

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 VEGETABLE FARMING IN ABBOTSFORD, BRITISH COLUMBIA

**BETWEEN:** CITY OF ABBOTSFORD **COMPLAINANT**

**AND:** MOHINDER S. KAPOOR **RESPONDENT**

## **DECISION**

### **APPEARANCES:**

**For the British Columbia  
Farm Industry Review Board:**

Daphne Stancil, Presiding Member  
Andreas Dolberg, Vice Chair  
Diane Fillmore, Member

**For the Complainant:**

Rob Isaac, Eng. L.,  
Director of Drainage and Wastewater  
City of Abbotsford  
  
Peter Sparanese, P. Eng.  
General Manager, Engineering and Regional  
Utilities, City of Abbotsford

**For the Respondent:**

Mohinder (Andy) S. Kapoor  
Randy Singh Sihota, Representative

**Dates of Hearing:**

February 4<sup>th</sup> and 5<sup>th</sup>, 2016

**Place of Hearing:**

Abbotsford, British Columbia

## INTRODUCTION

1. The British Columbia Farm Industry Review Board (BCFIRB) hears complaints about farm practices under the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 (*FPPA*).
2. On September 22, 2014, Rob Isaac, Director of Drainage and Wastewater for the City of Abbotsford (Abbotsford) filed a complaint on behalf of Abbotsford regarding certain farm practices of the property owner of 39964 Campbell Road in Abbotsford, Mohinder (Andy) S. Kapoor. In its complaint, Abbotsford alleged that Mr. Kapoor failed to plant a cover crop or use other mitigation methods (following the growing season ending in the fall of 2013) resulting in soil infilling the City's ditch on Campbell Road due to wind erosion in the months that followed. As a result, Abbotsford incurred maintenance costs which it tried unsuccessfully to recover from Mr. Kapoor.
3. In a letter dated October 8, 2014, BCFIRB's Executive Director Jim Collins advised Abbotsford that its notice of complaint did not allege that it was aggrieved by "odour, noise, dust or other disturbance" but rather appeared to be an attempt to recover costs for ditch maintenance resulting from "lack of a cover crop being planted or other mitigation methods being used", a remedy that BCFIRB did not have the authority to order. Mr. Collins indicated that while Abbotsford may be aggrieved by the practices of the property owner, if the complaint was to proceed and BCFIRB determined that the nuisance complained of was not the result of a normal farm practice, BCFIRB could only make an order that the farm cease or modify its practices. Abbotsford was asked to consider whether BCFIRB was the best option rather than proceeding with a nuisance action in Court where it could seek damages. Abbotsford decided to pursue its complaint before the BCFIRB.
4. Following a pre-hearing conference on November 26, 2014, the Presiding Member of the Panel raised the issue of BCFIRB's jurisdiction to hear the matter and in follow up correspondence noted that BCFIRB cannot provide general rulings; its orders are specific to the property and practice complained of. The complainant and respondent were given an opportunity to make written submissions on the extent to which local governments can complain under *FPPA*, whether Abbotsford was an aggrieved party and how a decision from BCFIRB would assist Abbotsford.
5. As part of this submission process, Mr. Kapoor sought a summary dismissal of the complaint.
6. The presiding member, in her decision of March 19, 2015, concluded that the wording of section 3 of the *FPPA* was sufficiently broad to allow a local government that suffers physical injury or damage to its land as a result of a farmer's practices to file a complaint and seek relief from BCFIRB with regard to those practices.<sup>1</sup> Mr. Kapoor's summary dismissal application was dismissed.

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<sup>1</sup> It should be noted that while local governments are not excluded from making complaints, they only have standing to do so where they are directly and adversely affected by a farm practice. There are certain types of complaints that

7. The complaint was originally scheduled for November 19 and 20, 2015 but was adjourned at the request of Abbotsford. It was heard in Abbotsford on February 4<sup>th</sup> and 5<sup>th</sup>, 2016.

### **COMPLAINANT'S CASE**

8. In support of the complaint, Peter Sparanese, General Manager, Engineering and Regional Utilities, presented Abbotsford's case relying on several witnesses:
- Robert Wayne Isaac, Director of Drainage and Wastewater, Abbotsford
  - Pardeep Kumar Agnihotri, Acting Director, Operational Services, Dyking, Drainage, Irrigation and Civic Facilities, Abbotsford
  - Peter Reus, property owner on Campbell Road in the Sumas Prairie in Abbotsford, farmer and Chair of the Abbotsford Soil Conservation Association (ASCA)
  - Robert Bruce McTavish, P.Ag., of McTavish Resource and Management Consultants, who was qualified as an expert in soils and drainage, land reclamation and agricultural capability assessment including soil capability.

### **RESPONDENTS' CASE**

9. The respondent, Mr. Kapoor was represented by Randy Singh Sihota, a vegetable farmer and shareholder of Canadian Farms Produce Inc. which leases the property at 39964 Campbell Road which is the subject of this complaint (the "subject property"). In addition to testifying, Mr. Sihota called the following witnesses:
- Dave Khakh, a farmer at #3 Road on the Sumas Prairie
  - Bob Singh Dhillon, a farmer on the Sumas Prairie
  - Thomas Ernst Baumann (Dipl. Ing. Agr.), Professor and Department Coordinator, University of the Fraser Valley, who was qualified as an expert in plant science and crop production practices.
10. The respondent relied on the following documents:
- a photocopy of Abbotsford Council Report No. ENG 56-2012, July 25, 2012)
  - a photocopy of CanadaGAP Audit for the Production, Packing, Repacking, Storage, Wholesaling and Brokerage of Fruits and Vegetables and Greenhouse Product, September 30, 2015 for Canadian Farms Produce Inc., Randy Sihota Operator; and copies of photographs of the Sumas Prairie
  - a photocopy of the minutes of the Sumas Dyking, Drainage and Irrigation Committee and Sumas Prairie Turf Producers, December 16, 1998; and a photocopy of Abbotsford Council Report No. ENG 37-2014, August 20, 2014
  - Professional Information regarding Mr. Baumann

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only human beings can be aggrieved by, such as odour. In order to bring a complaint, the local government needs to point to a local government interest that has been adversely affected by the complained of disturbance, see *Corporation of Delta v. Westcoast Instant Lawns*, September 24, 2004.

## ISSUE

11. Is the complainant aggrieved by dust resulting from lack of crop cover from the respondent's farm and if so, does this disturbance result from normal farm practice?

## ANALYSIS

### A. LEGAL TEST UNDER THE *FPPA*

12. This complaint was filed under section 3(1) of the *FPPA* which 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.

13. Normal farm practice is defined as follows:

**“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. (emphasis added).

14. Panels considering an *FPPA* complaint undertake a two-step analysis. The first step involves standing; complainants must establish that they are aggrieved by the odour, noise, dust or other disturbance that results from a farm operation conducted as part of a farm business. If the answer to that question is yes, the panel goes on to determine whether the disturbance complained of results from a normal farm practice. In determining whether a complained of practice falls within the definition of normal farm practice, the panel must look at whether it is conducted in a manner “consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.” The purpose of the hearing was to give the parties an opportunity to introduce fact and context specific evidence regarding these two questions.

### B. APPLICATION OF TWO STEP ANALYSIS

#### **Is the complainant (Abbotsford) aggrieved by a disturbance that results from a farm operation conducted as part of a farm business?**

15. The presiding member, in her decision of March 19, 2015, determined that section 3 of the *FPPA* is sufficiently broad to allow a local government that suffers physical injury or damage to its land as a result of a farmer's practices to file a complaint with BCFIRB. The issue for this panel is whether this complainant (Abbotsford) has demonstrated that it is aggrieved by a disturbance resulting from a farm operation conducted as part of a farm business.

16. In order to answer this question, the panel must turn to the specifics of the complaint. Abbotsford relies on the same photographs submitted with its complaint of September 22, 2014, showing the subject property abutting Dixon Road on its western border. Abbotsford contends that in the early winter of 2013- 2014, strong winds carried soil from the subject property to fill the ditch along Dixon Road, extending from the southern boundary of the field south of the subject property to the intersection of Dixon Road and Campbell Road. Abbotsford provides photographs taken February 14, 2014 showing a section of that ditch filled in with soil and an excavator removing soil from the ditch.
17. Mr. McTavish, Abbotsford's expert, submitted a report, Review of Soil Erosion Issues 39964 Campbell Road dated December 31, 2015. He testified that the soils of the subject property are sandy and would have moved fairly close to and along the ground surface through a process called saltation to fill the ditch. He also testified under cross examination that in his opinion the surface soil observed covering the west border of the subject property and the surface of the ditch in Abbotsford's photographs, filed with the complaint, showing the ditch along Dixon Road, was of the type he would expect from the subject property. In his opinion, it had been carried there by wind.
18. Mr. McTavish conceded that he did not sample the soils near or on the subject property and could not say for certain where the soil underneath the soil observed in the photographs came from. He also conceded that some of the soil he could not see may have entered the ditch as a result of water running off the fields or the road adjacent to the ditch. He acknowledged he did not consider rain as an issue, only wind.
19. City employees, Mr. Isaac and Mr. Agnihotri, testified that the strong winds in the winter of 2014 were from the north east or east. However, Abbotsford did not explain how the portion of the Dixon Road ditch which lies to the north-west of the subject property could have been filled with soil originating from the subject property, given that the prevailing winds were from the north east or east.
20. Mr. Isaac noted that during the early winter of 2013 - 2014, finer soils from the Sumas Prairie became airborne before settling. Mr. McTavish noted that properties to the east of the subject property were of a type categorized as silty clay loam, composed of finer particles than the soils of the subject property (sandy loam) (page 6 Report).
21. In his December 29, 2014 letter written as part of the submission process referred to earlier, the respondent, Mr. Kapoor, acknowledged that this complaint related to the lack of a cover crop in the winter of 2013 -2014. He states in part:

Our commitment to these practices is evident in the cover crop that has been planted this year (2014) at 39964 Campbell Road, as was each year prior to 2013. However, farming is a very weather-permitting industry, and is always at the mercy of Mother Nature. Heavy rains in the fall of 2013 made for an unusually late harvest of the Campbell Rd property, and subsequently circumstances did not allow the time or the conditions necessary to plant a cover crop after harvest was completed in November.

22. After considering the evidence noted above, the panel concludes that there is insufficient evidence to make a finding regarding the origin of all the material in the ditch along Dixon Road, as shown in the photographs of February 14, 2014. The panel, however, accepts Mr. McTavish's evidence that in February 2014 some of the soil in the Dixon Road ditch adjacent to and south of the border with the subject property, was deposited as a result of wind erosion of soil from the subject property.
23. The panel also accepts that this soil had to be removed to restore drainage in the City's ditch and, as a result, we conclude that Abbotsford was aggrieved by the disturbance of sandy soil being deposited in the part of its ditch adjacent to the north border of the subject property and south to the south border of the field to the south of that property.
24. Before leaving this issue, the panel must also be satisfied that the disturbance the complainant is aggrieved by, results from a farm operation conducted as part of a farm business".
25. The respondent, Mr. Kapoor, owns the subject property but does not currently operate the farm business on the subject property. His lessee, Mr. Sihota, operates Canadian Farms Produce Inc., a farm business, growing vegetables such as carrots, pumpkins and potatoes on the Sumas Prairie (including the subject property) and in Cloverdale. The farm operation complained of here relates to the harvesting of potatoes on the subject property immediately south of the property with the street address of 39964 Campbell Road. Mr. Sihota advised that his preference is to harvest potatoes as late as possible, both to take advantage of the storage conditions the field provides for the potatoes after they have grown and to bring the product to market at a later time than most producers, to attract the best price possible. The harvest in 2013 was unusually late as a result of wet conditions. He explained that a producer must take a number of factors into account in developing their business and operational plans, such as weather, soil conditions, field conditions and market conditions, in order to set an appropriate harvest date for each type of product, to meet consumer demands and achieve a fair return on sales.
26. In light of this evidence, the panel finds that in February 2014, Abbotsford was aggrieved by a disturbance (accumulation of soil or sand in its ditch) resulting from a farm operation (the harvesting of potatoes from one field in the fall of 2013) conducted as part of a farm business (Canadian Farms Produce Inc.'s field vegetable production).

**Does the disturbance complained of (accumulation of soil in ditch in 2014) result from normal farm practice?**

27. In determining whether a complained of practice falls within the definition of normal farm practice, the panel must look at whether it is conducted in a manner "consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances." In accordance with the contextual approach set out in *Pyke v Tri Gro Enterprises Ltd.* (2001), 204 D.L.R. (4th) 400 (Ont. C.A.) [leave to appeal to S.C.C. dismissed], the panel must also consider the site specific circumstances of the respondent farm itself and in relation to properties around it, to determine if there are

any factors that would cause the panel to increase or lessen the standards that would represent what is normal farm practice for this particular farm.

28. A panel of BCFIRB in the recent decision, *Swart v Holt*, January 12, 2016, commented on the contextual approach as follows:

...we find that the principles set out in *Pyke*, as adopted in BCFIRB decisions, are the principles that best achieve the objects of the *FPPA*. Only a fully contextual approach can meaningfully account for the words “proper” and “similar circumstances” in their context, and achieve the balancing of interests that is inherent in the very creation of a complaints structure.

## **Context Based On the Evidence Heard**

### **Sumas Prairie and Soils**

29. In his report, Mr. McTavish, described the Sumas Prairie soils and aspects of farming on the Sumas Prairie:

Sumas soils occupy the land area that was formally [sic] Sumas Lake. These soils are nearly level or very gently undulating as they were lake bottom. The parent material of these soils is coarse textured lacustrine deposits; the surface however is usually loamy sand to sandy loam. Sumas soils are poorly to very poorly drained, however they have a low water holding capacity due to their texture and have slow surface runoff. Most of the Sumas soils are in areas with controlled water tables and sub-irrigation is accomplished by manipulation of ditch water levels.

30. Abbotsford’s witness, Mr. Reus (Chair of the ACSA), described the Sumas Prairie and soils in a similar manner to Mr. McTavish in his written “affirmation” (Exhibit 1, tab 5B):

In Sumas Prairie, a majority of the soils are in the classification Sumas Soils; sandy soils with a low organic content, compacting easy (sic). Sumas Prairie is a land reclamation or “Polder” (formerly Sumas Lake), and has a system of manmade water courses, controlled by the Barrowtown Pump Station for excess water, and inlets for irrigation water from the Sumas River. The water courses are well maintained by an annual ditch cleaning program, executed by the City of Abbotsford. Sumas Prairie is located between 2 mountain ridges and is prone to winter storms, both from the South West and the North East.

31. Abbotsford employee, Mr. Isaac, confirmed that Abbotsford owns, operates and maintains drainage and irrigation ditches, which are located within Abbotsford’s road allowances. He and fellow employee, Mr. Agnihotri advised that Abbotsford cleans the roadside ditches annually, removing debris and vegetation.
32. Mr. Agnihotri indicated that the cleaning must be done in a particular time, in the fall, due to the need to protect fisheries. He also advised that occasionally (four or five times annually), Abbotsford returned to specific locations, such as in this case, to undertake further ditch cleaning necessary because of soil accumulation. He testified that these accumulations were not as extensive as the accumulation in the ditch adjacent to the subject property in February 2014.

33. Mr. Agnihotri advised that Abbotsford recovers costs of ditch cleaning through an annual drainage tax. Mr. Isaac confirmed this evidence on cross-examination and advised that farmers also pay a separate dyking charge. He indicated that Abbotsford is working on a basis to recover costs of additional cleaning measures beyond the annual cleaning cycle, and that he anticipates that this decision will assist Abbotsford with that initiative.

### **Farming on the Sumas Prairie**

34. The panel heard from a number of different farmers growing a variety of products including vegetables, blueberries and nursery crops on Sumas Prairie. Mr. Reus has grown vegetables for 31 years all around the Sumas Prairie. He produces endive and leeks, both late harvest products, and potatoes which he harvests in September. He grows cereal crops for cover and uses straw for field cover.
35. In terms of the respondent's witnesses, Mr. Khakh grows strawberries and raspberries, cole crops including cabbage, cauliflower, brussel sprouts, pumpkins, green beans, peas and corn and Mr. Dhillon grows pumpkins, squash and potatoes. The respondent's lessee, Mr. Sihota, has been farming a variety of vegetables on the Sumas Prairie since 1991. He grew potatoes on the subject property in the field season of 2013. He also observed that a significant proportion of parsnips and carrots sold in British Columbia came from the Sumas Prairie.
36. The respondent's expert, Mr. Baumann, reported that a wide range of vegetables and berries are grown on the Sumas Prairie and that weather conditions often vary considerably from year to year. His opinion was that 2013 was an extremely challenging year for harvesting crops in the fall as a result of heavy rains. He said that 2014 was a "normal" year, with adequate rain in May and June and again in September. He commented that the weather in 2015 was "unbelievable" with a warm dry spring so that farmers planted early and there were no heavy fall rains preventing farmers from getting onto the land at that time, stating that "everybody had a chance to plant cover crops."

### **Soil Erosion on the Sumas Prairie**

37. Mr. McTavish testified that a major source of soil erosion on the Sumas Prairie is the winter wind. He provides a summary of the winter climate for the Sumas Prairie at page 7 of his report:

The local climate is characterized by dry arctic outflow winds. Arctic outflow winds are regularly experienced on Sumas Prairie and are the cause of winter soil erosion." Local winds are described as follows: "The winter winds show a strong bias to blowing either from the northeast to east, or from the south to southwest. Northeast winds are very common and can be attributed to a cool katabatic flow that comes out from the eastern end of the Fraser Valley and curls around Sumas Mountain...."

38. At page 7 of his Report, he says that winds exceeded 31 km/hr, for 24 days in February, 2014, as recorded at the Abbotsford airport. Under these conditions the unprotected sandy soil of the subject property is very susceptible to wind erosion by saltation causing the sand particles to be lifted a short distance into the air and dropped

back to the soil surface. He advised that the wind would move these sand grains close to the ground and they would end up in the ditch on Dixon Road.

39. Mr. McTavish advised that the soil of the property to the east of the subject property was classified as a silty clay loam and not subject to saltation if left unprotected. This type of soil would be suspended in the air by the wind and carried long distances. He concluded these airborne soils would not be deposited on nearby areas.
40. Mr. Reus testified that the Sumas Prairie is located between two mountain ridges and is prone to winter storms, both from the south west and north east. He advised that when the soil is left bare, winter wind erosion will freeze dry the top soil and light particles will blow away. Some will fill the water courses. He provided photographs of his property in 1989 at a different location than he currently lives on Sumas Prairie, showing the effects of a storm covering the road beside his house, filling the ditch, surrounding his house and covering his land with sand. He said the air borne material settled on surfaces in his house. In 1989, he began to work with government and the farm community “to deal with the issue”.
41. Under cross-examination, Mr. Reus was shown a photograph from a Ministry of Agriculture power point presentation “Fall-Winter 2010/2011 Weather Impacts on Soil Management focus on Sumas Prairie”, depicting a flooded field with a ditch draining water away. He agreed that excess water draining from a flooded field can also be a source of soil erosion. He indicated that he did not support channeling to direct water away from a field to a ditch as a means to “save” a crop, because of the increased likelihood of soil erosion.
42. The respondent’s lessee, Mr. Sihota, commenting on the same photograph noted that “to me, this looks like a dump of rain in a potato field. Someone dug a trench to try to save the crop – to try to sell it rather than waste it.” He testified about a time after a hard rain in the first week in September where he and three others tried to save his carrot crop on 40 acres at the corner of Interprovincial Highway and No. 4 Road. The ditches were full due to rain and soil washed into the ditches. There was little he could do – “it was a hard lesson”. Mr. Sihota also referred to another photograph in the same power point presentation which showed a field with a gouge in it and a ditch close by filled with silt as an example of what he sees sometimes after a rainfall on the land he farms on the Sumas Prairie.

### **Soil Protection on the Sumas Prairie**

43. Mr. Reus advised that a group of farmers with the assistance of the federal and provincial governments established the Sumas Prairie Soil Conservation Association in 1991 which is now ASCA. ASCA conducted research that formed the basis for soil protection measures followed by farmers today. Mr. Reus noted that many of these measures are documented in the 1994-1995 Annual Report of the Sumas Prairie Soil Conservation Group.
44. Mr. Reus pointed to the summary of these soil protection measures, in the Ministry of Agriculture power point presentation which includes crop rotation, manure or compost application, cover cropping, straw mulching, crop residue and wind breaks. Measures to

help avoid soil compaction are also highlighted, e.g. tillage (type, depth, frequency, timing) and traffic (mass, tire configuration, frequency, timing).

45. Mr. Reus noted the role of the ASCA publications from 1992 to 2010 in communicating about erosion prevention to the property owners and farmers of the Sumas Prairie. Mr. Reus' opinion is that cover cropping is an important practice in the protection of the soil.
46. Mr. McTavish, at page 5 of his report, quotes a 1991 Ministry of Agriculture handbook summarizing appropriate soil conservation measures for the Sumas soils.

...During the fall, winter and spring, high winds across the Sumas Prairie can erode significant amounts of soil. Soils should not be left in a finely tilled, uncovered condition after harvest. Planting a cover crop or leaving a trash cover is highly recommended.”
47. The handbook describes cover crops and recommended types of cover crops for commercial growers. It recommends various methods of wind erosion control including reducing the wind speed near the soil surface by creating roughness; planting wind breaks such as trees and tall grass strips; leaving rows of unharvested crops; snow fencing; and retaining vegetation (cover crop), stubble and anchored harvest residue.
48. He also summarizes the recommended practices to minimize soil loss from wind or water erosion noted in the Ministry of Agriculture 2012 Berry Production Guide:

Topsoil is valuable and very difficult to replace. Where possible the following practices to minimize the loss of soil by water or wind erosion should be used. Although any of the listed practices will help control erosion, the best control is achieved by using as many of the practices together as are appropriate.

  - Wind erosion:
  - Establish windbreaks (e.g. tree rows, snow fences or hedges)
  - Leave crop residue on the field (it should be anchored to the soil)
  - Practice cover cropping.

### **Proper and Accepted Customs and Standards**

49. Abbotsford argues that erosion control is a “normal farm practice” on the Sumas Prairie<sup>2</sup>. It relies on the evidence of Mr. McTavish for the proper and accepted customs and standards to achieve erosion control which include:
  - reducing the wind speed near the soil surface by creating roughness;
  - planting wind breaks such as trees and tall grass strips;
  - leaving rows of unharvested crops;
  - snow fencing;
  - retaining vegetation (cover crop), stubble and anchored harvest residue; and
  - planting cover crops.

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<sup>2</sup> While Abbotsford characterised the various erosion control measures as “normal farm practice”, that is a determination is for this panel. We have taken this as evidence of the proper and accepted customs and standards in the area.

50. Mr. Reus as a farmer and member of ASCA confirmed this list and added the application and mulching of straw and the avoidance of soil compaction as important components of soil conservation.
51. Mr. McTavish also notes that on the Canadian prairies, a remarkably similar variety of measures are used:
- trees are planted along property borders,
  - stubble is left in the field after harvest,
  - cover crops are planted, and when cover crops cannot be planted, due to a late harvest, or stubble cannot be left in the field,
  - straw is used to cover parts or all of the field.
52. Mr. Isaac emphasized that Abbotsford had been advocating the benefits of cover crops and further that land management that results in erosion was not a “normal farm practice”. In support, Mr. Reus advised that he always applied a soil conservation measure after harvest, noting the application of straw to the harvested field and the planting of a cover crop as measures he uses after harvesting potatoes.
53. There is little disagreement from Mr. Sihota, on behalf of the respondent, regarding the appropriateness of this entire suite of soil conservation customs or standards. However, he says there are practical limitations to the type and timing of the conservation measure, depending on the crop and the time of harvest. He relies in part on the evidence of his witnesses regarding the use of soil conservation measures on the Sumas Prairie. Mr. Khakh confirmed the importance of protecting and conserving soil. He has experience with growing cole crops, green beans, peas, corn, pumpkins and potatoes. On cross-examination, he agreed that minimum tillage and planting a cover crop to provide additional soil nutrition are important soil protection and conservation practices.
54. However, Mr. Khakh explained that despite the importance of soil conservation, there are practical limitations to its application. He advised that it is impossible to “get into these fields” after a rain at certain times of year, including the early winter. On cross-examination he stated that if a farmer “can’t get onto the field”, the farmer “can’t do anything”. “Weather dictates what you are going to do.” Farming “is always a risky proposition”. He went on to say that “when the weather allows you – you use the best measure possible.” Some soil conservation measures require you to get equipment into the field. Planting a cover crop requires use of a tractor. If Mr. Khakh is relying on leaving residual cut plant material, he ensures the plant stock is chopped directly after machine picking and left in the field. If the crop is handpicked, the stalk remains in the ground, providing soil protection.
55. In response to a question from the panel about taking equipment onto a field, Mr. Khakh stated that when there has been a high volume of rain in a short period of time, “you can do serious damage to the soil (with equipment), you make your decision based on soil conditions.” He explained that some cole crops, such as cabbage, can be harvested as early as July. If this is the case, he will often plant a second crop for late fall or early winter

harvest. Mr. Khakh advised that whenever possible, as crops are harvested, extra leaves or stalks are left on the field.

56. Mr. Khakh testified that in his experience, there is another impediment (beyond wet soil conditions) to planting a cover crop for crops such as brussel sprouts which may be harvested as late as December. A cover crop simply will not germinate and grow if planted at that time of year (late fall/winter). Mr. Khakh advised he had no experience with covering a field with straw as a soil conservation measure.
57. Mr. Dhillon testified he began farming in the 1980's. He grows primarily squash, pumpkins and potatoes. He harvests pumpkins as late as October 28<sup>th</sup>. If the fields are very wet at this time, which can occur in some years, he will not go into the field other than to pick the pumpkins. He harvests zucchinis as late as the first frost or when other weather conditions dictate, which is usually no later than November. Vines and leaves are left behind on the fields. He advised that despite applying soil conservation measures, he loses soil from his farmed area. He estimated the loss of topsoil to be about a dump truck full per year. He employs crop rotation and the growing of cover crops after harvest. He advised that in the past he planted many maple trees, but that this was not a complete success as a soil erosion protection measure. The trees lost branches and leaves which had to be cleared from the growing areas and often provided too much shade to the growing areas. He has had to remove many trees due to these detriments.
58. Mr. Dhillon testified that he had tried applying straw as a field cover to protect the soil but did not have much success. Because he does not have his own source of straw, he has to anticipate his needs far in advance to order the product, which is difficult because every season's "weather picture" is unique. He also noted that the tractor left ruts during application and that he "just made a mess" when trying to incorporate the straw. In Mr. Dhillon's opinion, if the conditions after harvest are too wet to plant a cover crop, they are also too wet to apply straw.
59. On the use of straw, Mr. McTavish acknowledged that it can be expensive. Mr. Baumann testified that straw mulching is too expensive in the area because most of it is trucked in from the prairies and there can also be problems with rot for some crops given the wet climate.
60. As for cover cropping, Mr. Dhillon testified it is always his intention to plant a cover crop as in his experience it is the best form of erosion control. He advised however, that there are practical limitations. He seeded 150 acres too late one year because he grew a late harvest crop on the land and the cover crop did not grow. He explained that a combination of market timing (harvesting to maximize returns) and weather conditions will determine the success of cover cropping in any given year. He also testified that if he had to pay a fine for not using cover cropping to protect all his soil, he would not grow pumpkins, as there is always a risk that the weather conditions will not allow for successful planting and growth of a cover crop. He noted that cover crops seeded in November grew beautifully in 2015 but that this is not always the case.

61. On behalf of the respondent, Mr. Sihota testified that “Mother Nature” is a big part of farming – “we are the custodians of our environment, but we cannot control nature”. He commented that he has experienced changes in climate, noting there are more catastrophic weather events today than when he first started farming. He expressed his deep respect for the soil and his intention to conserve it but indicated there are practical limitations.
62. Mr. Sihota advised that he helps organize a group of vegetable farmers (about 15), who farm on a total of about 520 acres on the Sumas Prairie, to cooperate to rotate crops, as a means of improving the soil to produce better crops. He also says he is compliant with food safety growing standards (CanadaGAP). When practical, he applies soil conservation practices similar to those described by Mr. Khakh and Mr. Dhillon.
63. Speaking to the specific circumstances in 2013 regarding this complaint, after harvesting his potatoes and leaving plant debris in the field, it rained. Even if a cover crop seeded at that time would have grown, which he doubted, he could not have planted a cover crop due to the wet field conditions. He advised the muddy wet fields prevented him using equipment to seed a cover crop or to apply another soil protection measure such as straw. He agreed with Mr. Khakh’s conclusion that taking equipment such as a tractor onto the Sumas fields when they are wet causes serious soil damage (through compaction).
64. The panel observes that this evidence is consistent with Mr. Reus’ testimony. Further, Mr. Baumann indicated, when questioned by the panel, that he did not know of any soil conservation technique or practice that could be consistently applied under these circumstances.
65. Mr. Sihota’s evidence is he will always plant a cover crop when conditions allow for it, as he did most recently in the 2015 growing season which had a dry fall and exceptionally good growing conditions. Mr. McTavish noted that in 2015 about 1% of the land on the Sumas Prairie was not planted with a cover crop after harvest time as compared to 5% in 2014. Mr. Baumann also pointed to these differences as evidence that farmers will plant cover crops whenever conditions make it possible to do so. He suggested that the conditions were ideal in 2015 but that some farmers may have had challenges planting cover crops in 2014 as a result of wetter fall conditions.
66. We accept the respondent’s evidence referenced in paragraph 21 and 64 above, which was not contradicted by Abbotsford, that the subject property had a cover crop planted in the 2014 and 2015 growing seasons, as well as in the years prior to 2013 (which year is the subject of this complaint).
67. After considering the totality of the evidence, the panel has no hesitation concluding that it is an accepted practice of farmers on the Sumas Prairie to employ a variety of soil conservation measures. Having made that determination, we must now consider the circumstances of the farm itself, and in relation similar farm businesses.

### **Similar Farm Businesses/Similar Circumstances**

68. In considering the notion of “similar farm businesses in similar circumstances”, the panel relies on BCFIRB’s decision in *Swart (supra)* where the panel held that the “FPPA instructs the panel to look at the proper and accepted practices as established and followed by similar farm businesses under similar circumstances”, and that “by definition, similar means “like” or “resembling something but not the same”.
69. Abbotsford did not specifically make a submission regarding “similar farm business in similar circumstances”, but did rely on the evidence of Mr. Reus, a field vegetable farmer. We observe that Mr. Reus harvests in a time frame which allows him to grow a cover crop and where he does not plant a cover crop he applies straw to his fields.
70. The respondent argues that the customs or standards for soil conservation cannot be considered in isolation pointing to the evidence of plant science and crop expert, Mr. Baumann, who recommended that the type of farming or the farm business should determine the soil conservation practice “not the other way around”. “Proper and accepted customs and standards” must be interpreted in a manner pertinent to “similar farm businesses under similar circumstances”.
71. Mr. Sihota points to the vegetable growing businesses of Mr. Khakh and Mr. Dhillon as similar to his operation. Mr. Khakh chooses which field vegetable crops he will grow based on market demand. He sells direct from his farm to consumers, timing harvests to take advantage of market conditions and consumer preferences. Mr. Dhillon harvests pumpkins to meet seasonal demands, near the end of October. He harvests zucchinis in order to seek the best prices and this can include harvesting into November. Mr. Dhillon testified that harvesting of his potatoes is determined by the rules of the BC Vegetable Marketing Commission (BCVMC). “It is quota driven; we have to wait our turn to come into the market as the system allows” which can be as late as December 15<sup>th</sup>.
72. Mr. Sihota selects the crops to grow, the location and the harvest time, based on a number of factors, but positioning his business to take advantage of the best market conditions as practical is a key consideration. In 2013, Mr. Sihota says he planned to harvest potatoes on the subject property to best take advantage of market conditions but as a consequence of heavy rains the harvest was delayed and he was unable to take equipment onto the field to employ any soil conservation measure after harvest.
73. The panel finds that all the farmers who testified, produce field vegetables in a similar climatic and geographic area. In the specific circumstances of this complaint, however we find the most helpful evidence in relation to similar farm businesses in similar circumstances to be that of the farmers who provided specific testimony regarding the harvesting of their vegetables in relation to their marketing strategy, such as Messrs. Khakh and Dhillon. In their evidence, they stressed the importance of being able to harvest their crops when the market conditions are best suited for their farm business, or when the BCVMC quota rules allow for the delivery of their crop. Mr. Baumann corroborated this testimony, stating that variability in both market and weather conditions will in some years make it difficult to apply the best soil conservation practices. He

expressed concern that if farmers were required to apply soil conservation practices, they would start to restrict the crops they could grow and late cole crops would be gone at a time of growing demand for local food.

74. The panel accepts the evidence of the respondent's witnesses that the reality is that there will be some years that late harvesting of crops will limit options for applying soil conservation measures after the harvest.
75. Based on the evidence heard, we conclude that the respondent's soil conservation practices are consistent with those of similar farms in similar circumstances. While there may be a range of acceptable soil conservation measures, we accept the respondent's evidence, which was not contradicted by Abbotsford, that those choices can be limited by time of harvest and weather.
76. We specifically find that the respondent is aware of soil conservation practices and, weather permitting (as in 2014 and 2015), he incorporates them into his farm practices. Given the reliance a farmer places on good soil, it would be foolhardy to do otherwise.

### **Summary and Conclusions**

77. With respect to the definition of "normal farm practices", after considering all of the evidence, the panel finds:
  - the geological and climatic conditions of the Sumas Prairie are similar for farmers growing field vegetables there;
  - the soils of Sumas Prairie are subjected to wind erosion, especially in the winter months, during high winds when the soil is dry;
  - runoff from fields following heavy rain events also contributes to soil erosion;
  - soil conservation practices which reduce wind speed near the soil surface by creating roughness (such as planting wind breaks like trees and tall grass strips; leaving rows of unharvested crops; snow fencing; leaving stubble and anchored harvest residue, planting cover crops; applying and mulching straw) and avoiding soil compaction are all accepted practices on the Sumas Prairie
78. However, we also find that soil conservation practices can be limited, and at times prevented, by weather and field conditions, especially for farmers who harvest late in the growing season. Under certain circumstances (usually involving wet or cold weather) the use of equipment to plant a cover crop or spread straw would damage the field through compaction. In other cases, a cover crop might fail to germinate.
79. Applying these findings to the facts of this complaint, the panel concludes that the respondent and his lessee operate the farm in a manner consistent with similar vegetable farm businesses under similar circumstances (such as Mr. Khahk and Mr. Dhillon) who farm on the Sumas Prairie and require flexibility in the timing of their harvesting in order to maximize returns from the marketplace. The respondent's lessee harvested potatoes from the subject property late in the season in 2013. Although he recognized the importance of mitigating soil erosion to the viability of his farming operations, he was

unable to apply a soil conservation practice, other than leaving plant debris on the field after harvest.

80. The panel accepts the evidence of the respondent and his lessee, (uncontradicted by Abbotsford) that there was no practical soil conservation measure available other than leaving plant debris on the field late in the season of 2013. The field was too wet and it was too late in the year. In the absence of additional suitable soil conservation measures, in this situation we find the respondent and his lessee's failure to use a cover crop consistent with normal farm practice. Similarly, in the 2014 and 2015 growing seasons, weather conditions were such that the respondent and his lessee, consistent with normal farm practice, were able to plant a cover crop and did so.
81. Further, in the panel's view the underlying intent of the *FPPA*, that the ability to farm one's land should not be unreasonably or unnecessarily interfered with, should be a consideration for local government in managing agricultural issues such as soil conservation.

## **ORDER**

82. The complaint is dismissed.

Dated at Victoria, British Columbia this 2<sup>nd</sup> day of May, 2016.

## **BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**



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Daphne Stancil, Presiding Member



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Andreas Dolberg, Vice Chair



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Diane Fillmore, Member