

IN THE MATTER OF
THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996 C. 131
AND IN THE MATTER OF TWO COMPLAINTS REGARDING DISTURBANCES
GENERATED BY A SHELLFISH FARM IN CORTES ISLAND, BRITISH COLUMBIA

BETWEEN:

BRIAN HAYDEN

VERN KEMP AND MARY KEMP

COMPLAINANTS

AND:

ISLAND SEA FARMS INC.

RESPONDENT

AND:

**BC SHELLFISH GROWERS' ASSOCIATION
KLAHOOSE FIRST NATIONS**

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board:

Peter Donkers, Chair and Presiding Member
Al Sakalauskas, Vice-chair

For the Complainants:

Brian Hayden, self-represented
Vern and Mary Kemp, self-represented

For the Respondent:

Paul Simpson, Island Sea Farms President

For the Interveners:
BC Shellfish Growers' Association

Darlene Winterburn, Executive Director

Klahoose First Nations

Kathy Francis, Treaty Negotiator
Paul Muskee, Chief

Date of Hearing:

January 22 – 25, 2019

Place of Hearing

Campbell River, BC

A. INTRODUCTION

1. This decision relates to two separate complaints filed under section 3 of the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 (*FPPA*).
2. The first complainant, Brian Hayden, resides on an 8 acre property with approximately 600 feet of shoreline waterfront on Gorge Harbour, Cortes Island. His property is located about 150 metres from, and about 25 metres higher than, shellfish harvesting rafts operated by the respondent, Island Sea Farms Inc. (ISF). Prior to purchasing his property, Mr. Hayden was aware of a pre-existing shellfish operation and harvesting rafts in front of his property.
3. In brief, Mr. Hayden identifies two sources of excessive noise from ISF's farm practices, the harvesting machinery, including generators to supply power, and boat traffic. Mr. Hayden's complaint also includes odour from bags of shellfish netting, shoreline debris including plastic, styrofoam, and string and harassment of waterfowl. He says the manner in which ISF operates is inconsistent with the Strathcona Regional District (Regional District) zoning bylaws "developed precisely to avoid the siting of incompatible activities next to each other that may result in conflicts".
4. The second complainants, Vern and Mary Kemp, reside part-time on Gorge Harbour on their 42 foot cruiser which they keep tied to their dock when on-site. During their 8 weeks on Cortes Island each year, the Kemps spend about 2/3 of their time cruising and 1/3 of their time "on dock". They also have a pre-fabricated cottage for visiting family and guests. They are approximately 470 metres from the primary ISF site (Fulton). ISF boats travelling to and from Fulton pass within 200 to 300 metres of their property. Ring Island, the largest ISF lease in Gorge Harbour, is located 467 metres from the Kemps' property. ISF's other sites are 700 metres, 2000 metres (Bee Islets) and 1100 metres (Stove Islets) respectively.
5. In brief, the Kemps argue that the ISF operations in Gorge Harbour interfere with their peaceful enjoyment of their property due to the noise created by the mechanized machinery at the 3 leases located closest to them. In addition to the noise of the machinery, the frequent boat traffic needed to service ISF's five sites results in constant noise and boat wakes, and the predator netting bags and harvesting machinery located on the rafts take away from the visual enjoyment of their property. These issues coupled with the natural "amphitheatre" of Gorge Harbour results in "machinery noise that carries and carries and carries".
6. The respondent, ISF, is a licensed shellfish aquaculture company that grows blue mussels. The company was founded in 1996 and owns and operates a shellfish hatchery on Saltspring Island and has Crown land tenures in Gorge Harbour and Read Island. ISF also works with other tenure holders such as the Klahoose First Nation to produce mussels through partnership agreements. As a result of these and additional business arrangements, ISF is responsible for carrying out much of the mussel operations in Gorge Harbour. ISF takes the position that it operates according to proper and accepted

customs and standards as established and followed by similar farm businesses under similar circumstances.

7. BCFIRB retained Ministry of Agriculture, Aquaculture and Seafood Industry Specialist, Myron Roth, Ph.D., P.Ag. as a Knowledgeable Person (KP) under section 4 of the *FPPA* to prepare a report. He also testified at the hearing.
8. The BC Shellfish Growers' Association (BCSGA) was given full intervener status in these proceedings. Its position is that ISF's farm operations are conducted in a manner consistent with accepted industry practice in the province.
9. The Klahoose First Nation (KFN) was also given intervenor status. It provided oral testimony and a written summation. In their view, "ISF has proven that they are indeed carrying out "normal farm practices" and have also proven that they have gone over and above their obligation under the ... Act to work with the area residents in an attempt to address noise and boat wake concerns in the Gorge."
10. The panel conducted a site visit of the complainants' properties and the respondent's shellfish farm operation on January 21, 2019. The complaints were heard in Campbell River on January 22 - 25, 2019. Closing arguments were made in writing with the final submission being received February 22, 2019.

B. ISSUE

11. Is the noise from the machinery, boat traffic (speed and frequency/number), odour from bags of netting, debris (plastic, styrofoam and string) on the shoreline, and the harassing of waterfowl generated from/by the respondent's farm in accordance with normal farm practice?

C. PRELIMINARY ISSUE

12. Despite being advised, both in advance of and during the hearing, that BCFIRB does not have the authority to enforce standards set by other governmental agencies, the complainants persisted in raising issues related to current and historical non-compliance with zoning requirements, the Regional District bylaws, and the Official Community Plan (OCP) for Cortes Island. They challenged the proper interpretation of those bylaws and what constitutes permissible farm/industrial practices within the OCP, in the hearing and in closing arguments. Many of the documents upon which the complainants' sought to rely was correspondence with various government officials about the proper interpretation of bylaws and the OCP. Mr. Hayden also tendered two written submissions from a previous regional district director offering up an opinion as to the spirit and intent of the zoning bylaws, and the history of the dispute including the legal action initiated by the Regional District which stated in part:

I continue to view the expansion of shellfish farming to industrial proportions as a disregard against the "rural character" and the "quiet solitude" that was supposed to be enshrined in the Cortes OCP and bylaws. Industrialization is a development that the

Cortes community worked diligently to prevent. It has never been considered as "normal" farming practice on Cortes Island.

13. Given the fact that our efforts to clarify BCFIRB's jurisdiction on these complaints appear to have gone unheeded, we set our reasons for why compliance and enforcement of Regional District bylaws is not relevant to these complaints.
14. The *FPPA* offers protection to farmers in two distinct forums. Section 2 provides:

Normal farm practices protected

- 2 (1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,
 - (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and
 - (b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.
- (2) The requirements referred to in subsection (1) are that the farm operation must
 - (a) be conducted in accordance with normal farm practices,...and
 - (c) not be conducted in contravention of the Public Health Act, Integrated Pest Management Act, Environmental Management Act, the regulations under those Acts or any land use regulation.[emphasis added]

15. This section only applies to court proceedings and protects farmers from having their "normal farm practices" restrained by enforcement of certain local government bylaws, or private lawsuits claiming "nuisance" as a result of farm operations. In order to access protection under section 2, a farmer must demonstrate that the farm practices in dispute are not conducted in contravention of certain statutes (*Public Health Act, Integrated Pest Management Act, Environmental Management Act*, the regulations under those Acts or any land use regulation). To the extent that a zoning bylaw and an OCP can be considered land use regulation, a court would make its own findings on whether the farmer was in contravention of those regulations. Issues related to whether a particular bylaw applies to the farm operation or is consistent with the OCP would be relevant to the court's determination in a bylaw enforcement action, as would consideration of the meaning of terms used in that bylaw, like what activities constitute "processing".
16. The complainants testified about legal proceedings commenced by the Regional District against ISF for alleged bylaw infractions. Apparently this litigation was settled. There appears to be differing views about the Regional District's chances of success in this litigation but in any event, the Regional District entered into a mediated agreement with ISF. In this hearing, the complainants went so far as to challenge the legal opinions obtained by the Regional District in support of the legal actions taken against ISF.

17. The Kemps in their closing submission state at page 11:

This Director has sacrificed the...residents and business in Gorge Harbour for jobs and “food production”. She encouraged non enforcement of the bylaws without changing them. The landowners suffer greatly by this approach to the SRD legal initiative and the lack of will to enforce their bylaws. The SRD is legally bound to enforce but have chosen not to do so.

18. Mr. Hayden in his closing submission stated at page 13:

Despite what many Gorge residents feel has been a "sell-out" of their interests by the current Regional Director for Cortes, Gorge residents are still fighting to preserve what has historically been the normal rural nature of their island including the aquaculture farming that takes place on its shores and waters as well as the exploitation of its lands. They have opposed industrial-scale clear cutting by off-island large corporations, and we are opposing the ruining of our island and its lifestyle by the intrusion of large-scale shellfish operations with its industrial machinery.

19. Clearly, the complainants are unhappy that the Regional District did not pursue its litigation against ISF and now view BCFIRB’s complaint process as a second kick at the can which will allow them to right this wrong. This approach is misguided and, in our view, an abuse of process.

20. BCFIRB’s jurisdiction to hear complaints is set out in section 3 of the *Act*:

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

21. Section 2 is not part of our narrow and specialised mandate of determining “normal farm practice” which allows neighbours adversely affected by farmers who are farming other than in accordance with normal farm practice to obtain a remedy from BCFIRB. BCFIRB has no jurisdiction to make findings regarding alleged breaches of the *Public Health Act*, *Integrated Pest Management Act*, *Environmental Management Act*, the regulations under those Acts or any land use regulation. Quite simply, BCFIRB cannot enforce the statutory jurisdictions of other government agencies.

22. This approach is consistent with previous decisions of this board. See for example *Eason v Outlander Farms* (December 3, 1999), where the then Farm Practices Board stated:

Finally, there were times during our hearing when it appeared as if the Panel was being asked to exercise jurisdiction over what might generally be called “pollution”. The *Waste Management Act*, administered in this area by the GVRD, is the statute that governs the discharge of “waste” in this Province. Issues of compliance with that *Act* are for other agencies to determine. Neither Complainants, farmers nor *Waste Management Act* decision makers themselves should assume that our decisions are in any way based on the

Waste Management Act or that the nature or timing of decisions under that statute should depend on the outcome of our decisions.

C. KNOWLEDGEABLE PERSON (Myron Roth, Ph.D., P.Ag.)

23. Dr. Roth is an industry specialist in aquaculture and seafood within the Ministry of Agriculture. He has more than 30 years of experience working in aquaculture with different species and in different countries, primarily in the areas of fish health management and biotechnology, genetics, hatchery, production modelling, and shellfish aquaculture. After conducting a site visit of the ISF operations and the Gorge Harbour neighbourhood on March 27, 2018, he prepared his report.
24. The report summarized the complaints as follows:
 1. Noise from Island Sea Farms Inc. (ISF) machinery is too loud, persists over long periods of time and takes places during weekends, evenings and holidays. The noise from site operations is particularly severe from the “Ring Island” site ... which is a crown land tenure held by the Klahoose First Nation but farmed by ISF under an agreement with the Klahoose First Nation.
 2. The number of boats operating and the excessive speeds they travel causes both noise and wear and tear on docks and floats as well as disrupting boats moored to the complainant’s dock when occupied during summer visits. Boat traffic is particularly severe at the “Fulton” site ...where operations are based.
 3. Farming operations result in debris collecting on beaches, which includes plastic, Styrofoam and string; and
 4. Harassment of water fowl, by chasing them with boats, contributing to #2.
 5. The complaints assert that the respondent has made no effective concessions to alleviate noise resulting from farm operations.
25. The report reviewed the global, national and provincial shellfish industries. Globally, the total volume grown in 2016 was 2.0 million metric tonnes (MT), with a landed value of \$3.8 billion (USD) grown primarily in China, Chile and Spain. Canada ranked 8th in value (\$28.4 million USD) and 10th in volume (24,584 MT). Nationally, Canada produced 24,584 MT of mussels with a value of \$37.7 million with the bulk of that production on the east coast. BC is fourth in volume of production and second in value. Provincially, there are nine licensed mussel producers harvesting 545 MT; of these nine producers, only three farm mussels in Gorge Harbour. However, this production represents the majority (more than 80%) of BC’s mussel production.
26. Farming of mussels involves 4 basic steps, collection or production of seed, grow out, harvesting and processing. The report reviewed the farm practices at the Gorge Harbour site (page 18-23). This includes setting out seed on thin natural fibre rope at a receiving site starting in September and continuing until June. After an acclimation period, the rope is fed into mesh socking material for transfer to a grow-out site using a portable motor (Honda pump) to power a winch. If weather is not too warm, the pump is placed inside a large insulated tote to dampen the noise. Sound measurements on site using an uncalibrated smart phone application recorded sound levels at 65 - 70 dB. The socks

remain suspended from rafts for several months. Transfer of socked mussels between sites requires boats, winches and portable motors.

27. After approximately 8 months, the socks are lifted out of the water and the mussels are removed using a de-clumping machine, sorted, re-socked, and placed back in the water. This is described as a best practice to control density, increase growth and provide a more uniform product for the market. Use of machinery reduces damage to the mussels, and increases farm yield and reduces waste. Depending on the site and oceanographic conditions, approximately 30% of the stock may be handled up to 2 times prior to harvest. The lines are very heavy (several hundred pounds) and a generator is used to power the equipment, which is on a barge and moved site-to-site.
28. Larger pieces of equipment require larger generators to drive the hydraulic power packs, larger winches and cranes. To address noise concerns, ISF has had custom sound dampening stainless steel boxes manufactured. In general, the noise comes from a hydraulic pump powered by a diesel generator. A second generator runs a relatively quiet water pump. Sound levels were recorded to be 73-76 dB. There was not much difference in the readings with doors of the boxes open or closed but the quality of the sound was different. Sound dampening enclosures for large generators are not typically used on shellfish farms due to the risk of overheating.
29. ISF has also made efforts to reduce noise at the site by replacing water pumps with variable speed direct current pumps which are more expensive but more energy efficient and quieter than traditional single speed alternate current pumps. At approximately 70 metres, the sound level was 56 - 63 dB decreasing to 40.2 - 50.5 dB at 200 metres.
30. Anywhere between 8 to 16 months later, mussels are harvested which consists of pulling lines up, de-clumping, de-byssing, size sorting and put into totes. Equipment is used to haul in the lines as they are at their heaviest. It is a difficult job for two staff and there are hundreds of lines. ISF keeps the harvesting equipment on a barge that moves site-to-site. Generally, shellfish farmers use a barge or place the equipment on a dedicated or purpose-built harvest boat.
31. ISF harvests mussels over approximately 44 weeks per year, twice per week, from approximately 9:00 am to 5:00 pm but going as late as 9:00 pm if there is a breakdown. The use of mechanization has increased farm scale and improved the quality of the product allowing ISF to keep pace with local and international market volume and quality demands. Harvesting stops in the spring when mussels spawn. As ISF has added the Read Island site, it suspends harvest in the late summer due to complaints, boat traffic in the harbour and the risk of contamination from waste water disposal from boats.
32. ISF holds five leases, four in Gorge Harbour and one on the south end of Read Island, and carries out operations on Crown land tenures held by the KFN and the Bee Islets Growers Cooperative. All sites grow mussels in socks suspended from rafts in deep water similar to deep water farming operations in Washington State, PEI and other

locations around the world. ISF's production is smaller scale than national (PEI) and international producers. In total, it operates 320 rafts, approximately 240 in Gorge Harbour and 60 at the Read Island site.

33. The KP Report concludes as follows (pages 38 – 39):

Following a review of ISF mussel grow out operations that included several site visits, the most recent with BCFIRB Staff on March 27, 2018, interviews with key staff personnel and a review of current mussel practices nationally and internationally, the author concludes that ISF mussel farming practices meet current standards of practice. Key findings that support this conclusion include the following.

1. The machinery used on the farm, and in particular Honda pumps, hydraulic power packs, winches, and cranes are standard equipment on mussel farms and, in fact, most shellfish farms in BC. While there are shellfish farms that farm without the use powered winches or portable engines in BC, these are exception rather than the rule.
2. While the equipment noted in (1) does make noise, it was not found to be unreasonable or unusual for an operating a shellfish farm. Further, ISF has made several attempts to reduce the noise, at significant cost to their business, through the acquisition of VSDC and sound dampening enclosures for generators. Based on the author's work as the Industry Specialist, Aquaculture & Seafood for the Ministry of Agriculture, which requires visiting shellfish farms around the province, such mediations/upgrades are not common as there is no regulatory requirement for them.
3. The global scale of the mussel industry is such that it supports a large industry the designs and supplies specialised handling equipment to de-clump, sort, de-byss and re-sock specifically for mussel farming. It would follow that once an operation reaches a certain size the economies of scale will dictate the use of automation, which reduces cost of production and improves quality.
4. It is difficult to compare the nature of the ISF mussel operation with other farmers in the Gorge, given that beach clam culture is the predominant shellfish aquaculture activity along with a limited amount of small scale oyster production. The small scale of these operations do not avail themselves to automation. However, when the operation is compared to sites of similar size, such as the larger Penn Cover Shellfish operation in the US or the smaller Taylor Shellfish operation in BC, the technology gaps close and farm practices are very similar.
5. Most farmers in the Gorge indicated that they are on the water daily for most days of the year, similar to ISF operations. Further, they need to (and do) operate outside normal working hours to deal with emergencies such as storm damage, which is not unusual in coastal waters.
6. Practices employed by ISF meet current best practice guidelines for predator control/management for waterfowl.

7. Farm practices related to styrofoam debris are considered a work in progress as the farm works with regulatory agencies and other farmers to replace and upgrade flotation for farm billets. This issue is pervasive throughout BC and it is noteworthy that ISF took a lead role in applying the recently announced FACTAP program to replace foam billets. Given that a large percentage of shellfish farms are in a similar situation, it might be suggested that ISF are operating within the norm of farm practice for maintaining the flotation equipment on shellfish farms in general – but have taken steps to correct deficiencies.
 8. Relative to other operators in the Gorge, ISF boat operations do not appear to be exceptional. In contrast, the increased recreational boat traffic during the summer appears to present a potentially larger set of issues and potential risks that have resulted in ISF adjusting their farm practices by moving harvest activities to their Read Island site to avoid the peak summer boat traffic.
34. Notwithstanding the conclusion that ISF meets current industry practices, the KP made three recommendations to “contribute to improved alignment of current ISF farm practices with current shellfish best practices” which included ISF updating its standard operating procedures, working with other growers and the BCSGA to update the BC Shellfish Aquaculture Environmental Management Code of Practice and working with other growers, the province and DFO to replace unwrapped/exposed styrofoam flotation as appropriate.

D. FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT

35. These complaints were filed pursuant to section 3(1) of the *FPPA*:
- 3 (1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.
36. When a person files a complaint under the *FPPA*, section 3 requires the complainant to demonstrate both that he is aggrieved by the complained of disturbance (which arises out of a farm operation, carried on by a farm business) and that the complained of practice is inconsistent with normal farm practice (proper and accepted customs and standards as established and followed by similar farms in similar circumstances).
37. If, after a hearing, the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, the complaint is dismissed. If the disturbance results from a practice that is not a normal farm practice, BCFIRB may order the farmer to cease or modify the practice.

Aquaculture

38. Unlike previous complaints before BCFIRB, this complaint arises out of an aquaculture operation. In the usual course, complaints to BCFIRB involve a farm operation being

conducted on land zoned for agriculture either through the provincial Agricultural Land Reserve or land zoned for agriculture by a local government.

39. An aquaculture complaint involves a consideration of the definition of “farm operation” which provides:

"farm operation" means any of the following activities involved in carrying on a farm business:

and includes

(h) prescribed types of aquaculture;

40. The Specialty Farm Operations Regulation enacted pursuant to the *FPPA* provides:

Aquaculture

2.1 The following types of aquaculture are prescribed for the purpose of paragraph (h) of the definition of "farm operation" in section 1 of the Act:

- (a) aquaculture and prescribed activities within the meaning of the **Pacific Aquaculture Regulations**, SOR/2010-270 (Canada), if conducted
- (i) under an aquaculture licence issued under that regulation, and
 - (ii) in accordance with the terms and conditions of the licence and with that regulation;

41. The Pacific Aquaculture Regulations provides as follows:

aquaculture means the cultivation of fish.

prescribed activities means

- (a) the catching of fish for the purpose of cultivation;
- (b) the catching of fish that is incidental to the operation of an aquaculture facility;
- (c) the catching of fish for the purpose of complying with any monitoring condition specified in an aquaculture licence;
- (d) the catching of fish that escape from an aquaculture facility for the purpose of returning them to the aquaculture facility or otherwise disposing of them; and
- (e) the catching of nuisance fish.

42. The regulatory framework is somewhat complex. The province, through the Ministry of Forests, Lands and Natural Resources Operations, and the federal government, through the Department of Fisheries and Oceans, establish defined areas where the holder of a fisheries licence (under the federal *Fisheries Act*), an aquaculture licence (under the provincial *Fisheries Act*), federal approval (under the *Navigable Waters Protection Act*) and either a licence of occupation or a lease of a Crown land tenure (under the

provincial *Lands Act*) can operate a shellfish farm. Long term leases of Crown land tenures require surveys to define boundaries with GPS coordinates so that their locations can be precisely mapped. Long term leases are transferable and renewable subject to provincial and federal government requirements being met.

43. For the purposes of a *FPPA* complaint under section 3, a person holding the appropriate federal and provincial licensing and an interest in a Crown land tenure is in much the same position as a person farming on agricultural land. A neighbour aggrieved by a disturbance arising out of an aquaculture operation may apply to BCFIRB for a determination as to whether the disturbance results from “normal farm practice”.
44. The panel now turns to consider the first branch of the legal test.

Are the complainants aggrieved by disturbance from ISF?

45. There are six alleged disturbances involved in these complaints; the primary complaint relates to noise from ISF’s machinery and boats as well as the resulting wakes from their boats. There are also complaints related to odour from bags of netting and debris (plastic, styrofoam and string) on the shoreline, harassing of waterfowl (Hayden) and the unsightliness of predator netting bags and harvesting machinery which takes away from visual enjoyment (Kemps).

Noise and Boat Wakes

46. Both Mr. Hayden and the Kemps reside in relative close proximity to the ISF operations in Gorge Harbour and testified to the severe impact of the noise from ISF’s operations on their day-to-day lives as well as the disruption from boat wakes.
47. Mr. Hayden’s evidence is that ISF operates on an industrial scale, using mechanized equipment which produces sound levels of 67 to 86 dB. Sound levels near shore and at his home can easily approximate the sound levels at source. He says the unmitigated sound from the mechanized equipment negatively impacts his ability to enjoy his property. With respect to boats, he says 90-95% of the boat traffic in front of his home in non-tourist months is produced by ISF boats.
48. Mr. and Mrs. Kemp say they have held off building a new home due to the “operational noise that can drone on all day, every day depending on ISF’s needs, at varying noise levels...” Their son’s evidence is that the conflict has manifested itself in stress-related health issues for his mother. He described the relative peace and quiet of the harbour from his youth during summer vacations and says he doesn’t visit or use the property anymore because of the impact that the mechanization of the shellfish industry has had on his enjoyment. The Kemps testified that they were severely aggrieved by the noise and wakes of the frequent boat traffic serving the five ISF sites. They observe boats speeding and bouncing over rough water and have on occasion seen boats doing 360 degree circles in front of their property and ignoring ISF’s guidelines for workboats to reduce wakes. They say it is quieter at home on their busy street than on their wharf or

property when ISF is operating. They stated that ISF boat wakes rock their wharf all day long making one third of it unusable.

49. The respondent readily concedes that its mussel shellfish operation creates noise impacts and that sometimes those noises occur outside of normal working hours. ISF points to efforts it has undertaken to implement sound dampening initiatives on its own accord. To assist with noise abatement and mitigation efforts, the respondent entered into a mediated agreement concerning noise with the Regional District. This agreement specifies maximum decibel readings, best-effort morning start times, and evening stop times and a commitment to pursue development of a further noise-dampening harvester. The respondent has also taken steps to address boat speed and wakes through employee guidelines
50. Based on the evidence, the Panel finds that ISF's management practices have resulted in noise and to a lesser extent, boat wake disturbance experienced by the complainants. As such, the Panel is satisfied that the complainants have met the threshold test of being aggrieved by the noise and boat wake disturbance.

Other Disturbances including Odour, Debris on Shoreline, Harassment of Waterfowl and Unsightliness

51. Mr. Hayden advanced other disturbances including odour, debris and harassment of water fowl. However, during the course of the hearing the panel heard very little evidence to explain how he was aggrieved by these disturbances. Mr. Hayden did make a brief mention of harassment of waterfowl in his closing submissions.
52. The basis for the allegation that he is aggrieved by ISF's practice of using boats to chase away waterfowl is unclear. While this appears to be framed as a noise complaint, there appears to also be concern about harassment of birds regardless of whether such a practice is consistent with federal wildlife statutes and compliance with zoning bylaws. Mr. Hayden says chasing of waterfowl or using sound cannons to scare them away, may not be prohibited by the Canadian Wildlife Service (which is only concerned with preserving waterfowl). The issue for him is not whether such practices are legal under federal wildlife statutes but whether they create annoyances in residential neighbourhoods and are legal under Regional District zoning bylaws.
53. The panel finds insufficient evidence to conclude that the complainant is aggrieved by noise associated with chasing waterfowl. We heard limited evidence regarding the frequency of this practice, the magnitude of the noise generated or how it is different from other boat traffic in the area generally or ISF boat traffic in particular. Further, it is not for BCFIRB to determine whether such a practice is "legal under regional district zoning bylaws" or whether it is "harassment" and offside federal regulatory guidelines. As such, we dismiss this complaint.
54. As for the complaints about odour and shoreline debris, we heard very little evidence from Mr. Hayden as to how he is aggrieved by these disturbances. The magnitude,

frequency and location of such disturbances were unclear. As such, we dismiss the complaints with respect to odour and debris.

55. Finally, with respect to unsightliness, we observe that on past complaints BCFIRB has held that whether or not a particular farm may be an “eyesore” is not a disturbance within the meaning of the *FPPA*. The panel adopts the reasoning in *Hill v. Gauthier* (BCFIRB, March 6, 2013 at p. 5) when it concluded that visual aesthetics are not a “disturbance” for the following reasons:

I am of the view that common law of nuisance does not recognize interference with aesthetic appearance. To say this another way, the fact that a neighbour creates an eyesore does not create an action in nuisance. Given that the common law does not recognize interference with aesthetics as nuisance, I find that “other disturbance” [as per s. 3 of the Act] cannot be interpreted so as to give a complainant the right to file a complaint based on the unattractive appearance of his neighbour’s property.

56. As such, we dismiss the complaint with respect to unsightliness.
57. The panel having accepted the complainants are aggrieved by noise and boat wake disturbance, now turns to the issue of whether these disturbances result from a normal farm practice.

Is the respondent’s use of mechanized harvesting equipment including boats consistent with normal farm practice?

58. To determine whether a complained of practice falls within the definition of normal farm practice, the panel must determine whether the practice is “consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.”
59. This test requires a consideration of general industry practices, together with the specific contextual circumstances of the respondent farm itself and in relation to properties around it. The contextual analysis may involve asking what if any reasonable steps the farm should take to mitigate disturbances resulting from the farm operations - sometimes called the “good neighbour principle”: *Harrison v. Mykalb*, (January 30, 2013), *Ollenberger v. Breukelman* (November 18, 2005), *Eason v. Outlander Poultry Farms Ltd.* (March 10, 2000).
60. The normal farm practice test was discussed in detail in *Swart v. Holt*, (BCFIRB, January 12, 2016). We adopt the reasoning in its entirety:
96. It is important that the test for normal farm practice be clearly stated. It is pivotal to the operation of the *FPPA*. BCFIRB has been given primary responsibility to interpret this highly specialized and ambiguous term.
97. BCFIRB is entitled to adopt any reasonable construction that it considers best achieves the objects of the *FPPA*. In our view, and to address any confusion that may arise from the Holt Court Decision on this issue, we find that the principles set out in

Pyke, as adopted in BCFIRB decisions, are the principles that best achieve the objects of the FPPA. Only a fully contextual approach can meaningfully account for the words “proper” and “similar circumstances” in their context, and achieve the balancing of interests that is inherent in the very creation of a complaints structure. This also means, as set out by the BC Supreme Court in *Ollenberger* that this panel will consider if on application of the “good neighbour principle”, it is required to go beyond accepted farm practices to order a farm to do something more in order for its practices to be consistent with normal farm practice. That is the approach we have applied to this case. [emphasis added]

61. The first step for the panel is to undertake a general assessment of industry standards to determine proper and accepted customs and standards in the BC shellfish industry. On this point, there is not much dispute on the evidence that the use of mechanized harvesting equipment including boats is standard industry practice.
62. The panel heard from President Paul Simpson, two ISF farm operations managers, four shellfish producers, two residents of Gorge Harbour and the manufacturer of shellfish harvesting and processing equipment. The panel also had the benefit of the KP report and the testimony of Dr. Roth summarized above. The evidence from all these witnesses was that ISF’s management practices for farming mussels are consistent with industry practices of other shellfish operations in BC and the Pacific Northwest.
63. Mr. Simpson testified that ISF is fully compliant with all federal laws including the *Fisheries Act* and Ministry of Transportation regulations regarding navigable waters and riparian rights, Canada Food Inspection Agency regulations regarding food safety, and provincial regulations regarding its foreshore leases. There are no bylaw infractions with the Regional District.
64. Mr. Simpson acknowledged that ISF’s harvesting equipment and boats are noisy and can be a nuisance and, as a result, ISF has undertaken a number of initiatives aimed at addressing neighbours’ concerns including noise mitigation efforts using quieter motors and sound dampening enclosures, regulating hours of work and managing boat operators.
65. Mr. Luciano is president of a company that manufactures shellfish (including mussel) harvesting and processing equipment. He considers ISF to be a medium to large size farm and, having visited mussel farms in more than 12 countries, described ISF’s farming practices and equipment as similar to those of other farms. The equipment used by ISF, manufactured by his company, operates at an acoustic pressure not less than 80 to 85 dBs at source. When asked about the use of non-motorized equipment, his view is that such farms are not really farming; more like “catching”. Use of manual equipment started in the early 1980s but by 1985 most farms transitioned to motorized drives.
66. Mr. Jefferds of Penn Cove Mussels testified. This operation was established in 1975; it is the oldest and largest commercial mussel farm in North America and farms mussels, clams and oysters at 3 sites with over 100 employees. He is familiar with ISF and Gorge Harbour. He stated that while Penn Cove’s harvesting line set-up is unique, the

equipment used by Penn Cove and ISF is essentially the same. Shellfish farming on the west coast of North America is much smaller than on the east coast. Because of the size difference shellfish farmers on the west coast need to produce “a better product at a better price” by being as efficient as possible to be successful. Automation and mechanization are critical because every time the product is touched, the cost of production goes up.

67. Penn Cove is located just off of Whidbey Island in Washington State which has solid residential development along its shoreline. Because of this, Penn Cove makes every effort to be a good neighbour and tries to dampen sound. The nearest residences are about 250 to 300 feet from their operation. Penn Cove has 9 vessels, ranging in length from 24 to 65 feet and 2 harvest barges and the noise level on the barges can be as high as 70 dB but drops to 50dB two racks away.
68. The evidence of the interveners was helpful with the determination of industry standards. A panel of shellfish farmers testified for the BCSGA including Mr. Pocock (Sawmill Bay Shellfish), Mr. Reid (Odyssey Shellfish) and Mr. Munro (Fanny Bay Oysters and Raincoast Sea Farms). These gentlemen have a combined 70 years of experience in shellfish farming.
69. They testified that there are 478 licensed shellfish farms in BC including oysters, clams, geoduck, scallops and mussels. Diesel and/or gas hydraulic generators, Hiab cranes, barges and skiffs are essential equipment for non-hobby shellfish farming operations. Mr. Munroe and Mr. Reid testified that shellfish farms are often located close to shore. Near-shore siting is essential to protect employees and equipment as well as to provide logistical access to wharves and roads, making shellfish farming close to residential or recreational areas commonplace in BC. Mr. Pocock’s farming operations are located away from residential communities.
70. Mr. Pocock described the farming process that most shellfish farmers use as “nursery thru harvest”. The machinery used by commercial shellfish farmers is generally the same farm-to-farm and includes lifting gear (usually a hydraulic crane attached to a vessel or work platform/raft), power washers for cleaning, hydraulic driven tumblers for grading, and more lifting gear to return stacks. These machines are generally driven by gas or diesel generators.
71. Mr. Reid described his harvesting process; he has three 36-foot boats with hydraulic cranes driven by a 24 hp Honda generator and a large barge with two generators for grading product. At harvest, he has 25 staff working from 6:00 am to 2:00 pm. They stay on the barges all day while his other boats constantly travel back and forth pushing rafts, lifting and moving oysters.
72. Harvesting schedules are critical to the shellfish trade given that they are shipping live animals, sometimes around the world. Mr. Pocock’s business is direct to restaurant which requires that they harvest when an order needs to be filled. Mr. Munroe has a fully integrated business model, including purchasing from independent farmers. He

processes oysters 6-days per week, usually early in the morning given that oysters are sensitive to warmer conditions. Mr. Reid ships primarily to the US and is FDA regulated for his deliveries. He tries to harvest Monday through Friday however, depending on tides, harvest may also take place on the weekends. A key to their business success is not to miss a harvest or a delivery.

73. On the issue of noise. Mr. Pocock has a long history of land-based and shellfish farming. He testified that shellfish farming is generally less noisy than land-based agriculture and most noise is generated by motors required to move equipment around. Mr. Monroe testified that sound dampening tends to be done by larger farms only; the majority of the industry runs stock engines. Mr. Reid commented that all engines make noise and that his concern for noise is primarily the health of his employees. He has added standard mufflers with special silencers to reduce noise levels to 63 dB at 100 metres.
74. Mr. Reid testified that there are between 700 and 1000 individuals employed in the shellfish farming sector in BC and a further 350 to 500 in shellfish processing. Approximately 65% to 75% of BC's shellfish is destined for export.
75. Based on the preponderance of evidence, we conclude that the farm practices of ISF are similar to those of other mussel farms and consistent with industry standards. The equipment that is the subject of these complaints including diesel and/or gas hydraulic generators, Hiab cranes, barges and boats are used industry-wide by commercial operations. While ISF may be a larger operation in the area, it follows industry practices.
76. The real issue for the complainants is not that ISF is using different equipment from other shellfish farms. Rather, their argument is that the level of industrialization and mechanization used by ISF is inappropriate given the long-established residential and recreational nature of the Gorge Harbour area. They argue that they are not opposed to shellfish farming in the Gorge; they are opposed to the use of powered machinery (including the number of boats) in their operations. They argue that when all the contextual factors are considered including the topography of the harbour and surrounding areas and the proximity of neighbours, ISF should be restricted to "passive aquaculture" as defined in the Regional District zoning bylaw.
77. We turn now to consider these contextual factors to determine whether ISF is required to go beyond accepted farm practices for the shellfish industry and do something more in order for its practices to be consistent with normal farm practice.

Evidence at Hearing Regarding Contextual Factors

Complainants

78. In summarizing the complainants' evidence on contextual factors, given our preliminary finding above, we have expressly not considered whether ISF is contravening Regional District bylaws or the OCP. Instead what follows is the complainants' evidence of

relevant contextual factors which they argue ought to be taken into account in assessing whether ISF is following normal farm practices for a shellfish farm operating in Gorge Harbour.

Amphitheatre

79. The complainants describe Gorge Harbour as a natural bowl or amphitheatre surrounded by peaks and hills which they believe amplifies the noise from ISF. The Kemps argue that sound gets trapped within Gorge Harbour and likens it to a heavy metal concert in a stadium. In contrast, they point to the Penn Cove tenures that are situated in an open bay more than 500 metres from neighbouring landowners and in an area where the upland has heavy agricultural and rural zoning. The Kemps say they have lost the quiet enjoyment of their property as a result of the noise from the machinery.
80. Mr. Hayden's residence is about 150 metres from and 25 metres higher than shellfish harvesting rafts, with his principle residence situated above a series of terraces. He says this natural amphitheatre setting of Gorge Harbour causes the sound to carry, interfering with his life, lifestyle and health; he finds it difficult to work outdoors on his property and his work as a writer is impacted.
81. He says ISF is operating on an industrial scale, using mechanized equipment. He has recorded sound levels and presented photographs of readings taken outside his home. These readings ranged from between 67.6 dB to a high of 85.7 dB where noise levels of approximately 40 dB are "ambient rural background noise". His evidence is that sound levels near shore and at his home can easily approximate the sound levels at source and this may be due to environmental factors (wind, humidity and temperature conditions). He argues this area is only suited to "passive aquaculture" not machine harvesting as the unmitigated sound from all of the operating equipment negatively impacts his ability to enjoy his property.

Degree of Mechanization and Size

82. The complainants testified at length about ISF's use of mechanized harvesting machinery in the farming process. They described their concerns about the noise levels and how they find the use of Honda pumps, hydraulic power packs, winches and cranes in the process of harvesting, lifting, de-byssing, de-clumping, sorting, and socking all very noisy. Their evidence is that the noise can drone on for hours in this pristine peaceful area, up to 70 dB, from 9:30 am to 5:30 pm some days and to 9:00 pm if there is a machinery breakdown.
83. Mr. Hayden did acknowledge that the number of times ISF has started machinery on rafts before 9:00 am or after 5:30 pm is now rare and has occurred only a couple of times per year.

Boat Traffic (Noise and Wakes)

84. The Kemps use their property for recreational, seasonal use and live aboard their boat tied to their dock. For their 8 weeks of residence on Cortes Island each year, they spend about 2/3 of their time cruising aboard their boat and 1/3 of their time “on dock”. The noise and busyness of the ISF boat traffic disrupts their lifestyle. The Kemps leave the harbour to cruise on-board their boat to avoid the regular wakes caused by ISF boat traffic.
85. The Kemps’ evidence is that the noise of boat motors is disruptive to their peace and quiet; engine noise begins before 7:00 am as ISF employees transport to their work site. ISF boats can travel by as many as 40 times a day. Slow boats pushing a barge may take up to half an hour to pass while faster boats take less than a minute. In addition to raising the ambient noise levels from 25 – 30 dB to 55 – 60 dB, the large wakes from boat traffic causes their boat, which they live aboard, to rock and sway.
86. Mr. Hayden acknowledged that ISF’s boat traffic has improved over the past few years.

Similarly Situated Farms

87. The Kemps argue that there are no farms similarly situated to that of ISF’s operations and say that the KP’s comparator shellfish farms (Taylor's mussel farm in Okeover, BC and Penn Cove in Washington) are not similar at all. Their evidence is that Taylor takes its mussels to land for sorting, de-clumping, de-byssing, and socking, and Penn Cove is in an open bay further from neighbours and in a more industrial/agricultural setting.
88. They strongly disagree with Dr. Roth's conclusion that ISF meets the current standards of practice on Cortes Island and, while the noise Dr. Roth observed may be "reasonable and usual" as an abstract standard for large-scale shellfish industry in North America, they argue that the noise from ISF operations is neither reasonable nor usual for a residential and recreational neighbourhood, especially because Gorge Harbours’ geography can carry sounds with surprising fidelity.
89. The Kemps argue it is the scale of operation and the nature of the machinery required to operate at large scales which determine the amount of noise and disruption to the rural character of the Island. They argue that ISF far exceeds all other shellfish leases in terms of size and the use of industrial-scale powered machinery.

First in Time

90. While Mr. Kemp acknowledged that “first in time, first in right” is not an absolute right, his family arrived in “pristine Gorge Harbour” in 1979, 17 years before ISF was founded and 24 years before ISF acquired the Fulton operation. Their plan was to build a recreational/seasonal home for retirement and these plans have been destroyed by the industrial noise and busyness created by ISF. Their evidence is that the farm’s use of machinery is not “normal farm practice” for Gorge Harbour. They have been working

since 2001 to protect the Gorge from industrialization and fear that, should this “appeal” fail, ISF will expand their presence in the harbour, purchasing or leasing additional tenures resulting in greater mechanization, industrial machinery and noise. ISF’s operation is not consistent with a residential/rural community; noisy industrial equipment should not be surrounded by residential/ rural properties and this tenure should be moved away from this community to a location with other aquaculture operations and no close neighbours.

Island Sea Farms

91. Mr. Simpson testified that ISF was founded in 1996 and, following a year of government research, received its aquaculture licence to grow mussels. He described the history of Gorge Harbour as including both shellfish farming and the forestry industry. Shellfish culture by First Nations has been carried out in the Gorge Harbour for millennia. The President of the Cortes Seafood Association has maintained a shellfish tenure there since 1965 and in the 1980’s and 90’s, Redonda Sea Farms operated an intensive mechanized oyster farm with 13 full-time jobs at the Stove Islets lease. It supported an on-island processing plant. In the late 1990’s and early 2000’s, Desolation Sound had a substantial mechanized oyster operation on the Stove Islet lease. In addition to shellfish farming, the north coast of the Gorge Harbour near the complainants’ property is a heavy-industry zoned active log-dump owned by Island Timberlands Inc. which is also used for gravel deliveries for road maintenance. For many years, there were logging trucks unloading and boom boats working the water. There is a busy marina with moorage, fuel facilities, a provisioning and liquor store, a restaurant and accommodation located on the north shore.
92. He describes shellfish farming as a rural industry that shares space with water-front rural and recreational residents, among other stakeholders. ISF has committed to meaningful engagement with the Cortes Island community and mutual problem solving as evidenced by its commitment to regular stakeholder meetings, sound dampening initiatives, beach clean-ups and its openness to complaints. Contact information is printed on all trucks, boats and in the local paper. The lack of complaints in the last two years from the vast majority of the 50-60 Gorge Harbour residents (other than the complainants) is a positive sign that engagement is working for most residents.
93. Mr. Simpson testified about the mediated agreement it entered into with the Regional District which specifies maximum decibel readings, best-effort morning start times and evening stop times, and a commitment to pursue development of a further noise dampening harvester. ISF’s sound level readings at its harvest line (described as the loudest machine) indicate a sound level is 58 dB at 75 metres (confirmed by Dr. Roth).
94. ISF has participated in the Gorge Harbour stakeholder’s meetings and paid for a professional facilitator. These meetings discussed a wide range of issues including noise and, as a result, in 2016 and 2017 ISF addressed sound issues through sound mitigation of Honda two stroke hydraulic power packs, replacing Honda water pumps with a

direct-drive sound-insulated diesel water pump and rebuilding the main diesel hydraulic generator sound insulating enclosure.

95. ISF documented its harvest equipment start and stop times for the six month period July 2018 – January 2019 which demonstrates that 95% of machinery run times were between 9:00am and 5:30pm. Harvest record data show an average of 42 harvests per year from 2016 to 2018 on the Klahoose/Ring Islet Site which primarily affects the Kemps and 25 harvests during the same time on the Stove Islets site which primarily affects Mr. Hayden.
96. ISF intends to expand operations outside the Gorge Harbour to Read Island and has moved harvests for a number of summer weeks both in 2017 and 2018 and will continue to move as many summer harvests as possible out of the Gorge Harbour over the coming years.
97. According to farm operations manager Mr. Hilton, ISF has 9 boats with four-stroke engines and a non-motorized barge. Since 2016, he has convened regular boat captain meetings so that all boat captains understand that speeding in the harbour is not tolerated and code of conduct violations including boat offences are punishable by termination. Speed limits are clearly posted in the lunch room and reviewed in weekly crew chief meetings and monthly all-crew safety meetings. He testified that in response to Mr. Hayden and the Kemps' complaints, ISF voluntarily implemented a "minimum wake" policy in 2016 which sets maximum speeds of 5-8 knots for larger displacement-hulled boats. Boats have large decals with contact information for ease of identification and to facilitate community feedback on staff boat handling behaviour. Mr. Hilton placed a notice in the local on-line paper in November 2016, giving contact information to the community for complaints or questions. Every complaint, whether by phone or email, is answered.
98. Ms. Rendell, a long-time shellfish farmer of oysters, clams and scallops testified. She has been growing and harvesting shellfish for 42 years and has been operating in Gorge Harbour since 1998. She harvests 12 days per year using a boat equipped with a hydraulic lift. She describes ISF as a good corporate citizen and points to the annual Oyster Festival (Seafest) which ISF supports, as good for the culture, economy and morale of the island.
99. Ms. Glickman, a resident of Gorge Harbour since 2006 who is employed by the local harbour authority testified. She is a retired scientist with the University of Victoria and has experience as an aquaculture technician in finfish aquaculture. She also worked in the biotech industry in the United States. She described her many disagreements with Mr. Simpson and ISF, in particular, a "night from hell" in August 2016 when ISF ran equipment for close to 14 straight hours with no break from the droning of machinery. She lives 200 metres from the Bee Islet lease and says that from 2014 to 2016, the noise was worse than it is today because the noise abatement measures implemented by ISF were not entirely successful. Since 2016, she says communication between Gorge Harbour residents and ISF has improved. The stakeholder meetings were incredibly

stressful, hostile at times with threats being levelled in both directions. Despite the early hostility, her evidence is that there have been positive outcomes, including the initiation of a harbour clean-up supported by ISF that brings 30 – 50 Cortes Island residents out annually and an open invitation to communicate between ISF and the community.

100. As harbour master, Ms. Glickman is very familiar with boat traffic and wake-related issues. During the summer months, she says most of the wake disturbances are caused by marina traffic but that, after a while, wakes become a part of life on the Gorge. There are easily 100 vessels on the north side of the Gorge and large yachts tend to congregate at the east end. The harbour has posted “voluntary” speed limit signs for marine traffic which most boaters ignore, including ISF boat drivers, who she describes as no different from anyone else. The Harbour Authority cannot set mandatory speed limits.
101. Ms. Glickman said that ISF brings significant revenue and employment to Cortes Island. The annual Seafood Festival is over-subscribed every year which can be partly attributed to the presence of ISF. Ms. Glickman described how communication with ISF has improved; ISF is very open and responsive to criticism and is an important part of the community. ISF keeps islanders healthfully employed and the whole island benefits from their presence.
102. Mr. Beudin is the co-owner of Carmac Diesel in Campbell River. Carmac has looked after ISF’s trucks, boats, harvest diesels and water pumps for 9 years. Approximately five years ago, ISF raised the issue of noise and noise abatement and his company has worked with ISF’s farm operations manager to reduce sound impacts of diesel hydraulic generators. Unfortunately, not all of the noise abatement initiatives have been successful. The rebuilt sound enclosure for the main diesel hydraulic generator delivered in July 2017 did not meet sound dampening specification. Carmac subsequently investigated specialty sound enclosure manufacturers and in July 2018, commissioned Frontier Power to build a custom enclosure for the main harvest line hydraulic generator. This “generation 3” enclosure has reduced noise significantly from 65 dB to 58 dB at 70 metres.

Intervener - Klahoose First Nation

103. Ms. Francis testified on behalf of the KFN which was granted aquaculture tenures following years of negotiation with the federal and provincial governments. These tenures were subject to the application process and involved public notices, consultation and feedback from all agencies over a long period of time. The KFN support an active aquaculture industry on Cortes Island and view the shellfish industry as part of their heritage and an important legacy for younger generations.

Findings Regarding Contextual Factors

104. The complainants argue that Gorge Harbour is a natural amphitheater which amplifies the sound disruption they experience. The panel was shown photographs of this

“amphitheater”; Gorge Harbour is a protected harbour with a narrow entrance at sea level that opens up to a larger body of water surrounded by small hills. In the panel’s view, there is nothing in these photographs that sets this location apart from other coastal settings. While the panel can accept the complainants’ evidence about the noise they experience from ISF’s operations, we have no actual evidence to support the assertion that a specific topographical feature here, in fact, amplifies the noise heard at their properties. To accept this novel argument would require the complainants to produce technically supportable sound measurements both at the source of the sound and at their homes, and a qualified expert’s interpretation or analysis of the data. In the absence of such evidence, the panel cannot accept the argument that the configuration of the harbour itself amplifies the noise heard by the complainants.

105. The complainants provided decibel measurements and attempted to demonstrate noise levels with a video. They were critical of the measurements of the respondent’s witnesses and the measurements taken by the KP. In the absence of evidence from a qualified sound engineer, the panel is not prepared to place much weight on the accuracy of any of these measurements or the alleged differences between certain measurements taken in different places at different times. Handheld devices or apps on a phone give relative readings and we find it is difficult to draw comparisons or conclusions from the data before us. We do however accept that from time to time the complainants were disrupted by significant levels of noise from ISF’s operations.
106. However, the uncontroverted evidence of the respondent’s witnesses and the KP is that ISF uses the same kind of equipment (including boats) to farm and harvest shellfish as other comparable commercial shellfish farms. What the actual decibel reading might be at a given location at a given time is not determinative of whether a particular practice (or the use of particular piece of equipment) is inconsistent with normal farm practice. This is especially so in the absence of expert evidence to demonstrate the significance of a particular reading in light of established standards and possible consequences related to noise at measured levels.
107. The *FPPA* is not a nuisance statute and the test for breach of the *Act* is not merely whether a farm practice causes emotional upset and frustration. The panel has already acknowledged above that the complainants have been subjected to considerable noise disturbance. However, the reality is that the *FPPA*’s purpose is to balance community interests by protecting farmers from disturbance claims while giving neighbours the right to formal conflict resolution. The applicable test is whether the farm practice is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.
108. The complainants argue that the comparator farms are dissimilar in that these farms are not located in an enclosed harbour but are situated more in the open. Other farms are not as close in proximity to neighbours. They argue that ISF arrived in the harbour with its mechanized equipment, decades after the community was established and living in harmony with passive aquaculture, and proceeded to make lives unbearable. Their position is that Gorge Harbour is wholly unsuited to mechanized shellfish farming in

largely due to their interpretation of Regional District bylaws and the OCP. They say high intensity industrial farming is completely at odds with existing rural residential communities and the high levels of noise, the frequency of noise events and the marine traffic necessary to operate this farm are all inconsistent with normal farm practice.

109. In our view, the assertion that Gorge Harbour is unsuited for mechanized shellfish production is unfounded. The provincial and federal government have created a regulatory framework which permits aquaculture in certain prescribed areas and the rules under which these fisheries can operate. Crown land tenures can be mapped and surveyed and their location is just as precise as the property boundaries observed on land. If, and how, local government zoning bylaws apply to federally regulated aquaculture fisheries is not something for BCFIRB to adjudicate on. In this case, there is a mediated agreement entered into between the Regional District and ISF setting out terms and conditions for the ongoing operation of the farm. Without commenting on the enforceability of the mediated agreement, this is the best evidence before the panel of what the Regional District sees as compliance with its bylaws.
110. With respect to the comparator farms and proximity of neighbours, the evidence shows the closest neighbours to the comparator shellfish farms range between 76 to 500 metres, which we find sufficiently similar to these complainants. Mr. Hayden's residence is 150 metres from the closest raft; the Kemps are at about 470 metres. While we agree the Penn Cove operation is not situated in an enclosed harbour, it is in other respects quite similar in that it is a large commercial operation with relatively close neighbours. The panel does not find the proximity of the complainants to be a contextual factor warranting a modification of the shellfish farm practices.
111. We have considered the complainants arguments about the general character of Cortes Island and whether this is a contextual factor that should be taken into consideration. However, we observe that shellfish farming has occurred in this area for many years. In addition to shellfish farming, there are other industrial uses related to forestry and road maintenance. Light industrial uses include a marina with supporting businesses. As in many areas, we find that there is mixed use of the lands on Cortes Island.
112. The complainants have argued for ISF to adopt passive harvesting techniques but, in our view, the test for normal farm practice does not turn on whether there are non-mechanized processing options available elsewhere in the world. The test is what other similar shellfish farms are doing, having regard to the particular context. As stated earlier, ISF uses the same equipment as other similar shellfish farms for farming and harvesting. The complainants take issue with the size of ISF operation. However, the fact that ISF is a larger operation and as such, uses more equipment does not change our view. This area has many existing Crown land tenures. The fact that the tenures are predominantly operated by one farm as opposed to many smaller farms is, in our view, a neutral factor. Presumably, there may be efficiencies of scale available to a larger operator which could result in the need for less equipment but that would likely be offset by the need to move equipment site-to-site. In our view, some disruption is likely either way.

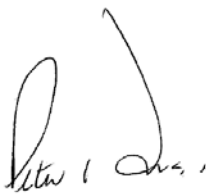
113. In considering the contextual factors, we have also applied the “good neighbour” principle. In this regard, Mr. Simpson gave evidence, which we accept, regarding the many steps ISF has taken to try and minimize its operation’s impact on neighbours. ISF has tried and continues to try different sound dampening alternatives. It has invested approximately \$150,000 in developing noise abatement equipment. The farm now uses four-stroke engines on its boats that are more efficient and create less noise. It has imposed code of conduct requirements on boat captains and speeding in the harbour is not tolerated, punishable by termination. It has voluntarily implemented a “minimum wake” policy since 2016, setting maximum speeds for larger displacement-hulled boats, and published contact information to facilitate feedback on staff boat handling behaviour.
114. The panel concludes that ISF has taken reasonable steps that a neighbourly farmer would normally employ in the circumstances, and continues to do so in an effort to mitigate the impacts of its operation on its neighbours. While the complainants remain concerned that once these complaints have been decided, the good neighbour attitude displayed by ISF will disappear and the noise and disruptions will increase, we do not agree. In our view, ISF has demonstrated over the past several years a commitment to work with the Cortes Island community and to be a good corporate citizen. While there were obvious problems in the past, ISF had made considerable effort to address those problems. Even Mr. Hayden acknowledged as much in his evidence.
115. Despite these steps, we acknowledge that, from time to time, noise and boat wake disruption remains and is unavoidable. However, that is the nature of farming. ISF is operating on tenures that specifically allow aquaculture fisheries. Aquaculture can be as intensive and disruptive as other forms of agri-business but this is the face of farming in BC.
116. The *FPPA* was designed to protect farms like ISF as long as they follow normal farm practices and, as we have concluded above, it does. The legislature has made the fundamental policy decision that the right to farm in accordance with normal farm practice prevails over the disturbances caused by farming – even extreme disturbances. It is not our role to apply the *FPPA* as if it were a nuisance or zoning statute, telling farmers, based on noise or other impacts, what they can and cannot grow or harvest in areas provincially and federally designated for aquaculture through leases and Crown land tenures. Where, as here, a normal farm practice produces a real and substantial disturbance, the farm operations prevail unless on the contextual analysis, modification is required. As we have found no basis on a contextual analysis to modify the farm’s practices, we dismiss the complaints.
117. We cannot conclude these reasons without observing that ISF should continue to act as a good neighbour and bear in mind the complaints of its neighbours heard during this hearing and try to implement best management practices to the extent possible to reduce the impact of farm-related disturbance on neighbours. This is what any good neighbour should do.

ORDER

118. The complaints are dismissed.

119. We have given considerable thought to the issue of costs. As is evident from our reasons, the complainants insisted on pursuing these complaints as if this was a bylaw enforcement matter despite repeated advice from BCFIRB to the contrary both before and during the hearing. We have concluded that attempts to use our processes for a collateral purpose is an abuse of process and in some circumstances could warrant an order for costs. However, ISF did not seek an order for costs. In light of that fact and in the interests of promoting neighbourliness within this community, we make no such order.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD



Peter Donkers, Chair and Presiding Member



Al Sakalauskas, Vice Chair