



September 18, 2002

DELIVERED BY FAX

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Attention: Brian E. Taylor

Dear Sirs/Mesdames:

A FARM PRACTICES COMPLAINT FILED BY THE WESTCREEK CITIZENS SOCIETY AND OTHERS FROM THE OPERATION OF A DUCK FARM OWNED BY VANE INVESTMENTS LTD. AT 7455 256th STREET, ALDERGOVE, BC

On August 7 and August 26, 2002, the Complainants submitted three preliminary applications requiring decisions by the Farm Practices Board Panel (“the Board”) hearing this complaint. These applications concern the following issues:

1. The admissibility of affidavit evidence;
2. The production of documents by three Government ministries and the Township of Langley; and

Farm Practices Board

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Iris Turaglio
Bert Vane
Andreas Dolberg
Stephen Thomson
Brian E. Taylor
September 18, 2002
Page 2

3. Access by a Complainants' expert to the Respondent Farm's production facilities.
The Board has received and reviewed the following information concerning these three issues:

- a. September 19, 2001 Notice of Complaint;
- b. December 6, 2001 Pre-hearing Conference Report;
- c. August 7, 2002 application from the Complainants (applicable extracts only);
- d. August 26, 2002 application from Counsel for the Complainants;
- e. August 30, 2002 response from Mr. Bert Vane on behalf of the Farm;
- f. September 6, 2002 reply from Counsel for the Complainants; and
- g. September 6, 2002 Pre-hearing Conference Report.

The Board has instructed me to provide you with its decisions on these applications, as follows.

1. ADMISSIBILITY OF AFFIDAVIT EVIDENCE

The Complainants submit that in the interest of economy, the Board should admit all their affidavits without putting each affiant on the stand, since it is important for the Board to be advised of the number of persons who are adversely affected by the Farm's operation. The Farm opposes this because it would deprive it of the ability to cross-examine.

In the Board's view, it would be unfair to allow the Complainants to adduce evidence without such evidence being subject to cross-examination (and questions from the Board).

If the Complainants want an affidavit to be given weight, they must produce the affiant for cross-examination if the Farm requests it. If the Complainants have decided that they absolutely need to tender 50 plus affidavits, then the Farm has a right to cross-examine all the affiants.

The Board has considered various alternatives as to how this process might be economized. It may be that, after reviewing all the affidavits, the Farm might not consider it necessary to request that each person appear for cross-examination, particularly if an agreed statement of facts can be produced. It may be that the evidence and cross-examination of some affiants might be very brief, and that this and other evidence might be given by certain affiants together and jointly in "panels". No other alternatives strike the Board as providing any more practical solutions.

Order

Given our understanding that the Complainants are fully prepared to have all their affiants appear, it would be useful for the Farm to advise the Complainants of: (1) those persons it most particularly wishes to cross examine; (2) those persons it may consent to appearing in

Iris Turaglio
Bert Vane
Andreas Dolberg
Stephen Thomson
Brian E. Taylor
September 18, 2002
Page 3

“panels”; and (3) those persons whose affidavits it may consent to being admitted without appearance (i.e., if an agreed statement of facts is produced). The Farm is to provide this list to the Complainants not later than Monday, September 23.

Once in receipt of this list and providing that an agreed statement of facts is still an option, the Complainants are to submit a draft statement to the Farm for review by Friday, September 27, with the aim of having an agreed statement of facts approved prior to the Friday, October 4 deadline for witness/will say lists.

2. PRODUCTION OF DOCUMENTS

The Complainants have requested certain documents be produced by: the Ministry of Agriculture, Food and Fisheries; the Ministry of Sustainable Resource Management; the Ministry of Water, Land and Air Protection; and the Township of Langley (“the Township”).

The Farm has taken no position on this issue other than to state that it should also be provided with any information produced; whether such production is voluntary or as a result of a Board order.

In accordance with paragraph 12 of the September 6, 2002 pre-hearing conference report, the Township has agreed to consider the Complainants’ application to be a request under the *Freedom of Information and Protection of Privacy Act* (“the *FOIPPA*”). The Complainants have in turn agreed to hold their application (as it applies to the Township) for a Board order in abeyance pending the receipt of documents from the Township. If the Complainants are not satisfied with the extent of the production of documents from the Township, they will pursue their application to the Board. The Township may also make submissions on this issue to the Board at that time.

After carefully considering the matter, the Board is of the view that it does not have the power under the provisions of the *Farm Practices Protection (Right to Farm) Act* or the *Inquiry Act*, to compel document production in advance of a hearing by persons who are not parties to the hearing. The Township is a party to this hearing; however, the three Government ministries are not.

The Board’s *Inquiry Act* powers tie document production to a summoned person’s attendance as a hearing witness. It is of course open to the Complainants to make application to the Board to issue a summons to a named individual for specified reasons, if such individual has relevant information that would assist in the hearing of this complaint. On any such request, the relevancy of such information would have to be demonstrated, and the Board would want to know whether the Complainants had exhausted other available avenues for document disclosure, such as the *FOIPPA*.

Iris Turaglio
Bert Vane
Andreas Dolberg
Stephen Thomson
Brian E. Taylor
September 18, 2002
Page 4

Order

The Complainants' applications for production of documents from the Ministry of Agriculture, Food and Fisheries, the Ministry of Sustainable Resource Management and the Ministry of Water, Land and Air Protection are dismissed.

Counsel for the Township is to take note of the Farm's request that information produced for the Complainants also be provided to the Respondent.

3. ACCESS BY A COMPLAINANTS' EXPERT TO THE RESPONDENT FARM'S PRODUCTION FACILITIES

The Complainants take the position that it is in the interest of natural justice for all parties and their expert (a Dr. R. Miner) to be given access to the same evidence (in this case, the Farm's production facility). This is particularly so when the Farm's own expert attacks the Complainants' expert on the grounds that Dr. Miner has not viewed the barn. The Farm opposes access being granted on the grounds that it is unnecessary, too broadly framed and invasive.

The Complainants' argument for access is compelling. Without such access, the Board is placed in an impossible position. If the Farm says "no" to access, then the only expert report of any value is that of the Farm's expert. To refuse to admit that report, as the Complainants suggest we do if its expert does not receive access, would in one sense place the parties on equal ground, but it would directly undermine the Board's task of getting to the truth. However, to allow the Farm's expert report into evidence without the Complainants' expert having access to the key information regarding the production unit, would also undermine the truth. The only solution consistent with a meaningful hearing to determine normal farm practice is to allow both experts to view the production facilities. This viewing does not engender the same privacy concerns as would exist if the barn were a private residence however, it must be done according to reasonable terms and conditions.

The enabling statute makes abundantly clear that the Board's role is to determine whether an "odour, noise, dust or other disturbance results from a normal farm practice". In this context, it is well to recall that this complaint is before the Board because the Supreme Court of British Columbia ordered that the Complainants' action against the Farm in that forum be "stayed until such times (sic) as the (Complainants) exhaust the remedies available to them under (the Act)". The Board's expertise being critical to that determination (see also *Pyke v. TRI GRO Enterprises Ltd.*, [2001] O.J. No. 3209 (C.A.)), and given the broad remedial power the Board holds (s. 6 of the Act), it is necessarily implicit in its function that it can order the parties to make various forms of disclosure to one another.

Iris Turaglio
Bert Vane
Andreas Dolberg
Stephen Thomson
Brian E. Taylor
September 18, 2002
Page 5

The Farm's practices being the fundamental issue on appeal, it would be inconsistent with the statutory scheme to allow the Farm to deny the Complainants access to information that is pivotal to a proper determination of the issues in this complaint. It is necessarily implicit in the Board's mandate – which mandate emphasizes its specialized role and which does not establish the Board as a merely passive tribunal – that the Board be able to order a farmer to grant access to his farm business. This is simply in the interests of justice and so as not to undermine the purposes of the legislation.

Order

The Farm is ordered to provide Dr. Miner access to its production facility no later than October 4, 2002. The Farm and Counsel for the Complainants are to discuss a date and time suitable to both parties. Given the notice requirements for expert reports, the visit should be set for the earliest possible date.

Although we will leave the exact date for the Farm and the Complainants to establish between themselves, we do expect: (1) that the Complainants will reconfirm in advance the specific terms of reference for Dr. Miner's visit; (2) that the viewing will be kept to the minimum amount of time required, and in any event no longer than two hours; (3) that Dr. Miner will attend with no more than one other person on behalf of the Complainants, preferably their legal counsel; and (4) that a Farm representative(s) will accompany Dr. Miner during his visit.

The Board wishes to make it abundantly clear that Dr. Miner will be there to observe. The Respondent may, but is not required to, answer any questions Dr. Miner poses regarding the operation, and no adverse inference will be drawn from the Respondent's failure to do so during the site visit. Any addendum by Dr. Miner to his report, based on his visit, must be provided to the Farm and filed with the Board no later than 7 days after the visit.

The parties are also advised, in accordance with paragraph #26 of the September 6, 2002 pre-hearing conference report, that the Board intends to view the Farm sometime during the course of the November 4-8 hearing.

The parties are to keep this office apprised of developments related to these three issues.

Yours truly,

(Original signed by):

Jim Collins
Manager
Dispute Resolution Services