

IN THE MATTER OF THE  
*FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT*, RSBC 1996 C. 131  
AND IN THE MATTER OF A COMPLAINT REGARDING DUST, ODOUR  
AND FLOODING ARISING ON A FARM  
IN DELTA, BRITISH COLUMBIA

**BETWEEN:**

**GURJEET SOHI**

**COMPLAINANT**

**AND:**

**DON MALENSTYN and DJM FARMS LTD.**

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia  
Farm Industry Review Board:

Carrie H. Manarin, Presiding Member  
Andreas Dolberg, Member  
Corey Van't Haaff, Member

For the Complainant:

Mark Rowan, Counsel  
Gurjeet Sohi

For the Respondent:

Don Malenstyn  
Trina Schattenkirk, Agent

Date of Hearing:

July 3, 4, 18 and 19, 2013

Place of Hearing:

Tsawwassen, British Columbia

*\*\*The published version of this decision has been 'anonymized' to a limited extent.\*\**

## **INTRODUCTION:**

1. The respondent, Don Malenstyn, operates a farm under the name DJM Farms Ltd. in the Agricultural Land Reserve in Delta, British Columbia. Mr. Malenstyn resides on a 78 acre farm property which is located on the west side of 104<sup>th</sup> Street. The property is owned by Dairylike Farms Ltd. which is a company owned by Mr. Malenstyn's mother.
2. The complainant, Gurjeet Sohi, resides immediately to the north of the respondent farm where he operates a blueberry farm on an 80 acre parcel. The southern boundary of the complainant's farm abuts the north boundary of the respondent farm which is divided by a drainage ditch. The Sohi family resides on this property and started constructing a new residence on the southeast corner of it in 2010. The house had not been completed as of the date of the hearing.
3. The complaint was received by the British Columbia Farm Industry Review Board ("BCFIRB") on September 28, 2012 and concerns dust, manure management and "health and safety" issues. In a case management conference held on October 30, 2012 and in a pre-hearing conference held on April 18, 2013, the complainant clarified that the disturbances he was complaining of were dust, odours and flooding.
4. The complainant alleges that between 2009 and 2011, the respondent accepted large amounts of untested and/or contaminated fill at the northeast corner of the property and questions whether the respondent has a bona fide intention of using it for a farm purpose. The complainant alleges and that the weight of the fill has changed the drainage pattern of the respondent's property so that lower lying parts of the complainant's property now experience flooding during the rainy times of the year. The complainant also alleges that the respondent has created large amounts of dust by moving the fill around on his property and that in 2011 and 2012 the dust caused damage to some of his blueberry crop near the fill site and health concerns for his family. The complainant further alleges that the respondent placed a large chicken manure pile in close proximity to a new residence on the Sohi property and that strong odours and dust from it blow onto his property.
5. The respondent's position is that the lowest lying portion of the Sohi property has historically been subject to flooding in the winter months. His position is also that he requires the fill in order to develop a cranberry operation and that the dust created by moving the fill is the result of a normal farm practice. The respondent also claims that his manure management practices accord with normal farm practices.
6. The complaint was heard in Tsawwassen, British Columbia on July 3, 4, 18 and 19, 2013.

## **ISSUES:**

- (a) Are the manure management operations on the respondent farm and modifications being made to the farm, "farm operations conducted as part of a farm business?"

- (b) If they are, is the complainant aggrieved by dust, odours and flooding caused by the respondent farm's operations?
- (c) If he is, does the dust, odours and flooding result from normal farm practices?

**KNOWLEDGEABLE PERSON:**

- 7. BCFIRB retained [a knowledgeable person (KP)] as a knowledgeable person pursuant to section 4 of the *Farm Practices Protection (Right to Farm) Act* ("Act"). [The KP] has been a registered Professional Agrologist with the BC Institute of Agrologists since 1997. From 1996 – 1999, she was the General Manager of the BC Horticultural Association. [The KP] has been employed as a regional Agrologist with the BC Ministry of Agriculture since 1999 and up to 2004 she was the Field Vegetable Specialist. Since 2004, she has been a regional Agrologist for the Delta, Richmond and Surrey areas dealing specifically with those local governments on planning and policy issues related to agriculture. [The KP] was qualified at the hearing as a person knowledgeable generally in the areas of soil management, field crop production and farm management. [The KP] was called to give evidence at the hearing and her report dated March 21, 2013 was entered as evidence.
- 8. [The KP] emphasized both in her report and in her oral evidence that she is not a cranberry production specialist and for that reason she obtained some of her information from Mark Sweeney, a Provincial Berry Specialist with the BC Ministry of Agriculture, and Brian Mauza, an agriculture scientist with Ocean Spray of Canada Ltd. Mr. Sweeney did not attend the hearing to give evidence. Mr. Mauza was called by BCFIRB at the request of the complainant to give oral evidence regarding only those matters attributed to him by [the KP] in her report.
- 9. [The KP] testified that one of her duties as a regional Agrologist is to respond to public complaints about farming practices and to attempt to resolve them informally. [The KP] said she attended Mr. Sohi's property in this role on August 17, 2012 after Mr. Sohi contacted her about dust and odours coming from the respondent farm. At that time, she stated she observed significant amounts of dust on Mr. Sohi's blueberries and plants north of Mr. Malenstyn's fill activities and took photographs of them (which are included in her Report at Appendix III). She testified that there was more dust on these berries than on plants and berries in an adjacent area where corn was planted on the respondent farm and that there was no dust on the berries on the western portion of the Sohi farm. [The KP] said she showed these photographs to Mark Sweeney, the Ministry's berry specialist, and he agreed that "the berries would not have been marketable as fresh fruit."
- 10. [The KP] testified that she then contacted Mr. Malenstyn about the complaints and it was his position that the dust and odours resulted from normal farm practices. [The KP] said she could not resolve the complaint so she made a written recommendation to both parties that the complaint should be referred to BCFIRB.
- 11. On February 25, 2013, [the KP] conducted a site visit to the respondent's and complainant's properties with respect to Mr. Sohi's filed complaint. [The KP] stated in

her report that approximately 75 acres of the Sohi property is planted in blueberries which are sold on the fresh market as well as to processors.

12. According to [the KP], Mr. Sohi reported that he first noticed dust on his blueberries in 2008/2009 and that the amount became worse in 2010/2011. Mr. Sohi alleged that the dust came from soil fill being brought onto the respondent farm and then being moved around. He claimed the dust was worse on the eastern portion of the Sohi farm which is closest to the fill operations on the respondent farm. Mr. Sohi also reported that since the respondent farm began accepting fill, he has noticed more wet areas in his western field. Mr. Sohi further reported that when he started constructing his new residence, Mr. Malenstyn moved a pile of chicken manure very close to the property line and directly south of the new home. Mr. Sohi claimed that the smell from the manure pile when it was turned was very strong.
13. [The KP] stated that on February 25, 2013, she observed areas of standing water in between the rows of blueberry plants on the fields to the west of the Sohi property and sawdust from the rows along the northern edge of the property. Mr. Sohi reported that this sawdust had been washed away by high water levels and that a harvester got stuck for the first time in 2011 and 2012 in that western field area due to the flooding. [The KP] stated that she could not determine where the water was coming from.
14. According to [the KP], Mr. Malenstyn reported that there was a history of flooding problems on the farm and that his and Mr. Sohi's properties were at the same elevation (near sea level). He claimed that in 2009 he decided to switch from growing field vegetables such as potatoes, corn and beans on the property to growing cranberries, starting with the eastern edge of the parcel nearest to 104<sup>th</sup> Street. As a result, he started to bring fill onto the property in 2009 although he said some was accepted as early as 2006 to help alleviate the flooding.
15. [The KP] stated that in 2010 the Agricultural Land Commission (the "ALC") issued a stop work order with respect to bringing fill onto the property and started a court enforcement proceeding against Mr. Malenstyn. Mr. Malenstyn reported that he continued to bring in fill until September 2011. In 2012, the Corporation of Delta adopted a new fill by-law which required a permit. According to Mr. Malenstyn, due to the actions of the ALC, the Corporation of Delta would not issue him a permit under the new by-law to bring in any further fill and it has created difficulties for him in completing his development.
16. According to [the KP], Mr. Malenstyn said he did not have a written business plan but advised her that he initially intended to plant 66 acres of the farm property to cranberries over 5 years at an investment of \$3 million. She also reported that Mr. Malenstyn did not have a written plan showing the finished elevations and grades of the cranberry dykes, had not tested the fill and was unaware of its characteristics (including pH). She stated that he was also unaware of the volume of fill that had been delivered as of that date and the amount or type of fill that was required to build the dykes and fields to his specifications. She further stated that Mr. Malenstyn advised her that he had not hired

anyone to examine potential drainage impacts on surrounding properties from the imported fill.

17. Mr. Malenstyn provided [the KP] with a hand-drawn site plan of the proposed cranberry operation which was set out in her report. The site plan showed the 80 acre property split into four equally sized sections, running lengthwise from the Sohi property on the north to the southern border of the Malenstyn property. The first quarter consists of the first 20 acres bordering the entire east side of the property and includes one three acre field bordering on the southern boundary (Field #1). There is another three acre field immediately to the south of the Sohi residence (Field #2) at the northeast corner of the property. The Malenstyn residence and barn sites lie between Fields #1 and #2. A water reservoir is located west of Field #2 and immediately south of the Sohi property. The other three equally sized 20 acre sections are labelled "Field #3, #4 and #5," respectively. Field #3 is located immediately to the west of Field #1, the Malenstyn residence and barn site and the water reservoir. Field #4 is located west of Field #3 and Field #5 is located between Field #4 and the western border of the Malenstyn property.
18. Mr. Malenstyn advised [the KP] that based on inquiries he made of the Corporation of Delta and other cranberry farmers, it was his intention to raise the fields or bogs within the dykes to 1.8 metres above sea level and the dykes to 2.9 metres above sea level. He reported that prior to placing fill material for dykes or fields, he dug out the existing peat topsoil layer and stockpiled it to use for finishing the fields. Mr. Malenstyn also reported that he had substantially completed two fields that are each three acres in size (ie. Fields # 1 and #2). At the time of the site visit, one field had drainage tile and an irrigation system installed and was to be planted in June 2013. He stated that he had ordered plants in 2011 but believed they were killed by contaminants in ditch water and that he ordered plants again in 2012 but they were destroyed by flooding due to a water pipe that burst in a barn where they were being stored.
19. According to [the KP], Mr. Malenstyn reported that he was having an irrigation and drainage plan prepared for him by a local company but that it was not available at the time of the site visit. He said it is his intention to remove excess water from the fields by tile drainage into a centre drain and then to pump it back into the reservoir. It was also his intention to collect rain water in that reservoir (which according to the site plan is approximately 2.5 acres in size and would hold 21 million gallons of water) and to use it for irrigation and flood harvesting. [The KP] noted that as of the date of the site visit, the reservoir had been dug out but was still not completed.
20. According to [the KP], Mr. Malenstyn stated that with the exception of placing ground asphalt on top of the main haul dyke, he made no efforts to control dust created by fill activities on his own property and he alleged that the Sohi's created their own dust problems as a result of their farming practices which included mowing inter-row areas and driving along the perimeter and between rows with farm vehicles.
21. Mr. Malenstyn reported that it was his intention to build a permanent manure storage/composting facility directly south of the Sohi's new residence, close to the

property line (or in roughly the same spot as the manure pile had been in August 2012). He stated that the composted chicken manure was for the use of a vegetable farmer who would be leasing part of the property (i.e. future Field #3 referred to in the description of the site plan in paragraph 18) in 2013 and thereafter it would be combined with cranberry leaves once he started growing cranberries.

22. According to [the KP], Mr. Malenstyn advised her that the main haul dyke was located in the northeast corner of the property to facilitate vehicle movement and harvesting, as the prevailing winds from the southwest to the northeast would naturally direct the cranberries to this location during flood harvesting.
23. [The KP] relied on information from Ministry Berry Specialist Mr. Sweeney that farmers in the Lower Mainland do not experience dust issues from the use of their equipment. She concluded that given the type, volume and handling practices of the soil fill materials brought onto the respondent farm and given that Mr. Malenstyn had taken no dust suppression efforts, it was unlikely the dust on Mr. Sohi's blueberries came from his own equipment and grass mowing activities. She also noted that both parties agreed that the prevailing winds were from a southerly direction which would blow dust in the direction of the Sohi farm. She recommended that under dry conditions (especially during the Sohi harvest season) that Mr. Malenstyn sprinkle existing fill piles with water before moving any fill.
24. [The KP] also recommended that before any further fill was deposited or moved that the respondent hire an engineer to determine how much fill has been brought onto the property, whether it is suitable to support cranberry dykes, equipment movement on the dykes and reservoir water storage in them. If the fill is suitable, she also recommended that it should also be determined what the necessary heights of the fields and dykes should be and how much more fill would be required to complete the project.
25. [The KP] testified that the respondent's main haul dyke is 6 metres wide and located next to the drainage ditch (separating the respondent farm from the Sohi farm). The proposed location of the manure storage facility is next to the main haul dyke which is the same spot as where the chicken manure pile had been located in August of 2012. She noted that while the Code of Agricultural Practice for Waste Management ("the Code") requires a 15 metre separation distance between an agricultural waste storage facility and a watercourse, it also requires that manure stored temporarily in a field be located at least 30 metres away from a well or watercourse.<sup>1</sup>
26. She also noted that for odour mitigation, the Ministry recommended that storage facilities for chicken manure should be out of view of neighbours, applied when neighbours are

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<sup>1</sup> The "Code" is embedded in the Regulation – however, the only thing the Regulation's two clauses say is that farmers are exempt from the Environmental Management Act requirements to obtain a permit provided that they follow the Code. It is the Code that then specifies both a 15 metre setback from water courses for a permanent manure "storage facility" and 30 metre setback for field storage of manure.

[http://www.bclaws.ca/Recon/document/ID/freeside/10\\_131\\_92](http://www.bclaws.ca/Recon/document/ID/freeside/10_131_92)

not home and loaded or spread when winds are blowing away from neighbours. In her opinion, the respondent's proposed location for the manure storage facility was not consistent with generally accepted practices and she recommended that it not be located on the northern property line but instead near other farm buildings on the respondent farm, which is located approximately 200m from the property line. She also recommended that Mr. Malenstyn avoid manure spreading during the Sohi's blueberry harvest season and when the wind was blowing in a northerly direction toward the Sohi farm.

27. [The KP] made no recommendations regarding the complaint about flooding other than to suggest that before any further fill was deposited or moved that Mr. Malenstyn should hire a qualified Engineer or hydrologist to evaluate if there has been any impact from those activities on flooding of the Sohi property. She noted that this was also a requirement of the Corporation of Delta's permit application for a fill deposit in the ALR which asks applicants to "describe any changes to drainage on your property or surrounding property following soil deposit and how these will be mitigated. An Engineer's report may be required."
28. [The KP] also noted that a cranberry grower who intends to plant new or additional acreage must notify the BC Cranberry Marketing Commission ("BCCMC") by December 31<sup>st</sup> in the year prior to planting with confirmation that a designated agency would accept the production from the additional acreage. According to [the KP], Mr. Malenstyn reported that he did not have a licence from the BCCMC and does not have a designated agency arrangement (or handler to sell to) although he intended to plant 3 acres in June 2013.

**Brian Mauza:**

29. Brian Mauza testified that he is employed as a scientist with Ocean Spray and holds a Bachelor's degree in Agriculture and a Master's degree in Nematology (or pests). He is also a professional Agrologist and has been involved with agriculture in the Fraser Valley since 1976. He has worked with cranberries and cranberry growers for the past 15 years and is responsible for BC and the northern Washington region. In his role as a scientist with Ocean Spray, he conducts research and provides advice to growers on topics which including fertilizers, pest control and plant varieties and sources. He also sits on some of BCCMC's research boards.
30. Mr. Mauza testified that all cranberry producers within a certain size must be licensed by the BCCMC (to obtain quota) before they can sell to a handler such as Ocean Spray. He agreed that typically a grower must have planted cranberries before applying for quota. Mr. Mauza testified that growers can sell their cranberries to Ocean Spray or another licensed handler but that 95% of B.C. production is grown for Ocean Spray. He said that despite the quota requirements, prior to 2009 there was such a large demand for cranberries that Ocean Spray was taking applications for future production on condition that the grower planted within 3 years. He said now, it could be a number of years before

a new applicant could sell to Ocean Spray so any cranberries they produced in the meantime would have to be sold to another buyer.

31. Mr. Mauza said he recalled speaking to Mr. Malenstyn approximately 5 to 6 years ago (i.e. in 2007/2008) and mentioned to him at that time that it would be easy to get on with Ocean Spray. Mr. Mauza said Mr. Malenstyn indicated that he might want to be a member of Ocean Spray and asked for an application to be put on a wait list, however Mr. Mauza was unaware if he ever applied.
32. Mr. Mauza testified that he is aware of the location of the respondent farm and of other cranberry farms in the area however he is aware of only one other grower that raised their fields to an elevation of 1.8 metres and he believed they may have done so because they were on a floodplain of the Fraser River. He said it was not a common practice to raise fields that high and he could not think of a reason why the respondent would need to do so. He said cranberry growers will usually only elevate parts of a field to bring it level and that dykes are usually built to be 3 – 4 feet above the field level.
33. Mr. Mauza also testified that he knew of no reason why a dyke would need to be raised to an elevation of 2.9 metres. He said in years past, he was aware of the odd one that was that high to contain water for harvesting but that this was no longer the case, and that 1.5 metre dykes are used on most cranberry operations. In particular, he noted that if a field is level, a high dyke is not necessary to harvest the cranberries. Also, the more dyke material that is put on peat, the more the weight will cause the peat to compact and settle. This in turn creates greater costs for the grower.
34. Mr. Mauza testified that cranberries can grow in any material such as sand, sawdust or peat provided that it is well drained because the vines have a shallow root zone. He said it would be important to know what material is being used to plant the vines in as it could affect root health, result in a longer time for the plants to mature and create pest problems such as weeds. Mr. Mauza testified that after cranberry vines are planted, it typically takes 3 to 4 years to get a small crop and a total of 7 years for the operation to come into full production.
35. Mr. Mauza testified that he is not aware of any other cranberry operation in BC that has a self-contained water system as cranberries require a lot of water and most farms do not have the capacity to store enough water for their operations. He stated that such systems usually must be topped up from a water source and have the ability to release excess water when there is a heavy rain event. He also testified that he is not aware of any other cranberry growers who have located a manure or composting facility in a field because bacteria from manure or composting leaves is a potential source of disease.
36. Mr. Mauza testified that he was aware of other cranberry operations where the addition of soil material displaced or interrupted the natural flow of water. He noted however that it would depend on the underlying parent soil and suggested that a hydrologist would be in a better position to make that opinion.



37. Mr. Mauza agreed that cranberry growers will import materials for dykes if it is not available on site. He also agreed that most cranberry growers have unique aspects of their operations such as the type of plants and planting materials used, but stated that some of the systems on B.C. cranberry operations are standard.

## **COMPLAINANT'S EVIDENCE AND SUBMISSIONS**

38. Mr. Sohi testified that he has experience farming as he grew up on a rice and wheat farm in India and has worked at a B.C. nursery. He said in 2002, he and his brothers purchased Hank Malenstyn's (Mr. Malenstyn's uncle) share in Dairylike Farms which entitled them to the 80 acres on which they now farm and reside. The farm was leased to another farmer to grow potatoes until 2005 when the front (or east) 40 acres were planted to the Blue Crop variety of blueberry. In 2006, the back (or west) field was planted with the Duke variety of blueberry.
39. Mr. Sohi said that in late 2009, Mr. Malenstyn started bringing in loads of fill at the northeast corner of his property and claimed the dumping was continuous and that Mr. Malenstyn would be busy moving the dirt until late at night. Mr. Sohi testified that he was still on good terms with Mr. Malenstyn at this time and Mr. Malenstyn advised him that "he could make \$1 million per year by accepting fill and only need to spend \$100,000.00 to build a cranberry operation to shut up the guys at the ALC." Mr. Sohi said he did not know what Mr. Malenstyn asked for tipping fees but claims that he (Mr. Sohi) was offered \$100.00 a load. Mr. Sohi also said he observed pieces of plastic and metal in the truck loads that were delivered to the respondent farm. Mr. Sohi claims that Mr. Malenstyn also said it was his intention to raise his whole farm by 2.9 metres and that he planned to sell off his topsoil.
40. Mr. Sohi testified that in 2008, he brought in some pre-load to the southeast corner of his property where he intended to build a new residence. Based on the Corporation of Delta's requirements for a residence (for flood proofing), he raised the building site to 2.9 metres. After learning that Mr. Malenstyn intended to raise his property however, Mr. Sohi said he decided to raise the site for his house a bit higher. Framing of the new Sohi residence started in May or June of 2010. Mr. Sohi stated that he had expected that it would be ready to occupy as of 2011 however, to date it remains unfinished.

### ***Odour Complaint***

41. Mr. Sohi testified that in early 2010 his relationship with Mr. Malenstyn soured. In late 2010 Mr. Malenstyn moved a chicken manure pile from the barn area in the middle of his property to approximately 70 to 75 feet away from Mr. Sohi's new house. Mr. Sohi claimed that at the time Mr. Malenstyn was not using the manure for anything because he was not farming and believes it was moved in retaliation for Mr. Sohi building a new large residence in that location. Mr. Sohi said Mr. Malenstyn appeared amused when he would turn the manure pile in 2011 and 2012 and it would release odours. He testified that the prevailing winds are from the south so the odours would blow in a northerly

direction where his new home is located. He said the smell was so strong that some contractors working on his new residence could not bear it on some days and would leave part way through the day.

42. A stucco contractor, Jason Bannister, testified that he has worked in agricultural areas and is accustomed to farm smells however there were 5 to 7 days in 2012 when he was subject to the worst odour he has ever smelled which came from the manure pile being turned by Mr. Malenstyn. He claimed that he would not have worked for another contractor under those conditions and did not believe that it would have been safe to operate power tools. Another witness, Cecil Calvert, testified that he has previously raised chickens and knows that the smell of chicken manure is so strong that it can make your eyes water and burn your nostrils. He stated that he observed Mr. Malenstyn turn the manure pile at the ditch line every Sunday and that the smell on the Sohi property was terrible. Jagjot Sohi, a nephew of Mr. Sohi's who also resides on the Sohi property testified that the smell from the manure pile made it hard for him to breathe.
43. Mr. Sohi testified that the manure pile was removed from its location by the drainage ditch in 2013 (after he filed his complaint) so odours are currently not a problem however because Mr. Malenstyn is planning on putting a permanent manure storage facility in the same spot, the matter is still an issue.

### ***Dust Complaint***

44. Mr. Sohi also testified that the dirt moving activities of Mr. Malenstyn created large amounts of dust which affects the front 35 acres of blueberry plants (closest to and to the north of the fill activities). He relied on a video recording of a dump truck driving on Mr. Malenstyn's property creating a large cloud of dust. Mr. Sohi agreed that his farming activities (including those of other nearby operations) created some dust but claimed it was a reasonable amount and not on the scale produced by Mr. Malenstyn's movement of fill. He said there was no problem with dust on his berries before Mr. Malenstyn started bringing in fill but that it was a problem in 2011 and 2012.
45. Mr. Sohi testified that he operates a U-Pick business and that customers do not want to pick the dusty berries and the affected berries must be sold instead to a processor for juice at a greatly reduced price. Mr. Sohi also testified that two of his nephews, particularly Jagjot Sohi who testified at the hearing, are affected by the dust and have to stay inside when it is bad. He claimed as well that contractors working on his residence were affected by the dust and wanted more money to work in those conditions.
46. Christina Stanford is a neighbour of Mr. Sohi's and testified that she often walked by the Malenstyn property and in the Spring months observed Mr. Malenstyn operating machinery and that it would create a great deal of dust. She said later in the year when she picked berries on the Sohi farm, she observed that the blueberries closest to the Sohi home (up to 5 rows in from the road and 5 bushes in from the Malenstyn property) were coated with dust.

47. Mr. Calvert also testified that over the past 2 years when he was on the Sohi farm he often observed large amounts of dust thrown high into the air (especially in June, July and August) as a result of Mr. Malenstyn operating heavy machinery to move dirt. He said in his experience working on a farm, it was normal practice to spray dirt with water before moving it.
48. Jagjot Sohi testified that he is 18 years old and has lived on farms all of his life. He said he has a dust allergy and that it was not much of a problem until a few years after he moved onto the Sohi property. He also said that in the past two years he observed clouds of dust when Mr. Malenstyn was moving fill around on the farm and that it went onto the Sohi farm and house. He said under these conditions he could not leave the house or he would become sick. He recalled that the summer of 2012 was the worst year with dust in the air every day.

### ***Flooding Complaint***

49. Mr. Sohi testified that he was advised by Hank Malenstyn that 5 acres in the northwest corner of the property was low and as a result Mr. Sohi said he brought in fill to elevate that area prior to planting. He said the whole field was professionally laser levelled and Big O pipe was installed every 25 feet which drains the water from the field into a drainage ditch (that runs from north to south) at the back of the property. He testified that the front (east) section of the field is higher by approximately 4 or 5 inches than the back (west) section but that he had no problem with flooding before Mr. Malenstyn brought in the fill. He first noticed standing water in the fields a bit in 2011 and then again in 2012. He testified that he believes that the fill Mr. Malenstyn has brought onto his property has compressed the water table so that it is filling the ditches and coming onto his property. He testified that he has seen water running off of Mr. Malenstyn's property into the ditch and has seen bubbles coming from under Mr. Malenstyn's property into the ditch water.
50. Mr. Sohi testified that in early 2005, he and Mr. Malenstyn agreed that they did not need the drainage ditch that runs east to west separating their properties, and that he gave Mr. Malenstyn permission to fill in 200 feet of the ditch (up to the Sohi residence). Mr. Sohi testified that in the winter of 2010/2011, Mr. Malenstyn blocked the drainage ditch at the southwest corner of the Sohi property and that this caused some flooding in that section of the property. Mr. Sohi claims that he had a survey done in 2008 which showed that this part of the ditch was more on his property however, more recently Mr. Malenstyn has had a survey done and claims that it is more on his property. The issue concerning whose property the ditch lies on is now the subject matter of separate litigation. Mr. Sohi said in the fall of 2012, he widened the ditch further onto his side of the property and put in two culverts for additional drainage.
51. Mr. Sohi testified that an irrigation ditch also runs behind his and Mr. Malenstyn's property to the west and that Mr. Malenstyn will not permit the City to remove debris from it. According to Mr. Sohi, failure to remove this debris could potentially cause flooding.

## RESPONDENT'S EVIDENCE AND SUBMISSIONS

52. Mr. Malenstyn testified that he told BCFIRB staff that he was opposed to [the KP] being the Knowledgeable Person in this matter because he believed she was not impartial. He stated that he had a difference of opinion regarding when [the KP] attended Mr. Sohi's property in August 2012. He also testified that although he had contacted [the KP] a number of months prior to August 2012 with complaints about Mr. Sohi's activities, she would not respond to him. He further stated that he had suspicions that [the KP] had been speaking to an enforcement officer from the ALC because when he spoke to her the following Monday and asked her why she had not come to see him, she responded that she had not been on his property. Mr. Malenstyn said the only person he had advised who was not welcome on his property was the officer from the ALC.
53. Mr. Malenstyn also objected to [the KP]'s Report as he claimed that he was advised by her that he would have an opportunity to review the report and comment on any inaccuracies in it before a final version was submitted to BCFIRB. According to Mr. Malenstyn, she did not do so and the report contains many inaccuracies. He entered into evidence a copy of a video recording of [the KP]'s site visit to his property on February 25, 2013.

### *Flooding Complaint*

54. Mr. Malenstyn testified that the Sohi property was subdivided from the respondent farm in 1995 which was the same year the centre ditch was put in for drainage. Mr. Malenstyn also testified that both his and the Sohi property were historically subject to flooding in the winter time because they (and two neighbouring farms) are the lowest lying farms in the area and collect drainage water from higher surrounding areas such as Burns Bog.
55. Mohinder (Mike) Dosanjh, a neighbour of Mr. Malenstyn's testified that he has grown blueberries for approximately 15 years in the same area. He stated that before the City installed a pumping station along #10 Highway to control the water levels in the ditches, there were many problems with flooding in the area. He also stated that he still experiences flooding, typically several times each year for periods of one or two days but that the worst was in 1999. Mr. Dosanjh testified that he has raised a four acre parcel of his farm by 3 feet, has put in a dyke and uses a sump pump to control flooding. Mahadir Gill, another neighbour of Mr. Malenstyn's, also testified that he has grown blueberries in the area since 2002 and has experienced flooding every year although it is alleviated by the pump station the City installed along #10 Highway in 2005 or 2006.
56. Tyler Brost, a long time friend of Mr. Malenstyn's, testified that he has observed flooding on the property now owned by the Sohi's when it was still part of the respondent farm. Dion Anger, an employee of Mr. Malenstyn's also testified that he has observed flooding on both the Malenstyn and Sohi properties in the rainy months. He said that dykes on the respondent farm prevent water from going into the ditch and most of it is contained by the reservoir which was dug out in 2012.

57. Mr. Malenstyn testified that his property was also subject to flooding in the summer months which started in 1996 due to the City's pumping of water from the Fraser River through the irrigation ditch for use by other farmers. He said in 2001, flooding was so bad that it destroyed 80 - 85% of his potato crop. Mr. Malenstyn claimed that this led to a number of lawsuits with the City of Delta which resulted in the City dumping fill on the farm for almost 10 years in an attempt to alleviate the flooding. Mr. Malenstyn testified that this factor, in addition to others, led him to conclude that vegetable farming was not financially viable and in 2009 he decided to convert the farm to a cranberry operation.
58. Mr. Malenstyn denied blocking the drainage ditch that runs between the two properties and his witnesses, Tyler Brost and Dion Anger, also testified that they had never seen Mr. Malenstyn block it. Mr. Malenstyn testified that he believes Mr. Sohi's farm practices could be a reason for the standing water in his fields that [the KP] referred to in her report. He testified that Mr. Sohi drives his tractor in the fields when the soil is wet thereby creating deep ruts where water collects instead of running off. He also claimed that Mr. Sohi does not maintain the centre ditch so water collects there. Mr. Malenstyn submitted that the fact that water is sitting in the Sohi's fields and accumulating in the ditches indicates that the Big O pipes in Mr. Sohi's field are not working (possibly as a result of being "silted up") and that water is instead running over the surface into the irrigation ditch. Mr. Malenstyn also submitted that because of the raised elevation of the new Sohi home, water draining from the residence site into the ditch and the sloping fields may also be factors contributing to flooding.

### *Dust Complaint*

59. Mr. Malenstyn questioned whether the photograph of dust on blueberries in the KP Report was in fact taken on Mr. Sohi's farm. In any event, Mr. Malenstyn said he believes that Mr. Sohi's farm practices are responsible for any dust found on his blueberries. He stated that when the ruts created by the tractor driving in wet soil dry out, the mower then drives over the higher ridges creating dust. Mr. Malenstyn also testified that Mr. Sohi and his workers frequently drive farm vehicles along the south perimeter of the field which is evident in his videos that he also entered into evidence. In the video recording of the KP visit, he states that this is also evident given that no grass grows in that area. Mr. Malenstyn further testified that his neighbour who leases 40 acres from him to the west of Mr. Sohi's property creates dust from driving along the western border of the Sohi's property and noted that this is also shown on his photographs and videos.
60. Mr. Dosanjh testified that the photograph of the blueberries taken by [the KP] appeared to him to be copper spray rather than dust. However, he agreed that copper spray would be applied in March rather than August and would not be sprayed on plants once they produced berries. Mr. Gill testified that he also gets dust on his blueberries but that processors do not reduce their prices to wash it off, but acknowledged that he did not sell his berries for the fresh market.

61. Mr. Brost testified that he has observed dust flying around on the Sohi property from the mower hitting ruts and has also witnessed dust from Mr. Sohi driving a four wheeler around and a truck during harvest. He testified that he recently noticed that Mr. Sohi purchased a water reservoir to pull behind the tractor to control the dust on the property.
62. Dion Anger testified that he was hired by Mr. Malenstyn in February or March of 2011 to assist him in developing a cranberry operation. Mr. Anger said there is one road to the back field on the respondent farm and that is the road from the northeast corner. He said he has only observed dust on this roadway when driving equipment in dry conditions. He testified that he never saw trucks driving around empty on the respondent farm as alleged by Mr. Sohi unless it was on the return trip after having dumped a load in the back field. He testified that he has seen dust on the Sohi farm when the tractor drives around and when the mower is used. He said he has also seen dust from heavy vehicles driving along a neighbour's dirt road along the west property line of the Sohi farm. He claimed that ever since he started working for Mr. Malenstyn, he frequently saw Mr. Sohi taking pictures of the farm and believes that if dust had been coming from the respondent farm he would have had an opportunity to take pictures of it.
63. Mr. Malenstyn also submits that although Mr. Sohi has had many opportunities to take photographs of dust going from the respondent farm onto the Sohi blueberries when it is being moved around, he has only provided video evidence of dust being stirred up by vehicle movement on the main entrance road (at the northeast corner of the respondent farm property) and going onto their house on one occasion. He notes that according to [the KP]'s report, "the complaint does not relate to dust from vehicle movement on the main haul dyke." Mr. Malenstyn clarified that while this is the proposed location of the main haul dyke, it has not yet been built.
64. Mr. Malenstyn denied telling [the KP] that he would take measures to reduce dust if Mr. Sohi was a better neighbour (as set out in her report). Mr. Malenstyn testified that the trucks delivering fill to his property did not create dust and he claimed that he has put water on the road to keep down the dust. Mr. Malenstyn submits that he creates no more dust than any other farmer and that it is normal farm practice so there is no need for him to put water on the dirt when moving it.

### ***Odour Complaint***

65. Mr. Malenstyn testified that in 2011, he leased 20 acres of the farm (or proposed cranberry Field #3) to a vegetable farmer and under this agreement, he was responsible for preparing the land for planting and for applying fertilizer. As a result, Mr. Malenstyn said he composted chicken manure for use on the fields. He admitted that he has not supplied manure to this tenant for the past year and a half but now uses the manure for his own crops. Mr. Malenstyn also testified that in 2012, he had a share crop agreement with a neighbouring dairy farmer to plant 40 acres (or proposed cranberry Fields #4 and #5) for corn silage and under that agreement he is responsible for tilling and fertilizing the fields. He testified that after the crops are removed, he plants a cover crop for birds for which he receives compensation from the Delta Farmland and Wildlife Trust.

66. Mr. Malenstyn testified that in the 1990's the chicken manure pile was near his house but was then moved around to make room for a proposed barn site and more recently to make room for fill. He said that in 2006, the manure pile was located 190 feet from the north edge of the property line and then he moved it a bit closer in 2011 when he put in the driveway at the northeast corner of the property to accommodate truck access for dumping fill. He said he believed this was a good location for the manure given that this area was readily accessible from the new driveway and was in close proximity to the fields. He also said that by 2011, the manure pile was much smaller because he was no longer using it for his own vegetable crops. Mr. Malenstyn said [the KP] did not measure the set back distance from the manure pile during her site visit and claimed it was located 24 metres from Mr. Sohi's property line and therefore complied with the setbacks under the Code of the Waste Management Regulations. He also said that he removed the manure pile after the complaint was filed but will build the permanent storage site in the same spot if the complaint is dismissed.
67. Mr. Malenstyn testified that he kept the window of the excavator open when turning the manure pile and the smell did not bother him. He also submits that Mr. Sohi has a horse manure pile that creates an odour. Mr. Anger testified that there was an increased odour from the chicken manure pile when it was turned but said it never interfered with him working. He agreed that it was closer to the Sohi residence than to Mr. Malenstyn's residence. Mr. Gill testified that his neighbour has a large chicken manure pile but that he considers the odours from it part of farming. He also testified that his neighbour does not turn the pile but instead leaves it to dry.
68. Mr. Anger testified that when he started working on the respondent farm in February or March of 2011, Mr. Malenstyn had cranberry plants in the barn, pre-load in the area designated for the reservoir and there were no completed fields. He also testified that he had no prior experience with cranberries or farming but that Mr. Malenstyn took him to other cranberry operations to show him the different berry varieties and the drainage, watering and harvesting systems. Mr. Anger said his duties mostly involved digging out and moving fill for the fields, dykes, roadways and reservoir but that he has also helped to build a retaining wall of blocks around the manure pile, install an irrigation line in one of the 3 acre fields and till and disk the fields. He said he was laid off in the summer of 2013 because Mr. Malenstyn could no longer afford to pay his wages.
69. Mr. Malenstyn testified that prior to bringing in fill, the elevation of his property was at sea level and in some spots 0.5 meters below sea level. Given the flooding problems in previous years, Mr. Malenstyn said he determined that pumping for drainage would be a significant expense because it would be continuous and that it was also susceptible to breakdowns. Consequently, he believed that the only way to drain excess water under those conditions was to raise the fields. Mr. Malenstyn also testified that he decided to build the dykes to an elevation of 2.9 metres for "longevity" because he had heard predictions that by the year 2100, the water table will rise by one metre which would put the farm one meter under water.

70. Mr. Malenstyn testified that he looked into the costs of converting the farm to a cranberry operation, discussed growing media and plant varieties with Mr. Mauza prior to 2009 and met with another representative of Ocean Spray in 2009. He testified that he also got information about growing materials and drainage from a nursery where he purchased cranberry plugs and from other cranberry growers. He said he did not hire an engineer because he had previously built dykes along 104<sup>th</sup> Street and knew how to build them. He also testified that he did not hire a hydrologist because he did not believe there would be any effect on neighbouring properties due to the drainage ditches. Mr. Malenstyn agreed that he did not have a written business plan in 2010.
71. Mr. Malenstyn testified that the ALC issued a stop work order in December 2010 which prevented him from accepting fill for a non-agricultural use. Consequently, he said his counsel had a professional Agrologist prepare a report to dispute the stop work order. Mr. Malenstyn referred to a document prepared by Interwest Appraisals, dated June 6, 2011 which he referred to as his “business plan.” He testified that [the KP] had a copy of this document but did not refer to it in her report. He admitted that during the site visit he showed her the document briefly but did not give her a copy of it. He testified that he was certain his spouse sent a copy of the document to BCFIRB staff to forward to [the KP] so she would have received a copy of it. The author of the report was not called to give evidence at the hearing and there was no prior notice that it would be tendered as expert evidence.
72. Mr. Malenstyn relies on the Interwest Appraisal report where it states that the farm lies in a low spot in the general area and that the water runoff from the surrounding higher elevations contributes to flooding conditions. He also relies on the author’s opinion that as a result of these factors, the field and dyke elevations on the respondent farm will have to be higher than on other farms for drainage and harvesting. According to the author (and the KP Report), Mr. Malenstyn determined the field and dyke elevations based on the City of Delta’s flood proofing elevation requirement for buildings which is 2.9 metres or 9.51 feet. The report also states that roughly 160,133 yards of material had been brought onto the farm and that an additional 556,271 yards would be required to complete the desired field and dyke elevations.
73. Mr. Malenstyn testified that while he received fees (of \$40.00 - \$50.00 per load) for accepting some truck loads of fill, he received nothing for others. He claimed that any income he earned from tipping fees was used to offset the costs of developing the cranberry operation. In the video of the KP’s site visit, Mr. Malenstyn estimated that he had received 60 loads of fill per day, 5 days a week for approximately 2 years. In the same video, Mr. Malenstyn denied that the fill was contaminated and stated that the fill came only from reputable suppliers who excavated it from building sites and therefore he believed it would have been tested. Mr. Malenstyn also testified that in his view the pH content of the imported fill was irrelevant because it would be covered with six feet of native soil. He further testified that he has tested the pH of the topsoil on his farm ever since the 1970s.



74. Mr. Malenstyn testified that the cranberry vines he bought in 2011 were destroyed by ditch water contaminated by sulphates (from laundry soap which he believes was from the Sohi property) before they could be planted and the ones he purchased in 2012 were also killed prior to planting as a result of flooding from a broken water line in a barn. He testified that dykes have been built around Fields #1 and #2 and he planted Field #1 (which is 3 acres) in June 2013 at a cost of approximately \$40,000.00. He said he hopes to plant Field #2 when more funds become available. He agreed that the reservoir has not been completed and that this means he cannot flood harvest a 20 acre field (or each of the proposed Fields #3, #4 and #5 on his site plan) or store enough water for irrigation. He testified that this will mean in the short term that he will have to rely on ditch water to irrigate his plants and will have to monitor it regularly for contaminants. He agreed that he recently filled part of the reservoir with ditch water and submitted that it was not creating flooding for other properties because it still retained the water. He also testified that he has recently arranged for a geotechnical study of the reservoir to determine its structural integrity.
75. Mr. Malenstyn testified that the modifications to the farm property have been a time-consuming and expensive process because he has to strip the topsoil away from the fields before depositing the fill and then put the topsoil back on top. He also testified that he has to remove large rocks from the fill before depositing it in the fields. The rocks will be used to line or reinforce the water reservoir. He believes he would have completed all of the cranberry fields by now had he not been shut down by the ALC due to allegations by Mr. Sohi that the fill being brought onto the farm was contaminated. He said he now thinks it could take between 5 and 10 years to complete the cranberry operation because he has now lost his contacts for accessing the fill that he will require.
76. Mr. Malenstyn also testified that he intends to apply for membership with Ocean Spray. He believes he could have become a member in 2011 however they would not accept him until he planted and because there was a bumper crop in 2012, Ocean Spray is not currently accepting new members. However, Mr. Malenstyn said he does not need to be “affiliated” in order to sell to Lucerne (another handler) but that there were many more advantages of being a member of Ocean Spray.

## **ANALYSIS**

77. As a preliminary matter, the panel considered the objections of Mr. Malenstyn to the testimony and report of [the KP] (set out above). The panel also considered submissions from counsel for the complainant who denied that [the KP] was not impartial and suggested instead that the respondent objected to her report because it did not support him. Counsel noted that there were many findings in [the KP]’s report with which Mr. Malenstyn did not dispute and that he had an opportunity to cross-examine her at the hearing on any alleged inaccuracies.
78. The panel has reviewed the video of the KP site visit which was entered into evidence by Mr. Malenstyn. The panel agrees that in the video recording [the KP] did in fact advise the respondent that he would have an opportunity to review and comment on the report before a final draft was submitted to the chair of BCFIRB. The panel accepts the

evidence of Mr. Malenstyn that this did not occur. However, the panel is satisfied that any procedural unfairness or inaccuracies that resulted from this omission were rectified by Mr. Malenstyn having an opportunity to address and respond to the alleged inconsistencies at the hearing and to cross-examine [the KP].

79. The panel also agrees that in the video recording of the KP's visit, Mr. Malenstyn brought to [the KP]'s attention a document he referred to as his "farm plan." Mr. Malenstyn stated that he believed his spouse had sent a copy of that plan to BCFIRB staff and he did not provide another copy of it during the site visit. [The KP] advised Mr. Malenstyn that she did not have a copy of it and that BCFIRB staff would look for that document. The panel accepts Mr. Malenstyn's evidence that he was not asked for another copy of that document and that accordingly the KP Report is inaccurate where it alleges that Mr. Malenstyn did not have the information that is contained in that document.
80. Having regard to these matters, the panel concludes that there will be portions of the KP Report that will not be reliable and the panel will in its reasons for its decision assess weight to that evidence accordingly. However, the panel finds that there is insufficient evidence to conclude that [the KP] was not impartial and that the report should be rejected in its entirety on that basis. In any event, the panel observes that as is the case with any KP report that BCFIRB receives, it is not binding on the panel.

### ***Step 1: Jurisdiction***

81. The complaint was brought pursuant to section 3(1) of the *Act* which states as follows:

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*** [emphasis added], 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.

82. Mr. Sohi questioned whether the importation of large amounts of fill onto the respondent farm and modifications being made to the farm were legitimate farming operations. Consequently, the first question the panel must determine is whether the respondent operates a farm business and if the modifications being made to build a cranberry operation as Mr. Malenstyn claims, is a farm operation that is being conducted as part of the farm business.
83. A "**farm business**" is defined under the *Act* 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." A "**farm operation**" is defined under the *Act* (in part) as follows:

Any of the following activities involved in carrying on a farm business:

- (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...

84. The panel adopts the approach set out in *Hanson v Asquini* (BCFIRB, October 31, 2003) at p. 4 as follows:

In determining whether a person is carrying out a “farm business” a number of factors can be considered (this list is neither exhaustive nor exclusive, and not all factors are necessarily of equal weight):

- a) What is the location and magnitude of the farming operation in comparison to other operations producing similar agricultural products?
- b) Does the farm operation operate or intend to operate on the basis of generating income or profit?
- c) Do the farm operation’s plans clearly contemplate future commercial activities and is income anticipated as a result of defined development plans (such as plantings that may not be productive for several years)?
- d) Does the farm qualify for a farm tax credit under the Income Tax Act?
- e) Does the farm hold licences related to agricultural or aquacultural activities?
- f) Is the farm a farm education or farm research institution?

The *Canadian Oxford Dictionary* (1998) defines “business” amongst other things as “one’s regular occupation, profession or trade”. *Black’s Law Dictionary* (7th edition, 1999) defines “business” as: “(a) commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”.

Implicit in the definition of “business” as it is used in the *Act* is some aspect of an agricultural undertaking carried out for the purposes of generating income or profit (except perhaps in the special case of farm education and research institutions which, for obvious reasons, have also been given the *Act*’s protections). Thus, as a bare minimum, in order to establish that a farmer has a “farm business”, there should be documentation supporting revenue or an intention to generate income from recognised farming operations or activities.

85. Counsel for Mr. Sohi submits that the respondent has brought in 160,000 cubic yards of untested fill and made modifications to his farm property “under the guise of building a cranberry farm.” Alternatively, he submits that the respondent’s construction of a raised cranberry operation is “an abnormal farm practice” and that he should be ordered to cease his activities.

86. The panel notes at the outset that neither party provided any financial information about their respective business activities. Nevertheless, the panel finds that there is sufficient evidence to conclude that Mr. Malenstyn operated a *farm business* in 2011 and 2012. The panel finds that in 2011 and 2012, Mr. Malenstyn leased a 20 acre parcel of the respondent’s farm land to a vegetable farmer and in 2012 he also had a sharecropping agreement with another farmer to grow corn for silage on another 40 acre parcel of the

respondent farm. In addition, the panel finds that in each of those years Mr. Malenstyn grew a cover crop for which he received compensation from the Delta Farmland and Wildlife Trust. The panel also finds that the chicken manure pile, which is the subject of Mr. Sohi's odour complaint, was used to fertilize the fields used for these crops.

87. The definition of a "farm operation" (reproduced in part above) states that clearing and cultivating land are agricultural activities and *Hanson v Asquini* indicates that the development of a farm operation where crops may not be productive for several years is a relevant factor to consider when determining if the operation qualifies as a farm business. In *Deverell v. Morning Bay Vineyard and Estate Winery* [BCFIRB, October 25, 2007 at p. 10], a panel also found that the definition of a farm operation "was sufficiently broad to encompass the development of a vineyard..." As a result, the panel finds that a "farm operation" includes the development of farm land for future crop production provided that it is for an agricultural purpose. Consequently, the panel must now determine whether the modifications Mr. Malenstyn has made to the respondent farm for the purported reason of developing a cranberry operation constitute a "farm operation" as part of his farm business.
88. Mr. Sohi testified that Mr. Malenstyn said he was making a lucrative income by accepting untested fill and that his plan to grow cranberries was simply to appease officials at the ALC. Counsel for Mr. Sohi submits that Mr. Malenstyn did not have a *bona fide* intention to build a commercial cranberry operation which is indicated by him not doing anything with the 160,000 cubic yards of fill that had been deposited on his property until the ALC issued a stop work order in December 2010 and by him continuing to accept untested fill for a further 9 months thereafter.
89. Counsel for Mr. Sohi submits that it does not stand to reason that Mr. Malenstyn claims the operation will require a \$3 million investment yet he has no written business plan, his hand-drawn site plan of the proposed operation has no dimensions or elevations, he has not tested the imported fill for suitability for fields, dykes or a reservoir and he has not hired any professionals to examine potential drainage impacts on surrounding properties from the fill or to have professionals prepare an irrigation and drainage plan. Counsel also submits that according to industry specialists such as Mr. Mauza, raised cranberry fields are rare and there was no practical reason for Mr. Malenstyn to raise them. Counsel further submits that Mr. Malenstyn has no production quota with the BC Cranberry Marketing Commission and has not applied for membership with a handling agency such as Ocean Spray.
90. In her report, [the KP] relies on an excerpt from a Prince Edward Island Ministry of Agriculture and Forestry fact sheet dated January 1999 which states (in part) as follows:

The construction of a commercial cranberry bog requires a professional engineered plan, careful selection of materials an experienced contractor and the proper equipment.

The panel gives this document little weight for the following reasons. The identity and qualifications of the author of the document are not indicated and nowhere in the document does it refer to the reason why a professional engineered plan is required. Furthermore, the panel notes that in her report, [the KP] has referred to a more recent and comprehensive publication on cranberry farming from the Michigan Department of Agriculture dated January 2013 and entitled, “Generally Accepted Agricultural and Management Practices for Cranberry Production.” That document includes a section on Design and Construction of Cranberry Farm Operations which states “that technical assistance [on most aspects of design and construction for erosion and sedimentation control] *may* be obtained from conservation offices, professional engineering firms or technical service providers.”

91. The panel also notes that a further publication referenced by [the KP] from the Oregon State University (2002), entitled “Cranberry Production in the Pacific Northwest” is a comprehensive guide to the development of a commercial cranberry operation in British Columbia, Washington and Oregon. Nowhere in that document does the panel find reference to a requirement to have a professionally engineered plan.
92. The panel is mindful of [the KP]’s evidence that sometime after 2010, the Corporation of Delta required a permit to accept fill and that a condition of the permit was that the applicant have a drainage plan. However, the panel notes that the required drainage plan does not necessarily have to be from an engineer; according to the KP Report, “an Engineer’s report *may* be required.” Consequently, the panel concludes that while a professional engineering and drainage plan may be advisable given the size of the investment, the panel cannot conclude that the development of a commercial cranberry bog requires a professionally engineered plan.
93. Mr. Malenstyn submits that it was unnecessary for him to retain experts because he already knew how to build dykes and he obtained much of his information about how to build his cranberry operation from the City of Delta, other growers, nurseries and staff at Ocean Spray. Nevertheless, he testified that he had an Agrologist report prepared for the ALC to demonstrate to them that the reason he needed to import large amounts of fill was for flood proofing and that the fields need to be raised higher than other cranberry operations due to the farm’s much lower elevation. Mr. Malenstyn also submits that the fields were raised with a view to “long term sustainable farming.”
94. Mr. Malenstyn submits that he has a bona fide intention to develop a cranberry operation on the farm property. He testified that his plan is to develop 2-three acre fields and 3-twenty acre fields for cranberries (for a total of 66 acres) with dykes surrounding each of these fields, as well as a main haul dyke and a 2.5 acre water reservoir. He testified that he hired Dion Anger in February of March of 2011 to assist him and that by the end of 2012, he had raised the 2-three acre fields, had put irrigation lines in one of them, had dug out the water reservoir (although it is not completed) and had put in a road where the main haul dyke will be located. He also testified that he has invested a significant amount of money purchasing cranberry vines in 2011, 2012 and 2013 and in his video of the KP visit also refers to purchasing heavy equipment to construct the operation.

95. Mr. Malenstyn admits that he cannot complete the cranberry operation without importing substantially more fill and his Agrologist report indicates that as of June 2011, he had imported 22% of the fill needed to build the raised fields and dykes to his specifications. He also admits that he has not applied for quota with the BC Cranberry Marketing Commission but testified that he could not get quota until he planted and that Ocean Spray is not currently accepting new members.
96. The panel finds that there is little evidence to conclude that Mr. Malenstyn had an intention to develop a cranberry operation until 2011. The panel notes from the 2010 City of Delta aerial map of the respondent farm property that there are loads of fill deposited on the property but little development had yet taken place (only preload for the reservoir and the start of field #2) and that a formal farm plan had not been provided. However, the panel finds that there was evidence as of 2011 that Mr. Malenstyn was taking steps to convert the farm into a cranberry operation; he purchased heavy equipment and hired an equipment operator, he began moving the dirt to raise some fields and build some dykes and purchased cranberry vines to plant. The panel also finds that by 2012, Mr. Malenstyn had substantially completed two 3 acre fields with dykes around them and had dug out the reservoir. Given the steps taken by Mr. Malenstyn in 2011 and 2012, the panel concludes that as of 2011, he had a bona fide intention to convert the farm to a cranberry operation in anticipation of generating future income from it.
97. Consequently, the panel finds that the development of the cranberry operation on the respondent farm is a farm operation conducted as part of a farm business. As a result, the panel must now determine if the disturbances complained of by Mr. Sohi are the result of the farm's operations and if they are, if they are the result of normal farm practices.

### ***Step 2: Standing***

98. Section 3 also requires a complainant to establish that he or she is ***aggrieved by a disturbance*** [emphasis added] that results from a farm operation conducted as part of a farm business. The complainant, Mr. Sohi, alleges that in 2011 and 2012 he was aggrieved by dust and flooding as a result of modifications made to the respondent's property and also by odours from his management of a chicken manure pile. With respect to the issue of dust, the panel would note that the complaint does not allege that the dust disturbance is the result of the magnitude of the fill operation but instead the result of the movement of fill around the property.

### ***Flooding***

99. Mr. Sohi testified that in 2005, he laser levelled his property and brought in fill to raise the western portion (or lowest lying) area of his property but that he started experiencing flooding in this area for the first time in 2011 after fill was imported onto the respondent farm. He admitted, however, that the western portion of his property remains lower than other areas on his property. He said he has observed water running off the respondent farm as well as percolating under it into the drainage ditches. [The KP] said she observed

areas of standing water between the rows of blueberries in the western portion of Mr. Sohi's field during her site visit on February 25, 2013 but she could not determine where it had come from.

100. Mr. Malenstyn and a number of his witnesses gave evidence that the Sohi property was historically subject to flooding as was the respondent farm and two neighbouring farms because they are the lowest lying properties in the area (having an elevation between sea level and 0.5 metres below sea level in some spots) and that they typically received run-off in the winter months from higher elevations such as Burns Bog. Mr. Malenstyn submitted that the Sohi property was not level and noted that in 2010, Mr. Sohi had raised the building site for his new home by more than 2.9 meters and suggested that this is causing or contributing to water draining to lower areas on the Sohi property. He also suggested that Mr. Sohi's practice of driving a tractor in the fields in the wet months of the year when the ground was wet and soft, left deep ruts in the soil which then collected water. Mr. Malenstyn further testified that he observed a filled drainage ditch and standing water on Mr. Sohi's fields and submitted that this indicated to him that the Big O pipes used for draining the fields were failing.
101. Mr. Mauza testified that he knew of other cranberry operations where the addition of soil material displaced or interrupted the natural flow of water (see paragraph 36 above) and that in this case, it would be necessary to obtain an opinion of a hydrologist to for a reliable conclusion. The panel also finds that as a matter of common sense a large volume of fill could affect the movement of ground and or surface water. However, in this case, given the contradictory evidence of the parties and the absence of any reliable, corroborating evidence from the complainant, the panel cannot conclude that flooding or standing water on the Sohi property is the result of modifications made to the respondent farm.
102. The panel notes that the flooding complained of by Mr. Sohi in the winter months of 2011 and 2012 was in the lowest lying portion of the Sohi property. Mr. Sohi denied any knowledge of this area having been historically subject to flooding, however the panel finds that the evidence submitted by the Respondent clearly shows that this was the case and the panel concludes that this probably was the reason for Mr. Sohi bringing in fill to raise that area in 2005. Consequently, the panel concludes that western portion of the Sohi property that experienced flooding or standing water in the winter of 2011 and 2012 was the same area that was historically subject to flooding.
103. In any event, Mr. Sohi alleges that once the western section of the property was raised in 2005, he had no problem with flooding until 2011, after Mr. Malenstyn started depositing fill. However, the panel is also mindful that in 2010 Mr. Sohi also brought in fill in order to raise his new home site in excess of 2.9 meters and that this modification could have affected the drainage on his property.
104. The panel is also mindful that with the exception of photographs showing areas of standing water on the Sohi's fields during the KP site visit on February 25, 2013, there is no photographic evidence of flooding or areas of standing water on the Sohi property in

2011 or 2012. In fact the only evidence of areas of standing water on the Sohi property during that period of time, as the respondent pointed out, is water that has apparently collected in deep ruts left in the soil by the complainant's tractor tires in the winter months.

105. In summary, the panel prefers the evidence of Mr. Malenstyn and his witnesses that the western portion of the Sohi property has historically and continues to be subject to periodic flooding in winter months in part because it is in a low lying geographic area (being approximately at sea level). The panel also finds it significant that Mr. Sohi provided no corroborating evidence of flooding in 2011 and 2012 and that the only evidence of standing water is that which had collected in ruts, created by driving his tractor in the field during the wettest time of the year when the soil was soft.
106. Given the complainant's lack of evidence (including the absence of a hydrologist report) and the respondent's plausible explanations for seasonal flooding and standing water on the Sohi property, the panel is unable to conclude that the modifications on the respondent's farm are the cause of the alleged flooding on the Sohi property in the winter months and accordingly that complaint is dismissed.

#### *Dust*

107. Mr. Sohi also testified that he, members of his family and his workers were disturbed by large amounts of dust that blew up in the air when Mr. Malenstyn or his employees moved the piles of imported fill around on the property. For clarification, the panel notes that [the KP]'s Report states that "Mr. Sohi's complaint does not relate to dust from vehicle movement on the main haul dyke." However, the panel finds that this statement is inaccurate. The case management conference report dated October 30, 2012 and Pre-Hearing Conference Report dated April 18, 2013 both indicate that Mr. Sohi alleges that "dust is a result of fill brought in on the farm and moving fill around the farm without a farm purpose." Mr. Malenstyn also testified that [the KP] was in error when she referred to the main haul dyke. He said although the area she referred to is the location where the main haul dyke will be built, it has not yet been constructed and all that exists in that location right now is the new road at the northeast corner of the property where trucks brought in fill.
108. Mr. Sohi testified that in 2011 and 2012 the dust from the fill operation affected 35 acres of his blueberry crop and heavily coated those plants closest to the fill operation rendering them unsuitable for sale as fresh produce. He also gave evidence that the dust created health problems for two of his family members and disturbed contractors working on his new residence in the southeast corner of his property. Mr. Malenstyn testified that there was little evidence that dust from his fill activities blew onto Mr. Sohi's blueberry crops and he submitted that Mr. Sohi created that dust himself through his farming practices. Mr. Malenstyn also submitted that even if there was dust on the berries, Mr. Sohi had provided no evidence that he suffered financial loss as a result.



109. The panel finds that the movement of fill on the respondent farm in dry conditions generated significant amounts of dust and given that the prevailing winds blow in a northerly direction, the dust would have moved onto the Sohi property. The panel accepts the evidence of Mr. Sohi and his witnesses that the dust disturbed him and his family members. The panel notes that the roadway at the northeast entrance of the respondent farm was where fill was brought onto the site and later moved to the back field. Consequently the panel finds it reasonable to conclude that dust from moving the fill around would have blown toward some of the blueberries in close proximity to the fill operations. Although Mr. Malenstyn submitted that other farming activities to the west of the Sohi farm created dust and that Mr. Sohi's practice of driving along the perimeter and main row of his fields with a mower and other vehicles also created dust, the panel notes that these were not the problem areas that Mr. Sohi identified. While there was insufficient evidence to conclude that Mr. Sohi lost income as a result of dust on the berries, the panel does accept his testimony that his U-Pick customers would not want to pick dusty berries and that such berries would likely not have been marketable as fresh fruit. The panel finds that the respondent's activities would likely have been a contributing factor to this occurrence. Consequently, the panel finds that Mr. Sohi is aggrieved by dust because he and his family members were personally disturbed by it and that it negatively impacted the marketing of his berries as fresh fruit.

### ***Manure – Odour and Dust***

110. Mr. Sohi also alleged that in 2011 and 2012 he, his family and workers on the farm were disturbed by odours and dust from a chicken manure pile that Mr. Malenstyn had moved in close proximity to the property line and directly across from the Sohi's new home. Mr. Sohi and his witnesses testified that when Mr. Malenstyn turned the manure pile, it released strong, nauseating odours that interfered with contractors building the new home. Mr. Malenstyn and his witnesses testified that the odours from the manure pile did not interfere with their ability to work, that the smell was normal and that Mr. Sohi had a horse manure pile on his farm. Given the close proximity of the chicken manure pile to the property line and given that the prevailing winds would have blown odours from it in the direction of the Sohi's new home, the panel finds that Mr. Sohi and his family were aggrieved by odours from the respondent's manure management practices.
111. Having found that the complainant, Mr. Sohi, is aggrieved of dust and odours, the panel must now determine if those disturbances are the result of normal farm practices or not.

### ***Step 3: Normal Farm Practice***

112. 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).

113. 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. (4<sup>th</sup>) 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 farm.
114. The respondent submits that the low lying elevation of the farm site is a factor that requires him to import large quantities of fill in order to raise the proposed cranberry fields and dykes higher than other cranberry operations. The complainant submits that there is nothing specific to the farm site that would justify a departure from proper and accepted standards and accordingly he argues that the volume of fill the respondent has imported and proposes to import is unjustified.
115. On this point, the panel observes that our task is not to consider whether every aspect of the respondent farm is consistent with normal farm practice; that is to say, we are not conducting an audit into the farm practices of the respondent. Rather we are constrained by the Notice of Complaint and the alleged disturbances that arise out of the complained of farm practices. In this case, the complaint is not the proposed design of the cranberry operation or even the magnitude of the fill operation. Rather it is a complaint about the depositing and movement of fill in 2011 and 2012.
116. In the KP report, [the KP] states that she “...assume[s] that the amount of dust potentially created on the Malenstyn property is related to the volume, type and handling practices of the soil fill materials brought onto the property” but admits that she did not know the type or volume of fill that had been deposited. The panel gives this opinion little weight because it is an assumption unsupported by any factual basis.
117. The panel agrees that the importation of fill over a period of two years could affect the frequency of the dust disturbance however the panel finds that it was not the total volume of the fill that was deposited on the farm but rather the handling of the fill that caused the dust and which is the subject matter of this complaint. While the panel heard from Mr. Mauza that he could not think of any reason why the respondent would need to raise his fields to the extent that he was, Mr. Malenstyn was clear that his intention to raise the fields to 1.8 metres and dykes to 2.9 metres above sea level is necessary for the long term sustainability of his farm, requiring a significant volume of fill. The panel finds that there is insufficient evidence upon which it could determine if the type and volume of fill imported onto the respondent farm at the time of the complaint met, exceeded or fell

short of what would be required to accord with dyke and field elevations on other cranberry farms.

118. In considering the complaint in respect of manure management, the panel finds that the type of manure, the close proximity of the manure handling and storage operations to the respondent's property line, the location of the Sohi's new home and the direction of the prevailing winds are all relevant contextual factors that could modify what constitutes normal farm practice for the respondent farm.

***Dust:***

119. In her report, [the KP] refers to a Michigan Department of Agriculture (2013) publication which recommends that cranberry farms should "control soil erosion and sedimentation during construction. Blowing wind and dust erosion can be reduced by sprinkling water on dry soil or sand". Consequently, she recommended that under dry climatic conditions, and especially during the Sohi's berry harvest season, Mr. Malenstyn should sprinkle existing fill piles before moving any more of the fill that has already been deposited.
120. The panel finds that farming activities can reasonably be expected to generate some dust but that what is an acceptable amount will often depend on the amount of dust, the frequency and duration, and intensity of the disturbance and its proximity to or interference with others such as neighbours, as also noted in a BC Ministry of Agriculture fact sheet on dust.<sup>2</sup>
121. In her report, [the KP] stated that Mr. Malenstyn advised her that other than ground asphalt in the area of the future main haul dyke, he has not used any dust suppression practices. In his testimony, Mr. Malenstyn disputed making these comments, however, in the video of the KP's visit entered into evidence by Mr. Malenstyn, he does in fact state that he believed his moving of the fill was for an agricultural purpose and stated emphatically that he was not going to do it [i.e. water down the dry fill] at his expense, but that he probably would if Mr. Sohi was a good neighbour.
122. The complainant's witness, Mr. Calvert, testified that in his experience working on farms it was usual practice to water down fill before moving it to suppress the dust. The panel accepts the evidence of [the KP] as well as Mr. Calvert that it is normal farm practice to try to mitigate excessive amounts of dust by sprinkling water over fill piles or dirt prior to handling or driving on it.
123. Given the close proximity of the fill site on the respondent farm to the Sohi's fields and residence and given that the prevailing winds blow in that direction, the panel finds that it was all the more incumbent on the respondent to mitigate dust by watering down the roadway and sprinkling the fill piles with water prior to moving or handling them during the dry times of the year. The panel finds that over 2011 and 2012, thousands of loads of fill (i.e. 160,000 cubic yards) were delivered to the respondent farm's northeast entrance

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<sup>2</sup> B.C. Ministry of Agriculture Publication No. 870.218-62. [Farm Nuisance: Dust](#). January 2004

and then moved to and spread on other areas of the property. The panel finds that the respondent failed to take adequate measures to suppress dust in the dry times of the year which resulted in large amounts of dust blowing onto the Sohi property. The panel finds that Mr. Malenstyn's failure to water down the fill piles prior to handling them or to water down the roadway prior to driving on it did not accord with normal farm practice.

***Odours:***

124. Mr. Malenstyn testified that in 2006 the manure pile was located 190 feet from his north property line and that at the end of 2010 he started a new chicken manure pile 24 meters (or 78 feet) from the property line to make it easier to move it into the fields. Mr. Malenstyn submits that section 7(1) of the Code of Agricultural Practice for Waste Management requires a manure storage facility to be set back 15 meters from a water course and that this represents normal farm practice. Consequently, he also submits that in 2011 and 2012 the manure pile was located more than 15 meters from the ditch and therefore accorded with normal farm practice. He also testified that the chicken manure must be turned to aerate it for composting before it is applied to fields used for ground crops and as a result he also submits that his chicken manure handling practices accord with normal farm practice.
125. Counsel for Mr. Sohi submits that the aerial photographs of the property corroborate Mr. Sohi's testimony that prior to the end of 2010, the manure pile was located closer to Mr. Malenstyn's barn which is much further than 190 feet from his north property line. Mr. Sohi testified that in late 2010 and throughout 2011 and 2012, the manure pile was located approximately 70 to 75 feet (or 22 metres) from his new residence. Mr. Sohi also submitted that the manure pile was not being used for a farm purpose.
126. The KP testified that in August 2012, the manure pile was located on the corner of Field #2 and she believed it was less than 15 metres from the ditch because it was located on one side of the main haul dyke (or roadway which is 6 metres wide) and the irrigation ditch separating the parties' properties is located on the other side, however she admitted that she had not measured the distance. The KP also testified that the location of the manure pile did not meet section 8(2) of the Code of Agricultural Practice for Waste Management which requires a 30 metre setback from any watercourse for field storage of manure. Mr. Mauza testified that it was not usual and accepted practice for cranberry growers to locate a manure storage facility in a cranberry field due to the risk of bacterial contamination from the manure. Consequently, [the KP] concluded that the location of the manure pile in 2011 and 2012 did not accord with normal farm practices and she recommended that the manure pile be moved away from the north property line and not within the cranberry fields. The KP also testified that the Ministry of Agriculture recommends that solid manure be stored out of view of one's neighbours and that it be handled as much as possible when neighbours are not home.
127. The panel finds that the chicken manure pile was used for a farm purpose. The panel accepts the evidence of Mr. Malenstyn that he applied it to the fields on the farm that were leased out to a vegetable farmer and to a neighbour to grow corn. The Code of

Agricultural Practice for Waste Management requires manure storage structures to be located 15 meters from a watercourse and that a manure pile in a field be located 30 meters from a watercourse. In this case, the panel finds that the respondent's manure pile was located in Field #2 and therefore is properly characterized as "field storage" under the Code and therefore normal farm practice required that the manure pile be located at least 30 metres from the irrigation ditch.

128. However, the panel also finds that there are contextual factors that warrant a modification of normal farm practice for this farm. The panel accepts the evidence of the parties that the smell of raw and partially composted chicken manure is extremely strong, especially when turned. Consequently, the panel also accepts the Ministry of Agriculture recommendations that when locating a chicken manure pile a farmer should consider such factors as the proximity of any neighbouring residences and the prevailing winds. The panel also accepts the evidence of Mr. Mauza and finds that it is not normal farm practice for cranberry farmers to store manure in a cranberry field due to the risk of crop contamination.
129. Given that the prevailing winds blow from the southwest to the northeast (or directly in the direction of the new Sohi residence) and given that the Sohi residence is located very close to the property line, the panel finds that it is not consistent with normal farm practice for the respondent farm to locate the manure pile on the northeast corner of the farm. The panel also finds that given Field #2 is intended for cranberry crop production, it is not consistent with normal farm practice for the respondent farm to store manure in that field. Consequently, the panel finds that normal farm practice for this farm requires that the manure pile be located at or near its previous location near the respondent's existing farm buildings – i.e. where it was prior to being moved in late 2010.
130. The panel finds that in late 2010, Mr. Malenstyn moved the location of a chicken manure pile to the northeast corner of the farm very close to the north property line (where the irrigation ditch separates his and the Sohi properties) and within approximately 75 feet of the new Sohi home which was then (and is still now) under construction (and which is also in close proximity to the Sohi's current residence). The panel finds that the relocation of the chicken manure pile to this location did not accord with normal farm practices because it was too close to a watercourse and the neighbouring residence, located in the direct path of the prevailing wind and because it was located in a field to be used for cranberry crop production.
131. The panel was also asked to consider if Mr. Malenstyn's practice of turning the chicken manure pile accords with normal farm practice. The panel finds that it is normal farm practice to turn a chicken manure pile in order to aerate it and thereby facilitate the composting process and that odours and dust are a normal result of that activity. The panel also finds that the odours and dust released by the turning of the manure pile only became a nuisance to Mr. Sohi due to the location of the manure pile and handling activities. Given that Mr. Malenstyn will have to relocate the manure pile to an area on the farm much further away from the north property line, the panel finds that this should significantly reduce any impacts on Mr. Sohi from the dust and odours released from

turning the manure pile. Even with the manure pile located further away, however, consideration for neighbours must still be taken into account when moving, spreading or handling manure.

## ORDERS

132. Having found that the respondent farm's fill handling and manure management practices did not accord with normal farm practices, the panel orders the farm to modify its practices as follows:
- (a) In dry conditions, before moving imported fill or driving on the dirt road on the farm, the farm must apply water to the piles of fill and roadways in order to suppress the dust created by those activities; and
  - (b) The farm must move the manure pile from its location in the northeast area of the farm property and return it to an area near the existing farm buildings where it had been, or to another location provided that it is the same distance away from the parties' common property line (as the respondent's farm buildings) and not subject to the prevailing winds.

Dated at Victoria, British Columbia this 6<sup>th</sup> day of February, 2014

### BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



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Carrie H. Manarin, Presiding Member



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Andreas Dolberg, Member



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Corey Van't Haaff, Member