IN THE MATTER OF
THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996 C. 131
AND IN THE MATTER OF TWO COMPLAINTS REGARDING NOISE
GENERATED BY A CHERRY FARM IN COLDSTREAM, BRITISH COLUMBIA

BETWEEN:

ROBERT LEARMONTH
LESLIE JOHN LEWIS

COMPLAINANTS

AND:

CORAL BEACH FARMS LTD.

RESPONDENT

AND:

BC FRUIT GROWERS' ASSOCIATION
DISTRICT OF COLDSTEAM

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	John Les, Chair and Presiding Member Daphne Stancil, Member Al Sakalauskas, Member
For the Complainants:	Robert Learmonth Leslie John Lewis
For the Respondent:	Alfred Kempf, Counsel
For the Interveners: BC Fruit Growers' Association	Glen Lucas, General Manager
District Municipality of Coldstream	Trevor Seibel, Chief Administrative Officer
Date of Hearing:	January 30 - 31, 2018

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 (*Act*).

2. The first complainant, Robert Learmonth, resides on a 320 acre property (partially in the Agricultural Land Reserve (ALR)) on Buchanan Road immediately to the north of the farm (cherry orchard) operated by the respondent Coral Beach Farms Ltd. (Coral Beach). The Learmonth home predates the planting of the cherry orchard by several years and is located about 250 feet (76 metres) from and about 100 feet (30 metres) higher than the orchard. The Learmonth property rises steeply to the north forming a mountainside backdrop to the Learmonth residence.

3. In brief, Mr. Learmonth identifies three sources of excessive noise from Coral Beach's farm practices - specifically frost fans, turbo sprayers and helicopters. He says the manner in which these pieces of equipment are used is inappropriate given the particular geographical aspects of this location, described as "a natural bowl", the climate in the area and the proximity of neighbours. As a result of these site specific factors, he says the farm requires additional management considerations above and beyond those that would be required at orchards located on flat terrain.

4. The second complainant, John Lewis, resides on Highway 6, approximately 1150 feet (347 metres) to the south and west of Coral Beach. In brief, he argues that Coral Beach is the coldest, darkest, wettest cherry orchard in the Coldstream and Kelowna Valleys in an area "wholly unsuitable for cherry production" and as such requires extreme measures for crop survival. These extreme measures coupled with the "amphitheatre of hills to the east and west" result in a situation that is "not even close" to normal farm practice.

5. The respondent, Coral Beach, operates the cherry orchard on Buchanan Road in Lavington (part of the District Municipality of Coldstream) on an acreage located within the ALR.

6. Coral Beach farms some 650 acres of cherries in various locations, of which 88 acres are at the Buchanan Road location. This orchard came into production in 2015. The respondent takes the position that all of the farm practices in relation to operation of helicopters, frost fans, orchard blowers and turbo sprayers are consistent with normal farm practice. It argues that there is nothing unique about the location which would warrant a modification to its farm practices, and submits that while 2016 was a highly unusual year, a long-term view must be taken to determine disproportionate impacts. Otherwise, complaints arising from unusual or extreme situations could result in precious resources being wasted arguing about situations that may never recur in the same way.

7. BCFIRB retained Ministry of Agriculture agrologist Carl Withler, P, Ag as a Knowledgeable Person (KP) under section 4 of the Act. Mr. Withler prepared a report (the KP Report), with the assistance of two other Ministry agrologists, Laura Code and

Anne Skinner, which assesses Coral Beach's management practices. Mr. Withler testified at the hearing.

8. The BC Fruit Growers' Association (BCFGA) intervened in these proceedings in support of the respondent, taking the position that the management tools and practices carried out at its orchard are within those considered to be normal farm practices in the cherry industry.

9. The District of Coldstream was also given intervenor status. It provided a written submission and brief oral summation. The submission lists the noise complaints it received from Mr. Learmonth and other residents for the time periods early spring to late summer 2016 and fall 2016 to 2018. It also lists and provides brief summaries of the meetings of Council and/or its Committees that dealt with noise form Coral Beach in 2016 and 2017. The District noted that it deferred to BCFIRB for determinations of "normal farm practice".

10. The Panel conducted a site visit of the complainants' and respondent's properties on January 29, 2018. The complaints were heard on January 30-31, 2018.

11. As the hearing did not conclude in the two days scheduled, the parties made their closing arguments in writing with the complainants being given a right of reply which submissions were received March 15, 2018. The respondents request for sur-reply was dismissed.

B. ISSUE

12. Is Coral Beach Farms operating frost fans, turbo spray fans and helicopters on its farm in accordance with normal farm practice?

C. PRELIMINARY ISSUE

13. Despite being advised that BCFIRB does not have the authority to enforce standards set by other governmental agencies (such as Work Safe BC, Ministry of Health or Ministry of Environment), at times during the hearing and in their written submissions, the complainants sought to raise issues of potential health and safety concerns related to certain farm practices and suggested that certain practices may be in contravention of the *Public Health Act*, the *Environment Management Act* or aviation regulations enforced by Transport Canada. Mr. Learmonth called Greg Baytalan, an Environmental Health Officer with the Interior Health Authority in support of his public health concerns. Mr. Baytalan expressed concerns regarding noise from Coral Beach's operation, but did not give specific evidence of noise levels emanating from the farm and did not provide the Panel with any information about noise standards set by the Ministry of Health and/or its legislation.

14. BCFIRB does not have jurisdiction to determine whether there is or is not a breach of any statute other than the *Act*. We appreciate that confusion arises given that section 2 of the *Act* states:

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. However, the purpose of this section is to preclude a court (not BCFIRB) from making a finding of nuisance and/or issuing an injunction against a farm operation where the operation is being conducted in accordance with normal farm practices and not in contravention of the *Health Act, Integrated Pest Management Act, Environmental Management Act*, the regulations under those Acts or any land use regulation. Section 2 is not part of the Panel's narrow and specialised mandate of determining "normal farm practice" found in section. 3 of the *Act* nor does it empower BCFIRB to make findings regarding alleged breaches of those Acts or regulations.

16. The Panel reiterates that we can only address farm practices issues; we have no jurisdiction to adjudicate alleged breaches of other federal or provincial enactments. In *Eason v Outlander Farms* (December 3, 1999), the then Farm Practices Board made a similar finding stating:

> 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.

D. KNOWLEDGABLE PERSON (Carl Withler, P.Ag.)

17. Mr. Withler's title is "Industry Specialist, Treefruits and Grapes" within the Ministry of Agriculture (Ministry). He has more than 30 years of experience in this field of work. He conducted site visits of the Coral Beach farm and neighborhood on May 23 and August 24, 2017. At the August site visit, various blowers, sprayers and wind machines were "fired up" for his benefit and evaluation.

18. The KP Report describes the circumstances which led to these complaints (page 2):

> The orchard came into "near full" production in 2016, and 2016 was characterized by a very hot (high growing degree days) start to the season in April and May followed by heavy, intermittent rains in June and into July during harvest (refer to Figure 5). Because of this shift forward in harvest, 2016 is noted as "the worst season" for rain events in the history of export quality cherries in B.C. All forms of drying equipment (fans, blowers, protective sprays and helicopters) were used during 2016 to protect the crop and deter rain split prior to harvest. This active removal of water from cherries brought the concerns of the Learmonths to the forefront with multiple helicopter flights per day, sprayer use night and day, blower use day and night and wind machine use as and when needed from ripening to harvest.

19. The KP Report provides an overview of cherry production in the Okanagan Valley from the late 1800's to the present. It states that new late season varieties developed at the Summerland Research and Development Center have resulted in an expansion of the cherry industry in the province. These late season varieties are particularly suitable for export markets; they command premium prices and have necessitated innovative production management to address the risks from rain and hail.

20. The KP Report also comments on the pressures related to the urban/rural interface in the Okanagan valley – that this area contains some of the best agricultural land and climate in the province (sun, water, soils, slopes), while the same climatic and geographic factors also attract non-farming residents to live, work and recreate. These competing interests for a limited resource have led to increasing conflict as agricultural production has expanded and changed.

21. The KP Report reviews the climate data for the 2016 crop year. It describes a very warm, dry April and May 2016 which moved crop production ahead across the valley by one month (into June instead of July). Unfortunately, June is often the wettest month in the Okanagan valley and in 2016 it rained almost daily. This necessitated rain mitigation measures (helicopters, blowers, fans, sprayers), often multiple times per day. This "perfect storm" of a warm spring coupled with harvest during or just after the traditional rainy period meant that neighbouring residents endured hours of noise that, until 2016, were generally unheard of in the industry.

22. In 2016, Coral Beach's harvest began July 2 and finished August 10 as the Lavington block was one of the latest blocks in production in the valley at that time. There are now later harvest blocks planted in the Armstrong/Spallumcheen area and more are planned.

23. The comparator farms in the KP Report began the 2016 harvest in early June finishing mid-August depending on their market and location in the valley. For Coral Beach, these date differences are generally guided by location in the valley, aspect and slope.

24. With respect to what are typical management regimes for cherry production, Mr. Withler's view is that no farm is "typical". However, he did examine four competing orchards with south/southwest slope, well drained soils, irrigation and residential development upslope. He also spoke with the BC Tree Fruits Co-operative with regard to industry practices.

25. The KP Report states that, with regard to noise-related practices involved in cherry production, the yearly production cycle includes spraying for disease and pest control, foliar feeding, and cherry split prevention. With regard to split prevention, as cherries near maturity, rainfall accumulations need to be physically blown off by use of tractor-mounted turbo-mist and power-blast sprayers. During daylight hours, helicopters are extensively used for this purpose. Removal of rain must be almost immediate to avoid rain accumulation on cherries, as splitting may begin as soon as 45 minutes after a rainfall event.

26. With respect to Coral Beach's use of equipment, including helicopters, turbo-mist sprayers, turbo-blast blowers and wind machines, the KP Report states (at page 20):

> I am convinced that Coral Beach Farms Lavington farm is not managed and operated in dissimilar fashion to other late season/export focused cherry orchards in the Okanagan. This similarity is not limited to just equipment operation (ie. frost fans, blowers, sprayers and helicopters), but includes the topographic layout and proximity to the neighboring public.

27. The KP Report makes eight recommendations for improvements which could reduce conflicts between cherry growers and neighbours:

    1. Where and when possible, Coral Beach Farms should use helicopters with enclosed tail rotors.

    2. As Coral Beach Farms becomes aware of impending weather events (i.e. rain, hail) e-mail notification should be supplied to all complainants of anticipated timing and intensity of the event and a proposed rain mitigation strategy. This response might include the number of blowers/timing, whether helicopter use is anticipated and if frost fans will be used.

    3. Coral Beach Farms should be encouraged to continue its field trials of netting in cooperation with the Climate Action Initiative as it has done on Cholla Hills. As well, CBF should work cooperatively with Summerland Research and Development Centre and the Ministry of Agriculture to ensure cherry quality can be retained under netting.

    4. B.C. Cherry Association, Transport Canada, the Ministry of Agriculture and Local Governments should develop a "best practices" document for helicopter use in cherry drying including, but not limited to approach, regress from farms, timing of operations and the use of spotters.

5. The complainants should consider and potentially build soil berms near their houses/buildings to reduce noise reaching their properties.

6. CBF could undertake shielding on blowers and sprayers attempting to remove the "whine" created by Turbo-mist equipment.

7. The Ministry of Agriculture, in consultation with the B.C. Cherry Association and the BCFGA should develop guidelines, or a Minister's standard, for wind machine use and placement similar to the South Coastal guidelines.

8. B.C. Cherry Association produces information for publication on the internet, or in print, outlining the generalized production cycle of cherries, use of equipment in production and harvest of cherries and any other information it deems appropriate to help bridge the divide between farming and non-farming neighbours.

E. FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT

28. The complaints were filed pursuant to section 3(1) 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.

29. When a person files a complaint under the *Act,* 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).

30. 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.

31. The Panel now turns to consider the first branch of the test.

Are the complainants aggrieved by the noise disturbance from Coral Beach orchard?

32. Both Mr. Learmonth and Mr. Lewis reside in relative close proximity to the Coral Beach orchard. They both testified that they were losing a considerable amount of sleep as a result of noise from drying equipment.

33. For Mr. Learmonth, the 2016 growing season is the reason for his complaint. He described the haunting cyclic nature of frost fan disturbance precluding a return to sleep once awakened, and the disturbance of turbo sprayers as they advance and recede through the orchard at night preventing sleep. He says his neighbourhood environment has been substantially altered and impaired, rendering his house non-habitable for several weeks of the year. He points to the evidence of his neighbours. Mr. Peterson

testified as to how the noise disturbs his life and interferes with sleep. He sleeps in the basement as he believes the noise levels are dangerous to his health. Mr. Allen testified that the noise levels (in June 2016) between 11:30 pm to 2:00 am four nights in a row interfered with his ability to sleep and he left his property. In 2017, he planned to be away as much as possible.

34. For his part, Mr. Lewis does not limit his complaint to the 2016 growing season. He described the scream of sprayers working all night keeping the entire valley awake and asked the Panel to imagine the sound of a hovering helicopter. He says Coral Beach has made his life unbearable as it uses more sprayers, for more hours, for more nights, than any other cherry orchard.

35. The respondent readily concedes that the management of a cherry orchard creates noise impacts and that sometimes those noises occur during nighttime hours. The respondent also concedes that 2016 was very challenging year for cherry production given the frequency and daily patterns of rainfall. The helicopter bill alone was quadruple that of a normal year.

36. Based on the evidence, the Panel finds that Coral Beach's management practices have resulted in noise disturbance experienced by the complainants in 2016 and to a lesser degree in 2017. The Panel is satisfied that that the complainants have met the threshold test of being aggrieved.

37. Having proved that they are aggrieved by noise, the next question – really, the key question on these complaints – is whether the noise disturbance results from a normal farm practice.

Is the respondent's use of drying equipment consistent with normal farm practice?

38. 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."

39. 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).

40. The normal farm practice test was discussed in detail in *Swart v. Holt*, January 12, 2016 at para. 89-96. We adopt those paragraphs in their entirety, and we quote from paragraphs 95 and 96 of that decision:

> 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.

41. The first step is to undertake a general assessment of industry standards – to determine proper and accepted customs and standards in the BC cherry industry. On this point, there is not much dispute on the evidence that the use of helicopters, frost fans, sprayers and blowers is standard industry practices in the Okanagan valley for drying cherries after rain events.

42. The Panel heard from farm owner Mr. Geen, the farm manager, two growers, the Grower Services Manager for BC Tree Fruits and experts in the use of helicopters, wind machines and sprayers. The Panel also had the benefit of the KP report and the testimony of Mr. Withler. The evidence from all these witnesses was that the management practices for drying late season cherries carried out by Coral Beach is consistent with industry practices carried out at other cherry orchards in the Okanagan Valley. Mr. Withler summarized it this way in the KP Report (page 5):

> With these new, high value, export grade cherries in production, the risk of rain and hail becomes more acute and to counter potential crop loss innovative ways to remove rainwater from cherries were created. Specifically, these innovations were the use of helicopters, frost fans, sprayers and sprayable products… and blowers to remove rainwater to deter split. These activities are carried out to a lesser or greater degree on all farms in the industry, and used by all cherry producers who are focussing on cherry production and targeting export grade, high value cherries.

43. The real issue for the complainants is not that Coral Beach is using different equipment than other cherry orchards in the Okanagan. Rather, they argue that the topography, location, and climate are all contextual factors which together require the farm to undertake extreme management practices that vary considerably from the practices of other cherry orchards. They argue that when all these factors are considered in

conjunction with the proximity of neighbours, the farm should be required to modify its practices to use quieter equipment.

Evidence at Hearing Regarding Contextual Factors

Complainants

44. The Panel heard from both complainants about Coral Beach's use of drying machinery in the 2016 and 2017 crop year. They describe their concerns about the non-typical topography from which their complaints arise, as compared to the other orchards including those referenced in the KP report. They variously described the topography as concave, a natural bowl or amphitheatre surrounded by steep hills which they believe amplifies the sounds from the farm. They also argue that the orchard is in a horticultural zone not suitable for cherry production.

45. As noted previously (para 2), Mr. Learmonth's residence is situated on 320 acres. He built his home prior to the orchard being developed. It is set back 80 metres (250 feet) from the property line and is about 30 metres (100 feet) higher than the orchard. He experiences unmitigated sound from all of the operating equipment. There are also 20 residences adjacent to the orchard and a nearby subdivision Whisper Ridge.

46. Mr. Lewis' house is the oldest house on a strip of housing along Highway 6 southwest of the farm. It is level with the south end of the Coral Beach orchard and approximately half a kilometer away. His house does not have air conditioning. In the summer with temperatures of 40 degrees, it becomes unbearable if he cannot open the doors and windows.

47. Mr. Learmonth's evidence is that in June 2016, Coral Beach used frost fans on two days (once was at night commencing at 2 a.m.), used turbo sprayers on 21 days (five of which were at night) and used helicopters on 10 days. There were only 4 days that month free of excessive noise. Frost fans come on at 1 or 2 AM and ran until about 7 AM. He claims the turbo sprayers are the worst for noise and causing sleep deprivation as they drive up and down rows, day and night giving off an extreme high pitch scream and fluctuations of sound as the tractors turn at the end of the rows closest to his property.

48. Mr. Learmonth recorded sound levels. He presented an audio recording of the farm machinery operating, taken from inside and outside his home. According to his PowerPoint presentation, the outside readings were 100 db for sprayers and helicopters. His testimony was that frost fan noise levels were 70 db and sprayers 80 db inside his house and outside readings for sprayers/helicopters were 95 db and frost fans 83 db.

49. Mr. Learmonth takes less issue with the farm's management practices in 2017. He states that but for the events of 2016, he would not have filed his complaint. Two of his neighbours Mr. Peterson and Mr. Allen, attended the hearing and gave evidence of the negative impacts of the noise from Coral Beach. Mr. Peterson noted that he measured

sound of 80 db from the wind machines and 100 db from the helicopters. His view is that "anything over 85db will cause hearing loss."

50. Mr. Lewis' evidence is that the farm's machinery use in 2016 was bad, and that 2017 was not as bad. In 2016, helicopters were used four at a time. Turbines (wind machines) would start in the early morning. He describes the noise from sprayers as insidious, likened to a quiet scream. On nights when equipment was operating, he had difficulty getting three hours sleep and a white noise machine ceased to be effective.

51. Mr. Learmonth's evidence is that alternatives are available. He points to the Frost Boss wind machine used in New Zealand which he says produces a fraction of the noise level produced by conventional fans (50 db as opposed to 70 db) and to the HSS spray system used in Ontario. He states alternatively that turbo sprayer operation can be modified by throttling back, and the Bell 407 Ranger helicopter (which he describes as half as loud) can be used as opposed to the "obsolete" Bell 206.

Coral Beach

52. Mr. Geen is the owner of Coral Beach. He has been in the fruit business for 37 years. He owns 9 large orchards between Lavington and Kelowna and is very involved in their operation. He has several farm managers, such as Ms. Krahn, who are accessible to neighbors.

53. He bought the Lavington farm site because of its favorable soil conditions, the more favourable risk profile in the north Okanagan, and the better timing of rainfall in the ripening cycle of cherries. His evidence is that cherry orchards are generally planted on a slope for better air drainage. The Lavington orchard has a nice slope, good soil and is close to 100 acres. The climate is suitable for cherry production as the fruit begins to mature in July, thereby missing the June rain. He has been getting excellent production and pack out levels at the Lavington farm, the higher pack out levels having to do with better timing of rain resulting in less splitting of cherries. This evidence was confirmed by Ms. Fitzgerald whose crop insurance data showed better quality fruit in the North Okanagan than in the South.

54. Mr. Geen agrees that helicopters, wind machines and sprayers are noisy and are a nuisance. The 2016 growing season was rainy and required extensive spraying. It was a very challenging year and the unrelenting rain resulted in a helicopter bill quadruple that of a normal year. In contrast, 2017 was not rainy and equipment operated for less than 1% of the year.

55. Mr. Geen has wind machines at his Carr's Landing orchard, where he lives. He disagrees with the characterization of "extreme" noise levels. He has other farms with topography similar to that at the Lavington farm and his Carr's Landing farm is located at the 1480 foot level (450 metres) , with the top of ridge at 3200 feet (975 metres).

56. His farm manager, Ms. Krahn, stated that for an orchard the size of Coral Beach, three sprayers are usually used, but the farm acquired a fourth sprayer, with the intended benefit that spraying could be completed more quickly (taking 25% less time), reducing nuisance to the neighborhood. They use the same turbo-mist sprayers that are utilized by most orchardists in the Okanagan Valley. She explained how the sprayers are calibrated to achieve the appropriate concentration for each specific treatment and the calibration affects the sound the sprayer makes.

57. Ms. Krahn travelled to Tasmania to study the use of orchard covers to protect against rain. Because of heat build-up, the fruit was softer, and not as desirable from a marketing perspective.

58. With regard to the use of wind machines, Ms. Krahn stated they are set to come on automatically, triggered by critical temperatures. Each machine has a separate thermostat and covers an area of about ten acres. There are eight wind machines in the Coral Beach orchard.

59. Ms. Krahn stated that night spraying is sometimes necessary because spraying during very hot daytime hours is less effective and may not be possible due to wind or rain. It is critical to maintain spray coverage to prevent disease and pest infestation. She times spraying in certain areas of the orchard to mitigate impact on neighbors where possible.

60. Ms. Krahn stated that approximately 100 trees had been removed from the south end of the orchard to increase the setback buffer between the orchard and residents to the south.

61. Records for 2017 show 30 hours of spraying over 11 nights between 11 pm and 5 am and wind machines operating for a total of 39 hours with approximately 4 hours in the block closest to Mr. Learmonth.

62. Helicopters are used as sparingly as possible as they cost more than $2000 per hour. Ms. Krahn is in constant communication with the pilots and tries to dry the orchard as quickly as possible. Once on site, helicopters are expected to fly within orchard boundaries.

63. Ms. Krahn advised that she follows the farm safety rules as supported by the Farm and Ranch Safety and Health Association (now AgSafe BC), which includes the Work Safe BC rules regarding noise.[1]

64. According to Coral Beach's helicopter log for 2017, helicopters (1-3 at a time) were used on four days in June, July and August for between 1- 3 hours each time.

[1] Part 7 of the Occupational Health and Safety Regulation, section 7.2(a) provides that an employer must ensure that a worker is not exposed to noise levels above 85 dBA Lex daily noise exposure level and 140 dBC peak sound level.

65. Mr. Markgraf (grower services manager for BC Tree Fruits), cherry growers Ms. Dendy and Mr. Khela, Mr. Cann (expert in helicopter and orchard blower usage), Mr. Holder (expert on the use air-blast sprayers on cherry crops) and Mr. Malloy (expert on frost fans) all gave evidence that helicopters, wind machines and sprayers practices are used by cherry growers to reduce rain damage. This evidence was confirmed by Mr. Withler (see paras. 25 -26 above).

Mr. Markgraf

66. Mr. Markgraf is responsible for a cherry growing area that extends from Creston to Keremeos and north to Salmon Arm. His evidence was that the latest-maturing cherries in BC are now located in Creston and Vernon, with harvest in late August and early September.

67. Mr. Markgraf testified that 2016 was the worst year in memory, with almost heroic efforts required to get the rain off the cherries.

68. Drying is critical as water accumulation on cherries is absorbed into the fruit by osmosis, which causes the cherry to split. The need to blow accumulated rain droplets off maturing cherries is urgent, as an entire crop can be lost in less than 4-6 hours. The best technology to remove rain accumulation from cherries is helicopters followed by tractor mounted blowers or pull-type sprayers, followed by wind machines. Helicopters cannot operate at night, or may be unavailable, making tractor mounted blowers and sprayers the primary option, especially at night.

69. Mr. Markgraf explained the various purposes of sprays used in cherry orchards, including pesticide application, nutrient application and growth regulators and the timing for the application of these sprays in some detail. A typical cherry orchard needs to be sprayed between 20-30 times per year, with more being required in a wet year because the spray washes off and the increased moisture creates a higher need for fungicide application. Any evidence of pest contamination in cherries can result in an entire crop being condemned, with the resulting risk of loss of reputation as a reliable supplier of premium cherries. There is zero tolerance in the market for pest damage or contamination and regulatory authorities will prevent export of a crop if contamination is detected. Sprays are also used to coat cherries to make them more resilient against water penetration and therefore less likely to split.

70. Spraying usually is best done in the early morning or later in the evening when winds are lightest, reducing drift. Spraying cannot occur during a rain event or if there is too much wind. When these adverse conditions are more prevalent, spraying during the night often becomes necessary. The important factor is to maintain "spray coverage" so that the crop is never left unprotected.

71. Under cross examination, Mr. Markgraf noted that although cherries in the Lavington area are some of the latest to mature, this does not mean that they require more

mechanical husbandry; the amount of management would be similar to that required at other orchards in other locations.

Ms. Dendy

72. Ms. Dendy, a long-time orchardist and cherry grower, operates a 90-acre orchard in east Kelowna. She says helicopters are a useful and necessary tool to remove rain accumulation from cherries. She considers Coral Beach's management practices to be very good. Night time spraying is necessary as there is zero tolerance for pest, or disease-infected fruit in the marketplace. She uses three sprayers and tractor mounted blowers at night. She has neighbors immediately adjacent to her orchard.

Mr. Khela

73. Mr. Khela farms approximately 200 acres of cherries and is planning to expand north of Kelowna to grow export cherries. He grows early cherries in the south Okanagan and late cherries in the north. He uses helicopters, blowers, sprayers and wind machines in his orchards and propane cannons for bird control. He said he sprays between the hours of 11 pm and 5 am as necessary using turbo-mist sprayers. He agreed that 2016 was a particularly challenging year; he lost a block of cherries in one of his orchards that year.

74. Under cross examination, Mr. Khela testified that cherry producers remove the rain and try to protect the crop as much as possible.

Mr. Holder

75. Mr. Holder gave expert evidence on the use of turbo mist sprayers employed by the majority of cherry producers in BC and generally considered as the industry standard equipment as observed by their widespread use throughout the Pacific Northwest tree fruit industry. There are several models manufactured to meet the diversity of industry needs which vary in tank volume, frame size, drive system, gear box, pump type, hitch mechanism, controls and fan turbine size.

76. Tower sprayers have also been used and while they are effective in young orchards, they are not suitable for use in mature orchards as they do not adequately penetrate the tree canopy. Coral Beach tried tower sprayers but found they were not effective and they were no quieter than turbo-mist sprayers. Timely spraying of herbicides and pesticides is critical to maintain coverage.

77. When asked about reducing noise from spraying by "gearing up, and throttling down", Mr. Holder emphasized this only works in a thinner canopy. In a fully developed canopy, less penetration would occur, leading to less effective coverage. Air volume is important to achieve good penetration of the canopy.

Mr. Malloy

78. Mr. Malloy was familiar with the Frost Boss wind machines used in New Zealand and has discussed bringing these to BC. However, there was insufficient interest to put together an order, which, coupled with the lack of manufacturer or dealer support meant that it was not feasible to introduce these machines to BC. Frost Boss fans cannot be retrofitted onto the Orchard Rite machinery. He could not comment on the difference in noise between the Orchard Rite or Frost Boss technology and had not heard a Frost Boss in operation.

Findings regarding contextual factors

79. The Panel notes that in their closing submissions, both complainants challenged the credibility of most of the respondent's witnesses. Mr. Learmonth says that the respondent's witnesses testified to matters beyond their expertise or experience. Mr. Lewis argues that all but one of the respondent's witnesses has a vested interest in Coral Beach being successful in this complaint given their involvement in the cherry industry.

80. Both complainants challenged the credibility of Mr. Withler and were critical of his report. Mr. Learmonth says the report does not address the degree (frequency) of disturbance created by the farm's equipment. Mr. Lewis questions the integrity, neutrality and competency of Mr. Withler. He suggests Mr. Withler is not neutral or objective as his job is to support Coral Beach; he has made a career out of supporting and defending the cherry orchard industry and any other agricultural enterprise, including those abusing the public. He was particularly incensed by his response to a question about what the people of Lavington should do to cope with the sleepless nights and his response that "they can leave". Mr. Lewis says this demonstrates a callous indifference. He also pointed to a number of deficiencies in the KP report (relating to measurements and the circumstances under which they were taken and certain maps). Mr. Learmonth was extremely disappointed that no one attended his property during the noisiest times in 2016 to hear the noise or to take sound measurements. Mr. Learmonth does not accept the conclusion that the management practices at Coral Beach were similar to those of three other comparator orchards when in his view its practices are extreme in almost all aspects. He says he pointed out the amphitheater effect to Mr. Withler during the site visit and he chose to ignore it.

81. In response to the complainants' broad based challenges to the credibility of these witnesses, developed largely in their written closing submissions and with little if any opportunity for these witnesses to respond to the complainants' theories or alleged deficiencies in their evidence at the hearing, the Panel has carefully evaluated the evidence regarding normal farm practice. In our view, the respondents' witnesses and Mr. Withler gave consistent evidence that Coral Beach was following the same practices used by other farms. None of these witnesses gave evidence that this farm is an outlier or poor performer within the industry. The evidence is that Coral Beach is trying new technologies to improve its production and reduce the impact of its farm on

its neighbours. In our view, this evidence cannot be discounted in the manner suggested by the complainants. The Panel accepts the evidence of the respondents and their witnesses.

82. The complainants argue that the site specific attributes (an amphitheater or bowl shape) amplifies the sound disruption they experience over that experienced by neighbours adjacent to other orchards. In considering the evidence we heard on the issue of "unique topography", the Panel was shown photographs of the "amphitheater". However the depiction of the valley in the photographs is not in and of itself unique. The Panel accepts the evidence from the respondent's witnesses that much of the tree fruit and grape production in the Okanagan is done on slopes. The KP with some 30 years of experience found nothing unique about the setting; there are many other orchards abutting an upslope in the neighbourhood. We find the preponderance of the evidence from the respondent's witnesses was that this location is not unique as a large percentage of cherry orchards are located on side hills.

83. The complainants introduced quite a novel theory that the particular topography of this area produced an "amphitheater-effect" the result of which was to amplify the sound experienced in their residences over the sound at its source. Mr. Lewis seems to believe this is a matter of common sense saying "we were of the belief that more than 3000 years of Greek and Roman theatre, every outdoor theatre in the world, every outdoor concert, Carnegie Hall and every opera house ever built pretty much provided sufficient evidence of the effect." Unfortunately the complainants provided no actual evidence in support of this novel theory or whether the specific topographical feature here did in fact create an "amphitheater effect". At a minimum, the Panel would need technically supportable sound measurements at the source of the sound and at the homes of the complainants and an interpretation of the data to assess this theory. While the complainants are critical that no one produced this evidence (including the respondent, the KP and BCFIRB), this is the complainants' theory which needs evidentiary support. In the absence of such evidence, the Panel cannot accept this argument.

84. Much was heard at this hearing about decibel measurements and the relative accuracy of the complainants' measurements (and the audio played in the hearing room) vs. that 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. There is no dispute that from time to time (and in 2016 with greater frequency) the complainants were disrupted in their homes by high levels of noise, often in the evening and early morning.

85. However, the uncontroverted evidence of the respondent's witnesses and the KP is that this orchard uses the same kind of equipment to dry cherries following rain events as most other cherry orchards. What the actual decibel reading might be at a given location at a given time is not determinative of whether a particular practice is inconsistent with "normal farm practice" especially 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.

86. The *Act* 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 (far worse in 2016 and to a lesser extent in 2017). However, the reality is that the *Act* was designed to protect the right to farm. 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.

87. The complainants also argued that Lavington is wholly unsuited to cherry production; they say it is the "coldest, wettest, darkest orchard" at the extreme edges of suitability which guarantees extreme measures for crop survival. As a result, Coral Beach requires extreme or unique management practices at frequencies unheard of in the industry. They say this high intensity industrial farming is completely at odds with existing communities and the high levels of noise they experience and the frequency of these noise events are inconsistent with normal farm practice.

88. The assertion that Lavington is wholly unsuited for cherry production was also not borne out in the evidence. The KP's evidence that the cherry industry in the Okanagan has moved from the south Okanagan to an area now more accurately described as "north of Kelowna", including Coldstream, was not challenged. His evidence, which we accept, is that later harvest blocks are now found in nearby communities of Armstrong and Spallumcheen and will likely move into the Thompson River drainage area in the future. This migration of production is mostly being driven by the fact that new varieties have expanded the area where soil and climate conditions are suitable. Mr. Khela indicated his desire to acquire new orchards in the North Okanagan to grow late season cherries. Mr. Markgraf's evidence was that although cherries in the Lavington area are some of the latest to mature, the mechanical husbandry (and presumably its frequency) would be similar to that required at other orchards in other locations.

89. The suitability of the Lavington area was also supported by Ms. Fitzgerald's crop insurance data showing less crop loss in the North Okanagan as compared to further south. Mr. Geen also testified as to the higher production and better quality of fruit in Lavington than in his more southern Lake Country (Carr's Landing) location.

90. The complainants also argue that the proximity of neighbours is a factor to be considered, arguing that the comparator orchards' neighbours reside below them and are therefore "largely oblivious"; the Dendy orchard is surrounded by other orchards and the only orchard with conflict is Northern Cherries in Lake Country but it uses one helicopter, two turbines, minimal spraying and has few neighbours. They argue that Coral Beach has dropped into a community of hundreds of homes that previously lived in harmony with agriculture for decades and proceeded to make their lives unbearable.

91. The KP report shows the closest neighbours to the comparator orchards range between 13 to 33 metres (about 40 to 100 feet), far closer than what we see with these complainants Mr. Learmonth's residence is set back 80 metres (about 260 feet) from the Coral Beach property line and Mr. Lewis is 347 metres (about 1150 feet); several of the orchards are adjacent to residential neighbourhoods on at least one side. Further, Ms. Dendy testified as to the proximity of her neighbours. As such, the Panel does not find the proximity of the complainants is a contextual factor warranting a radical modification of farm practices.

92. Both complainants argued that the contextual factors at least require Coral Beach to use quieter equipment. Mr. Learmonth argued that Frost Boss fans should be used although the evidence is that Frost Boss fans are not used in BC and the evidence that they are in fact quieter is equivocal at best. He says modern helicopters are quieter than the "obsolete Bell 206" used by Coral Beach. He argues that turbo sprayers can be operated quieter by adjusting the gear/throttle ratio although Mr. Holder did not agree that this was an option for mature canopy trees like those at Coral Beach.

93. The normal farm practice test does not turn on whether there is quieter equipment available elsewhere in the world. The test is what other similar cherry orchards are doing, having regard to the context. As stated earlier, Coral Beach's practices in relation to drying cherries involve the same equipment as used on other orchards in the area, and we do not find that the context warrants an order that they undertake the use of equipment that no one else in the province is currently shown to be using.

94. We wish to make clear that our assessment of contextual factors includes our assessment of the "good neighbour" principle. In this regard, Mr. Geen gave evidence, which we accept, regarding some of the steps he has taken to minimize the impact of his farm on his neighbours. Coral Beach has tried alternative sprayers which while slightly quieter were less efficient and did not meet spray requirements. The farm does not use propane cannons and uses innovative laser technology. It added a fourth sprayer in 2017 (one sprayer for 25-30/acres) to reduce spray time, and tailored its spray program when possible to avoid applications closest to neighbours later in the night. A farm employee lives on the farm site and the manager lives locally. The farm now uses four helicopters (when available) to get the job done quickly and efficiently.

95. The farm has been researching Voen covers to mitigate rain damage and is looking at covering an area closest to the Learmonth residence at considerable expense which could reduce noise by 25-30%. Mr. Geen also indicated a willingness to implement three of the four KP recommendations specific to Coral Beach – the fourth (Recommendation 6) involves modification of sprayers needs to be explored with the manufacturer and may not be possible, but he has indicated a willingness to follow up on this. These recommendations are set out at paragraph 27 above and we note here for completeness that recommendations #4, #5, #7 or #8 are not specific to Coral Beach.

96. Mr. Learmonth does not agree that the farm has tried to ease the disruption on neighbours. He says Mr. Geen has never come to the property to listen to the level of

disturbance caused by his farming operations. As for the possibility that the new cover may reduce noise, Mr. Learmonth suspects that while the cover may limit the use of helicopters, more not less fans may be needed to disperse heat.

97. The Panel concludes that Coral Beach has taken reasonable steps that a neighbourly farmer would normally employ in the circumstances, and continues to do so to ameliorate the impacts of its operation on its neighbours. Despite these steps, we acknowledge that from time to time, significant noise disruption remains and that this is unavoidable. However, that is the nature of farming. Coral Beach is operating on land specifically zoned for agriculture. Agriculture can often be intensive and disruptive; agri-business is the face of farming in BC. The *Act* was designed to protect farms like Coral Beach as long as they follow normal farm practices and we have concluded above that it does.

98. In the *Act*, 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 *Act* as if it were a nuisance or zoning statute, telling farmers based on noise or other impacts, what crops they can and cannot grow in what areas of the ALR. Where, as here, a normal farm practice produces a real and substantial disturbance, the right to farm prevails 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 complaint.

99. We cannot conclude these reasons without observing that the KP Report states that in times where extreme weather requires extreme measures, Coral Beach should bear in mind its neighbours and the complaints heard in this hearing and try to implement the KP recommendations to the extent possible to reduce the impact of farm-related noise on neighbours. This is what any good neighbour should do. While we issue no order in this regard, we encourage Coral Beach to carry out the recommendations specific to Coral Beach, as it has expressed its willingness to do as noted above.

ORDER

100. The complaint is dismissed.

101. There is no order as to costs.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

_____
John Les, Chair and Presiding Member

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Daphne Stancil, Member

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Al Sakalauskas, Member