

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, R.S.B.C. 1996, c. 131
AND IN THE MATTER OF A
COMPLAINT ARISING FROM THE OPERATION OF A COMPOSTING FACILITY
IN CONNECTION WITH A TURF FARM IN DELTA, BRITISH COLUMBIA

BETWEEN

WILLIAM JOHN LACEY

COMPLAINANT

AND:

INSTANT LAWNS TURF FARM (1994) LIMITED
d.b.a. WESTCOAST INSTANT LAWNS

RESPONDENT

AND:

THE CORPORATION OF DELTA

INTERVENOR

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine Elsaesser, Vice Chair
(Panel Chair)
Richard Bullock, Chair
Barbara Buchanan, Member

For the Complainant

William Lacey

For the Respondent

Jonathan Baker, Counsel
Greg Corson, Counsel

For the Intervenor

Scott Stanley, Counsel

Dates of Hearing

September 28-30, 2004

Place of Hearing

Delta, British Columbia

INTRODUCTION

1. The Respondent Westcoast Instant Lawns (“Westcoast”) operates a turf business in Delta, at 4295 - 72nd Street. (the “Property”). Westcoast grows turf on the Property and some other parcels which it owns or leases. These properties are all within the Agricultural Land Reserve (“ALR”). Westcoast is also involved in the composting of materials from various sources at this site.
2. The Complainant and other persons living in the area object to odours that they allege are being caused by Westcoast’s operations. The Complainant alleges that the practices engaged in by Westcoast do not constitute normal farm practices and as such, should be the subject of an order by this Panel to cause Westcoast to modify such practices. The Corporation of Delta (“Delta”) takes the same position.
3. This complaint was originally filed on October 24, 2003 by Delta.¹
4. After receipt of the complaint, staff and a contractor of the Provincial board conducted an initial investigation and examined settlement possibilities with the parties.
5. A pre-hearing conference was held on April 29, 2004 and there were various exchanges of correspondence between the Panel and the parties, dealing with preliminary and procedural matters including the exchange of numerous documents and expert reports discussed below.
6. Further to an issue identified during the pre-hearing conference, the Panel issued a preliminary decision on September 24, 2004 finding that Delta (which is not a natural person) was not an appropriate party to bring a complaint concerning odour. However, the Panel indicated that we would be prepared to have a natural person substituted as the Complainant, and Mr. Lacey agreed to assume this role. Delta proceeded in the capacity of intervenor.
7. In another complaint originally filed by way of an August 7, 2003 letter, Delta took issue with alleged leachate problems associated with a property on 64th street formerly leased and operated by Westcoast. Provincial board staff wrote to Delta on August 18, 2003 outlining the board’s role and jurisdiction and noting that “issues requiring environmental harm caused by contamination fall squarely within the (then) *Waste Management Act* as administered by the (then) Ministry of Water, Land and Air Protection”.

¹ Earlier, by way of a letter dated August 29, 2003, William John Lacey had written to this board on behalf of his family and other residents, raising concerns about odour allegedly arising from Westcoast’s operations. The complaints were originally filed with the then Farm Practices Board; which with the British Columbia Marketing Board was amalgamated into the British Columbia Farm Industry Review Board (the “Provincial board”) effective November 1, 2003.

8. In our letter of September 24, 2004 to the parties, the Panel advised that we were inclined to dismiss the leachate complaint as not being within the jurisdiction of the Provincial board. We received written submissions in advance and heard further arguments on this point at the commencement of the hearing and determined that we did not have jurisdiction to hear that complaint. We noted that we would provide written reasons in due course. Our reasons are as follows. The *Farm Practices Protection (Right to Farm) Act* (the “Act”) only gives us the power to order a person to modify farm practices and does not give us the authority to order a person to take remedial action to address past farm practices undertaken on land in which the person no longer has any legal interest. In this regard, we agree with counsel for Westcoast that to inquire into such a matter would be to essentially conduct and adjudicate an *Environmental Management Act* enforcement action, and that is not the role of the Provincial board.

9. Further, in our September 24, 2004 letter, the Panel put the parties on formal notice of our role and scope of mandate, by stating:

The Panel is not prepared to entertain those portions of the complaint relating to alleged breaches of environmental statutes and regulations. Those are questions for a Court in an action described under s. 2 of the *Act*. They are not part of the Panel’s more narrow and specialised mandate of determining “normal farm practice”. Similarly, the Panel is not charged with administering the *Waste Management Act* (now the *Environmental Management Act*). The Panel’s mandate is limited to determining questions of normal farm practice under s. 3 of the *Act*. While certain facts may in some circumstances overlap and be relevant to both the Provincial board and to public officials who administer other statutes, the Provincial board’s consideration of this complaint will be limited to evidence relating to normal farm practice. Delta’s allegations that Westcoast is not in compliance with the *Waste Management Act* will therefore not form part of this complaint.

10. The hearing of this matter was held over three full days on September 28-30, 2004. Mr. Lacey appeared in person. Delta and Westcoast were represented by counsel. The Panel heard from nine witnesses, including the Complainant, employees of Delta, and Mr. Daryl Goodwin, the owner and principal of Westcoast. Three witnesses were accepted as expert witnesses for specified purposes. A total of 377 pages of transcripts were created. The Panel also received a large number of documents, including two binders of materials filed by Delta with 67 separate tabbed documents. We also received a book of expert reports containing seven different expert reports or rebuttals to reports, as well as eight other exhibits. The Panel also undertook a site tour of the Property, with the parties present, on September 28, 2004. Finally, the Panel received written closing submissions and related responses by each party and Delta.

11. During the hearing, counsel for Westcoast objected numerous times to the relevance of the evidence presented by Delta and the cross-examination it conducted, arguing that Delta was seeking to have this Panel take on the job of enforcing the environmental laws referred to above (and which the Panel clearly stated it would not do). The Panel granted Delta considerable latitude but also attempted as best as it could to control this process and keep the hearing on point. Despite our efforts, the large amount of evidence tendered and the wide-ranging

cross-examination conducted has made the hearing of this matter and the review of materials for the purposes of drafting this decision more onerous and time-consuming than it would otherwise have been. For this reason, the Panel wishes to expressly note that it has carefully considered all of the evidence and submissions referred to above, even though it does not intend to refer to all of it in the course of this decision.

12. The Panel also notes that much of the evidence tendered at the hearing by persons who were qualified as experts purported to state an opinion on whether the operation of Westcoast is or is not “a normal farm practice”. This is the ultimate decision at issue in cases such as this, and it is not in our view appropriate for an expert to express an opinion on the ultimate issue before a panel. It is acceptable for experts in farm practices to express their opinion on what are proper and accepted customs and standards as established and followed by similar farm businesses in similar circumstances, and to express expert opinions on any related or subsidiary matters that may assist with assessing these questions (e.g. composting science, soil remediation, turf growth, etc). To the extent that the expert opinions purport to determine the ultimate issue before us, the Panel rejects all such expert opinion and has not relied upon it in reaching our decision.

ISSUES

13. Is the Westcoast operation a “farm business”?
14. Is the Complainant aggrieved by the activities of Westcoast?
15. Are the operations of Westcoast conducted in accordance with “normal farm practices”?

DECISION

16. Under 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 board 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.
17. A panel’s job is to determine whether an odour results from a normal farm practice. It is not to determine whether odour is excessive *per se*. Other laws and government agencies exist that may potentially have some role to play in respect of farm operations that allegedly cause odour problems. Specifically, the Ministry of Environment or the Greater Vancouver Regional District (the “GVRD”) may, if relevant legal tests are met, take action under the *Environmental Management Act*,

or GVRD air discharge bylaws passed in accordance with that Act, if the conduct in question causes “pollution”.

18. The term “pollution” is defined in both the *Environmental Management Act* and the GVRD’s Air Quality Management Bylaw No. 937 to mean:

... the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment.²

19. Similarly, public health officials may take action under the *Health Act* if they consider conduct to give rise to a “health hazard” which is defined as:

- (a) a condition or thing that does or is likely to
 - (i) endanger the public health, or
 - (ii) prevent or hinder the prevention or suppression of disease...

20. Further, where composting activities are undertaken on land that is within the ALR, the Agricultural Land Commission has responsibility for enforcing provisions in the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation* which permits farm production, storage and application of specified types of compost only if at least 50% of the compost measured by volume is used on the farm. There may also be other laws of relevance, such as local government bylaws concerning business operations, zoning etc.

21. For these reasons, it is important to note that even if the Provincial board considers a matter to be a normal farm practice, it does not mean that the conduct is acceptable for all purposes and beyond the scrutiny of regulators who hold their own mandates and are subject to their own legislation. This conclusion is consistent with the provisions of s. 2 of the *Act* which protects a farmer from private law nuisance claims only if the conduct is a normal farm practice and he or she is not in contravention of the *Environmental Management Act*, the *Health Act*, the *Integrated Pest Management Act* or any land use regulation.

22. The Panel takes no position on whether any other agencies can or should have taken action in respect of the matters giving rise to this complaint.

² In the case of GVRD Bylaw 937, action can be taken in relation to pollution caused by an “air contaminant”, which is defined to mean:

“any substance that is emitted into the Air and that

- (a) injures or is capable of injuring the health or safety of a Person,
- (b) injures or is capable of injuring property or any life form,
- (c) interferes or is capable of interfering with visibility,
- (d) interferes or is capable of interfering with the normal conduct of business,
- (e) causes or is capable of causing material physical discomfort to a Person, or
- (f) damages or is capable of damaging the Environment”

23. We do however wish to comment on what appears to have been a great deal of confusion and lack of clarity on the part of the agencies involved.³ In our view, it is essential that each agency fully understand, communicate and discharge its own role, as appropriate, so that people are able to properly assess the costs and benefits of bringing a farm practices complaint. This point was made previously in the *Eason v. Outlander Farms Complaint* (December 3, 1999), where the Provincial board stated:

91. Finally, there were times during our hearing when it appeared as if the Panel was being asked to exercise jurisdiction over what might generally be called “pollution”. The *Waste Management Act*, administered in this area by the GVRD, is the statute that governs the discharge of “waste” in this Province. Issues of compliance with that Act are for other agencies to determine. Neither Complainants, farmers nor *Waste Management Act* decision makers themselves should assume that our decisions are in any way based on the *Waste Management Act*, or that the nature or timing of decisions under that statute should depend on the outcome of our decisions.

24. In a preliminary decision in the *Judd v. Webber Complaint* (January 31, 2004), the board stated “[t]he parties are also reminded that this is a complaint under the *Farm Practices Protection (Right to Farm) Act*. It is not an enforcement proceeding under the *Pesticide Control Act* or the *Waste Management Act*”. The Panel hopes that, in future, other interested agencies will ensure that their roles are fully and properly explained to parties involved in odour complaints, rather than simply referring them to this board solely on the basis that a farm is involved.

25. Turning now to the issues on this complaint, the *Act* defines “normal farm practice” to mean:

...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). (*emphasis added*)

³ For example, we note that Delta’s original complaint letter expressly refers to “multi-jurisdictional issues which, unfortunately, have hampered a timely resolution to the problem”. In this regard, Delta notes the “legislative limitations” that the GVRD faces, and appends a letter from the GVRD to one of the neighbourhood residents which discusses the multi-jurisdictional issues. That GVRD letter notes that the “GVRD is requesting the appropriate agencies to assess the activities at this site for compliance under legislation which they administer” and suggests the complainant may wish to file a complaint with the Farm Practices Board. The evidence of various parties before us, including Mr. Lacey and Mr. Verne Kucy of Delta, also speaks to the degree of confusion among the regulatory bodies before this matter arrived at our board.

26. A “farm business” is defined as:

a business in which one or more **farm operations** are conducted, and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations; (*emphasis added*)

27. A “farm operation” is defined as “any of the following activities involved in carrying on a farm business”:

- (a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals;
- (b) clearing, draining, irrigating or cultivating land;
- (c) using farm machinery, equipment, devices, materials and structures;
- (d) applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying;
- (e) conducting any other agricultural activity on, in or over agricultural land;

and includes

....

- (g) conducting turf production
 - (i) outside of an agricultural land reserve, or
 - (ii) in an agricultural land reserve with the approval under the *Agricultural Land Commission Act* of the Provincial Agricultural Land Commission;

28. The evidence presented to the Panel clearly indicates that Westcoast is engaged in a substantial and ongoing turf production operation, farming on lands comprising approximately 200 acres. In our view, there is no question that Westcoast is engaged in a turf production operation, and as such falls within the definition of “farm operation”.

29. Delta does not dispute that Westcoast produces turf, but argues that the Westcoast operation should not be considered a “farm business” as it relates to the composting operations given the size of the composting operation relative to the turf production. In essence, Delta says that the composting operation outstrips the turf farm operation in magnitude, to such an extent that the operation should be considered a manufacturing operation separate from the turf farming operation.

30. Delta called Mr. Goodwin as its first witness. In his testimony, Mr. Goodwin indicated that the preparation and addition of compost as a soil remediation technique is essential to the long term stability of his land and farm operation. He indicated that approximately 70% of the compost prepared at his site is used on his own fields and approximately 30% is sold off farm to help defray composting costs. Mr. Goodwin further indicated that he obtains revenue from the composting operation both through payment for certain types of waste received and through sales of topsoil to third parties. His greatest source of revenue comes from turf sales, the second from receipt of compost materials, and the third through topsoil sales. Mr. Goodwin also provided evidence as to the varying degree of availability of materials at different times, his inability to dictate and predict delivery schedules

and the need to try different combinations of materials for maximum benefit. He explained that all of these factors made it difficult to ensure that the compost produced at any given time matched his soil remediation needs at that time. Mr. Goodwin further noted that it would be virtually impossible for him to specify a break-down of costs for labour and equipment use as between the composting and turf growing operations as they were integrally connected with employees undertaking tasks relevant to both or switching between them, routinely throughout the day. He further noted that the revenue from the composting operation helps defray the cost of the composting operation and provides affordable and beneficial soil remediation.

31. In questioning Mr. Goodwin, Delta sought to delve deep into the financial dealings and practices of Westcoast, with a view to determining how important the composting operation was in terms of generating revenues as compared to the turf sales. Specifically, Delta requested that the Panel order production of Westcoast's business records, including income tax returns, for the past 5 years. Counsel for Westcoast objected to this request on the basis that the information was sensitive, confidential and unnecessary for consideration of the matters properly before the Panel. Westcoast's counsel further argued that the nature of the integration between the turf and composting operations was substantial and that it was clear that they constituted an overall farm operation. The Panel decided that it was not necessary or appropriate to order Westcoast to produce its financial records. In our view, it is not necessary to determine whether Mr. Goodwin makes or loses money from the composting operation, or how this compares specifically to turf sales. Rather, it is instead necessary to consider whether the composting complained of is an activity that falls within the definitions in the *Act*. If it were necessary to determine this issue, we would accept Mr. Goodwin's evidence as we find him credible, that the majority of his revenue is derived from turf production, then composting revenues and then the sale of soil.
32. It was agreed at the hearing that Dr. Brian Holl, an expert who testified for Westcoast, would calculate topsoil sold as a percentage of compost produced. He subsequently provided detailed calculations and concluded that the topsoil sales as a percentage of compost production are in the 19-25% range during the period of 2002 to fall 2004. Delta provided a rebuttal from its expert Eveline Wolterson. Delta also noted that it did not have an opportunity to challenge the underlying data and assumptions upon which Dr. Holl's calculations were based. The Panel has determined that it is unnecessary to rely on the calculations of Dr. Holl for the purposes of this decision. Rather, as stated above we find Mr. Goodwin credible and accept his evidence that he uses approximately 70% of the compost on his farm at this time. This is in any event consistent with the expert evidence of Dr. Holl and does not appear to be directly challenged by the reply letter of Ms. Wolterson.
33. Having regard to all the above, we conclude that the on-farm preparation of compost in the circumstances of this case is an important part of, and integrally connected to, turf production. Were it necessary to separately identify a basis for

finding the composting aspect of this operation to be a farm operation, we would do so on the basis that it is, in the circumstances of this case, an “agricultural activity” undertaken on agricultural land, given that 70% is used on the farm and only 30% is sold. This is consistent with the Court of Appeal’s decision in *Central Saanich v. Jopp Ventures* [2002] B.C.J. 650, where it considered whether the receipt of materials for compost and the production of compost was an agricultural activity under the applicable zoning bylaw, when all the compost was used for soil remediation at another location. The Court of Appeal held:

In my opinion, the trial judge erred when he concluded that the production of compost cannot be essential or incidental to a farming operation. This is to say no farmer can compost organic material on his farm; the farmer must take the waste product to a compost facility, have it composted commercially, and redelivered as "black gold" to the farm a few months later, if he is not to offend the zoning bylaw. That is the interpretation sought by the municipality as accurately reflecting council's intention when it enacted the bylaw in 1999. With respect I cannot read the bylaw so restrictively.

The analogy the trial judge drew from the use of fertilizer is faulty. Since time immemorial farmers have been ploughing waste organic matter into their soil, remediating soil in the language of today's environmentalists. Our grandfathers would not have needed such a big word for what they were doing to restore the soil's ability to produce future crops. More recently, some farmers have begun to speed up the restorative process by processing the waste before ploughing it into the soil, and forward-looking municipalities have come to see the wisdom of composting organic waste they collect for their economic benefit, and for the benefit of the environment.

The municipality's primary submission is that the express inclusion of the use related to farm machinery suggests a narrow meaning of "Agriculture" was intended. That submission fails to take into account the importance of composting to the husbandry of plants and animals. Its secondary submission was that the inclusion of an "Accessory" use in the "Agriculture" use of a farm also supports a restrictive definition.

In my view, however, there can be no doubt that composting can be incidental to many agricultural uses and essential to others, just as it was to the mushroom growing operation in *T&T Mushroom Farm Limited v. Langley Township* (1997), [39 M.P.L.R. \(2d\) 282](#) (C.A.). There will be composting operations that are neither. *New Brunswick (Minister of Municipalities, Culture & Housing) v. B & B Environmental Services Ltd.* (1997), [39 M.P.L.R. \(2d\) 243](#) (N.B.C.A.) provides a good example of a commercial potting soil operation that was unrelated to an agricultural use of particular land. At 248, Bastarache J.A. (as he then was) suggested a distinction:

According to the facts in this case, it is apparent that composting was not a use incidental to the farming of the land where the sludge was located, nor for other farms in the vicinity. The trial judge found that the composting was an independent commercial operation which consisted of producing potting soil...

With the greatest respect to the trial judge, the fact all the compost is needed and will be used on the Vanreights' [sic] farm requires the conclusion this composting operation is integral to the flower farm and thus a use permitted by the zoning bylaw.

34. Unlike the *Jopp* scenario, Westcoast does not use *all* of the compost on its own farm. Rather, it uses approximately 70% of the compost material by volume for its own soil remediation and sells approximately 30%. Having regard to the factors noted above concerning the varying availability of materials, timing of delivery, the variable production techniques and the soil remediation needs of this farm, we do

not consider the sale of 30% of the materials to render the overall compost production something other than an agricultural activity integrally connected to the turf production. Further, we note that the rules applicable under the *Agricultural Land Commission Act* and relevant regulations permit a farmer to produce compost on a farm within the ALR (as this one is) as long as 50% or more of the compost is used on that farm.

35. The Panel also rejects the allegation by Delta that Westcoast is essentially using one of its fields (which has not grown turf for a number of years) for the primary purpose of disposal of materials, rather than remediation. The Panel heard evidence from Mr. Goodwin and others regarding the history of the field in question. It is a field that was used for turf production for many years before Mr. Goodwin's operation came along. He indicated that the prior owner did not engage in remediation because he leased the lands from the Province and did not have a long-term interest in them. Mr. Goodwin explained that the elevation of that field was altered over the course of years through the repeated removal of turf and soil, that there are now salinity problems with the field, and that it is his intention to restore this field through the application of composted materials so that it can be suitably used for turf production. He indicated that this takes more than a single year and explained his lack of recent use of the field in question for turf production on this basis, along with the fact that he generally chooses to use his most productive fields to meet whatever demand for turf he expects in a given year. The Panel accepts this evidence.
36. Finally, in its closing submissions, Delta took the position that the turf operation could not be considered a farm business as it was not being done with the intention of generating a profit citing the Provincial board's decision in the *Hanson v. Asquini Complaint* (October 31, 2003). The Panel does not accept that the *Hanson* decision stands for the proposition that each and every component of an integrated farm operation must in fact turn a profit or that money must be made at all times. Many farms do not at times make money, even if there is an intention to do so. Further, some aspects of an operation may be more profitable than others. We believe that the *Hanson* decision (which is not binding on us in any event) stands for the proposition that there must be an intention that the farm business as a whole make a profit. In *Hanson*, the property owner was using a propane cannon to control bird predation of his fruit trees. However, the fruit was not sold but consumed by the farmer, his friends and family. As such the facts are very different than those before us where the evidence here is that Westcoast is in business to make a profit. It is difficult to understand how Delta can argue that neither the turf production nor the composting production are farm businesses, when it brought this complaint to a board, whose very jurisdiction depends upon the existence of a farm business.
37. In any event, the Panel concludes that the Westcoast operation, including the composting operation, is a farm business. This of course does not mean that the

production and use of compost at issue in this case is necessarily a “normal farm practice”. That is a matter we address later in this decision.

38. We turn now to consider the issue of whether the Complainant is aggrieved by the activities of Westcoast.
39. The Panel heard from Mr. Lacey evidence concerning the impact that foul odours from the Property have had on him, his family and his neighbours. We are satisfied that Mr. Lacey and others have experienced significant negative effects due to odour problems in the area, in terms of their enjoyment of their properties, their ability to undertake outdoor activities and the general stress and anxiety this has caused in various aspects of their lives. We are less certain about which incidences of odour problems that have been experienced can be attributed to Westcoast and which can be attributed to other causes. Despite the lengthy hearing process, we were provided with limited evidence concerning specific correlations between the problems experienced and the activities of Westcoast.
40. Part of this uncertainty is no doubt due to the inherently difficult problem of localising odours. However, the Panel is of the view that further efforts could have been made, particularly by Delta, to attempt to draw this connection in support of their case. For example, we note that Mr. Thomas Loo, the Delta official involved with this file, did not keep a diary of complaints despite his extensive involvement. Further, he testified that approximately one-third of the complaints were attributable to Westcoast, but on cross-examination acknowledged that this was a “guess” and it could be as low as 15%. On the other hand, Mr. Richard Gregory, one of the neighbours, indicated that on one occasion he followed his nose to the edge of the Property and saw a windrow being turned. Mr. Lacey also provided evidence of links being established at times and we find him to be a credible witness.
41. For his part, Mr. Goodwin testified that he has extended an invitation (through GVRD and Delta officials) to any of the neighbours to view his facility at any time, and to take samples if they wished. This would have allowed them to better assess, and prove as appropriate, any link between odour problems they experience and the operation of the farm on a particular day. None of the neighbours pursued this offer.
42. Further, the Panel notes that the nature and degree of problems experienced shortly before the complaint was filed were generally described as worse than as at the date of the hearing. To the extent that Westcoast was the cause of odour problems in 2003, it was less clear at the time of hearing that this remained the case. In 2003, Westcoast applied chicken manure directly to fields and also had an uncovered lagoon. Neither of those practices occurs any longer and were not pursued in argument.

43. Given the foregoing, the Panel concludes that the Westcoast operation has caused a significant portion of the odour experienced by the Complainants. Moreover, we find that the composting operation may continue to cause some odours (even if perhaps less than that which was experienced in the past). As such, we are satisfied that the Complainant has met the threshold test of being “aggrieved” by Westcoast's activities.
44. We turn now to consider whether the operations of Westcoast are conducted in accordance with “normal farm practices”. In a recent decision (*Terrace et al v. Daybreak Farms*, May 20, 2005), the Provincial board set out the relevant test:
68. The Provincial board has considered the meaning of “normal farm practice” and “proper and accepted customs and standards as established by similar farm businesses under similar circumstances”. In determining whether a complained of practice falls within the definition of “normal farm practice”, the panel looks at whether it is consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. This analysis involves a close examination and weighing of industry practices as well as an evaluation of the context out of which the complaint arises. This evaluation may include many relevant factors including the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, and the size and type of operation that is the subject of the complaint.
45. Further, in the *Eason* Complaint, the Provincial board stated:
- ... implicit in the test, as in all good chicken farming, is the existence of practices showing some threshold of consideration for one’s neighbours.
46. The Panel adopts these passages as the basis for examining whether the practices in question in this case amount to a normal farm practice.
47. The Panel heard extensive evidence on the nature of composting practices undertaken by Mr. Goodwin over the last several years. We will refer to various relevant facts in our analysis below, but in addition, wish to note the following facts to set the stage for our analysis.
- Mr. Goodwin began farming the lands in question in approximately 1994.
 - Shortly thereafter, Mr. Goodwin was approached by Ms. Wolterson of Pottinger Gaherty (an environmental consulting company) regarding the possibility of utilising newsprint recycling residue for soil remediation. She advised Mr. Goodwin that her company had been engaged in discussions with the prior owner of the land, who had also operated a turf farm business.
 - Westcoast holds two permits under the *Environmental Management Act* (permit PR-15638) to deposit to his farm residual from de-inking newsprint recycling operations.
 - After a period of time of applying the newsprint residue directly to his fields, Mr. Goodwin began utilising it in his compost operations (which he had been undertaking since 1996). This initiative was undertaken under the oversight of the environmental consulting company and Ms. Wolterson, who

subsequently left that company and appeared at this hearing as an expert witness for Delta.

- The composting operation on the Property began in order to manage the flow of incoming newsprint residual material (as the timing and amounts of deliveries did not always correspond with the needs of the farm) and to allow greater use of newsprint residual than allowed through direct deposit. Later, other materials were included to enhance the quality of composting and resulting product, including fruit and vegetable waste, manure, grain pumpage and waste, hatchery waste, sawdust and yard waste.
- Aspects of Westcoast's composting and soil remediation activities are governed by the *Animal Waste Control Regulation* and the *Organic Matter Recycling Regulations* established under the *Environmental Management Act*), and relevant GVRD bylaws, as applicable. No evidence was presented to indicate that Westcoast has recently been found to be in contravention of any of these laws, and there was no evidence presented to indicate that an agency responsible for such laws has taken or is taking any enforcement action in respect of Westcoast under those laws.
- Although Mr. Goodwin testified about feeling intimidated by the frequent visits by GVRD and Delta officials to the Property, no regulatory action has been taken. Rather, Mr. Loo, an employee of the Environmental Services Department of Delta who has had extensively involvement with this file, described himself at this hearing as having more of a problem-solving role than any relevant regulatory authority.

48. Delta provided a 21 page closing submission. In it, Delta identifies nine aspects of the Westcoast operation that it alleges do not constitute normal farm practices. We address each in turn.

1. The compost operation is much larger than is required to support the turf operation. The unnecessary size of the compost operation contributes to odour generation. The size of the compost operation is more in line with that of a commercial composting facility rather than a supportive farm compost operation.

49. For the reasons noted above in assessing whether the compost operation is part of a farm business, we conclude that the size of the composting operation is not disproportionate to the needs of the farm for soil remediation. Given that 70% of the composted material is used on site for legitimate purposes, and given that the facts as presented to us do not cause us to conclude there is any deposit of composted material occurring on the land other than for legitimate soil remediation purposes, we do not find the practices of Westcoast to be outside of a normal farm practice based solely on the size of the composting operation.

50. This finding is dependant upon there being a direct link between valid soil remediation needs of the farm and the use of 70% of the composting materials for such purposes. To the extent that one field has been used extensively for deposit of

composted materials in recent years and not for turf growth, we accept that as a valid purpose to date, on the understanding that the current deposit rate cannot continue indefinitely. The test is whether there is a valid soil remediation requirement. Once the soil has been restored to historic levels, remediation will largely be complete.

51. Our conclusion should not be taken to mean that a compost operation of this size would be considered a normal farm practice for all farms. It may not always constitute a normal farm practice for this farm if, in future, use of 70% of composted materials is no longer required for valid soil remediation purposes.
 2. *Given the size of the compost operation, Westcoast should have a coverage structure to control excess moisture (from rainwater) which would reduce odour generation and odour older migration. The problem is magnified by the fact that most of Westcoast's feed stocks have a high water content that contribute to the problem with excessive moisture.*
 3. *Given the size of the compost operation, Westcoast should compost on a cement pad to prevent the migration of smelly leachate.*
52. Delta identified only one other farm which it asserted undertook compost activity on a concrete pad and under a plastic cover. Subsequent to the hearing, Mr. Goodwin presented, by way of affidavit, aerial photos of the farm in question, which he asserts clearly indicate that composting activity was occurring in places other than the concrete pad, and in an uncovered manner. Delta objected to the production of these photos after the hearing. The Panel has not relied on this evidence in reaching its decision. Delta further noted that one of the consultants hired by Mr. Goodwin himself had recommended installation of a concrete pad and building structure. Westcoast noted two other farms cited by Ms. Wolterson that were of a similar size and which did not use a concrete pad or cover for composting.
53. The evidence presented at the hearing, including that of the experts, regarding this specific operation makes clear to the Panel that ensuring the compost contains an appropriate (not excessive) amount of moisture is an essential part of effective composting and is a matter of interest to all persons properly engaged in composting operations as part of a farm business. However, the Panel notes that, according to the expert evidence presented, there are various ways to control moisture. We are not satisfied that it is a requirement of normal farm practices that a farm in circumstances such as this utilise a concrete pad and covered shelter. As noted at the hearing, moisture can be controlled by windrow size, frequency of turning, cover, selection of input materials, drainage techniques etc. We believe the normal farm practices permit farmers to determine the most appropriate means of controlling moisture content. The bottom line is that the moisture content must be appropriately regulated and environmental laws must be complied with.

54. Subject to the comments noted below in point 4 of Delta's argument, the Panel is satisfied, based on the evidence, that the composting process being undertaken at the time of hearing is consistent with normal farm practices, so long as Mr. Goodwin monitors and ensures appropriate moisture content on an ongoing basis. There was evidence at the hearing to indicate that Mr. Goodwin employs a regular monitoring program, originally developed by Ms. Wolterson. Further, there was no indication that the materials were excessively wet at the time of hearing despite a recent heavy month of rain.

4. *Westcoast's windrow piles are too high which make it more difficult to control excessive moisture which contributes to odour generation. The windrow piles should not exceed 5 feet.*

55. The Panel heard conflicting evidence on what is the appropriate maximum windrow pile size. Ms. Wolterson expressed the view that it should be no more than five feet. Dr. Holl and Mr. Albert Spidel indicated that size of the pile is only one factor. The real issue is moisture management which is a function of a number of variables such as the materials being composted, the conditions that the piles are subject to, the frequency of turning, etc. The Panel finds the "Composting Factsheet – Composting Methods" prepared by the then Ministry of Agriculture, Food and Fisheries, now Ministry of Agriculture and Lands, ("Ministry") referenced at the hearing instructive in this regard. It states:

A windrow is simply an elongated pile of material with a more or less triangular cross-section. As illustrated in Figure 2, a windrow should measure about 3 meters (10 feet) wide and 1.5 meters (5 feet) high; its length will vary depending on the amount of material used...

Large passive windrows can be as wide as 7 meters (24 feet), and as high as 4 meters (12 feet) and of any length. The center of a windrow this size will quickly become anaerobic and only by turning can it receive a new oxygen supply. An unpleasant odor will develop in the anaerobic region and may begin to emanate from the composting material; hence, a large land area is necessary to buffer residence and businesses from the odor...

56. Although this fact sheet does not specify the scientific basis for these size values, and while it does not have the force of law, we consider it a relevant and valuable source of information in assessing normal farm practice. In the Panel's view, the passages indicate that windrows may be higher than five feet, but if they are they require turning as necessary to receive a new oxygen supply. Further, we accept as a reasonable benchmark a maximum limit on the height of uncovered windrows of 12 feet of composted material.

57. While we appreciate the testimony of Dr. Holl and Mr. Spidel that there are many variables to consider, and while we accept that it may be *theoretically* possible for an appropriately composting windrow to exceed the Ministry recommended maximum height in some cases, we would not, in the circumstances of this farm, consider that to be a normal farm practice unless the farmer had first obtained confirmation from an appropriately qualified consultant that the combinations of

relevant factors and management techniques employed would result in an appropriate aerobic decomposition process.

58. The Panel therefore finds that, in the circumstances of this case and having due regard to the interests of neighbours located approximately one km away, normal farm practices requires Westcoast to apply the Ministry guidelines of 12 feet maximum height for compost windrows, unless Westcoast first obtains confirmation from an appropriately qualified consultant that some other maximum height, when combined with specified management techniques employed under a detailed compost management plan, would ensure appropriate aerobic decomposition process in the circumstances of this operation.
59. The Panel finds that Westcoast has at times used piles well in excess of 12 feet. The piles that existed at the time of hearing were in excess of 12 feet. To the extent this is the case, we find that this is not a normal farm practice and as such, the complaint is justified in this regard.
5. *Westcoast practice of windrow turning is not efficient and not appropriate given the size of its composting operation. The piles are turned to accommodate new material on the receiving pad. The piles are not turned when moisture and temperature readings suggest they should be turned. This reduces the ability to control excessive moisture and contributes to older generation.*
60. The Panel finds that at the time of hearing Westcoast was monitoring the temperature and internal moisture content of its windrow piles and was turning them as necessary to appropriately regulate the moisture content in accordance with accepted standards. We consider this to be a normal farm practice. While we find that the materials are turned in a location and manner that integrates the receipt of new materials, we do not find that the piles were being managed without sufficient regard for temperature and moisture content. We note that this has not always been the practice of Westcoast, in part due to concerns about odours that may be produced through frequent turning. As noted above, delay in turning due to concerns about odour problems is counterproductive as it fuels more anaerobic activity. Westcoast has now remedied its practices in this regard. If that practice had not been remedied, we would have found that it did not constitute a normal farm practice (even if the pile size did not exceed 12 feet).
6. *Westcoast takes feed stocks that rapidly lose their structure and collapse which will result an inadequate oxygen supply for aerobic decomposition which will contribute to odour generation. These wastes are hatchery waste, vegetable waste and fruit waste.*
7. *Westcoast takes protein waste, grain waste and hatchery waste which all have the potential to create excessive odour generation.*

8. *The wastes contain too much nitrogen which lowers the carbon:nitrogen ratio which results in excessive ammonia emissions. The feed stocks that contribute to the high nitrogen sources are protein waste, grain waste, hatchery waste, vegetable waste and fruit waste.*
9. *Many of the wastes have high moisture levels which lead to anaerobic conditions and contribute to the generation of odours. The wastes are grain pumpage, hatchery wastes, fruit and vegetable waste.*
61. As noted earlier, Westcoast presently accepts fruit and vegetable waste, manure, grain pumpage and waste, hatchery waste, sawdust and yard waste for compost materials. It has however reduced its use of certain types or sources of vegetable and hatchery waste in an effort to gain better control over the compost process and minimise odour production. The Panel was not provided with any evidence to indicate that it would not be normal farm practice to compost these materials, provided appropriate management practices are utilised. To the contrary, there was evidence to indicate that such materials are legitimate inputs for composting. It is therefore the Panel's view that the composting operations of Westcoast do not run afoul of being a normal farm practice solely by virtue of the fact that these wastes are composted. This does not mean that these materials will be appropriate at all times and in any combination. In our view, normal farm practice requires Westcoast to select materials that are not so wet so as to result in compost that is subject to anaerobic decomposition. The evidence indicates that Westcoast has on an ongoing basis modified its use and combination of certain materials with a view to ensuring appropriate moisture content. If and to the extent Westcoast failed to consider the total moisture content when selecting materials for compost, we would have found that to not be a normal farm practice.
62. Finally, the Panel does not accept Delta's argument that the materials being composted contain too much nitrogen, thus lowering the carbon to nitrogen ratio, resulting in excessive ammonia emissions. We find, based on the expert evidence presented, that the carbon to nitrogen ratio is within reasonable ranges. This is supported by the fact that the soil being produced through the composting operation is useful and beneficial, and by the fact that Mr. Goodwin has and continues to utilise consultants extensively in selecting and combining compost products. As Dr. Holl noted, never in his 30 years of association with agricultural businesses has he run across a person who has hired more consultants to advise him than Mr. Goodwin.

ORDER

63. Accordingly, the Panel finds this complaint to be substantiated as it relates to the size of windrow piles being used by Westcoast. Pursuant to s. 6(2) of the *Act*, we order Westcoast to modify its practices to ensure that the total windrow height does not exceed 12 feet from the normal ground level, unless Westcoast first obtains written confirmation from an appropriately qualified consultant that some other

maximum height, when combined with specified management techniques employed under a detailed compost management plan, would ensure appropriate aerobic decomposition process in the circumstances of this operation, and if Westcoast operates in accordance with that detailed compost management plan.

64. We find that the other aspects of the complaint are not substantiated. However we have in the course of reaching our decision on these points referenced numerous factors and criteria that are essential to our conclusion. For clarity, these are:
- a) The amount of composted soil deposited on the farm must be based on the soil remediation needs of the farm. Deposits in excess of this would not be considered normal farm practices. This may, in turn, also indirectly limit the amount of topsoil that can, as a matter of normal farm practices, be produced for the purpose of selling off farm.
 - b) Westcoast must continue to adopt appropriate compost management practices, including monitoring for and managing appropriate moisture content and temperature (whether this be through the construction of a concrete pad and cover or some other means is a matter for Westcoast to decide).
 - c) In selecting from among otherwise appropriate inputs, Westcoast must give due regard to the moisture content of those inputs to ensure that the overall moisture content of the compost is appropriate.
65. We also expressly note that we make no finding on whether the direct application to the field of chicken manure, and use of an uncovered lagoon, would constitute normal farm practices. Those issues were not argued before us and we make no finding in this regard, but we do note that to the extent those practices have been discontinued by Westcoast it appears that as of the time of hearing odour problems have lessened.
66. Finally, the above order and the related comments are all in addition to, and do not displace, whatever requirements that may apply to Westcoast under health, environmental or land use legislation.

Dated at Victoria, British Columbia, this 31st day of October 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by)

Christine Elsaesser, Vice Chair
Richard Bullock, Chair
Barbara Buchanan, Member