IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM NOISE, HOURS OF OPERATION AND LIGHTS AT THE WINSON ROAD PROCESSING OPERATIONS OF PACIFIC COAST FRUIT PRODUCTS LTD.

BETWEEN:

JACK AND COLETTE MADDALOZZO

COMPLAINANT

AND:

PACIFIC COAST FRUIT PRODUCTS LTD.

RESPONDENTS

AND:

BC AGRICULTURE COUNCIL

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	Suzanne K.Wiltshire, Presiding Member Derek Janzen, Presiding Member Cheryl Davie, Presiding Member
For the Complainant:	Jonathan Baker, Counsel
For the Respondent:	Jennifer Spencer, Counsel
For the Intervener: BC Agriculture Council	Garnet Etsell, Chair
Date of Hearing:	April 8, 2011
Place of Hearing:	Abbotsford, British Columbia

INTRODUCTION

1. The British Columbia Farm Industry Review Board (BCFIRB) is a specialized administrative tribunal established under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330. As part of its mandate, BCFIRB hears complaints about farm practices under the *Farm Practices Protection (Right to Farm) Act* R.S.B.C. 1996, c. 330 (*FPPA*).

2. Under the *FPPA*, normal farm practices are protected. Section 2 of the *FPPA* provides that a farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from a farm operation conducted in accordance with normal farm practices as part of a farm business on land in the Agricultural Land Reserve (ALR) or on land "on which, under the *Local Government Act*, farm use is allowed".

3. Under s. 3 of the *FPPA*, a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to BCFIRB for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, a panel of BCFIRB is of the opinion that the odour, noise, dust, or other disturbance results from a normal farm practice, the complaint is dismissed. If the panel determines that the practice is not a normal farm practice, the panel must order the farmer to cease or modify the practice.

4. This complaint was initiated by way of a letter filed with BCFIRB on May 17, 2010. The complainants, Jack and Colette Maddalozzo, state they are aggrieved by the hours of operation, lights and noise generated from the operations of the processing plant at 90 Winson Road in Abbotsford located across the street from their home.

5. The respondent, Pacific Coast Fruit Products Ltd., leases the land, buildings and other facilities at 90 Winson Road from a related company. It grows raspberries on 15 acres of this property. It operates a fruit processing plant on this property and has another processing plant on industrial land nearby. Pacific Coast conducts its processing business from the large house located on the property which it has converted to office use. The respondent's position is that its Winson processing operations are in keeping with normal farm practices and should be afforded the protection offered by the *FPPA*.

6. The issue of jurisdiction was initially raised in the notice of complaint and a written submission process was initiated on this issue. On July 27, 2010, the Chair of BCFIRB decided that he was not prepared to make any ruling regarding jurisdiction at that point in the proceedings. He determined that the appropriate course was to establish a panel to hear the complaint and determine, once it had the benefit of oral evidence and argument, whether the respondent's processing facility at 90 Winson Road is a farm operation and if so, whether the on-farm activities complained of accord with normal farm practices.

7. Following the appointment of a panel to hear the complaint, the British Columbia Agriculture Council applied for and was granted the right to make submissions as an intervener in the hearing.

8. The matter proceeded to hearing on April 8, 2011 in Abbotsford, BC. In the morning, before the commencement of the hearing, the panel viewed the property at 90 Winson Road and the complainants' home across the street in order to place the properties in geographical context.

9. At the conclusion of the respondent's case on April 8, 2011, the panel ruled that final argument would be made by way of written submissions and established a schedule for receipt of submissions. Subsequently on April 15, 2011, the panel asked the respondent to provide additional information by way of affidavit on the jurisdiction issue. That information together with the respondent's argument was received on May 9, 2011 and a revised written submission schedule was subsequently established. Final written submissions were received by the panel on June 10, 2011.

ISSUES

10. Is the respondent's processing plant at 90 Winson Road in Abbotsford a farm operation conducted as part of a farm business as required by s. 3 of the *FPPA* and as such, does BCFIRB have jurisdiction to hear the complaint?

11. If BCFIRB does have jurisdiction, are the hours of operation, lights and noise generated from the Winson processing plant operations in accordance with normal farm practices?

RESPONDENT'S PROCESSING OPERATIONS

12. Dianne Klatt and Ellen Klootwyk are the directors, officers and only shareholders of the respondent, Pacific Coast Fruit Products Ltd., which was incorporated in 1988.

13. In 1991, the respondent began operating a fruit processing plant on Industrial Way in Abbotsford. This property is not in the ALR and is approximately 1.5 km distant from the 90 Winson property.

14. Ms. Klatt and Ms. Klootwyk are the directors, officers and, through their respective personal holding companies, the holders of all the voting common shares of Copper Seven Enterprises, Inc. which was incorporated in late 2007.

15. In 2008, Copper Seven purchased the property at 90 Winson Road. This property is within the ALR.

16. In November 2009, Copper Seven issued one non-voting redeemable retractable preferred share to each of M. & G. Bros. Farms Ltd. and Geneva Farms Inc. for

consideration of $100 per share. These companies ship product to the Winson processing plant.

17. The respondent, Pacific Coast, leases the land, plant and house/office at 90 Winson Road as well as certain equipment from Copper Seven and operates the processing plant and related facilities located on the property. The property is approximately 18 acres with about 15 acres of raspberries.

18. In 2009, and as a result of allegations that the respondent's Winson plant was processing product in excess of the allowable limit for land in the ALR, the Agricultural Land Commission (ALC) investigated whether the Winson processing operations complied with the regulatory requirement under the *Agricultural Land Commission Act* S.B.C. 2002, c.36 (*ALCA*) for designated "farm use" which requires at least 50% of the farm product being processed be produced on the farm.[1] The allegations also raised an issue with respect to the municipality of Abbotsford's regulatory scope because the *ALCA* regulation while permitting "farm use" activities to be regulated, provides that they must not be prohibited by local government bylaw except a bylaw under section 917 of the *Local Government Act* R.S.B.C. 1996, c. 323.

19. In its January 7, 2010 letter responding to the ALC, the respondent forecast that in 2010 the volume of product coming into the Winson plant for processing would be just over 5 million lbs. and that 2.5 million lbs. or about ½ of the product would come from Pacific Coast, in particular from the 15 acres planted to raspberries at 90 Winson Road and from several other properties which the respondent indicated were either owned or operated by it. (In the course of the hearing of this complaint the respondent identified these other properties as a not yet producing farm owned by Ms. Klootwyk and her husband and producing farms owned or leased by M. & G. Bros. Farms Ltd. and Geneva Farms Inc., and characterized them as "related" farms. Evidence received with respect to these "related" farms and the nature of their relationship with the respondent is reviewed below under the heading "RELATED" FARMS.)

20. Based on the information provided by the respondent in its January 7, 2010 letter with respect to its forecast of products to be processed in 2010 and the source of such products, the ALC accepted the respondent's assertion that its processing operations met the test for designated farm use. The ALC also confirmed its position that Abbotsford could regulate but not prohibit the operations of the respondent's "farm processing facility".

21. Actual volumes of product processed at the Winson plant in 2010 and the sources of such product were provided by the respondent in response to the panel's post-hearing request for additional information. The respondent reported that in 2010

[1] *B.C. Reg171/2002 - Agricultural Land Reserve Use, Subdivision and Procedure Regulation Part 2 - Permitted Uses,section 2(2)*

total product processed at the Winson plant was 2.38 million lbs. of which the product sourced from those farms characterized by the respondent as related farms totalled 0.92 million lbs., broken down as follows:

- Respondent at Winson 74, 000 lbs
- M. & G. 698, 495 lbs
- Geneva 149,036 lbs

Of the total 2.38 million lbs. processed, the remaining 1.46 million lbs. came from other farms characterized by the respondent as unrelated farms.

THE COMPLAINT

22. The Maddalozzo home is located on a farm property that has been in their family since 1965. In 2002, Jack and Collette Maddalozzo built their current residence, located at the south-east corner of their property and across the road from 90 Winson Road.

23. Following Copper Seven's acquisition of the 90 Winson property and its lease to the respondent, the complainants noticed a large increase in the amount of activity at the processing plant and in the volume of truck traffic travelling to and from the property.

24. The respondent removed the old house on the 90 Winson property located in front of the processing plant, then expanded and paved the yard area between the plant and Winson Road and installed an in-ground scale. The respondent's driveway was also extended with the result that the complainants' and respondent's driveways were less offset and almost directly across from each other. The plant loading area was also expanded to 4 bays from 2. Then the yard area was extended to the north to provide for a paved parking area.

25. The complainants state they are aggrieved by the hours of operation, noise and lights from the Winson processing operations. Their evidence is that the operations are year round and activities sometimes continue late into the night and start as early as 4 a.m. Bright lights on the processing plant and related facilities shine across the street and against the front of their residence. There is a great deal of noise from the activities of the plant, the coming and going of semi-trailers, the beeping, bumping and rattling of forklifts, rigs idling, and reefers operating at the loading dock. Because of the narrow road and limited turning room the semis must turn sharply in front of the complainants' home as they exit the respondent's driveway and sometimes drive onto the complainants' driveway. The complainants estimate that there are an average of 5 to 6 semi-trailers coming and going each day between October and April, increasing to between 10 and 12 semi-trailers per day between May and September. The complainants view is that the Winson

processing operations are a large international food enterprise and not a farm operation.

"RELATED" FARMS

26. The respondent considers four of M. & G.'s farm properties in the Fraser Valley to be "related" farms for the processing of fruit at the Winson processing plant. Three of these farms are on land owned by M. & G. and the fourth is on land leased by M. & G..

27. The respondent considers four of Geneva's farm properties in the Fraser Valley to be "related" farms for the purpose of processing fruit at the Winson processing plant. Geneva owns the land with respect to three of these farms and leases the fourth farm.

28. The respondent also considers the farm of Ellen Klootwyk and her husband to be a "related farm" but it has only recently been planted to blueberries and black currents and was not in production in 2010.

29. At the hearing Jesse Brar, Grower Relations/Farm Operations Manager of the respondent, described the respondent, Geneva and M. & G. as related but was unable to specify how they were related. He referred to the Geneva "related" farms as his family's farms.

30. Ms. Klatt testified at the hearing that at first M. & G. and Geneva had a lease arrangement with Pacific Coast for fruit processed at the Winson facility but then Copper Seven issued shares to the two big growers, M. & G. and Geneva. These are the two preferred shares issued by Copper Seven in November 2009, one share to each of M. & G. and Geneva. Ms. Klatt indicated the lease arrangement and subsequent issue of shares were to satisfy the ALC.

31. In response to the panel's post-hearing request for additional information respecting the respondent's relationship with the "related" farms, affidavits were received from Ms. Klatt, Ranjit Gill, acting general manager of M. & G., and Malkit Brar, a director, officer and co-owner of Geneva.

32. Ms. Klatt described the respondent and its principals as having a relationship, both business and personal, of longstanding with M. & G. and Geneva and their respective principals and stated that the respondent, M. & G. and Geneva had for many years done business together on a handshake basis. This was confirmed by both Mr. Gill and Mr. M. Brar.

33. Ms. Klatt stated that M. & G. and Geneva were interested in "partnering" with Pacific Coast for the processing capacity at 90 Winson Road when the property became available in 2008, indicating M. & G., Geneva and the respondent were mutually interested in processing fruit using the IQF (individual quick frozen) technology available at the Winson plant because it yields better quality, higher value product. Mr. Gill described M. & G. as being "supportive" when Copper

Seven bought the farm at 90 Winson Road and Mr. M. Brar indicated Geneva was "willing to work with" the respondent in growing and processing its own fruit. Both Mr. Gill and Mr. M. Brar noted a need for greater processing capacity and confirmed their interest in being able to access the IQF technology.

34. Ms. Klatt confirmed that at about the same time Copper Seven acquired 90 Winson Road, the respondent hired Jesse Brar as its agricultural manager for his expertise and because of his relationships with both M. & G. and Geneva. Mr. Gill stated that M. & G. agreed that Jesse Brar would coordinate the operations at M. & G. for fruit going to the Winson plant because it made sense from a practical and business perspective. Mr. M. Brar indicated that Jesse Brar, his son, also coordinates operations at the Geneva farms for fruit going to the Winson plant for processing.

35. A copy of a draft lease between the respondent and Geneva for 100 acres covering the period from March 2008 to March 2009 was provided as an exhibit to Ms. Klatt's affidavit. After stating that no leases were signed, Ms. Klatt in her affidavit repeated her earlier statement that the respondent does its business with M. & G. and Geneva on a handshake basis but provided no details of the oral commercial arrangements or agreements with either of those entities. Instead Ms. Klatt stated: "When it became apparent the ALC wanted a formal relationship between our farms, M. & G. and Geneva each bought a share in Copper Seven (which owns the Winson Road Farm) to satisfy the government requirements. Basically, as between the group, we did what we thought was necessary to meet the zoning and regulatory requirements for grower-processors on agricultural land."

36. Mr. Gill stated that after issues arose with the ALC and Abbotsford, Jesse Brar had a form of lease drafted to make the respondent the operator of certain acres of M. & G.'s farms so that M. & G. had a direct relationship with the respondent. His recollection was the draft lease was for about 100 acres of berry fields with the understanding being that the arrangement would be in place until M. & G. decided against it. He added, "There never was a lease signed, only our usual handshake." Then realizing Geneva planned to buy a share in Copper Seven, M. & G. bought a share too because he "thought this was necessary so that we could continue to grow and process our berries as a group at the Winson Road farm facility".

37. Mr. M. Brar stated that Geneva "initially thought it would be fine for Pacific Coast to process its fruit at Winson Road as it was." Then after issues came up with Abbotsford and the ALC, "We wanted to make sure we complied with the government requirements." Jesse Brar then put together a form of lease with Geneva for the respondent to operate 100 acres of berry fields. Mr. M. Brar stated: "My understanding was that we would have this arrangement with Pacific Coast until we decided not to. We never did sign an actual written lease, we just continued as we were as a group….We did not finalize any written lease going forward in part because as a group we thought Geneva and M. & G. acquiring shares in Dianne and Ellen's company, Copper Seven Enterprises, would be an easier structure to show how we were related and compliant with the government requirements." Geneva then purchased a share in Copper Seven to "meet the

zoning and regulatory requirements" so that Geneva and the respondent "could continue to farm and process our berries between us."

38. Ms. Klatt described the respondent as having a different operational relationship with M. & G. and Geneva than with other growers in that Jesse Brar has a more hands-on, operational role with the M. & G. and Geneva fields than he does with other unrelated farms that grow for the respondent. She stated that in this role, Jesse Brar visits the related farms often to check fruit quality and ensure the right chemicals and pesticides are being used as part of the respondent's integrated pest management program and to identify which crops to pick in flats or drums depending on the quality in the field. She indicated Jesse Brar is also working with M. & G. and Geneva to have the Winson, M. & G. and Geneva fields obtain Good Agricultural Practices (GAP) certification under the On-Farm Food Safety Program. Ms. Klatt noted that for unrelated farms the respondent simply grades the fruit at the dock and pays accordingly. Ms. Klatt stated that the respondent also uses M. & G.'s and Geneva's farm equipment, including tractors and sprayers, and M. & G. flats and in turn M. & G. and Geneva use the respondent's trucks and reefer. The respondent, M. & G. and Geneva also make joint decisions about which varietals to plant across the related farms and also make joint cultivation decisions. From time to time farm labour is also shared among the farms.

39. Mr. M. Brar, noting that the majority of Geneva's Abbotsford fruit is processed by the respondent at its Industrial Way processing plant with some of it going to the Winson plant, described the respondent as directing the fruit to one plant or the other. In this regard, he noted his son, Jesse Brar, has authority to take an operational role with the Geneva fields. He confirmed Ms. Klatt's evidence regarding the activities undertaken by Jesse Brar but described the Integrated Pest Management and GAP certification efforts as mutual efforts of Geneva, M. & G. and the respondent with his son taking a leading role. He also confirmed the sharing of some equipment "between the farms" and sometimes labour. Mr. M. Brar concluded, "We have maintained our business relationship for decades because together we have best practices in both growing and processing berries and this is more profitable for all of us."

40. Mr. Gill confirmed that Jesse Brar, in his capacity as the respondent's agricultural manager, has an operational role for the M. & G. fields the same as that described by Mr. M. Brar.

JURISDICTION

41. Before proceeding to consideration of the merits of the complaint we must first determine if we have jurisdiction.

A. Law

42. The jurisdictional challenge here is with respect to whether or not the complaint can properly be brought under section 3 of the *FPPA*. Section 3 (1) provides:

> **3** (1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a **farm operation** conducted as part of a **farm business**, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.
> [emphasis added]

43. The following definitions are set out in section 1 of the *FPPA:*

> "farmer" means the owner or operator of a farm business.
>
> "farm business" means a business in which one or more farm operations are conducted…
>
> "farm operation" means any of the following activities involved in carrying on a farm business:
>
> (a) growing, producing, raising or keeping animals or plants, including mushrooms or primary products of those plants or animals;
> (b) clearing, draining, irrigating or cultivating land;
> (c) using farm machinery, equipment, devices, materials and structures;
> (d) applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying;
> (e) conducting any other agricultural activity on, in or over agricultural land;
>
> and includes
> …
>
> (k) **processing** or direct marketing by a farmer of one or both of
> (i) the **products of a farm owned or operated by the farmer**, and
> (ii) within the limits prescribed by the minister, **products not of that farm**,
> to the extent that the **processing** or marketing **of those products is conducted on the farmer's farm**;
> [emphasis added]

44. The minister has not prescribed limits for the purposes of clause (ii) of subparagraph (k) of the definition of "farm operation", although the minister has the power to do so under section 12(3) (b) of the *FPPA* which provides:

> **12** (3) The minister may make regulations prescribing one or more of the following:
> …
> (b) limits referred to in paragraph (k) of the definition of "farm operation";

B. Submissions

Complainants

45. The complainants submit that BCFIRB does not have jurisdiction. They argue the respondent does not meet the requirements for a "farmer", "farm business" or "farm operation" under the *FPPA.* Nor do the Winson processing operations meet the *ALCA* regulatory requirements for "farm use" designation.

46. The complainants argue that a number of separate farm businesses cannot patronize one processing plant located on land within the ALR and then claim they are a single farm. The designation by the respondent of some of these farm businesses as "related" does not explain how the various properties could be considered to be a single farm. There is no evidence that the "related" properties are owned or operated by the respondent, only the vague identification of such properties as "related". The "related" parcels of land are not "a farm business"; they are simply a group of related suppliers. A business is not a confederation of multiple separate businesses sharing resources.

47. As for the processing of products not of that farm, the complainants argue that the 50% limit established for designated "farm use" by regulation under the ALCA should be imported and used as the limit for the purposes of paragraph (k) of the definition of "farm operation" under the FPPA. The ALCA regulation designates as "farm use" for the purposes of the ALCA "the storage, packing, product preparation or processing of farm products if at least 50% of the farm product being stored, packed, prepared or processed is produced on the farm". Accordingly, the complainants argue that for the respondent to claim immunity from claims for nuisance under the FPPA with respect to the Winson processing operations, the respondent must provide evidence to prove that 50% or more of the farm product processed is produced on the farm. The complainants submit that the respondent has failed to do so.

Respondent

48. The respondent submits that BCFIRB does have jurisdiction to hear and determine this complaint under section 3 of the FPPA and argues that it meets the statutory requirements for "right to farm" protection under section 2 of the FPPA.

49. The respondent acknowledges that it does not own the farm businesses of the related farms. The respondent submits, however, that it does own and operate the farm business at 90 Winson Road and it does have a significant operational role in the planting, cultivation, pest control, quality control and processing of the berries from the related farms. The respondent argues that each of these agricultural activities is a farm operation as defined in the FPPA and that a farm business as defined in the FPPA is one or more of these farm operations. As such, the respondent argues it comes within BCFIRB`s jurisdiction as a "farmer" that owns or operates a "farm business" consisting of multiple "farm operations".

50. The respondent rejects the complainants argument that the 50% limit established for designated farm use by regulation under the ALCA can or should be imported into the FPPA. The respondent submits that there is no requirement under the FPPA that 50% or more of the farm product processed be produced from that farm to be a farm operation protected by the FPPA. Further, there are no regulations under the FPPA limiting the processing by a farmer of either products of a farm owned or operated by the farmer or products not of that farmer's farms.

Intervener

51. The intervener did not address the jurisdiction issue in its written submissions, although it indicated it would like to see BCFIRB deal with the matter. Instead it referred the panel to the central point of all its submissions – that for BC agriculture to be successful, it is increasingly important that opportunities for expansion, value-added processing and diversification remain available in all sectors and that it is critical that investment into value-added activity on agricultural land be facilitated through government policies.

C. Analysis

52. This complaint concerns disturbances resulting from the respondent's Winson Road processing operations. Under section 3 of the FPPA BCFIRB's jurisdiction with respect to complaints is limited to "a disturbance resulting from a farm operation conducted as part of a farm business". Similarly the "right to farm" protection claimed by the respondent under section 2 of the FPPA is afforded "in relation to a farm operation conducted as part of a farm business" where the farm operation is conducted in accordance with normal farm practices.

53. This means we must consider whether or not the respondent's processing operations at 90 Winson Road are a "farm operation" within the meaning of the FPPA. If they are not, such operations fall outside the ambit of section 3 of the FPPA and BCFIRB does not have jurisdiction with respect to this complaint.

54. The complainants and respondent have focused to some extent on the definition of "farm business". However farm business is defined in a circular fashion as a business in which one or more "farm operations" are conducted. It is clear the Winson processing operations are a business. The critical jurisdictional question is whether or not the Winson processing operations are a "farm operation" as defined in the FPPA. If the Winson processing operations are not a farm operation, then the processing business conducted on the 90 Winson property is not a farm business that is protected under the FPPA and as such BCFIRB would lack jurisdiction to deal with any disturbance complained of relating to that processing business.

Winson processing operations

55. The activities carried out by the respondent at 90 Winson Road consist of a commercial processing operation with a business office and a small raspberry acreage described by Ms. Klatt as a "show farm" used to impress customers. We have no difficulty concluding that the last of these activities, the growing of raspberries on approximately 15 acres, falls within the definition of "farm operation". If the 90 Winson processing operations were limited to the processing of those berries, the processing operations would also be a farm operation and as the complainants indicated during the hearing, they would have not filed a complaint. However, that is clearly not the case.

56. The Winson processing operations extend far beyond the processing of product grown by the respondent at 90 Winson Road. Based on actual volumes processed at the Winson plant in 2010, raspberries produced from the 15 acres under

cultivation at 90 Winson Road contributed only about 3% of total product processed. A significant portion (36%) of the total product processed at the Winson plant in 2010 was sourced from the "related" farms, and the majority (61%) of the product processed in 2010 came from unrelated farms.

57. Subparagraph (k) of the definition of "farm operation" in referring to "the products of a farm" and then again to "products not of that farm" and the limitation that "the processing … of those products is conducted on the farmer's farm" is clearly referring to the farmer as the one on whose farm the processing is being conducted. In this case that would be the respondent.

58. While the products of a farm might come from the cultivation of one or more separate pieces of land owned or operated by the same farmer, the panel finds that subparagraph (k) cannot be interpreted to mean that products coming from multiple farms owned or operated by different farmers constitute products of a farm owned or operated by the farmer on whose farm the processing is being conducted. Thus, the question becomes whether the "related farms" can be considered farms owned or operated by the respondent such that the processing of the product from these farms at the Winson plant would be subject to the protections of the FPPA.

"(i) the products of a farm owned or operated by the farmer"

59. We have considered whether the respondent's relationship with M. & G. and Geneva is such that the products from the M. & G. and Geneva "related" farms can be considered "products of a farm owned or operated by the farmer" as defined in paragraph (k) of the definition of "farm operation" set out above at paragraph 43. We have concluded they are not but are more properly "products not of that farm".

60. The evidence of Ms. Klatt and Mssrs. M. Brar and Gill establishes that the product coming from the "related" farms comes from fields that are owned or leased by M. & G. and Geneva, respectively. It is clear on the evidence that the respondent does not own M. & G. or Geneva.

61. The fact that M. & G. and Geneva subscribed for 1 non-voting preferred share each of Copper Seven does not establish anything other than that these entities have acquired an investment in a company which, while it owns the land at 90 Winson Road, does not operate the processing plant there and is a company separate from the respondent. It does not turn the "related" farms' products into products of a farm owned by the respondent.

62. The "related" farms are in our view part of farms owned by M. & G. and Geneva respectively. The more complicated question is whether the respondent operates the "related" M. & G. or Geneva farms.

63. While the parties have referred to a form of lease being drafted for about 100 acres of the "related" farm fields, the evidence establishes that no written lease was ever signed by either of M. & G. or Geneva. Reference was made to the parties proceeding on their usual handshake basis. However, no evidence was provided as to the exact nature and commercial terms of that "usual handshake" relationship, although the panel afforded the respondent ample opportunity to do so. Overall, the evidence in our view does not establish that the respondent leased the related farm

fields so that it operated those fields as part of its own farm. Indeed, the leasing concept appears to have been considered by the respondent, M. & G. and Geneva not as a commercial reality but as a way to meet the regulatory requirements of the municipality and the ALC, and then not acted on when the respondent and M. & G. and Geneva decided that their objective might be better accomplished by the issue of shares of Copper Seven to M. & G. and Geneva.

64. While there may be a close relationship of long standing between the respondent and M. & G. and Geneva, and while all three may co-ordinate certain aspects of their operations, loan each other equipment and share certification and pest control programs, the respondent is not in our view the operator of these farms on a day to day basis. It is clear that M. & G. and Geneva own and operate their own farms. While Jesse Brar may have taken on a limited operational role with respect to certain of these matters, in our view his coordination efforts with respect to the "related" farms are not unusual for a processor who seeks to ensure the product it processes meets certain standards. The long relationship between the respondent and M. & G. and Geneva has, as Mr. M. Brar put it, resulted in "best practices in both growing and processing berries and this is more profitable for all of us". However, this relationship does not make the respondent the operator of the "related" farms. The products coming from the "related" farms are not products of a farm operated by the respondent.

65. We find the products of the "related" farms are not "products of a farm owned or operated by" the respondent.

66. Given our conclusion with respect to the "related farms", it follows that products from unrelated farms, where there is no ownership claimed and where there is little if any oversight by the respondent, cannot be considered to be "products of a farm owned or operated by the farmer".

"(ii) within the limits prescribed by the minister, products not of that farm"

67. We have considered the parties submissions on the interpretation of the clause "(ii) within the limits prescribed by the minister, products not of that farm" found in subparagraph (k) of the definition of "farm operation" referred to above.

68. We agree with the respondent that the 50% limit established in connection with the designation of farm use for the purposes of the ALCA cannot be imported into the FPPA to become "the limits prescribed by the minister" under subparagraph (k).

69. The purposes of the FPPA and ALCA are different. The FPPA's purpose, as its title denotes, is to protect the right to farm by relieving farmers from nuisance actions for disturbances resulting from farm operations that are conducted in accordance with normal farm practices. The FPPA also provides a complaint process for persons aggrieved by disturbances resulting from farm operations that are not conducted in accordance with normal farm practices. The purpose of the ALCA is the preservation of land for agricultural purposes by restricting the uses of land within the ALR.

70. It would be wrong to import limits prescribed by the minister for land use purposes under the ALCA into the FPPA when the minister, having the power to do so under

the FPPA, has chosen not to prescribe any limits for the purposes of subparagraph (k) of the definition of "farm operation". The policy considerations are not the same. What might be an appropriate limit for a land use determination could be wholly inappropriate when considering the extent to which processing of farm products not of a particular farm should be afforded protection from an action in nuisance.

71. Commercial processing plants operating on land zoned for such a use but outside the ALR are not immune from nuisance actions. The respondent's other processing plant located in an industrial area would not be protected from a nuisance action.

72. The complainants' argument that statutory interpretation requires the ALCA limit be imported fails because the phrase "within the limits prescribed by the minister" is not ambiguous. This means we can only deal with the express words of the statute and cannot look beyond the FPPA. The minister has a clear power under section 12(3) of the FPPA to prescribe limits for the purposes of subparagraph (k). He simply has not done so.

73. Given that no limits "within" which the processing of "products not of that farm" would be recognized as being an included "farm operation" have been prescribed by the minister under the FPPA, we find the definition of "farm operation" is limited to the processing of "the products of a farm owned or operated by the farmer".

74. We have considered but reject the respondent's apparent argument that if no limits have been prescribed by the minister for the purposes of subparagraph (k), then there are no limits for an on farm processing operation such as the respondent's and the respondent may process as much "product not of that farm" as it wishes, even 100%, and still be a "farm operation" within the FPPA definition. That would be absurd as clearly then the distinction between products of a farm owned or operated by the farmer and products not of that farm would not be required and the definition could simply have included the processing of all products regardless of source except to the extent limited by regulation.

75. Rather, in the absence of prescribed limits within which "products not of that farm" may be processed, the express wording of the FPPA cannot be construed so as to offer protection to the processing of products not of that farm as such processing is a commercial processing enterprise like any other and not a farm operation. Accordingly, the processing of product from the unrelated farms (61% of total 2010 processing volumes) and the processing of product from the "related farms" (36% of total 2010 processing volumes) does not fall within the definition of "farm operation" and is not protected under the FPPA. Just as the respondent's other processing plant is subject to nuisance complaints, so is the Winson processing plant when, as here, the products it processes are almost entirely "products not of that farm".

76. Unless and until the minister prescribes limits under section 12 of the FPPA for the purposes of subparagraph (k) that would permit the on farm processing of "products not of that farm", processing of such products does not fall within the definition of "farm operation". Accordingly, a processing operation such as that at

Winson Road in which substantially all of the products processed are "products not of that farm" is not a farm operation as defined in the FPPA.

77. We pause here to note that the mere fact that a farmer processes some product not of that farm will not, in and of itself, be sufficient to deprive BCFIRB of jurisdiction. If on a consideration of the relevant circumstances BCFIRB can conclude that the disturbance complained of relates to the processing of on farm product (ie. that the circumstances of the complaint exist despite the processing of products not of that farm) BCFIRB will retain jurisdiction to hear the complaint. However, that is clearly not the case here where the majority of products processed are "not of that farm" and the complaint relates to the processing of such products

78. Since our jurisdiction in respect of a complaint is restricted under section 3 to disturbances resulting from a "farm operation" it does not extend to a complaint arising from a processing operation that is not a farm operation as defined.

CONCLUSION

79. BCFIRB's jurisdiction to hear complaints is restricted to disturbances resulting from "farm operations" conducted as part of a "farm business" as those terms are defined in the FPPA.

80. The Winson processing operations are not farm operations and the Winson processing business is not a farm business within the meaning of the FPPA.

81. Accordingly, BCFIRB does not have jurisdiction under section 3 of the FPPA to hear the complaint and the respondent cannot claim the protections afforded by section 2 of the FPPA in respect of its Winson processing operations.

82. The complaint is dismissed for lack of jurisdiction.

Dated at **Victoria, British Columbia**, this **7th** day of **September, 2011**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
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