



January 31, 2004

File: #03-07

DELIVERED BY FAX OR EMAIL

Gordon & Priscilla Judd
[address]

Wade & Michele Webber
[address]

Dear Sirs/Mesdames:

**A COMPLAINT CONCERNING THE OPERATION OF A CHERRY ORCHARD
LOCATED AT 5293 BOSSIO ROAD, WYNNDEL, BC**

Priscilla and Gordon Judd (the "Complainants"), who have a residence at 5261 Bossio Road, have filed a complaint to the British Columbia Farm Industry Review Board (the "Provincial board") under the *Farm Practices (Right to Farm) Act* (the "Act") with respect to the operation of the subject cherry orchard owned by the Respondents, Michele and Wade Webber. This complaint is scheduled to be heard on February 5, 2004 in Cranbrook, BC.

By letter dated January 20, 2004, the Respondents requested that the Complainants provide the following documents:

1. All video tapes and documents that will be introduced at the hearing.
2. Results of any soil or water testing done in 2001, 2002, 2003.
 - name of laboratory which did the analysis.
 - results of any pesticide residue test done.
3. Site history
4. Map with drainage ditches and sites where soil samples were taken.
5. Copy of permit to redirect water.
6. A copy of Gordon Judd's health records, five years prior to moving to Wynndel, and up to and including 2003.
 - a list of signs and symptoms of illness.
 - types of testing done to prove poisoning, if any, for 2001, 2002, 2003.
 - days tests were done.
 - proof of any intolerance or allergies to chemicals.
7. A list of all glues, types of stains, lacquers, solvents, reducers, paint thinners and strippers used to refinish pianos, and finish guitars.
 - include brand names and copies of labels.
 - list where and how you dispose of used rags, cans, spent solvents and paint wastes.
 - state where your chemicals are stored.

British Columbia
Farm Industry Review Board

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- list types of ventilation in workshop, if any.
- copies of permits and applicators licenses.
- name and type of respirator

In their response received January 28, 2004, the Complainants advised that they would only exchange documents once they have received the Respondents' documents. We understand that the Respondents also initially advised that they would exchange their documents only after receiving the Complainants' documents.

As for the remaining requests, the Complainants maintain that any measurement of residue in the soil samples relates to a separate Supreme Court action and not to their allegation of water flowing onto their property from the orchard (Request #2). The Complainants ask for more particulars as to the kind of site history required (Request #3). The Complainants indicate that while they are prepared to send a map of their ditches, they do not claim to have taken soil samples from their ditches (Request #4). With respect to the permit to redirect water, the Complainants indicate that this is a matter for another forum as it occurred after the farm's irrigation discharge onto their property (Request #5). With respect to health records, the Complainants argue that Mr. Judd's medical records are not necessary to prove their complaint as it relates to issues in 2002. The Complainants will provide hospital records relating to an August 4, 2002 visit if the Provincial board deems it appropriate. Finally, the Complainants reject that their business activities are in any way related to the farming practices, which are the subject of this complaint.

In their January 29, 2004 reply, the Respondents argue that the documents requested are necessary for them to properly defend this complaint. They argue that if soil or water samples are tendered as evidence, then a site history is necessary to determine what chemical sprays were used on the property prior to and after the Complainants purchased their property. Samples would also need to be taken by a qualified person or agency like the Ministry of Water, Land and Air Protection. With respect to the permit to redirect water, the Complainants state that precautionary trenching was done at the request of the former Health Officer, Alex Neilson in 1997. Given that the Respondents irrigation system was not installed then, this suggests that the Complainants had water issues prior to the irrigation of the orchard. Redirecting water and digging ditches would suggest a need to contain or protect something from a large amount of water. As for the request for health records, given that the Judd's formal complaint alludes to relationships between pesticide use and symptoms of illness experienced by both Complainants, the Respondents argue that they have the right to see health records to determine what health problems the Complainants may have had prior to and subsequent to moving to Wynndel.

Finally, given that both Complainants are exposed to chemicals in their business activities and given that these chemicals may produce similar symptoms of chemical poisoning attributed to pesticide exposure, the Respondents seek a list of chemicals used during business related activities in order to defend any allegations of illness related to pesticide use.

DECISION

If the above comments regarding exchange of documents are any indication, it would appear that this complaint is being used to address long standing issues which exist between the Judds and the Webbers, some of which have nothing to do with the *Act*. Both parties are encouraged to focus on the issues raised by the complaint.

With respect to the application it must first be stated that fairness dictates that all documents which a party intends to rely on at the hearing be disclosed in advance of the hearing. In their discussions, the parties have now agreed to disclose all documents, including maps, photographs and videotapes, which they intend to rely on by the evening of Monday February 2, 2004. We also understand that the parties have now agreed to exchange these documents at the same time.

If, as a result of their review of the documents disclosed by the other party, either party determines that other documents must be produced, those must be produced by the evening of Tuesday February 3, 2004. If a document is not disclosed the Panel may not allow it to be tendered in the hearing.

The 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 focus in this complaint is first whether the Complainants are aggrieved by certain practices of the farmer. The Complainants have identified those practices leading to their grievances. The second issue is whether the farm practices which lead to those grievances are “normal farm practices” and as such subject to protection under the *Act*.

The presence or absence of pesticide residue on the Complainants’ property does little to assist the Panel in its determination as to whether the practices employed by the farm in applying pesticide on its orchard fall within the definition of “normal farm practice”. Accordingly, the Panel dismisses the request for results from any soil or water testing. Similarly, while the site history of the Complainants’ property may be of some relevance in assessing the source of any pesticide residue on the property, that is not an issue in this complaint. Also, it is not clear that documents actually exist relating to the site history and the Panel cannot direct the Complainants to manufacture a document to satisfy the Respondents request. Accordingly, the Panel dismisses the request for a site history. However, the Respondents may have relevant questions concerning site history, such as any modifications to the property altering natural drainage patterns independent of irrigation water from the orchard. These questions can be put to the Complainants on cross-examination. The Complainants have agreed to provide a map of their drainage ditches. Given that the Complainants deny that any soil samples were taken in the ditches, the request for samples is dismissed.

The Respondents seek a copy of the permit to redirect water. Given that this relates in part to the issue of water concerns on the Complainants' property prior to the orchard being planted, it is relevant to an issue raised by the complaint. The Panel directs the Complainants to produce a copy of this permit.

As for the clinical records of Mr. Judd, the Panel is not satisfied that issues identified in this complaint raise a medical issue. The relative success of this complaint does not turn on whether the Respondents' use of pesticides has caused health problems to the Complainants. Rather the issue is whether in applying pesticides to their orchard, the Respondents followed normal farm practices. Clinical records do not assist in this determination. That said, if the Complainants intend to make any submission with respect to any health concerns arising out of the Respondents' pesticide use, that is a medical opinion which must be supported by expert opinion evidence. Fairness dictates that any expert opinion be disclosed well in advance of a hearing with ample time for the Respondents to reply. Given that no such medical opinions have been disclosed, and that the Complainants have conceded that they do not intend doing so, this does not appear to be an issue in this complaint.

The Respondents have requested a list of all chemicals used by the Complainants in their business activities. These types of documents are intended to assist the Respondents in challenging the allegation by the Complainants that pesticides used on the orchard have in some way damaged the Complainants' health. The Respondents argue that exposure to chemicals in the work place may be the cause of any alleged symptoms. A couple of points should be made. First, given that part of the complaint relates to pesticide drift from the orchard, the Complainants do not have to prove that the pesticides have caused them any health concerns. Rather they must prove that the Respondents have not been applying pesticides in accordance with "normal farm practice" and "proper and accepted customs and standards as established by similar farm businesses under similar circumstances". Second, as the Complainants have not provided any medical opinions supporting an allegation of pesticide use causing or contributing to health concerns, this is not an issue to be determined in this complaint.

ORDER

In addition to the general requirement for disclosure by the parties set out above, the Panel directs the Complainants to produce the following documents by the evening of Monday February 2, 2004:

- a) a map with drainage ditches; and
- b) copy of permit to redirect water.

The parties are both reminded that all documents must be disclosed in advance of the hearing. If a party attempts to introduce a document not previously disclosed, the Panel may not allow that document to be tendered as evidence in the hearing.

Gordon & Priscilla Judd
Wade & Michele Webber
January 31, 2004
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BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine Elsaesser, Vice Chair