



October 24, 2008

File: FP: # 08-02, 08-04

DELIVERED BY E-MAIL

Charlie & Diane Fox

Tony Crossman,
Miller Thomson LLP

Citizens for Legitimate Composting (CFLC)
c/o Maureen and David Adamson

**Re: Fox and CFLC vs Truong, File #08-02 and #08-04
Farm Practices Complaint, Langley Mushroom Composting Operation**

I write in follow up to the Case Management Conference (CMC) of August 19, 2008. As a result of that process, a number of issues were identified which need resolution prior to any alternate dispute resolution or hearing. In the interim, on September 5, 2008, a tragic workplace incident occurred on the mushroom composting site that is the subject of these complaints. The composting operation is shut down while Worksafe BC conducts an investigation.

Background:

On July 15, 2008 the British Columbia Farm Industry Review Board (BCFIRB) received a complaint from Charlie and Diane Fox (Fox Complaint) taking issue with the farm practices relating to odour and waste water discharges from the Truong mushroom farm and composting facility located at 23751 – 16th Avenue, Langley. There are two corporate entities involved in the ownership and operation of the mushroom farm and composting operation: A-1 Mushroom Substratum Ltd. and H.V. Truong Ltd. (the “Farm”).

On August 5, 2008 BCFIRB received another farm practices complaint regarding the Farm from Maureen and David Adamson “on behalf of our neighbourhood group, Citizens for Legitimate Composting (CFLC)”. Their complaint relates to odour from the composting operation. As the two complaints related to the same operation and both concerned odour, a decision was made that the two complaints be heard together. The following issues from the CMC remain to be addressed:

1. The standing of CFLC to bring a complaint;
2. Request for particulars of the complaints;

British Columbia
Farm Industry Review Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
3rd Floor, 1007 Fort Street
Victoria BC V8V 3K5
Email: firb@gov.bc.ca
Website: www.firb.gov.bc.ca

3. Use of a knowledgeable person (KP)

I will also address the impact of the September 5 workplace incident on the BCFIRB hearing process.

Standing Issue

The Farm takes issue with the standing of the CFLC to bring its complaint. Although the Farm has been provided with the names and addresses for the members of the CFLC, it questions the authority of Mr. and Mrs. Adamson to speak on behalf of this collective and questions what if any personal knowledge they have of their neighbours' complaints. The Farm seeks the following from each member of the CFLC:

- a) a statement of the nature of their complaint;
- b) the type and interference complained of including the time, place, severity and duration;
- c) the character of the complainant's neighbourhood;
- d) the nature of the complainant's use of his or her land and applicable zoning; and
- e) the relative timing of the Farm's operation and the occupancy of the complainant.

The Farm argues that if BCFIRB does not order these particulars, it calls into question BCFIRB's gatekeeping function and opens the floodgates for complaints by the general public and special interest groups.

I disagree with the Farm. The *Farm Practices Protection (Right to Farm) Act* (the "Act") provides:

Complaints to Farm Practices Board

3 (1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

(2) Every application under subsection (1) must

(a) contain a statement of the nature of the complaint, the name and address of the person making the application, the name and address of the farmer and the location of the farm,

(b) be in a form acceptable to the chair of board, and

(c) be accompanied by the fee prescribed by the Lieutenant Governor in Council.

[emphasis added]

The *Act* does not require the complainant, from the outset, to particularize its complaint in the manner contemplated by the Farm. A statement of the nature of the complaint, coupled with the respective addresses of the complainants, the farmer and the farm is enough. As the matter proceeds towards hearing, the complaint will be further particularized. The floodgates concern

raised by the Farm can be addressed through s. 6(2) of the *Act*, as well as the CMC and Pre-Hearing Conference processes. If a complaint filed by a member of the general public or a special interest group does not show a connection to the farm, geographical or otherwise, an application for summary dismissal could be made.

I am not satisfied however, that this is the case here. Ms. Adamson has identified that the CFLC are all neighbours of the farm who share a common complaint relating to the Farm's odour management practices. I do agree that there is some question whether Ms. Adamson speaks on behalf of all these neighbours and whether the complaint as framed adequately addresses the complaints of the neighbours.

There is another standing issue which should be noted. Given that an order of BCFIRB, made as a result of a complaint, can be filed with the Supreme Court and has the same force and effect as if it was an order of the Supreme Court, the parties to the complaint must be legal entities. The CFLC is not a legal entity; it is not a society or an association and could not enforce an order.

In my view, the members of the CFLC need to individually determine whether the complaint as framed by the Adamsons reflects the nature of their complaint and that they agree that the Adamsons may speak on their behalf. If so, they each need to formally sign the Adamson complaint and identify their address. If the complaint as framed does not adequately reflect their particular concerns, a new complaint could be filed. If a CFLC member does not wish to file a new complaint, they could seek intervener status in either complaint or be called as a witness as part of the case of one of the complainants. However, an intervener or witness would not have the right to enforce any order made with respect to the complaint.

Particulars of the Complaint

The Farm also seeks the particulars of the incidents complained of as a matter of procedural fairness. It requests that the Fox's provide:

- a) dates and times (for example, it is unclear if these are issues going back three years or if these are more recent issues);
- b) duration;
- c) the nature of the odour or wastewater discharge; and
- d) to whom was the odour or wastewater discharge reported (if anyone).

The Farm requests that the following particulars in the Adamson and CFLC complaint:

- a) details of negative effects on quality of life, and health;
- b) details of odour occurrences;
- c) clarification of whether the Adamson's are filing claim on their own behalf, on behalf of the CFLC, or both.

The Farm says that it needs this information before any settlement discussions take place. The Farm argues that before a person can make a complaint, the person must show that he or she is "aggrieved by an odour...or other disturbance" "resulting from a farm operation". The Farm argues that its operation is located in an area of chicken farms, horse farms and fields where manure is spread. As such, it is important that the Complainants meet the threshold and demonstrate that it is *this* farm

that is the source of their complaints before time and money is expended to deal with complaints that may not be attributable to the Farm.

As I indicated above, subject to the CFLC members reviewing the nature of the complaint as drafted by the Adamsons and confirming their intentions, the complaints as filed comply with the requirements of the *Act*. Under the guise of procedural fairness, the Farm is attempting to impose burdensome procedural hurdles on the complainants. The pre-hearing processes of BCFIRB are designed to ensure that complaints are addressed in a procedurally fair manner where there is adequate disclosure of the grounds of a complaint so all parties know the case they have to meet. The Complainants will need to prove their case and will be required to disclose all documents they intend to rely on in advance of any hearing. If, in the hearing, they fail to demonstrate that they are aggrieved or have sufficient connection to the complained of practices, their complaints will be dismissed.

Knowledgeable Person

Having found that the complaints as drafted comply with the requirements of the *Act*, and once the issue of standing of the members of the CFLC has been resolved, the next step would be for BCFIRB to retain a “knowledgeable person”. The parties would be given the knowledgeable person’s name and qualifications and be asked to sign off on the Terms of Reference document. The knowledgeable person would attend the farm to review its management practices including the farm’s practices relating to the complaint. A report would be prepared regarding the farm’s compliance with proper and accepted customs and standards as followed by similar farm businesses under similar circumstances as well as any recommendations to mitigate problems caused by the farm’s operation. Typically, the knowledgeable person meets with the neighbours to review their concerns about the farm’s practices and to discuss those practices. The report is meant to assist the parties in reaching a settlement of the complaint. However, if the matter proceeds to hearing, the report may be tendered as opinion evidence for the panel’s consideration.

In this case, the Farm has advised that as a result of the workplace incident, the Farm is not operating. Further, WCB (Worksafe BC) orders prohibit any party other than Hazco from accessing the composting operation, including the composting barns, the process water tank and the containment area. Given this order, the Farm argues that the knowledgeable person cannot be on site and as such, cannot render an opinion on whether the farm is operating in accordance with “normal farm practice”.

I preface my comments by noting that I am accepting the Farm’s arguments at face value not having seen any order. I would ask that the Farm produce a copy of the WCB (Worksafe BC) Order to BCFIRB and the parties immediately. However, assuming this statement is correct, I agree that there is little benefit to retain a knowledgeable person to prepare an opinion if he will be denied access to the composting operation. Further, while I appreciate that the mandate of WCB (Worksafe BC) is quite different from that of BCFIRB, it would appear to be at least a possibility that if and when the composting operation is permitted to resume it will do so under different operating conditions than previous. Thus, we are faced with a situation where the neighbours have a complaint relating to the past operations of the composting operation; current circumstances likely preclude the involvement of a knowledgeable person and if or when the Farm resumes composting operations, those operations may be quite different from those in the past.

The Complainants need to consider their respective positions in light of recent events. In these very unique circumstances, I question whether there is any utility in pursuing alternate dispute resolution or a hearing until such time as the Farm knows whether it will resume operations and under what conditions or restrictions. The alternate dispute resolution process is a BCFIRB staff function and would be an agenda item for discussion between the parties during any future conference calls.

In light of the foregoing, I propose as follows:

- a) Within three (3) days of this letter, the Farm provide the BCFIRB and the other parties with a copy of any order or correspondence confirming the access prohibition to the Farm;
- b) Within seven (7) days of this letter, the members of the CFLC clarify their respective positions with respect to the complaint drafted by the Adamsons;
- c) Within fourteen (14) days of this letter, the complainants provide their respective positions of how this matter should proceed;
- d) Within seven (7) days of the complainants position, the Farm respond with its position of how this matter should proceed;

Please ensure that all parties are copied on the above submissions. Once the submissions are received, I will make a determination as to the standing of the complainants and give further directions as to whether this matter can and should proceed or whether it should be held in abeyance until such time as the Farm resumes composting operations.

Yours truly,

A handwritten signature in black ink, appearing to read 'Richard Bullock', written over a light grey rectangular background.

Richard Bullock
Chair