

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, R.S.B.C. 1996,
AND IN THE MATTER OF A
COMPLAINT ARISING FROM THE OPERATION OF MORNING BAY VINEYARD
AND ESTATE WINERY
ON PENDER ISLAND, BRITISH COLUMBIA

BETWEEN

TEKLA and WILLIAM DEVERELL

COMPLAINANTS

AND:

KEITH WATT dba
MORNING BAY VINEYARD AND ESTATE WINERY

RESPONDENT

AND:

CHERYL GRUNBOCK
TERRY CHANTLER

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine Elsaesser, Member
(Panel Chair)
Richard Bullock, Chair
Honey Forbes, Member

For the Complainant

William Deverell
Keith Ferguson, Co-counsel

For the Respondent

Keith Watt

For the Interveners

Cheryl Grunbock
Terry Chantler

Dates and Places of Hearing

January 17-18, 2007
Pender Island, British Columbia

March 7-8, 2007
Sidney, British Columbia

INTRODUCTION

1. The Respondent, Keith Watt, operates Morning Bay Vineyard and Estate Winery (“Morning Bay”) at 6643 Razor Point Road on North Pender Island. The vineyard is approximately 9 to 10 acres and is located within the Agricultural Land Reserve (ALR). The balance of the property (approximately 15 acres) is zoned rural.
2. The Complainants, William and Tekla Deverell, are down slope neighbours adjacent to the Morning Bay sharing approximately 600 feet of common boundary. They allege that since the development of the Morning Bay there has been increased water drainage onto their property. Further, they are concerned about possible water contamination by herbicides and pesticides. The Complainants allege that the practices engaged in by Morning Bay do not constitute normal farm practices and as such, Morning Bay should be ordered to modify its practices.
3. The Interveners are neighbours of Morning Bay. They support the Complainants and also raise other concerns. Cheryl Grunbock’s property adjoins Morning Bay and she too has observed increased drainage onto her property which has resulted in the death of trees over an area of approximately 1½ acres. She is also concerned about the impact of chemical use by Morning Bay on the area’s water quality. Mr. Chantler represents 18 neighbours in a subdivision adjacent to Morning Bay. In his extensive submission, Mr. Chantler advocated for a higher standard of “normal farm practice” on Morning Bay given that it is situated in the environmentally sensitive Southern Gulf Islands. The thrust of this submission is that Morning Bay should be required to adopt organic farming practices.
4. The Respondent’s position is that the activities carried out at Morning Bay are normal farm practices and in compliance with the *Farm Practices Protection (Right to Farm) Act* (the “Act”). He contends that both the process the farm went through to develop the vineyard and the current on-farm practices meet or exceed normal farm practice standards.
5. The Deverell complaint was originally received by the British Columbia Farm Industry Review Board (the “Provincial board”) on November 7, 2005. The complaint raised concerns about the drainage problems in Mrs. Deverell’s organic garden and property. The complaint alleged that since Morning Bay was developed Mrs. Deverell has had difficulties in cultivating her garden, reduced productivity and increased numbers of dead and dying trees. The complaint also raised concerns about the quality of the water entering their property, and noise, smoke, dust, and spraying of the vineyard.
6. After receipt of the complaint, Provincial board staff conducted a site visit and investigation to explore settlement possibilities before both parties wintered out of the country. Subsequently, the Provincial board retained David Tattam as a knowledgeable person pursuant to s. 4 of the *Act*. Mr. Tattam visited the site on May 15, 2006 and provided a report to the Provincial board and the parties on May 24, 2006. Mr. Tattam was also retained to mediate the dispute between the parties.

The mediation, which took place on July 21, 2006, was unsuccessful and the complaint proceeded to hearing.

7. A pre-hearing conference was held on August 16, 2006. The pre-hearing conference report was issued August 31, 2006 and included an addendum summarizing Mrs. Deverell's October 28, 2005 letter. A second pre-hearing conference was held on October 20, 2006.
8. The matter proceeded to hearing on January 17-18, 2007 on Pender Island and reconvened for two further long days on March 7-8, 2007 in Sidney. The Panel heard from 10 witnesses, including Mrs. Deverell and members of the agricultural community on Pender Island, as well as Mr. Watt and previous and current employees of Morning Bay. The Panel heard from five expert witnesses. The Panel also received a large number of documents, including a binder of documents from each of the Complainant and Respondent, expert reports, maps and photo exhibits. The Panel heard from the two interveners including a 19 page written submission with a 10 tab book of documents from Mr. Chantler. A total of 663 pages of transcripts were created. The Panel also undertook a site visit of both the Complainants' and Respondent's properties with the parties present.
9. An extraordinary amount of time was expended by the Provincial board dealing with communications from the parties to clarify procedural issues in advance of and during the hearing. The Panel issued pre-hearing decisions relating to the role of Mr. Tattam in these proceedings, document disclosure, timeliness of expert reports, the threat of an adjournment, costs, and the restriction of disclosure to third parties. Prior to the resumption of the hearing in March 2007, the Panel addressed issues relating to the inconvenience of proceeding in Sidney as opposed to Pender Island, further disclosure of documents, the testimony of expert witnesses and again a possible adjournment application. A February 8, 2007 letter from the Provincial board to the parties noted the Panel's concern about the amount of correspondence and submissions necessary to resolve fairly standard issues relating to document disclosure. In a February 20, 2007 letter dealing with document disclosure, the Panel stated:

...I wish to note that the panel is concerned about the amount of correspondence and submissions necessary to resolve what is a fairly standard issue of document disclosure. We do not wish to receive submissions and counter submissions on this issue on an ongoing basis. Further, we note that it is not typical for the parties to a hearing to be making as many submissions and having as frequent contact with Board staff (and through them to panel members) as is occurring in this case. In order to bring some limits in this regard, while still respecting principles of fairness, I wish to advise that the panel will be scheduling a teleconference with the parties (**to be held only if necessary**) for on or about February 28, 2007 (specific date and times to be specified in due course after Mr. Nasato has spoken with you about that, if necessary). Please be on notice that the panel will not be considering any further applications or correspondence regarding procedural matters before any such teleconference. If parties have any procedural issues that they believe require the panel's direction in advance of re-commencement of the hearing (including any requests for summons, if document disclosure issues remain outstanding) they must advise each other and Mr. Nasato of such issues (with copies of any supporting documents if relevant) no later than 48 hours before the teleconference.

10. The large amount of evidence tendered and the wide-ranging testimony of experts and their cross-examination made the hearing of this matter and the review of materials for the purposes of drafting this decision more onerous and time-consuming than it would otherwise have been. For this reason, the Panel wishes to expressly note that it has carefully considered all of the evidence and submissions referred to above, even though it does not intend to refer to all of it in the course of this decision.

ISSUES

11. Are the Morning Bay farm operations with respect to water drainage, both quantity and quality, conducted in accordance with normal farm practice?

BACKGROUND

12. To place this complaint into context, some background information is necessary. The Deverells purchased their 10.5 acre property on North Pender Island in 1974. Since that time Mrs. Deverell has developed “Tree of Life Garden”, a productive one acre organic garden in the north-west corner of the property. She has grown garlic and vegetables and latterly perennial cutting flowers, a variety of vegetables, fruit, berries and nuts. She is well known locally as the “flower lady” and has been a regular contributor to the Pender Island Farmer’s Market, an organic gardening mentor in the agricultural community and a judge at the Pender Island Fall Fair for many years.
13. Mrs. Deverell’s garden is located in the corner of the property where it meets the corners of three other properties. Morning Bay vineyard borders approximately 600 feet of the Deverells’ northern boundary. The property to the north-west is owned by neighbour and Intervener Ms. Grunbock and the property to the west is owned by Mr. Coates. To the east of the Deverell property is the Harbour Hills subdivision where Mr. Chantler and many of the others he represents reside.
14. The area around Mrs. Deverell’s garden and the property boundary with the Morning Bay property was historically low-lying and marshy with naturally occurring springs. To control water in her garden, Mrs. Deverell built drainage ditches within and around its perimeter in 1979 and 1980. A simple gravity fed siphon system from the natural pond located east of her garden was used for irrigation. In 1990, the pond was cleaned out and deepened and a slight overflow was created using tubing to direct excess water to the south and west side of the garden. Excess water flowed west off the Deverell property and into a long-established drainage ditch running along the Coates property, eventually draining into the ocean.
15. In 1992, Mr. Watt bought his approximately 25 acre property to the north and east of the Deverells. Initially, he enjoyed an amicable relationship with the Deverells.

In 2001, Mr. Watt retained landscape architects Durante Kreuk Ltd. to assist with the development plans for his property. In November 2001, he showed the Deverells the landscape architect's plans for a vineyard and winery development. Initially, there was good communication between the Deverells and Mr. Watt. Mr. Watt proposed creating one large pond to supply the irrigation needs for both the vineyard and the Deverells' garden but due to Mrs. Deverell's objections the plan was changed. They shared the cost of building the post fence between the properties.

16. Clearing began on the east side of the property in the fall of 2001 and on the west side in January 2002. Mr. Watt retained Pottinger Gaherty Environmental Consultants Ltd. (Potinger Gaherty) as the environmental consultants to assist with site analysis including soil stability tests, test hole drilling and water management. In April 2002, terracing of the hillside and excavation for an irrigation pond was commenced. Representatives from Pottinger Gaherty met with the Deverells and noted their initial concern was that the changes to Mr. Watt's property could result in them not having enough water
17. Very quickly into the development, the relationship between the Deverells and Mr. Watt began to deteriorate. The Deverells felt that Mr. Watt was not listening to their concerns and rushing his development despite any potential impacts on their property. The adjoining neighbours, the Deverells, Allison's, and Mr. Coates met with Mr. Watt at the "four corners" in June 2002 to discuss their issues¹. The neighbours left the meeting with their concerns unresolved and the assertion from Mr. Watt that his development would not harm their property but if it did they could sue him and he would in turn sue his engineers.
18. Communication between the parties has dropped off since 2002. Mr. Watt claims to have heard nothing further from the Deverells until the mediation in 2006 where he claims he first heard that the Deverells were alleging increased water drainage onto their property. However, this is not correct as correspondence from Mr. Deverell in June 2002 indicates a serious concern over drainage. Mr. Deverell stated: "some solution needs to be found, because it is obvious that a great deal of runoff will occur from your pond affecting us, the Allison's' and ultimately, the downstream flow through the George Coates' property and ours". Mr. Watt would also have been aware of this complaint from the Notice of Complaint and subsequent site visit conducted in 2005

¹ The Allison property was subsequently purchased by Cheryl Grunbock, Intervener.

KNOWLEDGEABLE PERSON

19. The Provincial board retained Mr. Tattam as a knowledgeable person under s. 4 of the *Act*, to provide his perspective on the issue under dispute. Mr. Tattam has an extensive background as a dairy and beef farmer and he currently works in the area of environmental farm planning. He has diplomas in resource management from Vermillion Agricultural College in Alberta and Malaspina College on Vancouver Island.
20. During his site visit on May 15, 2006, Mr. Tattam observed low-lying wet areas on both the Deverell and Morning Bay properties. He noted that there was overflow from the irrigation pond on the Morning Bay property towards the south-west corner of the property and water flowing out of the end of the level spreader (a weeping ditch located at the bottom of the vineyard slope). Although he noted that the ground between the level spreader on the Morning Bay property and the garden on the Deverell property was saturated, he did not observe surface water flowing from the vineyard into the Deverell property. He observed that the Deverell garden was saturated and trees in the low lying area appeared to be stressed and dying.
21. Mr. Tattam is of the view that currently some of the water found on the Deverell property is undoubtedly generated on their own property but some of the water is coming from the Morning Bay property. He noted that the level spreader did not appear to be able to handle all the water coming off the land and attempts to capture water in a dugout at the bottom of the hillside seemed insufficient. As such, the overflow was being directed into the narrow strip of land between the vineyard and the Deverell property. Once that area was saturated, Mr. Tattam stated it was logical to conclude that adjacent properties to the south and down slope would receive the excess runoff.
22. Mr. Tattam noted that the Coates' drainage ditch (parallel to the Deverell property) would normally divert some of the water. However, it appeared overgrown with vegetation and filled with sediment. He also noted that Mr. Watt had not explored the possibility with Mr. Coates of his ditch handling the excess water
23. As a result of his observations and discussions with the parties, Mr. Tattam made three recommendations. First, he recommended that Mr. Watt retain a hydrologist to explore using the Coates' ditch to accommodate the additional water and determine the potential impact of additional water on adjacent landowners. Second, he recommended that Mr. Watt contact Mr. Coates and determine if it was feasible to make the necessary improvements to his ditch to accommodate the excess water. Lastly, Mr. Tattam recommended that Mr. Watt continue to monitor water quality and take the necessary steps should the water become contaminated.
24. Mr. Tattam is aware that there has been a stalemate as far as his recommendations are concerned. Mr. Watt was reluctant to hire a hydrologist and the hydrologist

found by Mr. Deverell was not acceptable. Further, although Mr. Watt was willing to do remedial ditch work, this was unacceptable to the Deverells. Finally, it does not appear that Mr. Watt has contacted Mr. Coates to discuss potential access to his ditch. Mr. Tattam did acknowledge in cross examination that the long term lack of maintenance of the Coates' ditch may have exacerbated water drainage issues for the Deverell's garden.

SUBMISSIONS OF THE INTERVENERS

25. Ms. Grunbock owns the property adjacent to Morning Bay (formerly the Allison property) and kitty corner to the Deverell property. She first visited the property in April 2003 after the development of the vineyard. She describes Mrs. Deverell's garden then as colourful and beautiful in contrast to the vineyard which she described as denuded, a "moonscape". In the low lying "four corners" area, she noted it was treed and easy to walk. Although there were signs of a seasonal wetland, it was dry. By 2006, she describes this same area (an area of approximately an acre and a half) as spongy and wet; different plant species were starting to grow and large fir and cedar trees were starting to die.
26. Ms. Grunbock attributes the increase in moisture to the development of Morning Bay. While Mr. Watt disputed the source of the water, she is of the view that water seeks its own level with no regard to property lines and will flow from a very moist area to a dry area. She states that Mr. Watt has previously acknowledged to Mr. and Mrs. Deverell in a February 10, 2003 email that their worries about the extra moisture coming onto their property were going to lessen because the water was to be directed onto Mr. Coates' field and her property.

The result is that many of the drainage problems that you have had on your property will probably subside as most of the water that used to flow through that corner of your property has been shifted west and now flows directly onto George Coates' field and onto the back corner of the Allison field (now the Grunbock field).

27. In addition, Ms. Grunbock claims that other farm practices have contributed to the death of her trees. She alleges that the fine clay particles released during the development of the vineyard (logging, ditching and terracing) have combined with the herbicides and fungicide chemicals on the ground forming a fine impervious layer that traps the water causing more difficulties for the trees. She is also concerned about the over-spray seen in photographs introduced in the hearing. She maintains that normal farm practice requires sprays to be contained on farm property and not spread into other people's air and water. While she concedes that she has not tested her groundwater for contamination, she states that if the Respondent waits until the ground water is contaminated before taking any steps it will be too late to fix the problem.

28. Mr. Chantler spoke on behalf of 18 property owners in the Harbour Hills neighbourhood. The thrust of his submission was that the Southern Gulf Islands (which include North Pender Island) are sufficiently different and distinct to warrant a definition of normal farm practices consistent with the sensitive and unique island environment. In Mr. Chantler's view this includes a reduction in reliance on synthetic chemicals and fertilizers and adopting practices that maintain natural fertility, ecosystem stability and biological diversity. Given the proximity of the vineyard to the Allison Fault and groundwater sources and wells, Mr. Chantler advocates a definition of normal farm practice for Morning Bay which precludes the use of herbicides or pesticides unless those chemicals are approved for growing organic produce.
29. Mr. Chantler states that "a farmer's right to farm must not include the right to further reduce biodiversity, nor to continue to impose an identified risk, attested to by expert witnesses, of contaminants leaching down into the groundwater supplying the pre-existing wells of Harbour Hills residents and the community water supply serving Razor Point Improvement District residents".

DECISION

30. Under s. 3 of the *Act*, 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 the Provincial board for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, the Provincial board is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, the complaint is dismissed. If the practice is not a normal farm practice, the Provincial board is empowered to order the farmer to cease or modify the practice.
31. Resolving a complaint under the *Act* involves a two-step analysis. First, the Panel must be satisfied that the Complainants are aggrieved by the odour, dust, noise, or some other disturbance emanating from a farm operation. If the Complainants fail to establish that they are aggrieved, the complaint must be dismissed, without need to consider whether the alleged source of the grievance results from a normal farm practice. If, however, the Panel finds that the initial threshold question has been met, it must go on to make a determination as to whether the grievance results from a normal farm practice.
32. In this case the Panel is satisfied that the Complainants have met the threshold of demonstrating that they are aggrieved by the Respondent's farm management practices. The increase in drainage onto their property coupled with their location and proximity of the Complainants' property to Morning Bay demonstrate sufficient personal interest in the subject matter of the complaints. The very personal and emotional nature of this complaint can be seen in Mrs. Deverell's summary comments:

I wanted to say that I tried to be a good steward of the land.... I'm pretty upset today because this has been five years of my waiting and hoping and waiting for things to stabilize and it just gets worse and worse every year. It was a very, very difficult time for me. I guess it's still a very difficult time for me and I'm pretty upset right now because I want everybody in this room to know that this morning when Nori Pope -- and you talked to Nori Pope about the restoration of my land which is what I was asking for when I filed this complaint, and although I've been talking about the garden as it's turning into a swamp, he affirmed that for me but what he told me that we would plant reeds and convert it into a wetlands I guess -- I'm sorry, but I realize that I will never -- it sounds like I will never have my garden back again and I'm pretty upset about it and I'm pretty angry right now...our retirement plans were for me to spend more time and really enjoy my garden and Bill would just write at a slower pace...[It] has become a nightmare.

33. Having found the threshold question met, the Panel must determine whether the Respondent's on-farm practices complained of are contrary to normal farm practice. Section 1 of the *Act* defines "normal farm practice" as follows:

"**normal farm practice**" means a practice that is conducted by a **farm business** in a manner consistent with

- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
- (b) any standards prescribed by the Lieutenant Governor in Council, and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

34. A "farm business" is defined as:

a business in which one or more **farm operations** are conducted, and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations;

35. A "farm operation" is defined as "any of the following activities involved in carrying on a farm business" and includes:

- (a) growing, producing, raising or keeping animals or plants, including mushrooms, or the 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.
{emphasis added}

36. In determining what is meant by "normal farm practice", the Panel looks to whether a particular practice is consistent with "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". This involves an examination of industry practices weighed with factors such as the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, the nature of the disturbance, and the size and type of operation that is the subject of the complaint.

37. As a preliminary issue, the Panel observes that this complaint is primarily about the development of the vineyard and the resulting drainage issues caused by that development. There was no suggestion in the evidence that the present irrigation practices of the Respondent are causing drainage issues. Rather, it is the actual development and siting of the vineyard on a steep slope, the removal of all natural vegetation and the subsequent terracing which is alleged to have disrupted the flow of naturally occurring ground and surface water causing drainage problems.
38. The *Act* states that “normal farm practice” means a practice that is conducted by a farm business in a manner consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. The Panel accepts that Morning Bay is a farm business carrying on farm operations. The Panel also accepts that the definition of farm operation which includes “clearing, draining, irrigating or cultivating land” is sufficiently broad so as to encompass the complaints made here.
39. However, the Panel does not accept that this definition can be extended to deal with what we would term the decision to site. The Complainants and Interveners attempted to establish that it was not normal farm practice to build the vineyard in the location in which it is built. The Complainants’ expert Derek Masselink, B.Sc.(Ecology), M. Sc. (Landscape Architecture), registered professional agrologist and an environmental farm planner questioned the wisdom of a decision to extensively modify the topography in order to plant just a few vines. Nori Pope, a Master Gardener, and geophysicist, Jim Henderson [P.Geoph. (B.Sc.), M.Environmental Design, Environmental Science Specialty, (PhD in progress)] questioned locating the vineyard near a recognized fault line and the potential risk of chemical seepage down this fault into the aquifer. Mr. Chantler submitted that a fragile ecosystem such as that found on North Pender Island must be given special consideration when these types of developments occur.
40. In the Panel’s view the issue of siting of the vineyard is not within our jurisdiction. Morning Bay vineyard is within the ALR. Issues relating to the wisdom of siting a vineyard on a steep slope in an environmentally sensitive area would have been or should have been matters considered by the relevant local government that presumably is entrusted with the authority to balance the interests of those wishing to develop on the Gulf Islands with the specific characteristics of the Islands. As far as this Panel is concerned, the only issue that siting can play in our analysis is whether, as a result of the particular site chosen for this agricultural operation, there are any special farm practices which must be employed in order to be consistent with “normal farm practice”.
41. A second preliminary issue to be dispensed with relates to the financial viability of the vineyard. The Complainants attempted to establish that the steepness of the vineyard location resulted in increased development and operational costs and as such the vineyard was not a financially viable operation. In the Panel’s view, in order to deal with a farm practices complaint, it is not necessary to determine either

the financial viability of the vineyard or whether vineyard losses are subsidized by winery sales. Rather, having accepted that the vineyard is a farm business carrying on farm operations, the Panel's task is to consider whether the vineyard practices complained of are activities that fall within the definition of "normal farm practices" under the *Act* and as such subject to protection.

42. Returning then to the issues on this complaint, we will address them in the following order: quantity of water, quality of water, other issues.

Quantity of Water

43. The Panel heard a great deal of evidence from both the Complainants and Respondent in respect to drainage issues seen in this situation but very little regarding normal farm practices related to drainage on steep slope vineyards in coastal areas. As was noted in the testimony, there are very few of such vineyards and only one other on the Gulf Islands². Further, the Panel recognizes that drainage issues will tend to be site specific in nature. Regarding more general drainage practices, the Panel had the benefit of evidence about normal farm practice from knowledgeable person, Mr. Tattam. Although Mr. Tattam did not testify specifically about vineyard drainage, he testified that experience and common sense dictate that the removal of vegetation and trees from a slope will increase both the volume and speed of water run-off. He also testified that the landowner is responsible for run off when changes are made to his property.
44. The Panel accepts as a general rule that property owners are responsible for water on their property. Should a property owner take steps to develop and alter their property, they must be sensitive to possible impacts on neighbouring properties. This issue is not in dispute. Where the dispute arises is whether the Deverell property has received more water as a result of the Morning Bay development and whether the increase arose as a result of normal farm practices.
45. As to whether the Deverell property has received more water as a result of the development, Mrs. Deverell gave evidence; her testimony included the following:
 - Mrs. Deverell is a "career" gardener, a pioneer in the area of organic farming;
 - despite the garden being in a low lying, wet area, by using trenching and ditching she was able to garden successfully for approximately 25 years;
 - a forestry survey done a considerable time prior to the vineyard development found her forest to be healthy and well managed;
 - since 2002, she has periodically observed water flowing onto her property from Morning Bay;
 - in 2002, she observed that silty water had been pumped into her pond and when she complained, the silty water was pumped into her garden;

² This vineyard is considered to be steep sloped in comparison to those found in the Okanagan. For comparison purposes the Panel heard about practices in Germany and Italy.

- she has observed and photographed rivulets of water flowing into her green house;
 - the greenhouse which was sound now shows signs of rot;
 - despite attempts to raise beds and move plants, she is unable to produce the variety and quantity of flowers and vegetables that she did in the past;
 - she has observed marked tree death in the area around her garden.
46. The Panel also heard from the Complainants' expert Mr. Masselink who indicated that the 22% grade slope coupled with bare soils and the down slope orientation of some of the vine rows created ideal conditions for erosion.³ He indicated that the re-contouring and disruption of drainage would change the hydrological patterns of the hillside and "uncork" subsurface springs, contributing to increased water coming off the hillside. He noted that the original vegetation would have slowed the flow of water, reducing erosion and flooding especially following storm events. Mr. Masselink also testified that the location of the Morning Bay water pond severely altered the natural hydrological pattern by holding and concentrating a greater amount of water in the area than before. He also raised concerns that the placing of the Morning Bay pond in close proximity to the Deverell pond necessitated it be watertight with an effective way of dealing with potential overflows. Mr. Masselink testified that since the development of the vineyard, he has observed turbidity in the Deverell pond, excessive surface and sub-surface water in the Deverell garden and a decline in the health of the trees between the vineyard and the garden.
47. The Panel also heard from Mr. Pope, a Master Gardener and neighbour of the Deverells. In his opinion, the western lower area of the Deverell garden, approximately a quarter acre, was extremely wet even after months of drought in 2006. He observed raspberries and fruit trees dying, tomatoes, squash and cucumbers chlorotic and suffering from blight. In addition, the cedar and alder trees along the boundary between the vineyard and the Deverell garden were in distress. He attributes the increased water to the fact that the vineyard's steep slope was stripped of all forest cover and native vegetation.
48. The Complainants also called several friends and acquaintances of Mrs. Deverell who attested to the decline in her garden productivity and her decreased participation in the Farmers' Market.
49. For his part, Mr. Watt denies that the Deverell property is more wet now than before the development of his vineyard. He states that the Complainants have offered no objective data proving any damage to their garden. There are no soil tests, water tests, measurements of groundwater, no definitive before and after photos of damage, no hydrological studies or studies of any sort. While Mrs. Deverell states she lost perhaps 25% of her income from her garden, he argues that she offered no proof of any loss. Although anecdotal evidence was called from friends and acquaintances supporting the Deverells' view that there has been

³ Mr. Masselink's qualifications are set out in paragraph 39.

deterioration in the garden, he argues that no linkage between the deterioration and the development of Morning Bay has been established.

50. Mr. Watt suggests that many of the witnesses called by the Deverells are on the record as being opposed to the winery development so their evidence may be coloured by their negative views. Further, there are other drainage conditions which have nothing to do with Morning Bay that may be playing a role on the productivity of the garden. First, there is a consensus that the Deverell garden was in a low lying, wet area to begin with. Second, the Coates' ditch has not been maintained for a considerable period of time and as a result, it is clogged and western migration of water from the Deverell garden has been slowed. Mr. Watt argues that the silting up of that ditch has had a major influence on the death of trees along that boundary and Mrs. Deverell's own testimony is consistent with the problems in her garden beginning in the southwest corner of her garden, adjacent to the Coates' property, at the farthest corner from the vineyard property. Third, Mrs. Deverell conceded she has done little maintenance on her own drainage system. Mr. Watt argues that her tendency to work in the garden less has resulted in a silted overflow ditch from her pond which was visible on the site visit. Mr. Watt argues that this silting up will cause all sorts of drainage problems downstream from her pond. Surges of water will not be confined but would instead flow down slope directly towards her garden resulting in the area above the garden becoming saturated. He argues that it is to be expected that after 27 years with little or no maintenance a drainage system would not be as effective as it once was.
51. Mr. Watt also disputes that sick or dying trees are indicative of anything. The evidence of long time island resident (and Morning Bay employee) Mr. Luckham was that trees all over the Island are under stress. Further, he argues that Mr. Pope's observation that visible needle thinness on the trees on the windward side of the forest was due to rising water table could just as easily be explained by recent winter storms which reported the heaviest winds in decades. Mr. Watt denies ever pumping silty water from his pond into the Deverell pond or garden.

52. The Panel agrees that the Deverell garden is in a low lying, historically wet area. The air photograph of the area received in evidence shows that the topography in this area acts like a funnel directing water through the general area of the four corners. This conclusion was reinforced in the Panel's site visit conducted January 17, 2007. Historically, the primary drainage was through the four corners and into the ditch on the Coates' property, down to the ocean. The Panel finds that through skill and ingenuity, Mrs. Deverell was able to carve out a garden from, what was and which would otherwise have been, unproductive seasonally wet land. Over many years, Mrs. Deverell created a delicate balance in which she was able to control her irrigation and drainage issues with traditional solutions which have been around for thousands of years. That Mrs. Deverell was able to garden in what the Panel sees as a marginal and vulnerable environment is a tribute to her skill and patience as a gardener. However, the unfortunate aspect of this gardening on the edge is that it left Mrs. Deverell's garden very vulnerable to change.
53. In looking at the totality of the evidence, the Panel concludes that Morning Bay has impacted on the drainage issues on the Deverell property. We accept that Mrs. Deverell is a credible witness and accept her testimony that from time to time she has observed water flowing from Morning Bay onto her property. We also accept her evidence that, at least initially, silty water was pumped onto her property from Morning Bay.
54. While we do not agree that Morning Bay has flooded the Deverell property, it is clear that incremental changes to the volume and speed of water draining through this area have had a detrimental impact on the viability of the Deverell garden, an area that was particularly vulnerable to change. While the Panel agrees with Mr. Watt that there may also be other factors that have impacted drainage, such as the lack of maintenance of the Coates' ditch, the Deverell pond and their irrigation system, the inescapable conclusion is that the Morning Bay development has added to the drainage problems. We say this for the following reasons:
- the proximity of the garden to the Morning Bay development;
 - the magnitude of the Morning Bay development and the major modifications to the slope and vegetation cover;
 - the coincidental observation of more water on the Deverell property in very close association to that development (spring 2002);
 - despite the fact this was a low lying, wet area, the historical evidence is that the garden and the forest were healthy and thriving;
 - the evidence that from time to time since 2002, water has been observed flowing directly from Morning Bay to the Deverells' property as well as the property of adjoining neighbours;
 - Mr. Watt's May 2002 email confirms his intention to improve the Deverell's drainage problems by draining water to the Coates and Allison property;
 - the remnants of this drainage resulted in the iron peg at the four corners boundary being buried in silt;

- since 2002, the date that Mrs. Deverell can plant anything in her garden has steadily moved later and later until 2006 when in August it was still too wet to plant;
 - the fact that a critical lynchpin in Morning Bay’s water management was Mr. Watt’s belief that Mr. Coates wanted the water and he acknowledged draining water in that direction;
 - the purpose behind the development of the level spreader was to slow the flow of water as it reached the Coates’ property;
 - when Mr. Coates decided he did not want the water, no other escape route for the water was designed; rather water was left to make its way to the Coates’ ditch through indirect means;
 - Mr. Watt’s own experts designed the system that is currently in place as a short term solution and advised the need for an “integrated water management plan” going forward.
 - there is no overflow mechanism in place, rather the hope is that the combination of the pond, level spreader and ditching will absorb all the water but if this system is full there is nowhere for water to go but down slope.
55. The Panel does not accept Mr. Watt’s argument that the Complainants’ evidence can be discounted as anecdotal and coincidental at best. Nor do we agree that this complaint can be discounted as another attempt by the Deverells to attack Morning Bay.
56. In coming to this conclusion, we are mindful of the testimony of Dr. Shum of Pottinger Gaherty. Dr. Shum was very careful in his evidence. He thought it unlikely that water from Morning Bay was causing drainage problems for the Deverells as in his view the topography of the land “kind of” flows towards that corner and “not so much” towards the Deverell property. He did not find there to be a strong hydraulic connection (or leakage) between the Morning Bay and Deverell ponds. He maintained that without data showing how ground water levels have changed, it is difficult to for him to draw any conclusions.
57. With respect to the Grunbock property, Dr. Shum was of the view that it was unlikely that water is flowing from Morning Bay to the Grunbock property as “water flows in the easiest direction, most, you know, energetically easy direction and it would flow kind of towards the corner. And it doesn't really flow that way, it'd come down the hill”...As an example he stated that “if you tilted this table and you poured water over it...most of the water just goes straight down, not across the table”. Here the Panel notes, that Mr. Watt’s own email confirms that he has (at least in the past) drained water onto the Grunbock property⁴.
58. While the Panel accepts Dr. Shum’s evidence, we note that he is a soil scientist and by his own admission he is not a water engineer, and commenting on the workings of the design of level spreader is at the outer edge of his expertise. We also note

⁴ Email of February 10, 2003 from Mr. Watt to Mr. and Mrs. Deverell.

that Dr. Shum was placed in the rather uncomfortable position of being held out as an independent expert but in reality he was placed in the position of having to defend a design which did not proceed to fruition. The Panel has also placed Dr. Shum's testimony in the context of Mr. Watt's comment to his neighbours that if they were damaged by his development they should sue him and he would in turn sue his experts. Finally, while we note Dr. Shum's preference for objective data, objective data in the form of pre and post ground water and surface water measurements were not possible in this case as it would have required the Deverells to anticipate the problems they encountered long before the development.

59. The Panel, having found that the development of Morning Bay has negatively impacted the drainage on the Deverell property, must next consider whether the increased drainage results from normal farm practices. The Panel agrees with Mr. Watt that, in order to carry out agricultural activity on ALR land, he needed to clear the land and he was within his rights to do so. However, the Complainants submit that, in carrying out these activities during the development of the vineyard and pond, Mr. Watt was stressed and over worked, rushing to completion. As a result, they argue that he made poor decisions and failed to implement the recommendations of his consultants, opting instead for his own design.
60. Mr. Watt argues that he retained experts to advise on his development. When they recommended another expert be retained, he did so. He initially hired landscape architect, Durante Kreuk Ltd., to design the project. When they recommended retaining environmental consultants, he hired Pottinger Gaherty. When Pottinger Gaherty recommended a geotechnical assessment, he retained Golder and Associates and Trow Engineering. To address the specific requirements of a vineyard, Mr. Watt retained Mr. von Krosigk to do the original site evaluation. Mr. von Krosigk determined that it was possible, although costly, to develop the vineyard on the steep and rugged terrain and recommended terracing for labour cost efficiency, slope stability, to capture water into the hill, and prevent flooding at the bottom.
61. The Panel accepts Mr. Watt's evidence that he used a combination of his own research, recommendations from the numerous consultants as well as the opinions of the employees hired for the construction, in his decision making. It is clear that Mr. Watt was actively involved in every aspect of the decision-making, was present and active in the construction of the vineyard and made what he regarded as the best choices for the development. However, it is equally clear that Mr. Watt's experts made specific recommendations about his development that were not followed. In 2002, Pottinger Gaherty recommended a short term plan for the development of interim (first season) water collection and irrigation (Phase 1), a period of monitoring (Phase 2) and then the development of an "integrated water management plan" (Phase 3). Pottinger Gaherty's involvement in this project ended in 2002 and while Mr. Watt may have carried out informal monitoring of his system, no "integrated water management plan" has ever been developed.

62. Further, Pottinger Gaherty specifically identified concerns regarding the potential for overflow onto neighbouring properties and recommended possible options for overflow protection:
- A1 - outlet ditch to Coates' ditch;
 - A2 - convert Coates' ditch to a proper French drain;
 - B – outlet ditch through Deverell property;
 - C – pump to storage tanks and then release to overflow ditch draining to east side of vineyard property.
63. In April 2002, Mr. Watt opted to not proceed with drainage improvement on adjoining properties as in his words “neither neighbour was agreeable”. He instead opted to carry the water further toward the western boundary of the property and plan for the ability to pump water up and over the hill to the east side. However, Pottinger Gaherty warned that while draining water towards the western boundary may be feasible for the first planting season, it was not a solution for major storm events or throughout the winter. Pottinger Gaherty also advised that as evidenced by the water accumulation and fallen trees further south on the Deverell property, too much water drained over the western forested area may not be suitable over the long term.
64. In the end, Mr. Watt proceeded with a modified design including a level spreader, interceptor trenches, what Dr. Shum called a modified version of A1. Drainage on Morning Bay property overflows from the pond into a level spreader and then flows in the natural direction towards the Coates ditch without the direct connection contemplated by Option A1. Dr. Shum would not agree that more water now flows off the Morning Bay property. However, he did agree that as a result of the changes there may in fact be more surface type water.
65. Mr. Tattam and Dr. Shum both agreed that normal farm practices include an awareness of impacts on neighbouring properties. Pottinger Gaherty's original recommendation was a three phase approach to development, with the final phase being an “integrated water management plan” where the impacts on all affected landowners were considered and managed. Dr. Shum agreed that if an effective strategy could not be arrived at with the neighbours then Mr. Watt would need to deal with the issue on his own.
66. The Panel finds that although Mr. Watt was made aware early on in the development that the Deverells had concerns about water and drainage, he failed to maintain effective communication with them even though they were his nearest neighbours and the ones most affected by the changes made on Morning Bay. What had initially been a good relationship with the Deverells was allowed to sour, become antagonistic and unworkable. Mr. Watt alone, however, cannot be held completely to blame. Despite the numerous communications submitted as evidence indicating the increasing concerns of the Deverells in 2002, the Panel finds the Deverells' lack of communication between 2003 to 2006 problematic. The

testimony did not clarify this lack of communication.

67. The Panel understands that the Deverells have taken the position that the excess water on their property is Mr. Watt's problem to deal with. We are not tasked with adjudicating whether this position is "good" or "bad", or whether the Deverells or Mr. Watt might have addressed this problem in other ways. A complaint has been filed, and the sole question we have to answer is whether or to what extent this position is supported by an assessment of normal farm practice.
68. After considering the totality of the evidence, the Panel finds that in these circumstances where an agricultural development of this magnitude was undertaken on a significant slope and in an area with historic drainage issues, normal farm practice would have required a farmer to take appropriate steps to consider and mitigate these issues, including consulting with the appropriate experts (which we find was done) and implementing the experts recommendations, which we find was only done in part. In coming to this conclusion, we are mindful of the conclusions of Mr. Tattam and his common sense approach.
69. The Panel finds that this is not a situation where the resolution to the drainage issues was unknown. In the very initial stages of this development, a three phase approach was developed to deal with the issues which may arise as the development progressed. However, instead of following through with a three phase approach, the Respondent chose to proceed in half measures. The Panel heard from and reviewed the reports of hydrologists, geophysicists, engineers and soil scientists. The Respondent did not spare expense when it came to retaining experts in the initial design and development. However, in the end the Panel finds that in proceeding with this development, the work was incomplete. This development was imposed on a steep wooded slope at the base of which was a seasonal wetland. Given the historical drainage problems in the four corners area, it is not surprising that this development which stripped the slope of natural vegetative cover has resulted in incremental increases in water in the down slope area. Mr. Watt's own experts recommended that he either come to an agreement and accommodation with neighbours or pump the water over the hill to the east bowl to drain into the ocean. In the end, neither option was followed.
70. The Panel was quite struck by the simplicity of the common sense approach advocated by Mr. Tattam. He was of the view that a farmer, with some reasonable facility with a backhoe or bobcat, a bit of good will and a bit of time could likely remedy most of these issues for all concerned. However, in making this comment we are aware that the simplest resolution of the drainage issue may not be available in this instance as to implement such a resolution requires cooperation and two way communication which to date have been non-existent in this neighbourhood. However, we observe that as it was Mr. Watt who created this issue, it remains for him to take steps to mitigate his development's impact on his neighbours.

Quality of Water

71. We will now turn to the issue of water quality. Although this issue is framed as dealing with water quality it includes concerns raised around the spraying practices employed on Morning Bay and the potential impact on the ground water, aquifers and neighbouring wells. Actual spraying practices will be addressed under the next heading.
72. The Complainants argue that the use of herbicides and pesticides by the vineyard present a threat to the downstream water uses. Further, fertilizers used on the vineyard have resulted in algae growth in the Deverell pond plugging irrigation tubes. Mrs. Deverell is concerned about the use of chromated copper arsenate posts and their impact on her water supply and her organic garden. Geophysicist, Mr. Henderson, expressed concerns about the impact of the vineyard on water quality, especially as they relate to the existence of Allison Fault. In his view, the fault creates a zone of increased porosity and permeability and as such acts as a conduit for contaminants. He testified to the necessity for water testing to ensure downstream users that their water has not been contaminated.
73. While the Panel is sympathetic to these complaints, we find that Mr. Watt operates within the definition of normal farm practices in his use of herbicides and pesticides. While we acknowledge the concerns raised by the Complainants and Interveners about the potential for contamination of ground water, the Panel accepts that the types of chemicals used by the vineyard and the application techniques accord with normal farm practice. Further, we are not convinced that the presence of the Allison Fault in the general area requires Mr. Watt to restrict or alter his spray program. Accordingly, this aspect of the complaint is dismissed.
74. With respect to the presence of chromated copper arsenate posts, the Panel's finding is that their use in this area of the farm does not accord with normal farm practices. Our reasoning with respect to this practice is much the same as in paragraph 79 below where we discuss the need for an appropriate buffer. Mr. Watt has created a situation where there is now more water in the low lying four corner area than previously. In this area, he has also installed some chromated copper arsenate posts. Given these two factors in conjunction with the proximity of Mrs. Deverell's garden and her historic organic gardening practices, the Panel accepts that the presence of chromated copper arsenate posts in this low lying area does not accord with normal farm practices. Accordingly, the Panel directs that all chromated copper arsenate posts on the Morning Bay property, within 100 feet of Mrs. Deverell's organic garden, be removed and replaced.
75. As an aside, it should be noted that even if the Provincial board considers a matter to be a normal farm practice, it does not mean that the conduct is acceptable for all purposes and beyond the scrutiny of regulators who hold their own mandates and are subject to their own legislation. This conclusion is consistent with the provisions of s. 2 of the *Act* which protects a farmer from private law nuisance

claims only if the conduct is a normal farm practice and he or she is not in contravention of the *Environmental Management Act*, the *Health Act*, the *Integrated Pest Management Act* or any land use regulation. In this case, there was no suggestion that the Respondent has contravened or was in contravention of any of these statutes.

Other issues

76. In their initial complaint, the Deverells raised concerns about noise (from a generator running a log splitter, saw mill and chainsaws), dust, smoke and spray drift. Aside from the issue of spray drift, very little evidence was lead with respect to these other concerns. The Panel notes that the noise, dust and smoke concerns primarily relate to the development time frame. While there may have been considerable disturbance as a result of these practices, there is no evidence to suggest that they were anything other than normal farm practices undertaken in the clearing and development of the vineyard. As such these complaints are dismissed.
77. The Complainants raised concerns regarding spray drift. Mrs. Deverell and Mr. Pope testified to seeing and smelling the chemical sprays. Photographic evidence did show some instances where spraying was occurring at times when localized winds resulted in the spray plume traveling some distance. However, the evidence of Mr. von Krosigk was that spray drift had never been a recommended practice. His evidence was that the photographs showed a sprayer calibration problem which has since been rectified. Mr. Watt agreed with this evidence.
78. Although Mr. Watt could have put greater effort in to the development of a good working relationship with the larger community relating to water quality concerns and pesticide use in the vineyard, the Panel found no evidence from his spray logs or in the evidence that he was not in compliance with normal farm practice. As such, this aspect of the complaint is also dismissed.
79. That said, the Panel acknowledges the Complainants' evidence that at times they have seen or smelled chemical sprays at their home or in their garden. Given the microclimate of a steep south facing slope adjacent to the ocean, the impact of heating and cooling may be magnified causing localized winds which make spraying difficult. In light of this fact, the Panel is of the view that a vegetative buffer between the Morning Bay and Deverell properties is warranted in order to comply with normal farm practice. Mr. Watt acknowledged that there was approximately 50 feet of common fence line which lacked any trees or vegetation. Although Mr. Watt has taken some steps to address a buffer zone by planting some 200 willow, fir and cedar trees, given that these trees are mere seedlings a buffer may not in fact be in place for many, many years. As such, the Panel finds the efforts to date do not meet normal farm practices and accordingly, we order the Respondent to, in accordance with the advice and recommendations of a qualified individual, install a vegetative buffer of sufficient height and width to ameliorate the concerns relating to spray drift. To this end, we also refer the Respondent to the

Ministry of Agriculture and Lands for input regarding Edge Planning.

80. The Panel cannot leave this matter without noting that this has been a most unfortunate complaint. Despite numerous opportunities for a resolution and what would appear to be some obvious solutions, this matter was not resolved by the neighbours involved nor did the parties take full advantage of the alternate dispute resolutions offered by the Provincial board. The time and expense of four days of hearing, preparation and attendance of witnesses and experts seems somewhat unnecessary when the solutions that the Panel will now implement could have been implemented by the parties through the exercise of a modicum of good will and common sense long before the issues escalated to the level of animosity and distrust witnessed at the hearing.

ORDER

81. Given that we have found a breach of the *Act* insofar as the farm management practices complained of result in excessive drainage, s. 6(1)(b) of the *Act* confers upon the Panel the jurisdiction to order the farm to modify the practice in the manner set out in the order, to be consistent with normal farm practice. In this case, the Panel finds that in circumstances such as these where there is a development on a significant slope, major changes to the vegetation and terrain, and a history of drainage issues, normal farm practice would have required compliance with the recommendations of the consultants retained for the very purpose of managing the drainage issues arising out of this development.
82. Accordingly, and in accordance with the findings we have made regarding normal farm practice and to be consistent with normal farm practice, the Panel orders the Respondent, pursuant to s. 6(1)(b) of the *Act*, to modify his farm management practices:
- a) in accordance with the advice and recommendations of a qualified professional, to implement an integrated water management plan as referred to by Pottinger Gaherty in its April 22, 2002 report, to be installed no later than June 30, 2008;
 - b) to remove and replace all chromated copper arsenate posts located on the Morning Bay property, within 100 feet of Mrs. Deverell's garden, no later than November 30, 2007;
 - c) in accordance with the advice and recommendations of a qualified individual, to install a vegetative buffer, in the approximately 50 foot gap identified in paragraph 79, of sufficient height and width to mitigate spray drift. The vegetative buffer is to be completed no later than July 31, 2008.
83. A copy of the integrated water management plan is to be filed with the Provincial board and copied to the parties within 90 days from the date of this decision. A copy of the buffer design plan is to be filed with the Provincial board and copied to the parties within 60 days of the date of this decision.

84. In making the above direction, the Panel wishes to specify that in our view an “integrated water management plan” takes into account the impacts of a development on adjacent land users and looks for ways to minimize those impacts. Necessarily, an integrated water management plan will look at the drainage issue in its totality, irrespective of property lines, and advise accordingly. The starting point for this analysis is the Panel’s conclusions in paragraph 54, 65 and 68 above.
85. We also wish to explain our decision to require the vegetative buffer to be completed one month after the installation of the integrated water management plan. The reason for this timing is to ensure that the planting of the vegetative buffer has the benefit of the new drainage regime
86. The Complainants may or may not be satisfied with the impact of the Morning Bay vineyard on their drainage issues even after it carries out the modifications directed by our Order. Be that as it may, we wish to make clear, as we have in other decisions, in our view normal farm practice requires nothing more or less than the farm taking those steps aimed at ameliorating the problem as required by this Order. If the farm does that, our view is that the farm will be compliant with the *Act*. Thus, having made the comment in paragraph 67 above, and given the historical drainage issues in this area, whether in the end the drainage issues can be resolved to the satisfaction of all concerned may well require cooperation by all neighbours. Everyone has vested interest in a successful outcome. As such, the neighbours may ultimately find it to be in their interests, and in the community’s interests, to ensure routine maintenance of waterways, ponds and drainage ditches, and to examine alternative ways of improving draining on their own properties without reliance on Mr. Coates. Drainage issues are not new to these four properties; the best solutions may well reside in a common will and appropriate action on both sides of property lines.

Dated at Victoria, British Columbia, this 25th day of October, 2007.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by)

Christine Elsaesser, Panel Chair
Richard Bullock, Chair
Honey Forbes, Member