



Province of
British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2000-WAS-008(b)

In the matter of an appeal under section 44 of the *Waste Management Act*,
R.S.B.C. 1996, c.482.

BETWEEN:	The Straw Farm Limited	APPELLANT
AND:	Assistant Regional Waste Manager	RESPONDENT
AND:	City of Abbotsford, East Abbotsford Compost Association, Farmers' Fresh Mushrooms Inc., and Ross Land Mushrooms Ltd.	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Marilyn Kansky, Panel Chair Fred Henton, Member Phillip Wong, Member	
DATES:	June 21-22 and July 7-8, 2000, concluding by way of written submissions on July 24, 2000	
PLACE:	Abbotsford, B.C. and Surrey, B.C.	
APPEARING:	For the Appellant:	R. Barry Fraser, Counsel Michelle Lawrence, Counsel
	For the Respondent:	Joyce Thayer, Counsel Angela R. Westmacott, Counsel
	For the Third Party City of Abbotsford:	Kathleen T. Higgins, Counsel James G. Yardley, Counsel
	For the Third Party East Abbotsford Compost Assn:	Barbara M. Cornish, Counsel
	For the Third Party Farmers' Fresh Mushrooms Inc. and Ross Land Mushrooms Ltd.:	Lee M. Sawatzky, Counsel

RECONSIDERATION OF STAY DECISION

APPLICATION

This is an application under section 48 of the *Waste Management Act* by the Respondent for reconsideration of the stay of Pollution Abatement Order OA-16332, ordered by the Environmental Appeal Board on April 20, 2000.

On March 31, 2000, the Respondent, R.H. Robb, Assistant Regional Waste Manager for the Lower Mainland Region, Ministry of Environment, Lands and Parks ("MELP"), issued Pollution Abatement Order OA-16332 to The Straw Farm Limited to deal with air contaminants being released from its mushroom composting operation located at 39960 South Parallel Road, Abbotsford, B.C. (the "Straw Farm facility"). In particular, the Order required the Appellant to:

- cease immediately bringing partially composted mushroom growing media or raw materials capable of emitting odours onto the site;
- within 10 days of the date of issuance of the Order, remove all mushroom growing media capable of causing emissions to the air; and
- confirm the performance of these requirements by letter dated no later than April 17, 2000.

On April 10, 2000, the Appellant appealed the decision of the Respondent and applied for a stay of the Order. The application for a stay was conducted by way of written submissions.

On April 13, 2000, the City of Abbotsford (the "City") and the East Abbotsford Compost Association (the "Compost Association"), a group of approximately 20 individuals and families who own neighbouring properties to the Straw Farm facility, applied for and were granted full party status in the appeal.

On April 14, 2000, Farmers' Fresh Mushrooms Inc. ("Farmers' Fresh"), an agency designated to market mushrooms grown in B.C., and Ross Land Mushrooms Ltd. ("Ross Land"), a mushroom farm that has a grower contract with Farmers' Fresh, applied for and were granted full party status in the appeal.

On April 20, 2000, the Board granted a stay with the following condition:

1. In accordance with its offer, the Applicant (i.e. the Appellant) will tarp the front of the bunkers that are currently open on one side, and erect a temporary tarped wall on the west end of the facility building. The tarped wall is only to remain open when people are working in the building. These changes are to be made within a reasonable time, which is to be determined by the Respondent.

In its decision, the Board noted that, although odours are worse in the spring and summer, tarping the front of the bunkers and erecting a temporary tarped wall on the west end should be of some assistance. The Board also noted the Appellant's submission that it would, during the stay period, "diligently pursue the issuance of a building permit and the construction of the full enclosure of the facility so that all operations take place within a negative pressure building and that the airflow exiting the building first passes through a biofilter."

The hearing of the appeal, which had originally been scheduled for the week of June 19, 2000, was subsequently adjourned to September 18, 2000.

As a result of the rescheduling, the Respondent applied for reconsideration of the stay, requesting an oral hearing, including a site visit, to address the issue of whether the stay should be vacated pending a decision on the merits of the appeal. In making this application, the Respondent submitted that the stay was granted on the condition that an expedited hearing of the appeal be held due to concern that the worst impact on the environment occurs during the spring and summer months.

In its submissions to the Panel, the Respondent submits that the stay should be vacated pending a decision on the merits of the appeal, on the basis of new evidence relating to irreparable harm and the balance of convenience.

In the alternative, the Respondent requests that the Board make an order imposing the following conditions on the Appellant to address the ongoing odour problem, pending the appeal:

- (a) cessation of any mixing and storage of any mushroom compost outdoors;
- (b) removal of all wastewater from the Straw Farm site in a manner and within a time frame acceptable to the Regional Waste Manager and to thereafter install measures to prevent the release of wastewater to the environment;
- (c) installation of air blowers that are necessary to aerate the compost materials in the bunkers. The air flow rate should be sufficient to prevent anaerobic conditions in the compost materials;
- (d) installation of an air collection system that collects emissions generated from the main compost building and the bunkers and installation of an air treatment system that consists of a wet scrubber and biofilter. The air collection system should be capable of maintaining negative pressure in the buildings, and the treatment works shall be designed and constructed in a manner acceptable to the Regional Waste Manager;
- (e) enclosure of the main compost building and bunkers such that gases are prevented from being released into the environment. The enclosure should be to the satisfaction of the Regional Waste Manager; and
- (f) conduct of a hydrogeological investigation of the Straw Farm site with the terms of reference for the investigation to be approved by the Regional Waste Manager.

The City and the Compost Association support the Respondent's request for an Order vacating the stay.

The Appellant opposes the application on the basis that there has been no change with respect to either irreparable harm or the balance of convenience.

Farmers' Fresh and Ross Land also oppose the application.

On the first day of the hearing, the Panel attended the site with all Parties present.

BACKGROUND

In 1996, the Appellant began the production of mushroom substrate at the Straw Farm facility, which is located in a rural part of Abbotsford, B.C.

As per a letter dated July 20, 2000 from the Appellant, mushroom substrate from the production facility is currently provided to All Seasons Mushroom Farms Inc. ("All Seasons Agency") and its affiliated farms in the amount of 1,050 cubic yards per week. An additional 550 cubic yards per week is provided to Farmers' Fresh, which has grower contracts with five mushroom farms, including Ross Land. Both All Seasons Agency and Farmers' Fresh are agencies designated to market mushrooms grown in B.C. The Panel notes that there was also evidence to suggest that the amounts were 1200 cubic yards and 400 cubic yards per week, respectively.

In December 1998, Frank Moscone, Gerry Magnin and John Hokesbergen purchased the shares of the Appellant. They met with the Respondent and the City and subsequently prepared a plan to upgrade the operation and to address pollution concerns. MELP accepted this plan. The new owners of the Appellant also met with local residents and asked for the residents' support.

The shareholders of the Appellant are also shareholders of a company called IMS General Partnership ("IMS") which operates a mushroom substrate production facility in Ferndale, Washington (the "Ferndale facility"). Mushroom substrate is brought from the Ferndale facility for further processing at the Straw Farm facility in Abbotsford.

The Pollution Abatement Orders

In May of 1998, Pollution Prevention Order OA-15446 was issued to the Appellant to address "unauthorized discharge of leachate resulting from effluent management practices" and "unauthorized discharge of air contaminants resulting from insufficient odour management practices." As well, the Order required the Appellant to submit a pollution prevention program to the Respondent, for his approval, and to implement that program within the time approved by the Respondent.

On March 31, 2000, following meetings between the Appellant and MELP and the provision of draft orders to the Appellant by MELP, the Respondent issued Pollution Abatement Order OA-16332 (the "Order") to the Appellant under section 31 of the *Waste Management Act*. The Order was served on the Respondent on April 3, 2000, and is the subject of the appeal before the Board and the subject of this application.

Zoning and Permitting

On August 11, 1997, the City adopted Zoning Amendment By-Law 452-97, which rendered the production of mushroom substrate on the Appellant's property a legal non-conforming use.

On April 23, 1999, the Appellant applied for rezoning for remedial works to extend the building and completely enclose the facility. The public hearing with respect to the rezoning occurred on October 18, 1999.

On February 21, 2000, the City Council made a decision not to proceed with second and third readings of the rezoning bylaw.

The Appellant submitted a building permit application for an expanded facility on April 4, 2000. According to the application, the size of the existing building is 21,000 square feet, and there would be an addition of 90,789 square feet, for a total of 111,789 square feet. In a letter dated May 12, 2000, from the City, the building permit was refused. The Appellant was asked to resubmit plans for a structure that would accommodate the production levels that existed on the lands as of the date of the adoption of Zoning Amendment By-Law 452-97.

On July 6, 2000, the Appellant commenced legal proceedings against the City, seeking an order compelling issuance of the building permit.

ISSUE

The issue raised in this application is whether the Board should vacate the stay of the Order pending a decision on the merits of the appeal.

RELEVANT LEGISLATION AND LAW

Waste Management Act, R.S.B.C. 1996, c.482

Section 48 of the *Waste Management Act* provides:

- 48** An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported) the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. there is a serious issue to be tried;
2. irreparable harm will result if the stay is not granted; and
3. the balance of convenience favours granting the stay.

The Panel agrees with the Appellant that, in this case, the onus is on the Respondent, as the applicant for the reconsideration of the stay, to demonstrate good and sufficient reasons why the stay should be vacated.

DISCUSSION AND ANALYSIS**Whether the Board should vacate the stay of the Order pending a decision on the merits of the appeal.**

The Panel will consider separately each stage of the test set out in *RJR-Macdonald*.

Serious Issue

The first stage of the test is whether there is a serious issue to be tried.

In *RJR-Macdonald*, the Court held that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

In its April 20, 2000 decision, the Board found that, because the issues to be addressed in this appeal are neither frivolous nor vexatious, or pure questions of law, there are serious issues to be decided in this case. This Panel agreed with the Board's previous finding and advised the Parties that information put before the Panel should be restricted to the tests of irreparable harm and the balance of convenience. The Parties at the hearing of this application did not dispute this.

The Panel will therefore proceed to the next stage of the test.

Irreparable Harm

The second stage of the test involves a consideration of irreparable harm.

In *RJR-Macdonald*, the Court stated at page 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

The Court then went on to define "irreparable harm" as follows:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision... where one party will suffer permanent market loss or irrevocable damage to its business reputation... or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined....

Although the Parties included submissions on harm to the public interest and the environment under this part of the test, the Panel finds that the appropriate place for this consideration is under balance of convenience.

In *RJR-Macdonald*, the Court stated that where a government authority is the applicant in a motion for interlocutory relief, the issue of public interest would be considered in the second stage as an aspect of irreparable harm to the interests of the government. However, in this case, the government is not the party seeking the interlocutory relief, but rather is seeking reconsideration of a stay decision. Therefore, the Panel finds that harm to the public interest is more appropriately dealt with under stage three.

For the purposes of this application, the City submits further that the Board must apply the test in *RJR-Macdonald* and determine if there is any new information that would change the Board's previous finding that a stay should be issued. In support of this argument, the City relies on *Raincoast Research Society v. Deputy Administrator, Pesticide Control Act et al* (Environmental Appeal Board, Appeal No. 99PES-09(b), September 9, 1999) (unreported). The Panel agrees.

Accordingly, the Panel must assess the new evidence to determine whether the circumstances have changed such that there is no longer sufficient evidence to find that the Appellant will suffer irreparable harm if the stay is not in effect. In doing so, the Panel finds that it may also consider evidence that was previously submitted to the Board.

Irreparable Harm to the Appellant

In the April 20, 2000 decision of the Board, the Board found that the Appellant had established that it would suffer irreparable harm if the Order were not stayed. The Board's finding was based on evidence before the Board that:

- the Appellant would suffer at least some financial harm and there may be associated job losses;
- the Appellant would not be able to fill its orders and would be in default of its contractual obligations;
- this may result in a loss of clients, market share and commercial goodwill that may not be recoverable.

Respondent's position

The Respondent submits that since the April 20, 2000 decision of the Board to grant the stay of the Order, the Appellant and Farmers' Fresh can no longer demonstrate irreparable harm in the face of new evidence that has emerged in the hearing.

The Respondent submits that, to establish irreparable harm, the Appellant must demonstrate the type of "extreme financial harm" resulting from loss of contracts which would effectively put it out of business. The Respondent further submits that the evidence falls far short of establishing that vacating the stay would cause "extreme financial hardship" to the Appellant.

In support of these submissions, the Respondent relies on the following evidence and arguments:

1. *Modifications to Existing Facility:*

The Respondent submits that there is no evidence that undertaking modifications to the existing facility would place the Appellant out of business. Expanding production to justify the cost of capital expenditures, which will be required to place the facility in compliance with regulatory requirements, is not an issue of irreparable harm.

2. *Arrangement or Contracts*

The Respondent submits that, based on the evidence of Ma Nguyen, a chartered accountant/tax adviser for six mushroom farms and an officer with Farmers' Fresh, Tam Truong, president and shareholder of Ross Land and a director of Farmers' Fresh, and Frank Moscone, president and shareholder of The Straw Farm, there is no written or oral agreement in place between the Appellant and Farmers' Fresh, but rather an informal month-to-month arrangement between the mushroom farmers represented by Farmers' Fresh and IMS. The only formal supply contracts that the Appellant has in place are with the mushroom farms represented by All Seasons Agency, in which one of Mr. Moscone's companies, Truong Mushroom Farms Ltd., has some beneficial ownership.

The Respondent submits further that IMS simply uses the physical plant at the Straw Farm facility for the ricking process, but the compost remains the beneficial property of IMS until it is sold to the mushroom farms. It states that whatever obligations are in existence with respect to Farmers' Fresh belong to IMS.

3. *Availability of Alternate Source of Supply*

The Respondent submits that Farmers' Fresh farms have been engaged in negotiations with Money's Mushrooms since at least January 2000 to secure an alternate source of supply. One of the farms represented by Farmers' Fresh, Truong Enterprises Ltd., has already given notice to the Appellant and entered a supply contract with Money's Mushrooms.

The Respondent also submits that evidence given at the hearing by Mr. Truong and Mr. Nguyen that Money's Mushrooms are not negotiating in good faith should not be relied on by the Panel. It submits that Truong Enterprises Ltd. and Christina Mushroom Farm have negotiated contracts with Money's Mushrooms.

4. *Loss of Customers*

The Respondent submits that there is no evidence that the Appellant would lose any other customers as a result of temporarily suspending its operations, because of the relationships between Mr. Moscone, Truong Mushroom Farms Ltd. and All Seasons Agency.

5. *Continued Supply from Ferndale Facility*

The Respondent submits that Mr. Moscone confirmed that the Appellant would continue to supply the 1,200 cubic yards of compost to the farms affiliated with All Seasons Agency through the Ferndale facility in the event that the stay is lifted.

The Respondent submits further that Mr. Moscone has sufficient resources and flexibility to rearrange his financial affairs through the various mushroom companies and composting facilities that he operates to ensure the continued viability of the Straw Farm facility.

6. *Commitments and Diligence*

The Respondent submits that the evidence does not show that the Appellant is committed to the Board to pursue the necessary permit in a diligent manner.

Finally, the Respondent submits that the Appellant did not fulfil the commitments that it made to the Board in a diligent manner, nor did it take any other steps that could have mitigated the odour problem.

Compost Association's position

The Compost Association supports and adopts the submissions of the Respondent. In particular, the Compost Association refers to the testimony of Mr. Yang, pollution prevention officer with MELP, that the existing facility could be modified to comply with regulatory requirements.

City's position

The City submits that the Appellant will not suffer irreparable harm if the stay decision is vacated. The City also submits that there is no convincing evidence that the factors enumerated in *RJR-Macdonald* would be met with respect to the Appellant. In particular, the City relied on the following evidence and arguments:

1. *Arrangements or Contracts*

The City submits that the Appellant does not have a direct contractual relationship with Farmers' Fresh and Ross Land, as was alleged in the initial stay. It submits that IMS, the owner of the Ferndale operation, invoices Farmers' Fresh and Ross Land and has the contract with them.

The City also submits that the Appellant would not be in breach of contractual obligations if the stay decision was vacated. Instead, any contractual breach would be that of IMS. At most, there is a vague, unwritten "understanding" involving the Appellant in conjunction with its related companies and Mr. Moscone.

2. *Potential Loss of Market Share*

The City submits that there is no evidence before the Panel on potential loss of market share, the onus of which is on the Appellant to lead.

Appellant's position

The Appellant submits that, if the stay is vacated, the Appellant will suffer irreparable harm in the form of financial loss as well as a loss of customers, market share and goodwill, and that it will be liable for breach of contract. The Appellant also submits that there is no party from which the Appellant can collect damages if

it is determined on appeal that the Order is invalid. The Appellant further submits that the evidence demonstrates that the irreparable harm would be extreme or catastrophic, and that it would put the Appellant out of business. In support of this submission, the Appellant relies on the following evidence and arguments:

1. *Loss of Annual Revenues*

The Appellant previously demonstrated that, unless a stay was granted, the Appellant's operations would cease, and the growers and agencies that rely on the Appellant for compost would be put out of business. The Appellant would lose annual revenues of about \$5 million, and the 11 mushroom growers who purchased its compost would lose annual crops worth approximately \$15 to \$16 million. Their agencies, All Seasons Agency and Farmers' Fresh, would lose sales worth approximately \$21 million. The Appellant submits that this has not changed since the initial stay hearing.

2. *Loss of Jobs*

The Appellant previously demonstrated that, if a stay were not granted, the Appellant's 5-6 employees, who receive a monthly payroll totalling \$15,000, would lose their jobs. The Appellant also submits that the employees of the mushroom farms and agencies who rely on the Appellant for compost would also lose their jobs. These farms employ 219 people and have a monthly payroll of approximately \$346,000. The Appellant submitted that All Seasons Agency, employing 6-7 people with a monthly payroll of \$25,000, and Farmers' Fresh, employing 5-6 people with a monthly payroll of \$15,000, would be put out of business. The Appellant submits that this fact has not changed.

3. *Effect on the Appellant's Business*

Mr. Moscone, in his affidavit, confirmed that the subject Order has drastic consequences for the Appellant, and the effect of its operation would be to put the Appellant out of business. Mr. Moscone also provided evidence that it is likely that a significant number of the growers who rely on the Appellant for compost would be lost as customers forever, either as a result of them going out of business, or by eventually establishing a new source of supply.

4. *Arrangements or Contracts*

Mr. Truong testified that the arrangement or contract for the supply of mushroom compost between his company and the Appellant is through Mr. Moscone, and that the invoice is from IMS.

Mr. Nguyen, a director of Farmers' Fresh, testified that the agreement to supply compost is with Frank Moscone.

Mr. Moscone testified that the arrangements with the growers who obtain mushroom compost from the Appellant are that they have given the All Seasons Agency growers and the Farmers' Fresh growers their commitment to supply compost, and, if they are paid, they will supply it again in the ensuing period.

Mr. Moscone further testified that the invoicing for the compost is out of IMS General Partnership, because they have costs at both facilities and it is simply more convenient to do it this way. At fiscal year end, the Appellant will bill IMS for services.

Mr. Moscone testified that the Appellant has a written contract with All Seasons Agency and each of its growers to supply up to a thousand cubic metres (1,200 cubic yards) of compost for five years. These growers include White Pearl Mushroom Farms, Canadian Mushroom Farms, Phan-Trang Mushroom Farms, Truong Mushroom Farms and Thenn Mushroom Farm.

The Appellant argued that All Seasons Agency and the Appellant are not the same legal entity. Mr. Moscone's company, Truong Mushroom Farm Ltd., owns 37% of the shares of All Seasons, and therefore does not control the agency. The other shareholders of All Seasons Agency are White Pearl Mushroom Ltd. and Do Holding Ltd., both of whom are growers. The Appellant and its shareholders are not shareholders or directors of White Pearl Mushroom Farm Ltd, Than-Trang Mushroom Farm Ltd. and Canadian Mushroom Farm.

5. *Loss of Customers*

If the stay is vacated, the Appellant submits that it will not be able to supply compost to All Seasons Agency and its growers, and will face the loss of these customers.

6. *Alternative Source of Compost*

The Appellant submits that there is no evidence of a reliable alternative source of compost available to the growers. In particular, it submits that there is no evidence to establish that Money's Mushrooms is a reliable alternative source of compost. The Panel is asked to draw the inference that Money's Mushrooms is not able to supply quality compost to the Appellant's customers because of the absence of supply contracts between Money's Mushrooms and the growers, and the failure of Money's Mushrooms to testify before the Panel.

Mr. Truong and Mr. Moscone testified that the compost, which the Ferndale facility produced in 1999, was a dismal failure.

Mr. Moscone testified that a contingency plan would be to produce compost in the Ferndale facility. At best, this would result in the Farmers' Fresh growers being without compost: at worst, it would result in the All Seasons Agency farms also being without compost. This is because Ferndale may not produce a sufficient quality of compost to generate successful growing.

Mr. Kirk, the project and facility manager of the Straw Farm facility, confirmed the evidence of Mr. Moscone with respect to the ability of the Ferndale facility to produce compost without using the Straw Farm facility. Mr. Kirk also testified that, if the processing were to take place at the Ferndale facility, the limit would be in the range of 1,080 yards per week, which is about half of what the Straw Farm facility is currently producing.

Farmers' Fresh and Ross Land's position

Mr. Nguyen testified that Farmers' Fresh has a good working relationship with Mr. Moscone and, for that reason, the Farmers' Fresh farms are content to buy mushroom substrate from Mr. Moscone on the basis of a handshake deal.

The Panel

The Panel finds that, if the stay were to be vacated, the Appellant would suffer irreparable harm. The Panel is satisfied, based on the evidence before it, that requiring the Appellant to cease operations will result in a loss of sales and customers to it. Because of the competitive nature of the business, this could result in permanent market loss or putting the Appellant out of business. It is unnecessary for the Panel to attempt to quantify the harm suffered. As the Court stated in *RJR-Macdonald*, "'Irreparable' refers to the nature of the harm suffered rather than its magnitude."

The Respondent argued that because of the informal arrangements and the absence of written contractual arrangements between the Appellant and Farmers' Fresh, the Appellant would not be in default of any contractual obligations if it ceased to provide compost. Evidence was tendered that it was IMS, which invoiced for the compost supplied by the Straw Farm facility that had the contractual arrangements. In response, the Appellant, Farmers' Fresh and Ross Land submitted that the agreement to supply compost was with Mr. Moscone, and that IMS would be billed for services by the Appellant at fiscal year end. As well, the Appellant referred to the existence of the written contracts with All Seasons Agency and four growers.

The Panel accepts the evidence that there are a number of written contracts with the Appellant to supply compost, and that there is an agreement to provide compost between Mr. Moscone and Farmers' Fresh, albeit an informal one. The absence of a formal written contract between the parties in this case does not negate the risk of permanent market loss or putting the Appellant out of business.

The Respondent also argued that an alternative source of compost would be available through either the Appellant's Ferndale facility or Money's Mushrooms. Based on the evidence of the Appellant and Farmers' Fresh, the Panel is not satisfied that the Ferndale facility or Money's Mushrooms will be able to supply the quantity and quality of compost necessary to meet the growers requirements. Based on the evidence, it would be speculative for the Panel to conclude that Money's Mushrooms will enter into contracts for an alternative supply of composting material. In any event, the question at this stage is whether the Appellant will suffer irreparable harm as a result of a stay, not whether other companies will suffer harm. In this case, the Panel finds that the new evidence does not change the Board's earlier finding that the Appellant would suffer irreparable harm.

Balance of Convenience

In the third branch of the test set out in *RJR-Macdonald*, the Court found that an assessment must be made as to which of the parties would suffer greater harm

from the granting or refusal of the remedy pending a decision on the merits. The Panel agrees.

The Respondent submits that, in determining whether or not to suspend the Order, which was made pursuant to legislative authority, the Panel must consider the "public interest" reflected in the Order. In support of this argument, the Respondent refers to *RJR-Macdonald* at page 409 where the Court stated:

In the case of a public authority, the onus of establishing irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

The Compost Association adopts this submission.

In the previous stay decision, the Board found that the balance of convenience favoured the granting of a stay pending a decision on the merits of the appeal. The Board found that, although there were legitimate concerns regarding odours emanating from the composting operation and regarding delays in making planned improvements to the facility, the need to shut down the facility was not so urgent that it warranted such drastic consequences to the Appellant and its customers.

Respondent's position

The Respondent submits that new evidence before the Panel reveals that the continuation of mushroom composting operations at the Straw Farm facility pending the appeal will cause irreparable harm to the residents and to the environment. It submits that there is ample, uncontradicted evidence from the local residents that the odours have caused headaches, eye irritation, sore throats and anxiety. There is also evidence that the odours interfere with the normal conduct of business at Yellow Barn and the other farms, and that they cause material physical discomfort to the residents who live in the vicinity of the Straw Farm facility. To the extent that the odours interfere with the ability of the residents to use their properties outdoors, the odours also substantially impair the usefulness of the environment.

Evidence from six residents and one employee who live, work and operate businesses in close proximity to the Straw Farm facility was presented at the hearing of this application. As well, the Compost Association filed affidavits from several other residents. The residents testified that the odours emanating from the Straw Farm facility have not decreased in frequency or intensity since the Board's issuance of the stay in April. Some of the terms the residents used to describe the odour are: "severe", "putrid", "irritating" and "very difficult to live with." In particular, the Panel heard the following evidence:

- Mr. Bruce Hildebrande, who lives west of the Straw Farm facility, testified that he smells the odours from the facility every morning, and that the odour switches direction in the afternoon, coming from the southeast. He further testified that the odours have not changed since the stay went into effect on April 20, 2000, and that the odours become much worse in the summer. He stated that he develops headaches about twice a week and his eyes become irritated from the odour.
- Ms. Marjorie Hodgins-Smith, who operates Yellow Barn Country Produce adjacent to the Hildebrande dairy farm, testified that the odour is present at certain times of almost every day, and that the odours are clearly connected to the wind patterns. She testified that the odour makes shopping and working at the Yellow Barn very embarrassing and very unpleasant, and that it may have caused her to lose a substantial amount of business.
- Ms. Christina Courtemanche, the manager of Yellow Barn, testified that she smells the odour eight out of ten days and develops headaches and a sore throat. She stated further that the odour is very stressful on her physically and also has an impact on the business of the store. The odours are worse in the summer.
- Mrs. Angeline Sztuhar, who lives approximately 1,500 - 2,000 feet east of the Straw Farm facility, testified that she and her family are affected most days by the odours from the facility. She described the odour as having "a lot of chemical in the smell, ammonia, manure, ... and there is nothing else like it." She feels anxiety and pressure because she cannot get the smell out of her house. The Sztuhars cannot open their windows at night to cool off, nor can they use the outside of their property for hanging laundry or socializing. She feels that the anxiety associated with the odours has exacerbated her high blood pressure and diabetes.
- Mr. Joe Sztuhar, husband of Mrs. Angeline Sztuhar, testified that there has been no difference in the intensity of the odour from the Straw Farm facility since the issuance of the stay, but the smell is worse in the summer when it gets hot. He described the smell as "horrible", and described the stress caused by the odour and the negative impact on their social life and their inability to enjoy their property.
- Mr. Martin Boon, who lives northeast of the Straw Farm facility, testified that he is impacted by the odours every time the wind blows from the southwest to the northeast. He described the odours as being very strong and putrid, and that they are present five out of every seven days, depending on the direction of the wind. He also stated that there has been no change in the odours from the facility since the issuance of the stay. He also described how the odours have adversely impacted his social life and his ability to enjoy his hobby farm, and that the odours affect his mental state.

- Mrs. Karen Romaszewski, who lives across the field from the Straw Farm facility, testified that her family is impacted by the odour practically every day when the wind comes from the southeast and even when there is no wind. She stated that all of the family members get headaches on extremely bad days, and that her 14-year-old daughter gets them regularly. The family cannot go outside when the odour is present because it makes them sick. The odour has had a significant adverse impact on their social life and the community. She testified that there has been no change in the intensity or frequency of the odour since the issuance of the stay.
- Other residents, by way of affidavit, confirmed the evidence of the residents who provided *viva voce* evidence.

The Respondent argues that the effects of the odours on the daily lives of the residents cannot be adequately compensated in damages.

The Respondent submits further that the release of air contaminants from the Straw Farm facility also constitutes irreparable harm to the environment that cannot be adequately compensated in damages.

Gladis Lemus gave evidence with respect to olfactometry testing conducted at the Straw Farm facility. Ms. Lemus collected samples from an outside pile and two samples from a rick that had been turned earlier that morning. These samples were submitted to an odour panel for assessment. Ms. Lemus testified that extremely high levels of odours are released from the piles and ricks. She further testified that an anaerobic process will produce more odours than an aerobic process, that the odours will be more intense in the summer when particulate counts are higher, and that the Straw Farm facility has the highest level of odours of any facility she has tested.

The Respondent further submitted that the discharge of effluent into the Sumas Canal and the risk of surface and groundwater contamination from the leachate on site constitutes irreparable harm to the environment that cannot be compensated in damages.

Brent Moore, a biologist with MELP, gave evidence regarding the level of contaminants in the effluent discharged into the Sumas Canal. Mr. Moore analysed the toxicity of the effluent discharged into the canal and provided evidence concerning the risk to surface water and groundwater. In particular, he testified that he provided his first report on April 26, 2000, outlining the analytical results of effluent discharge samples collected from the drain pipe on the Appellant's property. These results reflected a high faecal coliform count and a 96 Hr LC50 reading of 4.23%, which is highly toxic to fish. He explained that the discharge could result in acutely toxic conditions in the receiving waters because of the elevated ammonia and/or metals level. The discharge contained a level of ammonia that was almost ten times the safe level, and levels of other metals that exceeded their respective safety levels.

Mr. Moore further testified that the discharge could lead to eutrophic conditions in the Sumas Canal as a result of excess inorganic nutrient loadings entering the waterbody, thereby affecting the aquatic ecology by supporting bloom conditions for certain algae species. He described how the discharge could promote heterotrophic growths such as aquatic fungi and bacteria, and that high levels of COD and BOD in the discharge could also reduce the already marginal dissolved oxygen levels in the drainage canal. He also noted that the discharge could decrease the primary productivity of the canal by increasing the turbidity of the water, and result in bacterial contamination of the receiving waters because of the faecal coliform level.

Mr. Moore also testified that, on June 13, 2000, he prepared an update to the April report to address concerns regarding surface water quality of pooled effluent on site, and the potential for groundwater contamination. He testified that the effluent could impact on fisheries by discharging to groundwater and that the contamination could spread into the adjacent surface waters. The Respondent notes that the Appellant's witness, Mr. St-Gelais, a hydrogeologist, acknowledged on cross-examination that the potential for groundwater contamination was "moderate" at the Straw Farm site.

The Respondent further submits that Janet Pickard, the manager of the Toxicology Laboratory at B.C. Research, and Dr. Robert Lockhart, an expert witness called by the Appellant, corroborated Mr. Moore's analysis. In particular, Ms. Pickard provided a memorandum to Dr. Lockhart that stated, "I would agree with Brent Moore's assessment of the effluent discharge from the Straw Farm site dated April 26, 2000. There could be significant effects on the aquatic life in the Sumas Drainage Canal downstream of the discharge point."

The Respondent submits that the conditions imposed by the Board in issuing the stay have not mitigated the effect on the local residents of the noxious odours released from the facility, nor have they adequately addressed the environmental concerns. These environmental concerns include the continuing discharge of effluent into the Sumas Canal and the risk of surface and groundwater contamination from the leachate on site. The Respondent states that the Appellant has yet to take any steps to address either the ongoing problem with discharge of leachate, the issue of leachate storage, or the potential for surface and groundwater contamination.

The Respondent also notes The Straw Farm's lack of diligence with respect to installation of tarps and pursuing the building permit. The Respondent concludes from the evidence of Mr. Moscone and Mr. Kirk that the Appellant has failed to explore reasonable options to address the odour problem within the existing facility.

City's position

The City supports the Respondent's position regarding irreparable harm to the public and the environment. The City also called as a witness, Mr. Danziger, Director of Development Services for the City, to provide evidence with respect to the status of the building permit application of the Appellant.

Compost Association's position

The Compost Association also adopts the submissions of the Respondent with respect to irreparable harm. The Compost Association submits that it is unacceptable to allow the Appellant to continue to discharge or pool the leachate, because its members use the canal for recreation and, in some cases, to irrigate their crops.

Appellant's position

In response to the Respondent's submissions, the Appellant submits that the evidence of the residents falls far short of establishing harm of a greater magnitude than that found by the Board in its previous stay decision. In particular, the Appellant argues that there are contradictions in the evidence of the residents and that the residents' descriptions of the quality of the odour were not borne out by the site visit, and were inconsistent with the descriptions provided by Mr. Yang, a pollution prevention officer with MELP, and the odour panel.

The Appellant further submits that it has implemented numerous improvements that have reduced the emission of odours from the Straw Farm facility, and that the impact of the odour on the residents' ability to use their properties was not borne out by the site visit. As well, the Appellant submits that the Respondent failed to call any medical evidence to establish that the odours emitted from the Straw Farm facility have any adverse health impact.

Dr. Lockhart testified on behalf of the Appellant that no toxicological effects would be suffered by the residents as a result of the odorous chemical substances emitted by the Straw Farm facility. The Appellant also submits that the Respondent did not present evidence to challenge Dr. Lockhart's expert evidence.

Mr. St-Gelais advised the Panel on assessment of the risk of groundwater contamination at the Straw Farm facility. It was Mr. St-Gelais' opinion that there is only a moderate risk that the groundwater at the Straw Farm site might be contaminated by leachate. He further testified that the only manner in which to determine this issue is to drill test wells and sample the water drawn from those wells.

The Appellant submits that it has been diligent in pursuing a building permit. In support of this submission, the Appellant argues that it was delayed in making the changes to its facility to eliminate the odours, due to actions of the residents and their opposition to the rezoning and the City. The Appellant submits that this is something that the Panel should take into account in weighing the balance of convenience.

With respect to the evidence regarding the conduct of the residents, the Compost Association submits that the Appellant should be barred from raising this issue because the Appellant did not cross-examine the residents on this matter. However, the Appellant argues that the Compost Association did not provide contrary evidence, and objected when the Appellant tried to cross-examine Mr. Sztuhar on this issue.

The Appellant submits that the evidence called by the Respondent, the City and the Compost Association has not altered the balance of convenience, while the Appellant's submissions have brought the balance of convenience further in favour of the Appellant.

Farmers' Fresh and Ross Land's position

Farmers' Fresh and Ross Land submit that when the Order was issued, and during the initial stay, there was no evidence that the groundwater had been, or was being, polluted by effluent from processing mushroom substrate. It was noted that, if the Respondent was particularly concerned about the risk of groundwater contamination from the facility, the Respondent would have included related provisions in the Order, or raised the issue in the previous stay application. They further submit that the evidence before the Panel is that the discharge of effluent has been stopped.

With respect to odour emissions, Farmers' Fresh submits that the evidence before the Panel relates to identification of the odours and discomfort, rather than to irreparable harm to the public. In support of this position, Farmers' Fresh refers to the Appellant's expert witness who testified that odour emissions from the Straw Farm facility would not cause irreparable harm to the local residents.

Farmers' Fresh and Ross Land also called evidence regarding the irreparable harm that they and the five Farmers' Fresh farms would suffer in the event that the stay were vacated. This irreparable harm would result from:

- the Farmers' Fresh farms going out of business because the Farmers' Fresh farms will have no mushroom substrate with which to grow mushrooms.
- Farmers' Fresh going out of business because it will have no mushrooms to market.

Farmers' Fresh and Ross Land submit further that people employed by the mushroom farms and by Farmers' Fresh suppliers and customers will also suffer irreparable harm if the stay is vacated. In support of these submissions, Farmers' Fresh and Ross Land rely on the following evidence and submissions:

1. *Alternative Source of Compost*

Farmers' Fresh submits that if the stay is vacated, the five Farmers' Fresh farms will not be able to find an alternate source for the uninterrupted long-term supply of mushroom substrate of the necessary quality, and at a price that makes growing mushrooms an economically viable business.

Farmers' Fresh and Ross Land submit that the recent dramatic price increases for mushroom substrate is incontrovertible proof that there is a shortage of mushroom substrate in B.C. Mr. Truong testified that the price of mushroom substrate in B.C. has increased approximately 50% since 1999, rising from \$31.50 to its present price of \$45 from The Straw Farm facility and \$47 from Money's Mushrooms.

The five Farmers' Fresh farms, and Farmers' Fresh, have made continual efforts to obtain mushroom substrate from Money's Mushrooms, however, at no time has it been determined that Money's is able to provide mushroom substrate.

Mr. Truong testified that there was a significant loss of mushroom production using mushroom substrate purchased from the Ferndale facility. The overall loss in mushroom production was between 70,000 and 86,000 pounds.

Mr. Nguyen testified that Farmers' Fresh does not believe that Money's Mushrooms can provide quality mushroom substrate to Farmers' Fresh, and it has not been proven to him that Money's has excess capacity for the production of mushroom substrate.

Mr. Nguyen testified that Money's Mushrooms has never negotiated with Farmers' Fresh in good faith.

2. Arrangements or Contracts

Mr. Nguyen's evidence was that mushroom growers make a return of between 5% and 7% on their production. Even a 5% reduction in mushroom output due to lower-quality mushroom substrate could drive a farm out of business.

Mr. Nguyen testified that Farmers' Fresh transferred their production away from Money's Mushrooms in order to survive.

Farmers' Fresh has long term contracts with other parties that would be breached if they no longer had any mushrooms to market.

3. Loss of Jobs

Mr. Truong testified that Ross Land's employees are primarily new Canadians who would have difficulty obtaining other jobs in Canada.

4. Economic Impact

Farmers' Fresh and Ross Land referred to evidence that was previously before the Board relating to economic impact. This included evidence that the Farmers' Fresh farms produce approximately 10% to 12% of all of the mushrooms grown in B.C., and approximately one-half of B.C. jumbo mushrooms. The mushrooms grown by Farmers' Fresh farms are worth approximately 6.2 million dollars annually.

Three of the Farmers' Fresh farms are among the top three to five mushroom growers in B.C.

The Panel

It is clear that all parties to the appeal have experienced a great deal of frustration in trying to resolve this difficult problem. The Panel does not intend to consider the alleged delays, and the role, if any, of any of the Parties in causing such delays, when considering this application. Nor does the Panel intend to address issues related to the rezoning or the building permit application of the Appellant.

The Panel accepts the evidence of the residents that they have continued to suffer as a result of the odour resulting from the operation of the Straw Farm facility. The odour was consistently described by the residents as distinctive and noxious. The odour has clearly had an impact on the residents who have described the physical effects in the form of headaches, as well as the stress in their lives. As well, the Panel accepts that the odour has affected the ability of the residents to enjoy their properties.

The Panel also accepts the evidence of Mr. Moore that there is a potential for risk of contamination of both surface water and groundwater. The Panel notes that this evidence is not inconsistent with the evidence of the Appellant's witness, Mr. St-Gelais.

The Panel recognizes there will be harm to the residents and potential harm to the environment if the stay is not vacated pending a decision on the merits. However, on balance, the Panel finds that the harm suffered by the Appellant, and the farms and agencies supplied by the Appellant outweighs the harm to the residents and the potential harm to the environment for the duration of the stay. The Panel, therefore, finds that the balance of convenience is in favour of leaving the stay in place pending a decision on the merits of this appeal. The Panel finds that the new evidence presented to the Panel does not shift the balance of convenience as found by the Board in the previous stay decision.

However, the Panel also accepts the evidence of the residents that the odours are worse in the summer and that the tarping ordered in the previous stay decision has not improved the odours emanating from the Straw Farm facility. As the hearing of the appeal is not taking place until mid-September and the decision will not be issued until some time after that, the Panel finds that there are steps that must be taken on an interim basis by the Appellant to address the concerns of the residents and of the Respondent with respect to the environment.

The Respondent proposed a number of conditions that could be imposed to address the odour problem pending the appeal, if the stay is not vacated. The Panel also accepts the evidence of Mr. Moscone with respect to significant changes that the Appellant is making.

DECISION

For these reasons, the Panel finds that the stay of the Order should not be vacated, subject to the following conditions:

The Appellant shall:

1. cease any mixing and storage of any mushroom compost outdoors, including any outdoor storage of the finished compost;
2. load and unload any mushroom compost indoors, wherever possible;
3. design, construct and implement a leachate collection system in a manner and within a time frame agreed to by the Regional Waste Manager;

4. remove all surface wastewater from the Straw Farm site in a manner, and within a time frame agreed to by the Regional Waste Manager, but no later than two weeks after the completion of the leachate collection system, and thereafter take measures to prevent release of wastewater to the environment;
5. implement processing procedures with respect to moisture content and turning of the ricks to reduce odour, in consultation with the Regional Waste Manager;
6. maintain the custom tarps, as ordered in the previous stay decision;
7. close all tarps and doors to the facility during non-operating hours, and during operating hours when people are not working in the building;
8. develop and implement a program for a hydrogeological investigation of the Straw Farm site to address the question of groundwater contamination, with a work program to be submitted for approval to the Regional Waste Manager no later than 7 days from the date of this decision;
9. submit a hydrogeological monitoring report, including data and the interpretation of the data, recommendations regarding continued monitoring and any required remedial measures, no later than 4 weeks from the date that the program referred to in condition 8 is approved by the Regional Waste Manager;
10. provide copies of documents with respect to the implementation of all conditions to a designated representative of the City and the Compost Association, on a weekly basis, as agreed to by the City and the Compost Association;
11. take steps to establish a stakeholder committee consisting of a representative of MELP, the Compost Association and the City to ensure that the residents and members of the community have a forum in which to raise concerns until a decision on the merits is provided; and
12. implement the following changes suggested by the Appellant itself:
 - a. extending the composting time at the Ferndale facility to 16 days, and
 - b. checking the drainage pipe to the Sumas Canal daily to ensure that no further breaks have occurred.

Conditions 1 and 2 must be carried out as soon as possible, but no later than 14 days from the date of this decision.

Marilyn Kansky, Panel Chair
Environmental Appeal Board

August 25, 2000