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Dear Sirs/Mesdames:

COMPLAINTS UNDER THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT BY THE CORPORATION OF DELTA FROM OPERATIONS OF WESTCOAST INSTANT LAWNS

The Panel of the British Columbia Farm Industry Review Board (the “Provincial board”) presently has before it two applications by the Corporation of Delta (“Delta”) for orders compelling the production of documents and witnesses.

The first application is a May 26, 2004 application by Delta for disclosure of documents by the respondent Instant Lawns Turf Farm (1994) Ltd. (dba “Westcoast”) prior to the hearing. As the Panel understands it from reviewing subsequent correspondence relative to this application (June 1, 2004 letter from Mr. Baker, June 16, 2004 pre-hearing conference report, June 28, 2004 letter from Mr. Stanley), the unresolved requests from that letter pertain to items 8-10 of that disclosure request.

The second application is a July 21, 2004 application requesting that the Panel summon seven witnesses to the hearing. As it is unclear whether Mr. Stanley provided a copy of this application

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to Mr. Baker, a copy of the July 21, 2004 letter is being provided with this letter for reasons that will be made clear below.

The Panel has given careful consideration to both applications, and wishes to advise the parties as follows.

With regard to the May 26, 2004 application, the Panel has concluded that it does not have statutory jurisdiction to make an order requiring a party to disclose documents prior to the commencement of the hearing of a complaint. In contrast to our board's power under sections 8(4) and 8(5) of the *Natural Products Marketing (BC) Act*, the Provincial board's power under the *Farm Practices Protection (Right to Farm) Act* ("FPPA") is limited to the powers conferred by reference from sections 12, 15 and 16 of the *Inquiry Act*. Mr. Stanley has not provided, nor is the Panel aware of, any authority that interprets the summons power as a pre-hearing discovery power or document production power.

However, this does not end the matter. Using the Provincial board's *Inquiry Act* powers, the Provincial board is fully within its authority to issue a summons compelling a party to attend the hearing and in that context to produce documents associated with the hearing of the complaint, i.e., to "bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry". Once documents are tendered under summons, procedural fairness may require the hearing to be adjourned depending on the nature and volume of the documents produced in response to the summons. While the above process may be cumbersome and result in the delay in cases where parties are unable to reach pre-hearing agreement on disclosure, it does prevent a party from evading any obligation to produce relevant documents and ensures a fair hearing where all parties have time to prepare.

The more difficult question for the Panel has been whether, on the merits, to issue summonses to the respondent and other witnesses pertaining to the outstanding matters raised in the May 26 and July 21 letters. It is trite law that a party requesting a summons must demonstrate, at a minimum, that the information sought is relevant to a question that is properly before the Panel in the proceeding.

It appears from the submissions and pre-hearing conference report that several of the orders requested by Delta pertain to a threshold question as to whether Westcoast is even engaged in a "farm operation" as defined in section 1 of the *FPPA*.

If this were a court action for nuisance or an application to Court for an injunction, the question whether Westcoast is operating a farm operation might determine whether Westcoast enjoys the statutory protection granted by the *FPPA*: see section 2(1). However, these are complaints before the Provincial board, and a complainant coming to this board must seek a remedy within the board's jurisdiction. The board's mandate is focused on determining normal farm practice,

and a prerequisite for obtaining a remedy from the board under section 6 of the *FPPA* is that an operation is a farm operation.

This board's past decisions recognize that the question whether an operation is or is not a farm operation is not always readily apparent to a complainant. Consistent with the notion that a complaint under section 3 allows a person to "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", an inquiry on this threshold question may be necessary: Farm Practices Board's decision in *Hanson v. Asquini*, October 31, 2003 (available on the Provincial board's website). Thus, as shown by *Hanson v. Asquini*, the question whether an operation is or is not a farm business is properly addressed as a preliminary issue respecting which evidence is potentially pertinent. It follows that, in principle, it could be appropriate to issue summonses on the threshold question whether an operation is a farm operation.

The complication here, however, is that Delta's request for documents and witnesses appears in large extent to be based on the legal assumption that Westcoast's status as a farm may turn on factual questions pertaining to the relative volumes of (or revenues relating to) turf and soil Westcoast has sold over the past several years. Before proceeding down the path of issuing summonses based on this legal premise, the Panel wishes to have written submissions from both parties, with rationale, on the following questions:

- (a) Would Westcoast be excluded from the definition of "farm operation" under section 1 of the *FPPA* even if its sole business were composting?
- (b) If the answer to (a) is "yes", how are the factual questions of the proportion of turf versus soil sold legally relevant to the "farm operation" question?

In answering the above questions, the Panel would ask to the parties to consider the case of *District of Central Saanich v. Jopp et al*, 2002 BCCA 185. The question before the Court in that case was how to interpret a municipal by-law that contained a particular definition of "agricultural" for zoning purposes. Given that Delta's complaints are governed by the *FPPA*, the question arises whether *Jopp* applies to or governs the proper interpretation of "farm business" and "farm operation" in section 1 of the *FPPA*. More specifically, the question is whether a composting business falls within the definition of farm operation in the *FPPA* even where it is not an "agricultural" operation for purposes of a municipal by-law such as the one before the Court in *Jopp*.

Other aspects of Delta's applications for summonses raise the different legal issue of whether or to what extent compliance with the *Organic Material Recycling Regulation*, B.C. Reg. 18/2002 ("*OMRR*") is relevant to this board's determination of "normal farm practice". This question is of threshold importance as the Provincial board's mandate is confined to determining normal farm practice issues; this is not a court action or injunction application where, under section 2 of the *FPPA*, the court's inquiry is potentially broader: see s. 2(2)(a), (b), (c). As the parties are

aware, section 2(2) of the *FPPA* lists and describes the *Waste Management Act* – the statute under which the *OMRR* was made – separately from “normal farm practice”. This raises the legal question whether these two subject areas were intended to overlap in a complaint before the Provincial board. As this legal issue appears to underlie some of the requests for documents and summonses, the Panel also wishes to have written submissions from the parties on the question of whether and how compliance with the *OMRR* (and potentially any other provincial, federal or municipal law with which a farmer must comply) is relevant to the determination of “normal farm practice”.

Finally, based on its review of the pre-hearing conference report, the Panel wishes to confirm whether there are any objections relating to Delta’s standing that need to be resolved prior to the hearing and resolution of these complaints. In *Central Saanich (District) v. Kimoff*, 2002 BCCA 169, the Supreme Court, quoted at paragraph 10 of the Court of Appeal’s decision, stated as follows:

It seems to me that the scheme of the Act is such that the people who complain, and I think a person includes a municipality who is aggrieved (even though it says it is not a normal farm practice to put up signage), I think it is arguable, as submitted by Mr. Wilson, so the Board could and should rule on that. The sign, he says, is "other disturbance" within the meaning of the section. It seems to me that I should simply say that the court will pay some deference to the Act and the Board and permit the matter to go to the Farm Practices Board because their decision on that issue can be argued a second time before the court. The municipality should exhaust its administrative remedies. The court would have, at least before embarking on the argument, which will be identical to the one that I have just heard, the advantage of a Board set up by government with some expertise in the field, who would be far better at knowing what is a normal farm practice than most Supreme Court judges who do not farm very much.

If Westcoast wishes to raise any objection to Delta’s standing on either complaint, it is directed to do so as outlined below so that the issue may be resolved, or possible alternatives explored, without interfering with the scheduled hearing dates.

The Panel appreciates that it was the intent, reflected in the Pre-hearing conference report, to have all jurisdictional issues addressed, if possible, at the time the complaints are heard. However, given the nature of the issues, and the broad requests for coercive orders, including orders binding third parties, the Panel has concluded that the issuance of summonses at this stage, without receiving proper submissions respecting the issues listed in this letter, would likely undermine rather than advance the interests of efficiency and fairness. The answers to these issues will determine the proper focus and terms of reference for the September 28-30 hearing.

We therefore direct as follows:

- That on the first two questions: Mr. Stanley will make submissions, Mr. Baker will respond and Mr. Stanley will reply.

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- That Mr. Stanley's submissions on the first two questions also make clear (a) respecting his July 21, 2004 request for summonses, what efforts have been made to obtain the requested witnesses to attend voluntarily, and (b) respecting items 8-10 of his May 26, 2004 letter (i) what he means by Westcoast's "business records for the past five years and supporting documents" in item 8, and (ii) whether items 9 and 10 have differing relevance for purposes of this complaint.
- That on the standing question, Mr. Baker will make a submission on any objection related to standing, with a response by Mr. Stanley and a reply by Mr. Baker.

Rather than dictating the precise submissions schedule in this letter, we have instructed Provincial board staff to consult with your respective offices regarding the dates for exchanging submissions. However, the panel wishes to make clear that the parties are to make every effort to agree on a schedule that allows submissions to be made and a decision to be issued (and summonses to be issued if the request is granted) without jeopardizing the hearing dates.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine Elsaesser
Vice Chair

Attachment

cc: Daryl Goodwin
Westcoast Instant Lawns

Verne Kucy, Manager, Environmental Services Division
The Corporation of Delta