AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES ACT

DECISION

In the matter of an application for a review of the facts of a violation of provision 45(1) of the *Pest Control Products Regulations* alleged by the Respondent, and requested by the Applicant pursuant to subsection 8(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act.*

James Gray, Applicant

- and -

Pest Management Regulatory Agency, Respondent

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of the written submissions of the parties including the report of the Respondent, the Tribunal, by order, determines the Applicant did not commit the violation.

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The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

The oral hearing was held in Halifax on June 28th, 2006.

The Applicant made his own submissions.

The Respondent was represented by its Regional Manager, Mr. Neil McTiernan.

Evidence was given for the Respondent by Mr. McTiernan and its Inspector, Mr. Troy Troop.

The Notice of Violation # 02AT-210 01W alleges that the Applicant, on the 25th day of July, 2002, at 718 Windermere Road, in the province of Nova Scotia, committed a violation, namely: "Used a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label" contrary to provision 45(1) of the *Pest Control Products Regulations* which states:

> 45(1)No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

At the outset of the hearing I ascertained whether each party had copies of the following key documents in this file;

- Notice of Violation deemed served on June 23rd, 2003.
- Letter dated June 16th, 2003, from the Applicant requesting a review
- Report by the Respondent received by the Tribunal on July 4th, 2003.
- Letter dated July 17th, 2003, from the Applicant in reply to the Respondent's report, together with attachments.
- Letter dated August 1st, 2003, from the Respondent replying to the Applicant's letter, with attachments.

Having confirmed both parties had copies, these documents were entered on the record as evidence for the purpose of the hearing.

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Further, the following were either agreed to, or not disputed by both parties:

- On the morning of July 25th, 2002, the Applicant sprayed fruit trees and grapes on his property with the products "elevate" and "dikar".

- Although both these products are "control products" as defined in the *Pest Control Products Act*, this case deals primarily with elevate, as its label is the only label submitted in evidence.

- The neighbouring property to the south is owned by Mr. and Mrs. Fred Trahan on which they grow a variety of berry crops and tree fruit, and market as a public U-pick operation.

- The raspberry crop in question is adjacent to the Applicant's property.

- The label on the product "elevate" as set out in tab 4 of the Respondent's report contains the following words "avoid spray drift".

However, the evidence of the parties regarding wind conditions at the time of spraying, chemical product mixture, and location of the Applicant's grapes vis-à-vis the alleged spray drift varied considerably.

Wind Conditions

Mr. Troop testified that at 10:50 a.m. on Mr. Trahan's property, the direction of the wind was from the north-east which he stated to be consistent with the spray drift alleged by Mr. Trahan and a picker on the Trahan property, Ms. Elizabeth Brown.

The weather report attached at tab 3 of the Respondent's report indicated the wind direction at locations 20 kilometres east and west of the Trahan property between 8 and 9 a.m. as being generally from the north-east and increasing in intensity from very light to moderate speed.

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The Applicant testified that the wind direction and speed at 10:55 a.m. bore no relationship to the wind direction and speed two and a half hours earlier. He testified that while spraying, the wind was light and variable with normal short gusts. He further

indicated that any drift at that time would have blown away from the Trahan property. However, after spraying the fruit trees and while spraying the grapes (which he indicated where about 1/4 km. from any pickers on the Trahan property), he felt the wind shift. When it shifted to the north he said he stopped spraying. Up to that point, he indicated conditions were good for spraying.

Chemical product mixture

The Applicant provided evidence in his letter dated July 17, 2003, that the recommended application for dikar was 5.5 kilograms per hectare and for elevate was 1.12 kilograms per hectare (ratio of 5 to 1). He testified he kept this same ratio but diluted the concentration of each chemical. He indicated the manner in which he combined and mixed the chemicals in his sprayer and said that, while spraying, the turbulence in the tank would have insured the chemicals would have been perfectly homogeneous and applied in a consistent ratio of more than 5 to 1.

The Certificate of Analysis set out at tab 6 of the Respondent's report shows that the active ingredients of the control products in the sample are in the ratio of 1.5 to 1.6. And not 1 to 5 as might be expected.

The Respondent explained that this could be a result of many variables such as the rates at which the products were added to the tank, the uniformity of mixture within the tank, the relative rate of evaporation, movement of off-target drift and relative absorption to the leaf surface.

At the hearing the Applicant tabled a document entitled " Starting a Vineyard in Prince Edward County?" showing the recommended rates of application of each of these chemicals, which rates are consistent with the documentation earlier submitted.

The Applicant further submitted farm expense statements to bolster his evidence as to the rate of application of these chemicals.

These documents were accepted as they did not provide new evidence, but evidence that was consistent with that already contained in the documentation submitted prior to the hearing. The Applicant was also subject to cross-examination on these documents.

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The Applicant as well referred to a Crop Production Guide, being a publication of the Ontario government, and which was extensively used and relied upon by the growers in Atlantic Canada. Although useful information, the Guide was not tabled, and any references to it will not be considered as evidence in this hearing.

Although Mr. Troop said Mr. Trahan told him he could smell the drift, and Ms. Brown told him she could smell the fog, the data sheet describes the odour as "weak, not characteristic", and the Applicant testified it had no smell. It is doubtful that a person could detect elevate in its diluted form from a considerable distance.

Location of Applicant's grapes

Mr. Troop said he measured 27 paces from where Ms. Brown said she was standing, to the fence on the southernly property line of the Applicant.

The Applicant testified that the diagram set out at tab 1 of the Respondent's report was misleading and said he was spraying about a 1/4 km. from any pickers on the Trahan property. He further testified that it would have been impossible for a 25 horsepower tractor with a small fan for any spray drift to have reached the neighbour's raspberries. In his view, since he indicated his air blaster switch was broken and not able to be turned on, it was impossible to spray further than 3 to 4 metres.

The certificate of analysis set out at tab 6 of the Respondent's report and showing the active ingredients of elevate and dikar on the leaf samples taken from Mr. Trahan's farm of July 25th, 2002, is not challenged. This issue is whether the fenhexamid, being the active ingredient of the control product "elevate" and found on the sample, was as a result of the Applicant's spraying of his fruit trees and grapes on the morning of July 25, 2002.

There is evidence that elevate can also be used on raspberries.

Conclusion

In accordance with the section 19 of the *Agriculture and Agri-Food Administrative Moneraty Penalties Act,* the Respondent must establish, on a balance of probabilities, that the Applicant committed the violation identified in the notice.

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In this case, the Respondent relies almost entirely upon the hearsay evidence of spray drift given by Mr. Troop and based on his discussions with Mr. and Mrs. Trahan, and Ms. Brown. None of these persons with whom Mr. Troop spoke gave evidence at the hearing, and accordingly, there is no basis upon which their evidence could be challenged or their credentials or credibility assessed.

The "history of dispute between the families of James Gray and Fred Trahan" as reported by Mr. Troop, may also have tainted Mr. Trahan's evidence.

On the other hand, the Applicant, who is president of the Grape Growers Association of Nova Scotia and with extensive experience in the industry, gave direct evidence at the hearing on which he was cross-examined.

In this case, the Applicant's evidence has considerably diluted the impact of the Respondent's evidence to such an extent that I find the probative value of the Applicant's evidence to carry considerably more weight than that of the Respondent.

I conclude from all the evidence that the Respondent has not met its burden of proof.

That being the case, I am bound to find that the Applicant did not commit the violation.

Following an oral hearing, it would be very difficult, in any circumstances, to find that a violation had been committed solely on the basis of hearsay evidence where there was considerable direct evidence to the contrary.

Dated at Ottawa this 11th day of July, 2006.

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Thomas S. Barton, Q.C., Chairman