion is based shows the extent of the interference with the respondents' use and enjoyment of their properties. I find it useful to reproduce the trial judge's summary of findings in this respect in its entirety particularly since the respondents, on the subsequent question of the statutory protection, take the position that the statutes do not extend protection to nuisances that exceed a certain tolerance level:

> The operation of GMF has produced offensive odours and a haze and there is some evidence that it produces noise. While annoying, the haze is not sufficient to constitute a nuisance because it is infrequent. The evidence does not establish that the noise is a nuisance. However, the odours, some of which are associated with the haze, have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands.
>
> The number of the plaintiffs, their testimony and their varied backgrounds satisfy me that the interference would not be tolerated in their location by the ordinary occupier whether

that person be only a resident or also a farmer. Other than the defendants, every owner called as a witness has found the interference intolerable. The only witness from the area who was not a party was the golf director of the Thunderbird Golf Club who took the same view as the plaintiffs. The interference has been repeated frequently.

The neighbourhood is rural. The zoning is agricultural but the majority of the owners to the southwest of GMF use their lands for primarily residential purposes. In the surrounding area there is also mixed farming, a hog farm, a dog kennel, a stable and a golf course. The severity of the interference is not the result of the plaintiffs' special sensibilities although one of the plaintiffs has special sensibilities which have magnified the impact on her. The operation of GMF has dramatically changed the nature of the neighbourhood. While the mushroom farm is classified by statute as an agricultural operation the odours and haze it produces are completely unheard of and intolerable to the owners in the area which was the subject of the evidence. The plaintiffs have resided in the area for up to 58 years and the interference caused by GMF is unprecedented. Three of the plaintiffs have resided on working farms in the area for decades. The reasonableness of the plaintiffs' complaints is enhanced by the fact that they have tolerated the usual farm odours from mixed farms and a hog farm.

The defendants' operation produces a food product and an agricultural producer of food is a valued enterprise. However, it is not the growing of mushrooms which is the nuisance but only the composting of material used to grow the mushrooms. The defendants have made efforts at significant expense to reduce the nuisance caused by their operation but have deliberately tried to belittle the neighbours' complaints and have falsely denied under oath that their operation produces a nuisance. I accept the evidence of the defendants' experts that they now take all the reasonable precautions possible in the current state of the art of mushroom composting. However, the use of the defendants' land for composting is unreasonable having regard to the fact that they have neighbours.

> Considering all these factors, I find that the defendants' operation has caused an unreasonable interference with the use and enjoyment of the plaintiffs' lands by producing offensive odours. The odours constitute a nuisance at common law.

[34] The trial judge then proceeded to determine whether the nuisance resulted from a normal farm practice. After reserving judgment but prior to determining this question, the trial judge asked counsel for submissions on whether, in the exercise of his discretion, he should decline to decide the issue and leave it for determination by the Normal Farm Practices Protection Board. After receiving submissions, the trial judge concluded that it would not be practical or appropriate at this late stage in the proceedings to follow such a course of action. Consequently, he proceeded to decide the issue.

[35] The trial judge reviewed the definition of "normal farm practice" contained in each statute and noted the differences between the wording of the two statutes that he considered to be material. For ease of reference, I reproduce again the two definitions and have underlined the differences that were noted by the trial judge in the later statute:

> Under the 1988 Act*:*
>
> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;
>
> Under the 1998 Act:
>
> "normal farm practice" means a practice that,
>
> (a) is conducted in a manner consistent with proper and <u>acceptable</u> customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with <u>proper</u> advanced farm management practices;

[36] The trial judge further considered the factors set out under s. 6(15) and concluded that:

> ... when the legislature changed the definition in the new statute by replacing "proper and accepted customs and standards" with "proper and acceptable customs and standards" it was the intention of the legislature to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context. The addition of the word "proper" seems to reflect the same intention. [Emphasis in original.]

[37] The trial judge held that the proximity of neighbours and the effect of the operation upon them was a relevant consideration in determining whether the operation was a normal farm practice. He further held that the timing of the start-up of mushroom farms in relation to the commencement of adjacent residential development was a relevant consideration. In his view, the "inclusion of this factor" in determining what is normal farm practice would provide "a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing" and "would be consistent with the intention of the legislature in enacting [the] legislation". After quoting from the legislative debates, he stated as follows:

> It is clear that the legislation was intended to protect farmers from unreasonable complaints of people who are intolerant of agricultural disturbances because they are used to city living and that it was also intended to protect *farmers who are already carrying on agricultural practices which produce disturbances which are normal in the area*. The defendants in this case do not fall into either category.
>
> I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before. *The issue would be whether the intensity and frequency of any nuisance produced by that farm would be consistent with normal farm practice in that area*. In the case before me the evidence establishes that the GMF produces a nuisance which because of its intensity and frequency is completely out of character for this rural area.
>
> It is not unreasonable to expect city folk moving to residences in the country to make enquiries and to tolerate any normal farm practices *which already produce a nuisance in that area*. Similarly, it is not unreasonable to expect new types of

> farms which produce a nuisance which is fundamentally different in intensity or frequency or both from those *already existing* in a rural area to make enquiries and desist from conducting such operations in that new area. Nor is this a new concept. As mentioned earlier, Dr. Rinker in his publication written for the Ministry of Agriculture and Food recognized that composting odours were a world wide problem and said, "… anyone considering constructing or purchasing a mushroom farm must be especially cautious in choosing the site for composting preparation". He noted that some farms had to relocate their composting operations up to 160 km. from the growing site. The evidence satisfies me that the defendants were well aware of the potential effect on neighbours and should not have started composting in that area. [Emphasis added.]

[38] The trial judge concluded that the operation of GMF up until the spring of 1995 was not a "normal farm practice" because the composting was not carried out properly. With respect to the operation of GMF over the entire period of time, he further concluded as follows:

> From the commencement of its operations GMF was not operating in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and was not operating in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances *because GMF commenced its operations in an area where the nuisance it produced was completely out of character*. There is no evidence that such a fundamental change in an area's environment had ever been introduced anywhere else in similar circumstances. In any event I do not think it is acceptable. In my view the intensity and frequency of the odours produced by GMF fundamentally changed the rural environment the plaintiffs enjoyed before. Even those of the plaintiffs who had been farmers themselves found the GMF odours intolerable.
>
> Having considered the factors I discussed earlier as relating to what is a normal farm practice, I conclude that the GMF operation was never in the category of normal farm practice. [Emphasis added.]

3. Application of the statutes to the appellants' operation

[39] There is no question that the appellants' mushroom farm is an agricultural operation within the meaning of both statutes. There is also no issue on this appeal that the odours resulting from the composting phase of the operation constitute a nuisance at common law. The narrow issue for determination is whether the trial judge, based on the facts as he found them, erred in not concluding that the composting phase of the appellants' operation was carried on as a "normal farm practice" within the meaning of both statutes.

[40] The definition in each statute is comprised of two components. The first part of the definition necessitates that a comparative analysis be made between the practice in question and that followed by similar agricultural operations under similar circumstances. The second part of the definition concerns the use of innovative technology. Since proper subjects of comparison in cases where innovative technology is used may not be available, the question becomes, rather, one of measuring such use in a more general way against advanced management practices.

[41] The different wording of the definition in each statute was noted by the trial judge as "material in this case". As noted earlier, it was his view that when the legislature changed the definition to read "acceptable" instead of "accepted" and added the word "proper" it intended "to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context".

[42] I agree, and the parties do not dispute, that the determination of what constitutes a "normal farm practice" must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands. However, it is my view that this approach applies under either statute. Hence, nothing turns on the 1998 amendment to the definition of "normal farm practice" in this case and the differences between the two statutes are not "material" in any real sense.

[43] In this case, there is no suggestion that GMF was making use of innovative technology and it is therefore the comparative component of the definition that is applicable. The kind of evidence that will be relevant to this inquiry will vary greatly depending on the practice and the operation in question. The following hypothetical published by the Ministry of Agriculture, Food and Rural Affairs [2] illustrates the highly fact-specific nature of the inquiry:

> Hypothetically, in a hearing before the [Board] by an applicant about noise-producing equipment frequently used to

> scare birds away from eating grapes in vineyards, the [Board] might decide that it was *normal* to use this equipment:
>
> - in a *location* where few, if any, neighbours lived nearby, but not normal if there were many residences nearby
>
> - in a *vineyard* in the Region of Niagara, but not normal if used to scare coyotes from sheep pastures in Bruce County
>
> - with a *method of* operation using automatic shutoff switches, but *not normal* using manual shutoff switches
>
> - when bird pressure was greatest during the *timing* of early morning and late afternoon, but *not normal* during the middle of the day during hot weather when birds eat less frequently. [Emphasis in original.]

[44] In my view, the trial judge properly identified the kind of evidence that could be relevant to the comparative analysis in this case in his ruling on the application to reopen the case. He repeated the relevant part of his reasons on the ruling in his final judgment:

> In this case the focus is on evidence relating to the odour of phase one composting operations carried on to produce substrate for mushroom farming. Without limiting the scope of what evidence may be relevant to show "similar circumstances" of the defendants' operation, I would say that in my view it would include evidence [to show how the defendant's operation compared to other operations] as to the location, the surrounding geographical features, the proximity of neighbours and the uses they make of their lands, the zoning of the farm land and of the neighbours' lands, weather features of the area and other factors which may bear on the potential effect, if any, of the operation on others.
>
> It would also include other factors which are already in evidence such as the size of the operation and the formula used.
>
> When I say these factors are relevant I am not saying that there must be evidence on each factor in every case. The sufficiency of the scope of the evidence and its weight are matters which must be considered in the circumstances of each case which include the extent to which the plaintiffs take

> issue with the evidence. The court must make a finding as to whether the defendant has established that its operation is carried on as a normal farm practice in the context of the particular case.

[45] The appellants called this kind of evidence about the composting practices followed by similar agricultural operations under similar circumstances and the trial judge made the appropriate comparison. As noted earlier, he concluded that, since at least the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry and all reasonable precautions possible in the current state of mushroom composting to reduce the odours resulting from the process were being used. He further concluded that there was no material difference between the relationship of GMF and residential neighbours compared to other mushroom farms.

[46] I agree with the appellants' position that, based on these findings with respect to the appellants' operation since the spring of 1995, the trial judge should have concluded that the appellants were entitled to the statutory protection against nuisance claims. Rather, he improperly concluded that the appellants were not entitled to the statutory protection because the nuisance was new and out of character to the area previously enjoyed by the respondents. It is my view that this approach introduces a notion of proximity in time that is inconsistent with the stated objectives of the legislation. It would prohibit intensive agricultural activities from being established in new areas, even where properly zoned agricultural, simply because there are existing residences nearby. This prohibition would be inconsistent with the stated objective in the preamble to the 1998 Act to, not only "conserve" and "protect" but also "encourage the development and improvement of agricultural lands for the production of food". This approach also ignores the fact that the legislature expressly recognized that "agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands".

[47] While the proximity of neighbours and the effect of the farm practice on the use of their lands are relevant considerations in the determination of whether the farm practice is "normal", the fact that the nuisance may be new to the area or to the complainants is irrelevant. It cannot change the character of a practice that is otherwise a "normal farm practice". Otherwise, the inclusion of the notion of "first in time, first in right" would effectively undermine one of the important objectives behind the legislation.

[48] Counsel for the respondents made no attempt to support the trial judge's inclusion of this additional factor in the interpretation of the legislation. Counsel argued, rather, that the trial judge's decision could be supported on the basis that the intensity and frequency of the odours produced by GMF exceeded any "acceptable" tolerance level and, hence, fell outside the scope of protection under the statutes. Counsel argued that it is implicit from the use of the words "discomfort and inconveniences" in the preamble

and “proper and acceptable” in the definition of ‘normal farm practice’ under the 1998 Act that the protection does not extend to intolerable levels such as those experienced by the respondents in this case.

[49] I see no merit to this argument. The protection afforded under both Acts is against “nuisance” which, by definition, must constitute a substantial interference that would not be tolerated by the ordinary occupier. The reference to “discomfort and inconveniences” in the preamble of the 1998 Act does not change the nature of the tort of nuisance. Further, I am unable to read any outer limit to the protection as contended by the respondents from the words “proper and acceptable” in the first part of the definition of “normal farm practice” in the 1998 Act. Quite clearly, these words qualify the nouns “customs and standards” as established and followed by similar agricultural operations under similar circumstances. While the effect of a particular practice on neighbouring properties can be a relevant consideration in determining what are the “proper and acceptable customs and standards” for an operation, it does not mean that the practice must be within the tolerance limits of, or acceptable to, the affected neighbour before the test can be met.

4. Conclusion

[50] In my view, the findings of fact made by the trial judge support his conclusion that GMF’s composting practice was not a “normal farm practice” up until the spring of 1995, but not thereafter. The trial judge’s conclusion with respect to the period of time up to the spring of 1995 was based on his specific finding that the manner in which the composting was conducted during the initial months of the operation was not consistent with accepted customs and standards as established by similar mushroom farms under similar circumstances. As such, the appellants cannot claim the statutory protection for that period of time. On the other hand, the trial judge’s conclusion with respect to the period thereafter cannot be supported by the material findings of fact made at trial. The trial judge’s findings can only lead to the conclusion that the composting practice followed by GMF after the spring of 1995 was a normal farm practice within the meaning of the statutes. The conclusion to the contrary was based on the trial judge’s erroneous interpretation of the legislation and cannot be supported.

[51] In the result, I would allow the appeal, set aside the judgment and refer the matter to the trial judge for a reassessment of the damages and costs of the trial in accordance with this analysis.

III. Intervention by the Ontario Federation of Agriculture

[52] Although the Ontario Federation of Agriculture (“the OFA”) argued in its factum that the Superior Court of Justice did not have the jurisdiction to determine at first instance what constitutes a “normal farm practice” under the 1998 Act, this argument was

not advanced in oral submissions. Counsel for the OFA conceded that, given the late stage in the proceedings when the question was raised, the trial judge did not err in deciding the issue himself rather than leaving the matter for determination by the Normal Farm Practices Protection Board.

[53] Although counsel did not expressly acknowledge the point, I take it from this concession that the OFA is retracting the primary submission in its factum that the Superior Court of Justice only acquires jurisdiction to make an award in a nuisance case against an agricultural operation after the Board determines that the "disturbance" complained of is not the result of a "normal farm practice". In any event, it is my view that there is nothing in the 1998 Act, express or implied, that ousts the jurisdiction of the Superior Court of Justice to decide, in the context of an action in nuisance, whether the defendants are immune from liability because the subject matter of the claim is a "normal farm practice" within the meaning of the statute. The question is, rather, whether the court should, in its discretion, decline to determine the issue and stay the action in nuisance until the Board makes the determination whether the disturbance constitutes a normal farm practice. See s.106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for the general power to stay proceedings in appropriate circumstances. The intervener takes the position that courts, in all cases, should decline to exercise their jurisdiction and leave the determination of what constitutes a normal farm practice to the Board.

[54] In the circumstances of this case, no one takes issue with the trial judge's decision to determine the matter himself. As he stated in his reasons, had the issue been raised at the commencement of the trial [3], he might well have left the matter for the Board to determine, but as matters stood, the parties had gone to enormous expense to present the case before the court and if the issue were referred to the Board, the evidence would have to be called again and significant delays would be occasioned. The trial judge also noted that the court was better equipped to determine the related questions of statutory interpretation than the Board. Finally, the trial judge remarked that, whether he declined to hear the matter or not, a multiplicity of proceedings appeared to be unavoidable:

> If the matter were referred to the Board and it found this was not a case of normal farm practice it could order the composting operation to stop but could not compensate the plaintiffs because this is not within their authority. The parties would have to return to the court once again. As I will discuss, if the plaintiffs succeed before me I can compensate them but cannot issue an injunction to terminate the nuisance. This is a very impractical and costly division of authority.

[55] Although the court's power to issue an injunction prohibiting a farmer from carrying on an agricultural operation that is not a normal farm practice is not in issue on this appeal, I find it important to determine the matter in the context of the issue raised by

the intervener. For reasons that I will set out below, it is my view that the court does retain this jurisdiction under the 1998 Act. Nonetheless, there remains a division of power between the Board and the court that lends much support to the intervener's position. In my view, absent special circumstances (this case is one example), the question, raised within a nuisance action, of whether a disturbance constitutes a "normal farm practice" should generally be left for the Board to determine and the action should be stayed pending such determination. I find the intervener's position persuasive for the following reasons.

[56] First, the expertise of the Board is a very important factor. The Board is an administrative tribunal that has been constituted with the particular expertise to achieve the purposes of the legislation. It also has the power to appoint experts to assist it in performing any of its functions: s. 8(3).

[57] Second, the Board's special procedure and non-judicial means available under the legislative scheme to implement its purposes can present litigants with significant advantages over the traditional court system. I note the following. The Board has the general power to inquire into and resolve a dispute respecting an agricultural operation and to determine what constitutes a normal farm practice: s. 4(2)(a). The material before the court demonstrates that the informal procedures that have been put in place have proven quite effective. One consultation paper on the role of the Farm Practices Protection Board dated February 1996 reveals that, on average, the Ontario Ministry of Agriculture, Food and Rural Affairs receives approximately 700 environmentally related complaints annually, yet the Board holds only two hearings per year. The great majority of complaints are otherwise resolved by ministry staff and/or other experts. This is further confirmed in the Ministry's "fact sheet" referred to earlier where it is estimated that only about 1% of the total complaints received by Ministry staff on nuisances covered by the Act actually end in a Board hearing. Even when the matter is not resolved informally and a hearing does take place, it is usually held in local municipalities, the procedure is less formal than court proceedings and, judging from the Board decisions that have been presented to this court, the entire process appears to be more accessible to the unrepresented litigant.

[58] Third, the Board has extensive powers of relief that can, in many cases, be more suitable to the needs of the parties. If the practice is a normal farm practice, there is no difference between the powers of the Board and the court. The Board must dismiss the application and likewise, the court must dismiss the action in nuisance. It is in those cases where the disturbance is not a normal farm practice that the differing powers can become significant.

[59] Of particular significance is the Board's power, where the disturbance is not a normal farm practice, to require that a farmer implement certain farming techniques and methods to ensure compliance with normal farm practice: s. 5(4)(c). The court does not

have such power. Example of remedial orders made by the Board under the earlier statute can be found in the following decisions: *Re Youcke v. Hermann* (29 September, 1993) 93 – 01 (F.P.P.B.); and *Re Thuss v. Shirley* (27 December 1990) 90 – 02 (F.P.P.B.). After making an order, the Board retains the power to make the necessary inquiries and orders to ensure compliance with its decisions: s. 4(2).

[60] If the practice is not a normal farm practice, the Board, in addition to its power to make remedial orders, has the power to order the farmer to cease the practice: s. 5(4)(b). In my view, the court also has this power under the 1998 Act. I reproduce the relevant provisions here for ease of reference:

> 2.(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.
>
> …
>
> (4) Subsections (1) and (2) do not apply to preclude an injunction or order, in respect of a nuisance or disturbance, against a farmer who is in contravention of an order of the Board made under clause 5(4)(b) related to that nuisance or disturbance.

[61] It is clear that a court has the power under s. 2(4) to issue an injunction against a farmer who is in contravention of an order made by the Board under s. 5(4)(b) to cease a practice that is not a normal farm practice. In my view, the court, under s. 2(2), also retains the general power to issue an injunction against a farmer who creates a nuisance where the disturbance is *not* a normal farm practice and the Board has not issued such an order. It is undisputed that the protection under s. 2(1) is limited to agricultural operations that are carried on as a normal farm practice. In my view, the words "the agricultural operation" under s. 2(2) can only be referable and limited to the "agricultural operation carried on as a normal farm practice" to which the protection extends under s. 2(1). This interpretation is more consonant with the general principle that a superior court's jurisdiction cannot be ousted by legislation unless by clear and explicit statutory wording to this effect: see *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

[62] However, the court's power to grant injunctive relief where the nuisance results from an operation that is not a normal farm practice is no greater than that exercisable by the Board. Indeed, the Board's general power to make inquiries and further orders to

ensure compliance with its orders may present certain advantages to the litigants that are not as readily available before the courts.

[63] Of course, as noted by the trial judge the Board does not have the power to award damages. However, in those cases where the disturbance is held to be not a normal farm practice, the Board can issue an order to stop the practice, and the complainant, if so inclined, can pursue his claim before the courts. Presumably, the offending practice will have ceased and the total damages can then be assessed.

[64] For these reasons, it is my view that, absent special circumstances, complaints in respect of agricultural operations should generally be brought first before the Board before any action in nuisance is entertained by the courts.

Signed: "Louise Charron J.A."

SHARPE J.A.

[65] I have had the advantage of reading Charron J.A.'s reasons for judgment. I agree with paragraphs 52 to 64 of her reasons and with her conclusion that, absent special circumstances such as existed in the present case, complaints with respect to nuisances created by agricultural operations should generally be brought first before the Normal Farm Practices Board before any action in nuisance is entertained by the courts. However, I respectfully disagree with her conclusion that the trial judge erred in the manner in which he interpreted and applied the *Farm Practices Protection Act*, R.S.O. 1990, c. F.6 (the "1988 Act") and the *Farming and Food Production Protection Act, 1998*, S.O. 1998, c.1. For the reasons that follow, I would dismiss the appeal and uphold the award of damages he made in favour of the respondents.

FACTS

[66] My colleague has fully set out the facts, the legislation, and the findings of the trial judge. [4] I need not repeat her comprehensive discussion of these points. I would, however, place greater emphasis on the trial judge's findings with respect to the degree of disturbance caused to the respondents by the appellant's mushroom farm operation, as I believe those findings were an important factor in his ultimate decision that the appellants were liable in nuisance despite the protective legislation.

[67] The trial judge generally accepted the evidence offered by the respondents describing the odours emanating from the appellant's mushroom farm and the effect those odours had upon the respondents. The odours were described in various graphic terms, including the following: "like a septic tank"; "rotten eggs, putrid, stink, rank and

nauseating"; "decaying animals, cow manure"; "nauseating and like rotten flesh"; "like an outhouse, ammonia, sour, putrid, rotten vegetables"; "like ammonia or rotten meat and as bad, terrible and unbearable stenches"; "having one's face buried in faeces"; "worse than the pig farm"; and "unbelievably terrible."

[68] The trial judge accepted the respondents' evidence that these odours were regular and persistent and that they significantly interfered with the use and enjoyment of their properties. The respondents significantly curtailed their outdoor activities, including walking and gardening. Several respondents complained of sore throats and breathing difficulties, which they attributed to the odours. The trial judge found that the odours "have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands." The trial judge also found that the respondents were not unusually sensitive, nor were they unfamiliar with odours emanating from farming operations. Indeed, several of them compared the odours emanating from the appellant's operation to those experienced from a nearby pig farm. The odours from the appellant's operation were said to be stronger, more prevalent, and more of an interference with enjoyment and use of the respondent's property than those from the pig farm.

[69] I would also point out that at trial, the appellant led evidence disputing that of the respondents as to the significance of the offensive odours emanating from the mushroom farm. The trial judge specifically rejected the evidence of Mac Snobelen, Clay Taylor, Brent Taylor, and David Van Dusen in this regard. As the trial judge noted, the gist of the testimony of these witnesses "was that there were seldom any offensive odours in the immediate area of the composting operation and virtually never any offsite". The trial judge concluded "that in their effort to minimize the plaintiffs' complaints they deliberately gave the court an inaccurate impression of the odours produced by composting."

ANALYSIS

[70] The central issue on this appeal is the meaning to be given the phrase "normal farm practice". It is common ground that if the activities of the appellant qualify as a "normal farm practice", the respondent's claim in nuisance must be dismissed. For ease of reference, I repeat here the statutory definitions of "normal farm practice". The 1988 Act defined that term as follows:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices.

> The 1998 Act contains the following definition:
>
> "normal farm practice" means a practice that,
>
> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>
> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices.

[71] It appears to be common ground that the inquiry into whether a farming operation qualifies as a "normal farm practice" is both fact and site-specific. I agree with Charron J.A. at para. 42 that "the determination of what constitutes a 'normal farm practice' must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands."

[72] There appear to be no judicial decisions, apart from that under appeal in this case, interpreting these provisions of either of the statutes. In some cases, the Farm Practices Protection Board under the 1988 Act appears to have taken a broadly contextual, site-specific, and evaluative approach. In *Bader v. Dionis* (2 September 1992), FPPB92-01, the Board found that the use of acoustical bird scaring devices was a normal farm practice, but warned at p. 6 that "this does not mean that in all situations where it is in close proximity to residential dwellings that the use of a bird banger will be a normal farm practice." In *Thuss v. Shirley* (27 December 1990), FPPB 90-2, the Board dealt with a red ginseng operation that required sandy soil with little or no organic material. The soil was susceptible to wind erosion, and blowing sand seriously disrupted the activities on, and enjoyment of, neighbouring non-agricultural properties. There was no evidence of similar operations in Ontario, but there was evidence that the farm had followed the practices of its Korean advisers. The Board concluded at p. 4 that the farm practice for this crop "will, by necessity, have to be innovative" and that "[i]nnovative management practices … cannot be deemed normal if they result in severe erosion. Consequently, in this case, the blowing soil and related sand storms, do not result from a normal farm practice." The underlying premise of this conclusion is that even though a practice may be appropriate from the perspective of the farming operation that seeks to defend it, it will not be acceptable if it causes disproportionate harm to neighbouring non-agricultural users.

[73] The Normal Farm Practices Protection Board saw fit to express strong disagreement with the approach taken by the trial judge in the case on appeal when the situation of the appellants' operation came before it in another proceeding. In *Gardner v.*

Greenwood Mushroom Farms (21 September 2000), 2000-01, the complainants argued that the appellant was bound by the result in the judgment under appeal here. The Board rejected that contention and went on to state its concern that the trial judge did not fully appreciate the Board's approach to the determination of "normal farm practices". The Board expressed the view (at p. 7) that the trial judge had "placed too much weight upon the order in which competing land uses arrive in a particular area as a basis for determining normal farm practice." The Board added at p. 9 that "even though normal farm practices may cause 'discomfort and inconvenience' to other persons, those discomforts and inconveniences are the price which may have to be paid if the Province of Ontario chooses to maintain viable agricultural businesses."

[74] However, when dealing with another mushroom farm operation in *Gunby v. Mushroom Producers' Co-operative Inc.* (30 July 1999), 99-02, the Board found that the operation satisfied the statutory definition of "normal farm practice" but at the same time expressed disappointment "that the mushroom industry in Ontario does not appear to take a leading role in the development of technology which would reduce the production of anaerobic gases. We strongly urge the mushroom industry to expend the money that is necessary to develop aerated floors and biofilters in mushroom production within Ontario. Otherwise, the entire industry may be adversely affected by a future ruling of this Board which may conclude that the standard of normal farm practice has shifted from conventional Phase 1 production to aerated floor and biofilter technology." This latter decision, like the others I have cited, indicates that the Board does take into account a broad range of factors, including the nature and the extent of the harm suffered by third parties, in determining whether farm practices gain the protection of the Act. In effect, the Board adopts an appropriately evaluative approach that is in keeping with the legislative language, and does not strictly equate "normal farm practice" with those practices actually adopted by industry in Ontario.

[75] The appellants argue that the preamble to the Act indicates a legislative intention to "encourage the development and improvement of agricultural lands for the production of food…" and that this legislative purpose would be frustrated, if not defeated, if landowners could complain of a disturbance on the ground that they were there first. I agree that the preamble has an important bearing on the interpretation of the Act and that terms of a statute must be interpreted in light of its purposes. However, statutory interpretation does not occur in a vacuum and there are other important legal principles that a court can and should take into account. This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public

purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.

[76] It is, of course, open to the legislature to limit individual rights of property in order to achieve some broader social objective. On the other hand, it is a well-established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights: Côté at pp. 473-75, 482-86. In *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 S.C.R. 101 at p. 109, the Supreme Court of Canada adopted the following passage from *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 at p. 542:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

[77] There is also authority for the proposition that a court will lean against an interpretation that would allow one party to appropriate the property of another: *British Columbia (Board of Industrial Relations) v. Avco Financial Services Realty Ltd*., [1979] 2 S.C.R. 699 at p. 706. Undoubtedly in the modern era, there has been an increasing judicial acceptance of laws restricting rights of private property to achieve some broader social purpose, but as pointed out by R. Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 373, when interpreting such statutes the courts still have a role in achieving an appropriate balance:

> The idea that a legislature might intend to limit the free and full enjoyment of individual property rights for the purpose of securing a public benefit or promoting the interests of a larger community is familiar to modern courts and excites little resistance. The focus is on striking an appropriate balance between individual property rights, which remain important, and legislative goals.

[78] In my opinion, a broad approach, relating the inquiry to the specific circumstances pertaining to the site with a view to striking an appropriate balance between the rights of affected property owners and nuisance creating farming operations, is borne out by the language of the statute. I agree with the trial judge that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". As I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards.

[79] First, both statutes require that the "circumstances" be taken into consideration. This means that the same practice may qualify as a normal farm practice in one situation, but not in another where the circumstances are different. The definition of "normal farm practice" requires that the operation at issue be assessed with regard to the "customs and standards as established and followed by similar agricultural operations under similar *circumstances*" (emphasis added). Section 6 of the 1998 Act, exempting a "normal farm practice" from the application of municipal ordinance, sheds some light on the question. Section 6(1) provides that "[n]o municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation", and s. 6(2) allows the Normal Farm Practices Protection Board to determine whether the practice at issue is a normal farm practice for the purposes of non-application of a municipal by-law. Section s. 6(15) directs the Board to consider, among other factors, "[t]he specific circumstances pertaining to the site." Although these provisions do not apply directly to the circumstances of the present case, the phrase "normal farm practice" should be given a consistent interpretation and, if "the specific circumstances pertaining to the site" bear upon the definition of "normal farm practice" in one context, it would be anomalous to exclude site-specific considerations form the definition in another context. As Cory J. stated in *Thomson v. Canada (Agriculture),* [1992] 1 S.C.R. 385 at p. 400: "Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act": see also P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000) at p. 332. In my opinion, the same holds equally true for phrases recurring throughout a statute.

[80] Second, the farming operation must also satisfy the tribunal hearing the case that, in the circumstances, the customs and standard are, in the words of the 1988 statute, "proper and accepted" and in the words of the 1998 statute, "proper and acceptable". The words "proper and acceptable" connote a qualitative, evaluative inquiry. The *Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) defines "proper" as (*inter alia*) "of requisite standard or type; fit, suitable, appropriate; fitting, right" and "acceptable" as "worth accepting; likely to be accepted; pleasing, welcome, tolerable." These words qualify and limit the phrase "customs and standards as established and followed by similar agricultural operations under similar circumstances". I read this qualification as adding another important dimension to the inquiry.

[81] In my respectful view, this statutory language indicates that the farming industry does not have *carte blanche* to establish its own standards without independent scrutiny. Not all industry standards prevail – only those that are judged to be "proper and acceptable". In my view, this statutory language requires the adjudicative body to consider a wide range of factors that bear upon the nature of the practice at issue and its impact or effect upon the parties who complain of the disturbance, with a view to determining whether the standard is "proper and acceptable." An analogy may be drawn from the law of negligence, where reliance on custom and established practice is relevant but not decisive on the requisite standard of care. In *Waldrick v. Malcolm,* [1991] 2

S.C.R. 456 at p. 474, Iacobucci J. dealt with this issue in the context of an occupier's liability case: "…the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers under s. 3(1) of the [*Occupier's Liability*] Act."

[82] To the extent there is any ambiguity in the legislation as to whether or not the words "proper and acceptable" limit or qualify the industry standards, the principles I have discussed suggest that ambiguity should be resolved in favour of the respondents whose property is adversely affected without compensation.

[83] In deciding that the appellants failed to satisfy the "normal farm practice" standard, the trial judge was strongly influenced by two factors. First, as I have already mentioned, he found that the degree and intensity of the disturbance created an intolerable situation for the respondents. The second was the fact that the respondents were there first and that the appellants' mushroom farm operation created a significantly greater and different disturbance than anything that had been experienced before in the area.

[84] The appellants take issue with the trial judge's approach. They argue that he erred in taking into account both the degree and extent of the disturbance and the fact that the respondents were there first. I disagree. In my view, the trial judge was warranted in taking these closely related factors into account in assessing the appellants' claim that they were simply following "proper and acceptable" customs and standards of the farming industry.

[85] I agree that a strict or automatic "first in time, first in right" approach would not be warranted and that it would result in an unduly restrictive interpretation of the Act that would unduly limit the establishment of new farming operations. However, I would not go to the other extreme and accept the proposition that the timing factor should be excluded as entirely irrelevant. In my view, the relative timing of the establishment of the farming operation and the occupancy of those who complain of the disturbance it creates is one of the relevant contextual, site-specific circumstances to be considered. On this point. I find the reasons of the trial judge to be persuasive (at para. 283):

> The consideration of this factor would also seem to be a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing. Within a five minute drive of the courthouse where this trial took place there are numerous examples of situations where there are agricultural operations immediately beside housing subdivisions. Indeed, the subdivisions are spreading rapidly into what has been farmland. In considering, for example, how these statutes would operate if the mushroom farm were immediately

> adjacent to one of these subdivisions, it would seem to me to be appropriate to consider what was the normal farm practice in the area before the subdivisions were built. If [the appellant] GMF were adjacent to one of these subdivisions it would seem to me to be relevant to consider whether the farmland was first used for a mushroom farm before or after the subdivisions were built. Another example would be the situation where a mushroom farm was started in an area where there were already other mushroom farms operating in close proximity to residences. That would seem to me to be a significantly different situation from the one here where the previous farm operations adjacent to the plaintiffs' residences did not produce anything close to the degree and frequency of offensive odours which were introduced by GMF.

[86] I do not agree that the trial judge's reasons rest on any strict or absolute rule of "first in time first in right." He expressly stated at para. 285: "I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before." As I read his reasons, timing was one of the factors he took into account, albeit in this case an important factor, but it was only part of the much larger picture of a very significant disturbance suffered by the respondents.

[87] The second and related factor was the serious nature of the disturbance suffered by the respondents. Again, it seems to me that this was an important aspect of the site-specific circumstances the trial judge was entitled to take into account in determining whether the appellant's operation constituted a "normal farm operation" within the meaning of the Act.

[88] In my view, the trial judge was entitled to take these factors into account in assessing whether the appellants had brought themselves within the statutory exemption from liability afforded normal farm practices. I would not interfere with his determination that they failed to do so.

[89] For these reasons, I would dismiss the appeal with costs

Other issues

[90] I agree with that portion of the reasons of Charron J.A. dealing with the issues raised by the intervention of the Ontario Federation of Agriculture. It follows that I do not agree with the trial judge's determination that he could not award an injunction or

damages in lieu of an injunction. However, as there was no cross appeal on that point, I would not interfere with the remedy as ordered by the trial judge.

Released: AUG 03 2001
RSA

Signed: "Robert J. Sharpe J.A."

"I agree R.S. Abella J.A."

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[1] The Greenwood Mushroom Farm is a partnership consisting of Tri Gro Enterprises Ltd and G.M.F. Part 2. G.M.F. Part 2 is also a partnership: its partners are the appellants Brent Taylor Holdings Ltd., Rick Campbell Holdings Ltd., and Snobelen Mushrooms Ltd. The latter corporation owns and operates the corporate appellant Mac Snobelen Holdings Ltd. The individual defendants are employees or officers and directors of the defendant corporations and the action was dismissed as against them. The dismissal of the action against the individual defendants is not an issue on this appeal.

[2] This hypothetical is set out in a "fact sheet" entitled The Farming and Food Production Protection Act (FFPPA) and Nuisance Complaints.

[3] Sometime before trial, the appellants moved for the dismissal of the respondents' action on the ground that it was barred under the *Farm Practices Protection Act.* Alternatively, they sought an order staying the action. The motion was heard and dismissed by Chadwick J. on October 26, 1998. The motions judge held that there was a genuine issue for trial i.e. whether the appellants' operation fell within the definition of "normal farm practice" and he therefore refused to grant summary judgment. However, it does not appear from the motions judge's endorsement that the alternative question of a stay was considered, and the parties on appeal could not provide any explanation.

[1] The trial judge's reasons are reported at [1999] O.J. No. 3217, online: QL (OJ).