

Concerned Agrologists

c/o RR #1, HP-8, Bowen Island, BC Canada V0N 1G0
Tel.: 604-947-2893

December 14, 2008
by email

Keith Duhaime, P.Ag, President and Members of BCIA Council
British Columbia Institute of Agrologists

Dear President Duhaime and Council Members:

Re: Disciplinary decision regarding Susan Ames and subsequent interpretation

We are a group of longstanding members of the British Columbia Institute of Agrologists with a membership history ranging from 22 to 46 years. Seven of the present nine members of our group have received the Agrologist of the Year award. Three have been President of BCIA and three have been Land Commissioners under the Agricultural Land Commission Act. In addition, two held positions of Chair (20 years) and Member (15 years) in the former Ethics and Practices Committee. We bring a wealth of knowledge and experience to the matter at hand.

It is an objective of our group to ensure that all members of BCIA are treated fairly and in accordance with the *Agrologists Act*, BCIA Bylaws, and principles of natural justice. It is our contention that in a recent disciplinary process, that has not been the case. Recent disciplinary action against one BCIA member has caused harm to that individual and sets a precedent that compromises the ability of members to communicate their professional opinions. This is not only a detriment to BCIA but also to the general public, and we write to BCIA Council due to our concerns related to those events and the effect they may have on the profession and the public.

We are sufficiently concerned regarding the professional implications of this matter that we have, as a group, engaged the services of Vancouver lawyer Joseph Arvay, Q.C., of the law firm Arvay Finlay, to advise us. Mr. Arvay has reviewed and approved the contents of this letter

Background

As you are no doubt aware, a complaint was laid against Dr. Susan Ames, P. Ag. (the "Member") further to s. 1(b) of the BCIA guidelines, which requires an Agrologist to "express a professional opinion only when it is founded on adequate knowledge and experience, and where Agrologists have an understanding of the situation and context against which the opinion is being offered."

The Member was the subject of a complaint laid by a fellow Agrologist for having written a letter to the Delta Mayor and Council, urging them to consider carefully the implications of an Agricultural Land Reserve (ALR) withdrawal application. In the correspondence to Delta Mayor and Council, the Member had suggested that the following possible results be considered when making a decision about the future use of ALR land that was part of the Tsawwassen Golf Course:

- the message being sent to other golf course owners,
- the impact on farming,
- the message being sent to developers,
- the message to the general public, and
- the message to farmers next door and in the vicinity.

Following from the complaint, on December 6, 2007, the Conduct and Discipline Committee found the Member guilty of a breach of the Code of Ethics. On December 10, 2007, by letter from D. Rugg, P.Ag., Executive director, the Member was told that the C&DC had “determined that you have breached the Code of Ethics”, and the Member was required to withdraw her letter and to take remedial action.

In reference to the charged member, the Chair of the Conduct and Discipline Committee in a report published in the February 2008 Newsletter entitled “Conduct and Discipline Action By Council” made the following statement: “This decision (accepted by Council) now establishes the context in which an Agrologist may offer an opinion.”

The report goes on to state that “an Agrologist may not offer an opinion unless he or she has done the work or the work had been completed under his or her direct supervision”.

Based on the inclusion of these statements in the report, it is clear to this group of Agrologists that this “established context” was the basis for the breach of the Code of Ethics finding against the Member.

Council has subsequently repudiated this statement, in particular in a July 2008 newsletter to the profession. In that document, BCIA council provided the following statement:

ETHICS AND DUE DILIGENCE

A report in the February 2008 BCIA Newsletter and discussion at the BCIA Annual General Meeting April 11, 2008 in Abbotsford, has led to expressions of concern from BCIA members regarding their ability to work in an ethical manner. BCIA Council would like to clarify the Institute’s position.

...

Accepting the fact that the report’s intention was that “due diligence” be the guiding requirement, the Council has determined that:

An Agrologist may offer a professional opinion only when he or she has undertaken due diligence with regard to that opinion.

Considering this clarification, it appears that the basis for the finding against the Member no longer exists. If the BCIA does not hold to be a general principle that an Agrologist may not offer an opinion if she is not employed to do the work, the basis for the disciplinary finding against Dr. Ames does not exist, and the ruling cannot be sustained.

It is, therefore, our view that Council must take steps to make it clear to the membership and the public that the member did not contravene the Code of Ethics.

Procedural Fairness and Natural Justice

As an administrative body empowered by provincial legislation, the BCIA is required to abide by requirements of procedural fairness, in particular when it is acting in a quasi-judicial capacity as in the circumstances of a complaint about one of its members.

Rules of natural justice and procedural fairness require that the respondent to a complaint be provided with sufficient opportunity to:

- ask questions of and cross examine the complainant;
- call witnesses to refute the allegations;
- call witnesses and bring evidence to support the contention that the Agrologist has the expertise and experience to offer the opinion and that the opinion is valid; and
- be heard and judged by unbiased and impartial decision makers.

We find it regrettable but necessary that we seek resolution of what we consider to be unacceptable use of the disciplinary process in our profession. It is our view that the Conduct and Discipline Committee (C & DC), with the support of Council, failed to follow the rules of natural justice and procedural fairness in respect of the complaint regarding the Member. If this type of proceeding is a precedent, BCIA members risk being required to deal with a complaint about their conduct without the assurance that fair process will be followed by the BCIA.

It is our view that, in the case of the Member, by a plain reading of Bylaw 17.11, and s. 21(1)(a) of the *Agrologists Act*, a finding of a breach of the Code of Ethics cannot be made without a citation being issued by Council and a hearing being held before a discipline hearing panel to make a finding of guilt. In such a hearing, the Complainant or the BCIA would have to prove that the Member did not have the expertise to form the opinion in issue, or that the opinion was wrong and misleading. Such a finding could be made only in accordance with the requirements of natural justice and procedural fairness.

In the present case, it is our understanding that the Complainant was allowed to bring forward the complaint and discuss it with members of the C&DC without the Member subject to the complaint being in attendance. At no time was the Member permitted sufficient opportunity to ask questions of the Complainant, or properly to be heard. She was not given the opportunity to call witnesses or provide expert evidence in response to the complaint. In effect, the Member was not afforded a sufficient opportunity to respond in her own defense.

The process that resulted in a finding against the member did not accord with principles of procedural fairness, and important rights possessed by the Member were affected as a result.

In a letter of September 9th, 2008 to the charged Member, BCIA stated that the Registrar advised the Member that she “undertook” the remedial action requested by the Council without raising any jurisdictional concerns and the complaint file was closed without proceeding to a discipline hearing” and that “there is no appeal or review process available under these circumstances”.

To ensure members are entitled to fair processes, in particular with respect to the case of the Member discussed, we ask Council to investigate, consider and answer the following questions:

- *Do BCIA and the C&DC in their disciplinary function operate in accordance with the requirements of procedural fairness and natural justice to which professional disciplinary processes must comply? In particular, do BCIA and the C&DC afford members of BCIA a disciplinary process that is consistent with those principles of administrative law?*
- *Have the requirements of natural justice and procedural fairness been carried out in the recent case of the Member discussed above, and were the actions and processes used by the C&DC appropriate in this case?*

The responses to correspondence from the BCIA since the last AGM have failed to fully address our concerns, and we ask Council to provide us with a full response.

Conclusion

It is our view that it was appropriate for the Member to raise the concerns she did, on the basis of her expertise and her review of the matter in question. Furthermore, the Member did not criticize the Agrologist’s reports; rather, she used portions of those reports to support her comments that the farmland had been degraded, therefore limiting agriculture on the subject land. It is our experience that this type of expert opinion has been provided by most Agrologists since the inception of the Institute, and it is our opinion that it is an appropriate role for members of the profession.

It is also our view that the Code of Ethics and the disciplinary processes of BCIA should not be interpreted in the manner indicated by the decision in respect of Dr. Ames. Rather, they should be interpreted consistently with the objects and purposes of the profession, which include the provision of professional views on subjects that are pressing and grave in our province, including the use, management and preservation of land and soil, and the effect of relevant decisions on food, agriculture and water. It is only through open discourse and respectful debate that we may achieve the goals of our profession.

We ask Council to thoroughly review the processes and actions of both the Conduct and Discipline Committee and Council that resulted in a member being found to be in breach of the code of ethics. It is our firm contention that the rules of natural justice and procedural fairness, rules that protect all Canadians and British Columbians, do not allow a finding of guilt to be made without proper adherence to the requirements of procedural fairness.

In the interest of professional discussion, we also ask Council to publish this letter and its attachment in the next issue of the Institute's newsletter or, in the alternative, to post it on the BCIA website with notification to the membership.

Yours sincerely

Ron Bertrand, P.Ag. BC Agrologist of the Year 1989; Chair, Ethics & Practices Committee 1980-2000, Member BCIA, 34 years.

Richard Bocking, P.Ag. Member BCIA, 44 years.

Larry Bomford, P.Ag. BCIA Special Recognition Award 2006; Pres., BCIA 2002-04; Pres. Peace River Br, 1981-85; Pres., Victoria & Islands Br, 1999-2002, Member BCIA, 31 years.

Art Bomke, P.Ag. BC Agrologist of the Year 1981, Vancouver Br. Director (1982, 1988-91), Chair, BCIA Provincial Land Use Committee (1978-1982), Member BCIA, +30 years,

Arthur Hadland, P.Ag. BC Agrologist of the Year 2001; Pres., Vice Pres. and Councillor Peace River Br. 1971-980; BC Agricultural Land Commissioner 1992-96, Member BCIA, 34 years.

Niels Holbek, P.Ag. BC Agrologist of the Year 2004; Chair Bylaw Review Committee; Director, Victoria and Islands Br, 1996-99; Member BCIA, 22 years.

Wendy Holm, P.Ag. BC Agrologist of the Year 2000; BC Director, AIC, 1990-92; Pres., BCIA 1989-90, Pres., Vancouver Branch, 1989-88; Member BCIA, 35 years.

Gary Runka, P.Ag. Fellow, Agriculture Inst. of Canada (FAIC) 1990; Pres. BCIA 1984-85; BC Agrologist of the Year, 1978; Member, BCIA Ethics and Practices Committee 1980-1995; Member BCIA, 46 years.

Dave Sands, P.Ag. BC Agrologist of the Year 1996; Fraser Valley Br. Director (1980s); BCIA Legislative Secretary (1970s); Member BCIA, 35 years.

cc: Joseph Arvay, Q.C., Arvay Finlay
Dr. Susan Ames, P.Ag.
BCIA Branch Presidents

Example of the Rules of Natural Justice or Procedural Fairness in BC*

1. The requirement to provide a form of hearing.
2. The requirement to give all parties an adequate and equal opportunity to be heard – both parties are given opportunity to participate in the investigation.
3. The requirement to give adequate notice; both parties have to be served and notified of hearing.
4. The requirement to allow the parties to be present.
5. The requirement to allow the parties to be represented.
6. The requirement to provide the parties with an opportunity to present evidence; both parties are given equal opportunity for their positions to be considered.
7. The requirement to provide an opportunity to challenge the evidence of other parties; ability to present contrary evidence (cross examination).
8. The requirement to provide an impartial and unbiased decision maker.
9. The requirement that the person who hears must decide.
10. The requirement to base the decision solely on the evidence.
11. The requirement to stay within the tribunal's jurisdiction.
12. The requirement for individuals to know the allegations/charges laid against them.
13. Justice should not only be done but should manifestly and undoubtedly be seen to be done.
14. Take into account factors relevant to the incident.

** (Taken from the Residential Tenancy Office under quote: "There are different variations of the 14 Points of Natural Justice used in mediations and other like administrative tribunals settings like the Residential Tenancy Office, Employment Standards Branch and British Columbia Human Rights Council").*

Sections taken from "Handbook on Professional Discipline Procedure"

5. Natural justice and procedural fairness

Disciplinary proceedings must also be fair to the member accused of misconduct or incompetence. Many of the procedural safeguards included in discipline legislation or imposed by the courts were adopted to ensure that a professional's career is not destroyed without giving him or her an opportunity to make a full defense before an unbiased and impartial tribunal. As the *McRuer Report (Ontario Royal Commission Inquiry into Civil Rights, 1968-71)* observed:

The most obvious feature of the power of a self-governing body to discipline its members is clearly that it is a judicial power... It is a power whose exercise may have the most far-reaching effects upon the individual who is disciplined... Where a conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established and rigorously observed.

The importance of procedural rules as a means of protecting the interests of the profession, the public, and the accused can hardly be overemphasized. Canadian courts have long required all disciplinary proceedings to follow what have been called the principles of natural justice. This was restated in very strong terms by the Supreme Court in a Saskatchewan case in 1990.² The court held that the rules of natural justice apply rigorously to professional discipline.

These principles require that:

- the accused has an opportunity to be heard, thus the accused must be fully informed of the allegations against him or her and be given a full and fair opportunity to respond to them;
- decision makers must "act judicially", that is, in a fair and unbiased manner, which usually requires a hearing before a discipline committee at which the accused may attend, present evidence, and be represented by legal counsel.

Legislation governing professional discipline embodies the rules of natural justice. The courts will enforce the rules by staying or overturning decisions of disciplinary committees, often going beyond the specific statutory requirements if justice demands.

² Knight v. Indian Head School Division, [1990] 106 N.R. 17.