

IN THE MATTER OF
THE FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996 C. 131
AND IN THE MATTER OF TWO COMPLAINTS REGARDING A NOISE
DISTURBANCE FROM A CHILLER ON A NEIGHBOURING VINEYARD IN
THE NARAMATA BENCH, BRITISH COLUMBIA

BETWEEN:

CHERYL BINGLEY

LAURA WARD

COMPLAINANTS

AND:

LANG VINEYARDS

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board:

Harveen Thauli, Presiding Member
David Zirnhelt, Member
Dennis Lapierre, Member

For the Complainants:

Cheryl Bingley, self-represented
Laura Ward, self-represented

For the Respondents:

Teresa Campbell, self-represented

Date of Hearing:

June 24-25, 2019

Place of Hearing

Penticton, British Columbia

A. INTRODUCTION

1. This decision relates to two separate noise complaints filed with the British Columbia Farm Industry Review Board (**BCFIRB**) under section 3 of the *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c. 131 (the **Act**), and received by BCFIRB on January 11, 2018.
2. The first complainant, Cheryl Bingley, resides on a residential property on Gammon Road in the Naramata Bench that is east of the farm (vineyard) operated by Lang Vineyard (the **respondent**). More particularly, Ms. Bingley's residence is immediately east of the respondent's Pro glycol chiller, the noise from which is the subject matter of this dispute. Her residence is upslope from the respondent and approximately 10 metres higher than the chiller. Ms. Bingley is retired.
3. The second complainant, Laura Ward, resides on a residential property on Gammon Road that is east of the respondent's chiller but north of Ms. Bingley's residence. Her residence is also upslope from the respondent and approximately 10 metres higher than the chiller. Ms. Ward is a practising lawyer.
4. In brief, Ms. Bingley and Ms. Ward (together, the **complainants**) allege that they are aggrieved because the respondent's chiller generates variable noises continuously throughout the day and night, which they state is so pervasive and disruptive that it has impacted their enjoyment of their properties. Ms. Bingley, in particular, states the noise has impacted her mental health. They argue that the respondent's use of its chiller is inconsistent with normal farm practice given its proximity to their residences and the duration of its use.
5. The respondent operates a vineyard on Gammon Road on an acreage located in the Agricultural Land Reserve (**ALR**). The respondent began operating in 1990 when it received the first Farm Gate Winery licence in the Naramata Bench. It has approximately 6.5 acres in production. The respondent's position is that its use of the chiller is consistent with normal farm practice and its relocation is not an option. The respondent argues that the noise is not unbearable, and the complainants can still enjoy their properties.
6. BCFIRB retained Ministry of Agriculture agrologist, Carl Withler, P. Ag. as a "Knowledgeable Person" under section 4 of the *Act*. Mr. Withler prepared a report, with the assistance of Ministry agrologist, Christina Forbes, P.Ag., which assesses the respondent's chiller and vineyard practices. Mr. Withler testified at the hearing.
7. The parties attempted to settle this dispute with the assistance of BCFIRB staff. Although the hearing was adjourned to accommodate the settlement discussions, the parties did not reach an agreement. This matter proceeded to an in-person hearing.

8. The BCFIRB hearing panel (the **Panel**) conducted a site visit of the complainants' and respondent's properties on June 23, 2020. The complaints were heard on June 24 and 25, 2020 with strict COVID-19 protocols in place.
9. The parties made their closing arguments in writing with the complainants being given a right of reply. This process concluded on July 3, 2020.
10. The Panel would like to emphasize to the parties that the Panel has fully considered all of the facts and evidence in the parties' written submissions and adduced during the hearing, but the Panel refers only to the facts and evidence it considers necessary to explain its reasoning in this decision. The Panel will not comment on the various assumptions and conclusions drawn by the parties, or the criticisms they directed at each other, in their written submissions or at the hearing.

B. ISSUE

11. Is the noise generated from the Pro glycol chiller on Lang Vineyard operating in accordance with normal farm practice?

C. KNOWLEDGABLE PERSON REPORT (the KP Report)

12. Mr. Withler's title was a "Treefruit and Grape Industry Specialist" within the Ministry of Agriculture (the **Ministry**). He retired in early 2020. He has more than 30 years of experience in his field of work. In particular, Mr. Withler has worked in the grape industry since 1992 and has assisted with converting orchards to grapes and designing vineyards in BC and New Zealand. He or another Ministry staff member conducted site visits of the complainants' and respondent's properties on September 24, September 27, October 18, and November 5, 2019. During his site visits, the chiller was turned on for his benefit and evaluation. The KP Report dated December 6, 2019 was an exhibit at the hearing.
13. The KP Report states that since receiving the first Farm Gate Winery licence in 1990, the respondent has continuously produced grapes and wine and has gone from a "small" winery to a medium sized winery in the BC wine industry.
14. The KP Report indicates that the respondent installed its chiller in 2012. Its purpose is to control temperature in the production of wine. The KP Report further indicates that the complaint is "*very focussed*" on the noise that the chiller generates, which is described by the complainants as "*not normal*" when compared to other wineries.
15. The KP Report notes that the respondent had a shed built around the chiller to muffle the noise but that the complainants state the shed has not had the intended result of reducing the noise.

16. The KP Report describes the location of the complainants' residences in relation to the chiller. The linear distance from the chiller to Ms. Bingley's front door is 68.9 metres and 51.9 metres to Ms. Ward's deck whereas the linear distance from the chiller's corner to the edge of Gammon Road varied from 17.6 metres to 22.3 metres. The KP Report refers to the Ministry of Agriculture's "Guide to Edge Planning" (the **Guide**), which includes recommended setback distances from an ALR boundary to urban areas. The Guide is a good reference but does not carry the force of law. It proposes a distance of 50 metres for open loading areas and refrigeration units. Therefore, the KP Report concludes that although the chiller does not meet the recommended minimum setback distance to Gammon Road, it does meet the minimum setback of 50 metres to the complainants' residences.
17. The KP Report indicates that noise migrates uphill and is not significantly reduced by shrubbery or simple fences. As stated above, the complainants' residences are upslope from the chiller (approximately 10 metres vertically) and have shrubs and trees in an attempt to reduce winery noises and activity as well as enhance the beauty of their properties.
18. The KP Report indicates that the respondent's winery/processing facility is located on the eastern (upslope) edge of the property. More particularly, it states at page 4:

The location of the facility is not uncommon in the Okanagan wine industry as it capitalizes on the view of Lake Okanagan, allows direct access to the processing facility from Gammon road and minimizes loss of productive agricultural land by being proximate to the road for access to the winery and crush pad. As the winery has grown, this location is squeezed and a new storage facility has been built to reduce the need to store, process and manufacture all materials on the crush pad. Unfortunately, this location is directly below, and within sight, of the complainants [sic] residences which may contribute to the current concerns.
19. In describing the use of chillers by wineries, the KP Report indicated that chillers/coolers are used by every winery Mr. Withler visited. Chillers themselves have evolved from being "home built" to "engineered" units, some built on-site from pre-designed components and others off-site and sent as a unit and placed on a pad at the vineyard.
20. Mr. Withler discussed the respondent's chiller with Jesse Tanner of Custom Climates Refrigeration (**Custom Climates**). He helped install the chiller when he worked for a different refrigeration company and now services it. Mr. Tanner confirmed that (page 10): *the unit is operating correctly (chilling wine and "quiet"), is standard in the industry (30 hp dual phase) and is likely "suffering" due to the shed placed around it.* He believes the shed has shortened the chiller's life expectancy by approximately five years and that the chiller is more costly to run as the shed impedes airflow.

21. In brief, the KP Report provides the respondent's chiller operates "*not dissimilarly*" to other chillers at different wineries. The difference, however, is that the other wineries Mr. Withler visited did not have residences located near their chillers except if those wineries had farm residences or agri-tourism accommodations. The chillers of these other wineries were generally located behind or beside their processing facilities.
22. During the four site visits by either Mr. Withler or his staff member, they assessed the chiller noise at 10 neighbourhood locations, including Ms. Bingley's front door and Ms. Ward's deck. They did not hear the chiller noise at the complainants' residences or seven neighbouring sites. They only heard it while walking on Gammon Road during three of the four visits.
23. Mr. Withler had a normal conversation with the respondent's staff within three metres of the chiller running at full capacity. He acknowledged that there were other noises during his site visits, including the sounds of rock hammers from above the complainants' residences, compressors from the house renovation on the respondent's vineyard, general banter and music on the respondent's crush pad, and bins being moved. Mr. Withler found that the chiller noise was less intrusive than the foregoing noises.
24. The Naramata Bench is within the Regional District of Okanagan-Similkameen (**RDOS**). The KP Report indicates that RDOS Noise Bylaw 2386 does not apply to noise resulting from normal farm practices within the ALR.
25. Despite hearing no chiller noise at the complainants' residences, the KP Report provides three recommendations for improvement, which Mr. Withler believes may reduce the conflict between the complainants and the respondent:
 1. *As harvest season approaches a generalized schedule of activities be forwarded from the General Manager to the complainants outlining approximate crush times in weeks, approximate chiller times/usage in weeks and any other details that the General Manager deems relevant regarding crush related activities.*
 2. *When the chiller in question requires replacement consideration be given to moving it to an exposed location so that airflow is not impeded. This will increase the efficiency of the unit and reduce operating costs.*
 3. *It may be in Lang Vineyard's best interest to plant a permanent, evergreen buffer along the road edge to deter sight of crush and cool operations into the future. Steel roof coverage of the crush pad may also assist in reducing concern for crush activity and noise while providing a weather reduced work environment for Lang employees.*

D. FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT

26. 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.
27. 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).
28. 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.
29. The Panel now turns to consider the first branch of the test.

E. PRE-HEARING SUBMISSIONS

Are the complainants aggrieved by the noise disturbance from the respondent's vineyard?

Cheryl Bingley

30. Ms. Bingley and her husband purchased their residence on Gammon Road in 2009. They rented their residence until March 2015 when they moved permanently to the Naramata Bench.
31. Ms. Bingley launched her initial complaint against the respondent to the RDOS in June 2015 before learning of BCFIRB's complaint process.
32. Ms. Bingley first approached the respondent about the chiller noise in September 2015.
33. Ms. Bingley described the chiller noise as a low frequency tonal humming, droning and sometimes buzzing noise. When the chiller is in use, she states that it runs 24/7, that is, continuously throughout the day and night, weekdays and weekends "*for 365 days*". More specifically, she recorded the months when the chiller was in use from 2018, onwards:
- 2018: January, February, and September to early December;

- 2019: a few weeks at the end of early June/July, and mid-August to December; and
- 2020: January to at least June 25, the conclusion of the hearing.

Her contention is the chiller has been in use continuously for approximately 10 months since the respondent started the chiller on August 12, 2019. The Panel does not know whether the chiller remained in use or was eventually turned off after the hearing had concluded.

34. Ms. Bingley explained how she is aggrieved by the chiller noise as follows:
- Despite having double paned windows across two-thirds of the front of her residence to capitalize on the views, the low tonal droning noise penetrates through them.
 - She can sometimes hear the noise in her dining room or two bedrooms even when the windows are closed and the rest of the house is quiet.
 - Her worst experience of the noise occurs when she is outside on her deck or patio or working in the front garden. She used to enjoy gardening but it has now become a chore.
 - She can no longer relax outside to enjoy a morning coffee or evening dinner with wine and sometimes the noise gives her headaches.
 - She and her husband wear earplugs to fall asleep even when her master bedroom windows are closed.
 - The noise is so intolerable that she and her husband have considered moving and have looked at other properties with a realtor.
35. Ms. Bingley referred to an email of June 14, 2017 from Mike Lang, the respondent's former general manager indicating that he had consulted a sound expert. Two wood panels were installed on either side of the chiller and against the chiller's air intake, which caused the chiller to work harder and in Ms. Bingley's opinion, noisier. Despite advising Mr. Lang that the noise was worse than before, she stated this structure stayed in place for eight months.
36. Ms. Bingley referred to another email of February 9, 2018 from Mr. Lang that stated the respondent's staff and a Custom Air¹ employee had "*figured out a way to actually shut down the machine for a period of time which would not compromise the wines in our cellar.*" He also wrote: "*...we may be able to have the machine shut off for much of the year and only need to use it for shorter periods during the year.*" The chiller remained off from February to September 2018. Mr. Lang left his employment with the respondent during the fall of 2018.

¹ Custom Air and Custom Climate are two separate entities.

37. Ms. Bingley stated the wooden shed was constructed in December 2018. It was completely closed except for vents on the roof. The big doors on the north and south sides of the shed were built for maintenance access. She stated the shed did not assist in reducing the noise when the chiller was turned on in June 2019, for approximately one month, because the noise was escaping through the large gaps and open shed doors. Ms. Bingley was upset when this happened because she thought she had an “agreement”² with the respondent whereby the chiller would stay off until September 2019.
38. Ms. Bingley stated she hears tractor noises and dogs barking. She used to hear the occasional bird cannons and helicopters when there was a cherry orchard north of the respondent’s vineyard. The difference, however, is that the chiller noise is continuous.
39. Ms. Bingley was diagnosed with anxiety and depression in July 2019, which she claimed was brought on by the noise and the dispute with the respondent. She previously took Trazadone to help her fall asleep and recently began taking it again because she is having difficulty sleeping.

Laura Ward

40. Ms. Ward and her husband, Doug Oucharek, purchased their residence on Gammon Road in 2009.
41. Ms. Ward stated the noise is similar to having a truck running all the time at the end of the driveway. The noise sometimes becomes louder and then softer, but it is constant and the drone, highly invasive.
42. Ms. Ward explained how she is aggrieved by the chiller noise:
 - She can hear the noise in her yard and on the second-floor deck. If she keeps the upstairs door open to the deck, she can hear the noise in the kitchen, dining room and upstairs living room.
 - She has in the past, in the summer when it is very hot, slept outside on a mattress on the deck. She stated this is no longer possible as the noise constantly wakes her up.
 - She stated the only way to address the noise is to drown it out with another noise. For example, when she is working in the garden for any length of time, she now listens to music or audio tapes with earbuds to block out the noise. Before the chiller was installed, she did not have to do this. She would sometimes work or read outside, but she can no longer do so because of the noise.

² The “agreement” refers to settlement discussions between the complainants and the respondent in November 2018. The parties did not enter into or sign any settlement agreement. Settlement discussions are undertaken on a “without prejudice” basis and inadmissible in these proceedings.

- She sometimes sits on her deck to watch a TV programme while wearing earbuds. However, even with earbuds, she can hear the noise, every now and then, over the program she is watching.
 - She and her husband grew trees in the front of their property in an attempt to block the noise but this did not help. In 2019, they added a water fountain on the east side of their property and created a sitting area by it because the sound of running water drowns out the noise.
43. Based on the evidence, the Panel finds the complainants have met the low threshold test of being aggrieved by a disturbance resulting from a farm operation carried out by a farm business. In this case, the disturbance is the noise generated by the respondent’s chiller.
44. As the Panel is satisfied the complainants are aggrieved by the chiller noise, the next question – normally, the key question on these complaints – is whether the noise disturbance results from a normal farm practice.

Is the respondent’s use of the chiller consistent with normal farm practice?

45. 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.”
46. This test requires a consideration of general industry practices, together with the specific contextual circumstances of the respondent farm (vineyard) 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), and *Eason v. Outlander Poultry Farms Ltd.* (March 10, 2000).
47. The normal farm practice test was discussed in detail in *Swart v. Holt*, January 12, 2016 at para. 89 to 96. We adopt those paragraphs in their entirety, and we quote from paragraphs 96 and 97 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*³, as adopted in BCFIRB decisions, are the principles that best achieve the objects of

³ *Pyke v. TRI GRO Enterprises Ltd.* (2001), 204 D.L.R. (4th) 400 (Ont. C.A.)

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*⁴⁴ 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.

48. The first step is to carry out a general assessment of industry standards – to determine proper and accepted customs and standards in the BC wine industry. On this point, there is not much dispute on the evidence that the use of chillers is standard practice in the wine industry. Chillers are used to moderate temperatures of wine in tanks.
49. The Panel heard from wine representatives of the Serendipity, Tightrope and Bench 1775 wineries at the hearing. The Panel also had the benefit of hearing from Mr. Tanner, who services chillers at various wineries in the Okanagan region as well as the KP Report and Mr. Withler’s testimony. The evidence from all of these witnesses was that the respondent’s use of its chiller for moderating wine temperatures in tanks is consistent with industry practice carried out at other wineries in the Naramata Bench and Okanagan Valley.
50. The real issue for the complainants is not that the respondent is using a chiller. Rather, they argue that its location near their residences and the duration of time the respondent uses its chiller are the contextual factors that vary considerably from how other wineries use their chillers. They argue that when these contextual factors are considered, the respondent should be required to modify its practices so that the chiller noise does not disrupt the enjoyment of their properties. This is reflected in the remedies they are seeking.
51. Ms. Bingley is asking the Panel to order that the respondent modify its practice by relocating the chiller to the west side of its facility so that it is no longer directly across from her residence. Ms. Ward acknowledges there may be other solutions besides moving the chiller. She is asking the Panel to order that the respondent modify its practice by not using its chiller, at a minimum, during the warmer months.

⁴⁴ *Ollenberger v. Farm Practices Board*, August 10, 2006, Chilliwack Registry No. S16527

F. THE HEARING

Evidence at the Hearing on the Contextual Factors

Carl Withler, P.Ag.

52. Mr. Withler summarized his findings in the KP Report at the start of the hearing. He also confirmed the following:
- The respondent carries out its activities similarly to other wineries.
 - Chillers are used during harvest season generally from mid-August to mid-November and then sporadically throughout the rest of the year, such as January or in the spring.
 - There are 300 wineries in BC but 212 different patterns of how these wineries use their chillers.
 - He did not hear the noise generated by the respondent's chiller during his two visits to the complainants' residences but he acknowledged that he attended on two weekdays during the daytime. He did not use a decibel reader.
 - Noise is not linear and travels uphill.
 - He confirmed the shed enclosing the chiller is too small and will reduce the chiller's life expectancy.
 - He stated the life expectancy of a chiller like the respondent's is approximately 20 years.
53. The KP Report was not meaningfully challenged in cross-examination.

Complainant - Cheryl Bingley

54. Ms. Bingley began by playing a recording of the chiller noise, which she apparently recorded with her iPhone 7 (the **Bingley Recording**). She confirmed the birds, which could be clearly heard in the background, were close by and towards the south end of her property.
55. Ms. Bingley confirmed her evidence from her written submissions. She also testified as follows:
- The respondent should have hired a sound engineer, as it said it would during a BCFIRB case management conference (discussed below), to find ways to mitigate the chiller noise.
 - She believes the chiller noise changed and became worse during the two weeks before the hearing. She saw a Custom Climate truck on the respondent's property on June 23, 2020 from 4:45pm to 5:30pm and made a request for this invoice during the hearing. The Panel denied her request

based on the respondent's objection that this visit was unrelated to the chiller.

- The shed has not made much difference to reduce the noise generated by the chiller.
- She does not hear the noise from behind her house.
- The respondent should have given more careful consideration to the chiller's location on its property given BCFIRB's farm practices guide on BCFIRB's website and a brochure for a different make of chiller, both of which discuss locating stationary equipment where the potential impact on neighbours is minimized.

56. Ms. Bingley responded in cross-examination as follows:

- She agreed the sound files for the Bingley Recording were MP3 files. She indicated the original Bingley Recording was on Vimeo but putting it onto a flash drive for the Panel and respondent required converting it to MP3 files. She was not aware of the compression rate and did not know that different compression rates could boost volumes.
- She could not hear the chiller noise very much between September to November 2019 because of the construction taking place behind her property and at the respondent's property. She was away from mid to late January 2020. She acknowledged that the noise was not as loud when it was running at half-capacity from late January to February 28, 2020 when Custom Climate attended to the chiller. She believes the noise has greatly increased since then.
- She knew she was purchasing a property across from a winery.
- She was not aware of the septic tanks on the west side of the respondent's facility.
- She did not know the age of the grape vines in the area where she thinks the chiller should be relocated.
- She thinks the respondent's staff misled her on two occasions: 1. Mr. Lang stated he would put a barrier around the chiller but instead he installed two plywood panels, which were eventually taken down; and 2. Teresa Campbell, the respondent's sales manager initially discussed obtaining quotes to relocate the chiller but then decided to reduce the chiller's use and look into other mitigation options. Ms. Bingley does not believe the chiller's use has been reduced.
- She acknowledged questioning staff members working on the crush pad or in the wine store about the vineyard's practices.

Cheryl Bingley – Witnesses

Edwin Bingley

57. Edwin Bingley, Ms. Bingley's husband, testified that they purchased their current residence while on vacation. They rented it until they permanently moved into it in 2015. He testified as follows:
- He hears a low drone noise when he is in bed and wears earplugs every night to sleep. His wife can only put in one earplug. Sometimes she cannot sleep and can be "*miserable*" from the lack of sleep.
 - He cannot enjoy a cup of coffee on a Sunday morning on his deck and listen to the birds because of the low drone noise.
 - The noise has affected his mental health and his wife's.
 - He would like to find a way to get along with the respondent and find a solution. He believes relocating the chiller would be the best solution.
58. Mr. Bingley responded in cross-examination as follows:
- He confirmed he knew he was purchasing a residence across the street from a vineyard.
 - His renters did not express any concerns about the chiller noise.
59. In response to Panel questions, Mr. Bingley responded as follows:
- They used to live in North Vancouver before moving to the Naramata Bench. Living in the Naramata Bench has been their first exposure to a "rural" environment.
 - He agreed the noise has affected Ms. Bingley's mental health but acknowledged that he reacts to how his wife is feeling.
 - He believes the chiller noise has been more intrusive than the current construction noise and the traffic on Gammon Road.
 - He initially confirmed the shed made the noise worse but then stated the noise has been about the same with the shed.

Mike Lang

60. Mr. Lang was employed as the respondent's general manager from 2012 to 2018. He testified as follows:
- Viking initially installed the chiller and had to service it numerous times after it was installed because the chiller was overheating or coolant, dripping. He described the chiller as a "*lemon*".
 - He confirmed Ms. Bingley approached him in September 2015.
 - His father and Andy Arink, who was someone his father hired to assist with odd jobs at the respondent's vineyard, installed the two wooden panels on

either side of the chiller in 2017. Mr. Arink did some sound testing by recording decibel readings and produced a one page report dated June 30, 2017, which was received into evidence (the **Arink Report**). He does not believe the panels reduced the noise.

- He contacted Custom Air in late 2017/early 2018 to ask the cost of moving the chiller to the west side of the facility and received a “*rough estimate*” of \$15,000.
- He believes the respondent’s cellar is not ideal because the building is brick and does not have insulation. The cellar adapts to outside temperatures. If it is cold outside, the cellar is cold and vice versa. The chiller then has to work harder to compensate for the lack of insulation, particularly during the harvest season. He acknowledged that adding insulation would be a “*major project*”.
- He stated the fuller the tanks, the harder the chiller has to work.

61. Mr. Lang responded in cross-examination as follows:

- He went downstairs to the cellar “*maybe a couple of times*”.
- He did not deal with Viking, the installation company when an issue arose with the chiller. The now-deceased former winemaker did.
- He confirmed he has no experience as a winemaker or with chillers.
- In response to his relationship with Ms. Bingley, he stated: “*It wasn’t great*”; “*It was not easy dealing with her situation*”; and it was “*frustrating*”. He confirmed writing an email on August 2, 2017 to Ms. Campbell in which he questioned whether it would ever be possible to meet her [Ms. Bingley’s] expectations.
- He conceded he would not argue with the winemaker who needed the chiller to be turned on.

Beatrice Lindstrom

62. Beatrice Lindstrom’s residence is east of Ms. Bingley’s. She stated she hears the chiller occasionally when it is quiet, but the noise does not bother her because it is not constant.

Timothy Hodgkinson

63. Timothy Hodgkinson lives across from the vineyard and to the south of Ms. Bingley’s residence. He has lived in his residence for approximately six years.

64. He can hear the chiller noise in the front garden, living room, balcony, den, his bedroom and his daughter’s bedroom. He hears the noise when the windows are open, but he can hear it in his daughter’s bedroom when the window is closed. The front of his property does not have any trees to buffer the sound.

65. Mr. Hodgkinson responded in cross-examination as follows:
- The noise is “*there*” but he has not done anything about it.
 - He is currently renting out his house. The renters had only been in the house for a couple of months at the time of the hearing. Ms. Campbell put to him that his renters have not complained about the noise to her.
66. In response to Panel questions, Mr. Hodgkinson responded as follows:
- The noise has been frustrating but he believes the noise can be managed.
 - He initially stated the noise has not come up in discussion with his renter but then stated his renter mentioned it.
 - He denied reviewing his testimony with Ms. Bingley but then stated Ms. Bingley mentioned that there would be a hearing.
 - He could not remember when the noise became an annoyance.
67. Mr. Hodgkinson acknowledged in reply to Ms. Bingley that they had in fact reviewed how he was affected by the noise and he received questions emailed to him from Ms. Bingley, all before the hearing.

Complainant - Laura Ward

68. Ms. Ward confirmed her evidence from her written submissions. She also testified as follows:
- She previously owned the residence that Mr. Hodgkinson now occupies but when she owned it, the residence was a log house. She purchased it in October 2002 when she lived in Vancouver and used it approximately every other weekend. She moved out in May 2004 and then eventually sold it. She heard normal farm noises but not the chiller noise.
 - Her current residence was built in 1990. She and her husband purchased it in November 2009 and moved in the following month. Her husband works from home.
 - She cannot hear the noise in her residence when the doors and windows are shut. However, when they are open, she hears the noise in her kitchen, living room and dining room, which is approximately 30% of her house. She hears the noise on her front and lower deck.
 - The volume of the noise varies, which she believes results from the atmospheric variances.
 - She argued that the only decibel reading that the Panel should consider is the one prepared by RPR Heating & Air Conditioning⁵ (**RPR**), which states that at full capacity (two compressors and four fans operating), the decibel

⁵ RPR tested the decibel range at one foot from chiller on October 31, 2018 and found the chiller was operating as quietly as possible.

range at one foot from the chiller is 85 decibels (the **RPR Report**).

- She provided guidelines from the World Health Organization (**WHO**), which state that the average night exposure should not exceed 40 decibels. This corresponds to the sound of a quiet street in a residential area.
- She does not think it is reasonable for neighbours to have to adapt their lifestyle and land use.

69. Ms. Ward confirmed in cross-examination that she does not work from home, so she is not exposed to the chiller noise and does not hear the traffic, such as trucks and motorcycles during the day.

70. In response to Panel questions, Ms. Ward responded as follows:

- She agrees sound travels differently depending on different variables such as the temperature and wind direction. She further agrees that people hear noises differently, which may be from the impact of environmental factors.
- She confirmed that the shed has not made much difference to reduce the noise.
- She agreed she adopted measures such as installing the water fountain to compensate for the noise.

Laura Ward – Witness

Dr. Annette Stenning

71. Dr. Annette Stenning had dinner on Ms. Ward's deck on one occasion and heard a loud hum. She believes that dinner took place during the summer of 2018 but she could not confirm the year. Dr. Stenning recalled watching a movie outside with Ms. Ward and did not hear any hum.

72. In cross-examination, Ms. Campbell advised Dr. Stenning that the chiller was not in use during the summer of 2018. Dr. Stenning then stated she was not certain what the noise was but it was definitely coming from the respondent's vineyard.

Respondent – Teresa Campbell

73. Ms. Campbell, the respondent's sales manager took over the issue of the chiller noise when Mr. Lang left his employment in December 2018. The only person who approached her about the noise was Ms. Bingley.

74. Ms. Campbell confirmed her evidence from her written submissions. She also testified as follows:

- She wanted to appease the neighbours. A friend had suggested building a shed around the chiller, so she commissioned New Spaces Construction in mid-December 2018 to build the current shed made of Roxul board around the entire chiller. The shed's total cost was \$6,930.

- She subsequently learned from reviewing a Custom Air invoice dated December 14, 2018 that it was not recommended to operate the chiller with the shed built around it. She tried to cool the chiller down with fans.
- When the chiller was off, there were no problems with the complainants. She never had any complaints or other issues before 2015.
- She contacted the RDOS and learned that Ms. Bingley had been dealing with the RDOS for four years up until 2019. A RDOS staff member visited the site three times, including one evening and listened to the chiller for 10 minutes each time. He found the chiller to be “*reasonably quiet – about as quiet as most commonly found air conditioner units used at such facilities.*” He could barely hear it from 100 feet (approximately 30 metres) away, along the roadway. He did not find the noise sufficiently disturbing to be enforced under the RDOS noise bylaw.
- The winery has been there for 30 years. When Guenther Lang started the winery in 1990, there were not any residences along Gammon Road.
- Ms. Bingley has approached staff and questioned them in the wine shop or on the crush pad and also asked for phone numbers of the respondent’s staff. Ms. Bingley has also taken pictures or videotaped the staff and respondent’s property, which she described as invasive.
- The chiller cannot be relocated to the west side of the respondent’s facility because the dirt roadway on the west side is narrow and needed for the forklift and there is also a septic tank and sewer pipe. To accommodate moving the chiller, the respondent would have to remove 60-year-old vines.
- She obtained estimates from two qualified sound engineers. The cost for them to do a reading and present findings was up to \$10,000. The respondent’s current owner did not think it was necessary to hire a sound engineer given the findings in the KP Report and of the RDOS staff member. He believed if the complainants felt so aggrieved, they were welcome to hire their own sound engineer.
- She advised that the respondent added a flood light after a break-in to protect the respondent’s facility and the neighbourhood. When someone complained that the light was shining into her house, the respondent had the flood light adjusted to fix this issue.
- The residence on the respondent’s property was renovated in 2019. She asked the workers to jack hammer in the mornings only because she did not want the neighbours to have to listen to the noise all day.
- She gave two bottles of the respondent’s wine to Ms. Bingley for a fundraiser.

75. Ms. Campbell responded in cross-examination as follows:

- She acknowledged that the shed has not solved the noise issue.

- Ms. Bingley works with her to solve the noise issue only when the chiller is off, not when it is on.

76. In response to Panel questions, Ms. Campbell responded as follows:

- The chiller is nine years old.
- The RDOS had not previously dealt with a chiller issue before Ms. Bingley's complaint.
- Future plans are to renovate the parking lot during the spring of 2021 to address complaints about visitors parking on Gammon Road.

Respondent – Dorian Wolaniuk

77. Dorian Wolaniuk, the respondent's wine maker started working for the respondent in the summer of 2018 and became the head winemaker in January 2020. At the hearing, he referred to his email of March 16, 2020 that he sent to BCFIRB staff in response to the contextual factors raised by the complainants. He confirmed the following from his email:

- The chiller ran at half-capacity from mid-January to mid-February 2020, so its noise was halved during this time. By mid-February, the temperature spiked and the wine in the tanks began to warm up. Therefore, the chiller had to be returned to full capacity because changes in temperature are not good for wines.
- He was previously employed at Joie Winery (**Joie**) and Joie's practice was to turn off its chiller by February after bottling its wine in January. This is a "*stylistics choice*" and given the type of wine Joie makes, its wine can be bottled early. He stated: "*All wineries are not the same, and there is not just one way to make wine*" and "*...chillers are turned on throughout the whole season at various times at different wineries.*"
- It is not possible to bottle the respondent's wines in January or February because the wines are put through further processes, which means the wines require more time in the tank.
- The respondent's red wines are designed to ferment in barrels for longer periods of time. The red wines are removed from the barrels and then poured into the tanks. The red wines are completed by early summer. Red wines need to be kept at a stable temperature, so the chiller is needed to control heat fluctuations. The respondent makes more red wine than Joie, so Ms. Bingley's comparison of the respondent to Joie was "*poorly placed*".
- He explained why the chiller runs longer in some years than others: "*Vintages are rarely the same every time, and are reflections of the seasons. That means some years the wines may require a little more time or a little more attention... .*"
- He was hoping to bottle the respondent's wines at the end of March 2020.

However, factories have been closed and his order for glass bottles delayed because of COVID-19. Given this situation and the unpredictable changes in climate, he has kept the chiller running for as long as he needs to because he does not want 80,000 litres of wine to become ruined.

- The shed is causing stress on the chiller because it requires proper ventilation. This is why he opened the shed doors.

78. Mr. Wolaniuk also testified as follows:

- He and his colleagues are concerned, taking the complainants' complaints seriously, and do not want the respondent to be an intrusive neighbour.
- He had to open the shed doors because the shed boxes in the heat, which ultimately damages the chiller. He informed Ms. Bingley that the shed was a mistake but it was built to try and fix the noise issue.
- He uses the chiller throughout the year and had hoped to have his wine bottled in March 2020 but the bottles did not arrive until months later and other complications arose. Part of the delay was due to COVID-19. He also had a problem with one wine, which needed more chilling to drop its acidity and make it more palatable. If he has a problem with a wine, he has to turn on the chiller right away. For example, if there is a very hot day, he cannot risk losing any wine because heat can ruin its quality. He cannot wait three or four days so that emails can be delivered to the complainants.
- He has been a professional jazz musician for 20 years and has sound experience. He does not claim to be a sound expert but he does understand sounds, decibel readings, and bouncing sounds in rooms. He does not like loud sounds because he does not want to damage his own hearing but he feels no threat to his hearing when working on the respondent's crush pad by the chiller.
- He can pick out frequencies and identify them. Therefore, he could tell there were issues with the Bingley Recording and stated it was not an accurate representation of the chiller noise.
- He discussed decibel readings recorded by an iPhone 10 referring to decibel readings taken by the wine shop manager (the **Lang Report**) and his own decibel readings. He confirmed that although an iPhone 10 is not the same as a sound engineer's calibrated instrument, the decibel readings are very close to each other. Even if the iPhone is off by five decibels, this would not make a big difference overall to the decibel readings. He had similar results to the Lang Report when he took decibel readings with his iPhone 10.
- He does not understand how the sound could be so debilitating to the extent that the complainants cannot work on their properties. The construction sounds such as the explosions, blasting, and jack hammering above the complainants' residences were much worse. These sounds will become much worse because there is housing slated for development across the

mountain. He does not understand how Ms. Ward can still hear the chiller noise with earbuds because when he wears earbuds, he cannot hear the chiller when he works next to it.

- Ms. Bingley has consistently taken photos of him and the staff while they are working and of the chiller. This makes him feel uncomfortable.
- He has not had any conversation with Ms. Ward and only one with Ms. Bingley when she complained to him about his music being too loud.
- He has been a cherry orchardist for the past 20 years and understands intrusive agricultural sounds such as tractors that start at 4:00am. Therefore, he does not operate his forklift before 9:00am because he wants to be considerate of the neighbours and avoid waking them up, particularly on weekends.

79. Mr. Wolaniuk responded in cross-examination as follows:

- The chiller was not running at full capacity at the time of the hearing.
- He anticipated bottling in July and then turning off the chiller at that time but he was reluctant to be “boxed into” a date by Ms. Bingley.
- Depending on the weather, he does not require the chiller as much for red wines.

Respondent – Witnesses

Winery - Serendipity

80. Katie O’Kell is part owner of Serendipity. She stated a chiller is used to stabilize white wines from January to March and always used during harvest from September to November. Serendipity’s chiller is indoors.

81. She stated in cross-examination that the Serendipity building has insulation but insulation has nothing to do with the chiller.

Winery – Tightrope

82. Lyndsay O’Rourke is the owner of Tightrope. She testified that there have been some years when Tightrope’s chiller has run year round.

Winery – Bench 1775

83. Val Tait was previously a winemaker at Bench 1775. Depending on what types of wine are being made, the chiller may run through crush (harvest) and after. If, for example, she wants to stabilize her wines by chilling them, she runs the chiller beyond the harvest season. Ms. Tait confirmed that to make wine of quality, a chiller is essential.

84. Ms. Tait stated in cross-examination that the chiller runs 24/7 during harvest. For some wines, the chiller stays on for longer periods of time than other wines. In particular, sweet wines need to stay chilled to preserve them until they are filtered and bottled.

Jesse Tanner – Custom Climates Refrigeration

85. Mr. Tanner is the owner of Custom Climate, which services and maintains chillers. Chillers are designed to run often and their use depends on the winemaker.
86. Mr. Tanner confirmed that Ms. Bingley contacted him to inquire about run times and discuss wineries without chillers, which he has never seen.
87. Mr. Tanner responded in cross-examination as follows:
- He advised the respondent to take down the shed because it is causing overheating and damaging the chiller. He added that Custom Air had also advised the respondent to take down the shed.
 - The lack of building insulation is not a concern because the respondent has climate control to maintain temperatures in its cellar. The respondent tries to maintain temperatures at 20° Celsius.
 - The shed makes the chiller run longer and not harder because the heat caused by the shed slows the chilling process.
 - None of his other clients have sheds enclosing their chillers.
 - The cost for moving the chiller to the west side of the respondent's facility is noted as \$20,000 in the KP Report. Other than discussing the costs for piping, electrical, and the crane, he could not recall whether he stated to Ms. Bingley that relocation was not an option. He understood that the chiller is located in its current spot because there is a septic tank located on the west side of the respondent's facility.
 - He confirmed he was at the respondent's facility on June 23, 2020 to work on the respondent's air conditioner, not the chiller.
 - He could not state which wineries have residences in close proximity to their chillers.
88. In response to Panel questions, Mr. Tanner responded as follows:
- He services about 50 wineries throughout the Okanagan area.
 - If only one of the two chiller compressors is on, the noise generated is half of what is generated by two compressors.

G. FINDINGS

Panel Findings on the Witnesses

89. Before the Panel gives its findings on the contextual factors, the Panel provides its findings on the parties' witnesses.
90. The Panel did not find the complainants' witnesses particularly helpful in advancing their arguments that the contextual factors require the respondent to take additional steps to meet normal farm practice.
91. Responding briefly to Ms. Bingley's witnesses, the Panel finds as follows:
 - Mr. Bingley knew he was purchasing a property across from a vineyard and acknowledged that this was his and Ms. Bingley's first experience living in a "rural" environment. He confirmed the shed has not made any difference to reduce the noise.
 - Mr. Lang's theory that the lack of insulation in the cellar makes the chiller work harder was contradicted by the respondent's witnesses, Ms. O'Kell and Mr. Tanner. Mr. Lang confirmed he is neither a wine maker nor an expert in chillers and he conceded he would not question a winemaker's decision to turn on a chiller. He further confirmed the former winemaker dealt with the respondent's chiller when an issue arose. He also questioned in an email to Ms. Campbell whether it would be possible to meet Ms. Bingley's expectations.
 - Ms. Lindstrom stated she hears the chiller noise but is not bothered by it.
 - Mr. Hodgkinson acknowledged that he did not do anything about the noise. He was adamant that he had not discussed his testimony with Ms. Bingley before the hearing but then agreed he had reviewed his evidence with her and received questions emailed to him from her.
92. Ms. Ward's only witness, Dr. Stenning did not recall whether she had dinner on Ms. Ward's deck in the summer of 2018 but described a loud hum. On cross-examination, Ms. Campbell put to Dr. Stenning that the chiller was not in fact operating during the summer of 2018. Dr. Stenning acknowledged that she did not know the source of the noise she heard.
93. It is unclear why Ms. Ward did not call her husband, Mr. Oucharek as a witness. Unlike Ms. Ward, Mr. Oucharek works from home and according to page 3 of the KP Report, "...is acutely familiar with the activities around the winery and local construction works."
94. In contrast, the Panel found the respondent's witnesses helpful in confirming certain facts.

95. The witnesses from Serendipity, Tightrope and Bench 1775 all confirmed that wineries use their chillers outside of the harvest season (August/September to November/December).
96. Mr. Tanner confirmed that the heat generated by the shed is damaging the chiller and the lack of building insulation is not a concern given there is climate control to maintain temperatures in the respondent's cellar.

Findings on Contextual Factors

97. The complainants argue that the duration of time that the respondent uses its chiller is a contextual factor that needs to be taken into consideration. They state the chiller has been on more than previous years. Ms. Bingley stated the chiller was off between February and September 2018 whereas it has been on since mid-August 2019 and remained on until at least the date of the hearing. The complainants argue the duration of time the chiller is in use varies considerably from previous years.
98. The complainants argue that the chiller is located too close to their residences. In support of this argument, they highlight that Mr. Withler was unable to find other wineries with residences close to their chillers. The complainants' residences are 10 metres higher than the chiller and since noise travels upslope (as indicated in the KP Report), they hear the noise generated by the chiller. They describe the noise as a low hum and drone, which is so constant and intrusive that it has impacted the enjoyment of their properties. The complainants argue that the location of the respondent's chiller in relation to their residences is another contextual factor that varies considerably from the location of chillers at other wineries.
99. The complainants challenge the findings in the KP Report whereby Mr. Withler or his staff member only heard the chiller noise on Gammon Road. They submit that had he attended their residences during the evening or weekend, he would have heard the chiller noise. Mr. Withler confirmed at the hearing that he attended the respondent's and the complainants' properties on a Tuesday and Thursday during regular business hours.

Chiller Noise

100. Since the basis of the complaints is the noise itself, the Panel will begin by discussing the noise disturbance.
101. Given the complainants' contention that Mr. Withler failed to attend during an evening or weekend, the Panel conducted its site visit of the complainants' and respondent's properties on a Tuesday evening after 6:00pm. The purpose of this site visit was to assist the Panel in understanding and placing the evidence into context.

102. The Panel members share what they heard:
- The Panel had a regular conversation beside the chiller and did not have difficulty hearing each other.
 - A Panel member described the noise as a low volume hum when listening to it at the complainants' residences and thought the hum was similar to an air conditioning unit attached to the local neighbourhood grocery store.
 - A Panel member heard the sound of feet shuffling in the grass and could hear the birds in the complainants' trees.
 - Another Panel member also described the noise as a low hum like a refrigerator.
 - A Panel member described the noise as "white noise" in the background and found the traffic noise on Gammon Road far more intrusive.
 - The Panel found the noise of the air conditioning in the hearing room louder than the chiller noise at the complainants' residences.
103. The Panel heard the Bingley Recording and reviewed the Arink Report, the RPR Report, and the Lang Report. Mr. Wolaniuk, who is an experienced jazz musician, provided credible testimony about sounds and decibel recordings. The Panel noted he does not feel any threat to his hearing when working near the chiller. The Panel finds as follows:
- The Bingley Recording is not reliable. It was initially on Vimeo and then converted to MP3 files. Ms. Bingley did not know the compression rate nor was she aware that different compression rates could boost volumes. In any event, the Panel concluded the Bingley Recording was not an accurate depiction of the chiller noise; it did not sound like the noise the Panel heard the previous evening during its site visit.
 - The Arink Report was produced when two wooden panels were installed on either side of the chiller. These wooden panels were eventually taken down. It is unclear what impact these panels would have had on decibel readings. Furthermore, since Mr. Arink did not testify, it is also unclear what instrument Mr. Arink used to take the decibel readings, if he took them on June 30, 2017 or another day, and where he took the recordings, particularly the recordings on the Gammon Road curb edge. For these reasons, the Arink Report is of limited use to the Panel. However, Mr. Arink provided the typical decibel readings of four different air conditioner brands. As these have some use as comparators, the Panel notes they were reported at: 53, 56, 57 and 59 decibels.
 - The RPR Report is reliable but not helpful because it provides a reading of 85 decibels taken at one foot away from the chiller.
 - The Panel finds the Lang Report helpful and reliable. Mr. Wolaniuk explained that decibel readings taken with an iPhone 10 are very close to a sound engineer's calibrated instrument. His view is that even if the iPhone

10 was off by five decibels, this would not make much difference to the sound. The Lang Report indicates the readings were taken with an iPhone 10X Max using the decibel reading application of Niosh SLM. They were taken at 32 feet (approximately 9.8 metres) east of the chiller and 82 feet (approximately 25 metres) east and across the road facing the chiller. An Internet search indicates that the Niosh SLM application has a tested and validated accuracy of two decibels (plus or minus).

104. Since the Panel is placing some weight on the reliability of the Lang Report, the Panel sets out the readings when the shed doors are open and adds five decibels as a margin for error in favour of the complainants:

	Shed doors open	+5 decibels
First Reading 32 feet (9.8 metres)	58.6 decibels	63.6 decibels
Second Reading 82 feet (25 metres)	51.5 decibels	56.5 decibels

The WHO guidelines indicate that a normal conversation averages 60 decibels. The decibel readings of four air conditioners cited in the Arink Report were all below 60 decibels.

105. The Guide indicates a recommended setback distance of 50 metres from an ALR boundary to urban areas. As noted above, the linear distance from the chiller to Ms. Bingley’s front door is 68.9 metres and it is 51.9 metres to Ms. Ward’s deck. Given the front door and the deck are over double the distance from where the second reading was taken, the Panel infers that the decibel readings at the complainants’ residences could be lower than 56.5 decibels.
106. The Panel acknowledges, however, that sound is not linear and travels upslope. Noise is also impacted by atmospheric variances such as wind and temperature. Here is where the findings of the RDOS staff member, Mr. Withler, and the Panel provide context to the noise itself. The RDOS staff member visited the site three times in response to Ms. Bingley’s noise complaint and listened to the chiller for 10 minutes each time. He found the chiller to be as quiet as most commonly found air conditioner units used at such facilities. More importantly, he did not find the noise sufficiently disturbing to be enforced under the noise bylaw. Mr. Withler heard the chiller noise only on Gammon Road during the week and daytime. He found the chiller noise less intrusive than the other sounds he heard such as rock hammers and compressors. The Panel’s observations, which are set in paragraph 102, are consistent with the findings of the RDOS staff member and Mr. Withler. Therefore, the Panel concludes that the chiller noise is not unreasonably intrusive.

Chiller Duration

107. In addition to the magnitude of the noise, the complainants argue that the duration of the chiller's use is another contextual factor that must be taken into consideration. They state that when the chiller is on, it runs all day and night. In particular, Ms. Bingley states the chiller runs 24/7, 365 days per year in her submissions and at the hearing. However, her statement is inconsistent with her notes, which indicate the chiller was off from March to September in 2018 and was off again from January to the end of June/July 2019, when it was turned on for a few weeks, and then turned on again on August 12, 2019. She argues that the respondent is not living up to the "agreement" whereby the chiller would remain off from February to September 2019.
108. With the exception of a few weeks at the end of June/July 2019 and from August 12 to 31, 2019, the Panel observes that the "agreement" was for the most part respected. It should also be noted, as set out in paragraph 37, that the parties never entered into a formal settlement agreement. The "agreement" referred to by Ms. Bingley is more in the nature of a record of a conversation setting out the parties' intentions.
109. Furthermore, Ms. Bingley admitted in cross-examination that she could not hear the chiller noise very much between September and November 2019 because of the construction taking place behind her property and at the respondent's property. Mr. Wolaniuk advised that construction sounds such as explosions, blasting, and jack hammering will become much worse in the future because the mountain where the complainants' residences are located is slated for more housing.
110. The Panel acknowledges the complainants' contention that the chiller had been running steadily since August 12, 2019 to at least the hearing date. This is not disputed. However, the uncontroverted evidence from the representatives of the other wineries and Mr. Withler is that chillers are used outside of the harvest season. Ms. O'Rourke testified that there have been years when Tightrope has run its chiller year round. In a similar vein, Mr. Withler stated there may be 300 wineries in BC but 212 different patterns of how these wineries use their chillers.
111. The Panel accepts Wolaniuk's evidence that the chiller was running at half-capacity from mid-January to mid-February and at the time of the hearing, which meant the chiller noise was halved. He stated "*...there is not just one way to make wine*" and "*...chillers are turned on throughout the whole season at various times at different wineries.*" He contrasted the respondent's style of making wines to Joie's whereby the respondent's wines are put through further processes in January and February whereas Joie bottles its wine in January. He also indicated that vintages are rarely the same every time, so some years the wines need more time in the chiller.

112. In addition, it bears noting that 2020 has been an unusual year because nobody predicted a global pandemic, which would have an overwhelming impact on businesses, including wineries. Mr. Wolaniuk testified that his planned bottling in March 2020 was delayed because bottles did not arrive until months later. It is understandable that he could not honour an “agreement” to keep the chiller off because 80,000 litres of wine could potentially have been ruined. The complainants have to understand that unexpected events with potentially devastating consequences come up and may require action outside of the norm. This does not mean the farm is suddenly no longer following normal farm practice.
113. Given our findings above, the Panel concludes that the chiller noise is not unreasonably intrusive and the duration of its use is consistent with industry standards, that is, consistent with proper and accepted customs and standards as established and followed by similar farms (vineyards) in similar circumstances. The Panel finds the respondent’s use of its chiller is consistent with normal farm practice.

Chiller Location

114. The Panel will now address the chiller’s location. The Panel’s observations of the respondent’s facility are consistent with Ms. Campbell’s testimony about the difficulties with relocating the chiller. The dirt roadway on the west side of the facility is indeed narrow. Mr. Wolaniuk and staff use this roadway to move product between the cellar and warehouse with a forklift. There is also a septic tank and sewer pipes on the west side. It is generally understood that a septic tank requires clear access for maintenance and repairs. Therefore, the only way to relocate the chiller would be to remove 60 year old vines.
115. The cost to relocate the chiller is noted at \$20,000 in the KP Report but detailed costs estimates would be needed. During Ms. Bingley’s cross-examination of Mr. Tanner, it became clear that there are costs for re-piping, electricity, and the crane to lift the chiller to the west side.
116. Since the respondent’s use of its chiller is consistent with normal farm practice, the Panel finds that it would be unreasonable to expect the respondent to remove 60 year old vines and incur the cost to move the chiller.
117. The Panel wishes to make clear to the complainants that the legislature made the fundamental policy decision in the *Act* 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 statute, which was an argument put forward by the complainants. The Panel has found above that the chiller noise does not produce a real and substantial disturbance, but even if we did, the right to farm prevails unless on the contextual analysis, modification is required to be consistent with normal farm

practice. The Panel has found no basis on a contextual analysis to require the respondent to relocate its chiller because in the Panel's view, its use of the chiller and the associated noise fall within the definition of normal farm practice.

Related Legal Issues

118. The Panel wishes to address other issues raised in this complaint. Ms. Ward made an argument that her residence was built in 1990, the same year the respondent's vineyard was founded. She wrote in her closing submissions that: *"The tribunal advised me during the hearing that they were not hearing an argument from Lang that they were in the location first and so I must put up with what Lang does."* She also wrote: *"The panel therefore cannot assume that the [sic] Lang was not fully aware at the time of purchase the winery was going to be place [sic] directly opposite a residential neighbourhood."*
119. Ms. Ward mischaracterized the Panel's ruling on her "first in time" argument as part of the contextual analysis. The timing of when a complainant or farm came to a neighbourhood is a relevant consideration before BCFIRB in complaints. However, who is "first in time" is not determinative because it would unduly limit the establishment of new farms. Furthermore, there is no such "first in time" principle in the *Act*. Instead, who was there first falls into the general contextual analysis, which the Panel undertook.
120. In addition, the ALR came into force in BC in 1974. The respondent's vineyard is located in the ALR. Ms. Ward and Ms. Bingley knew they were purchasing residences across the street from land specifically zoned for agriculture. Agriculture can often be intensive and disruptive but agri-business is the face of farming in BC. It just so happens that this farm is a vineyard, not a livestock operation or an orchard that relies on propane cannons or helicopters as part of its farm operation. If it were, the neighbours would be exposed to disruptions such as animal noises and odours, equipment operating from dawn to dusk, dust and pests. The *Act* was designed to protect all types of farm businesses provided they demonstrate they are following normal farm practice. The Panel has already concluded that the respondent is following normal farm practice.
121. The Panel wishes to make clear that our assessment of the contextual factors included our assessment of the "good neighbour principle". The Panel finds the respondent has made a concerted effort to address complaints and appease its neighbours. The Panel heard testimony from Ms. Campbell and Mr. Wolaniuk as follows:
- Ms. Campbell stated the respondent built the shed enclosing the chiller for the sole purpose of trying to reduce the noise generated by it.
 - Mr. Wolaniuk does not start his forklift before 9:00am to avoid waking up neighbours who wish to sleep in on weekends.
 - Ms. Campbell stated the respondent added a flood light after a break-in as

protection for its facility and also the neighbours. The respondent had the light adjusted following a complaint from a neighbour that it was shining into her house.

- Ms. Campbell directed the workers renovating the house on the respondent's property to restrict their use of jackhammers to the morning only.
- Ms. Campbell stated the respondent is improving its parking in the spring of 2021 in response to complaints of visitors parking on Gammon Road.
- Ms. Campbell donated two bottles of wine to Ms. Bingley's fundraiser.

122. Despite the respondent's efforts, Ms. Bingley stated several times in her submission and at the hearing that she has been treated unfairly by the respondent. This belief seems to be based on a representation made by the respondent, during a BCFIRB case management conference, that it would hire a qualified sound engineer but did not do so.⁶ The BCFIRB case management process does not bind parties to take certain steps. Rather, it is intended to promote disclosure and ensure that the parties understand the case they have to meet. Stating it would hire a sound engineer was not a breach of any legal agreement. It amounted to a broken promise. The Panel's role is not to enforce broken promises. Our mandate under the *Act* is to assess farm practice issues only.
123. More importantly, it is a general legal principle that an aggrieved party has the onus of proving her case. In *Clapham v. Monga* (September 22, 1997) (the **Clapham decision**), the hearing panel discussed this legal principle at paragraph 25: "...*Because the process is initiated by a complaint, the onus is on the complainant to produce evidence and make submissions in support of the complaint.*"
124. Had the complainants thought that evidence from a qualified sound engineer was necessary to prove their complaints, the onus was on them to retain one. Deflecting this responsibility onto the respondent was not an effective way to advance their positions. Based on its analysis of the case it had to meet, the respondent decided against hiring a sound engineer. This does not now create an obligation on the Panel to order the respondent to hire a sound engineer to prove whether it is or is not meeting normal farm practice. The Panel must decide this case on the evidence before us, which we have done.

⁶ After the hearing had concluded, Ms. Bingley requested that the case management report be added as an exhibit. The Panel denied her request because this report was not relevant and it would be prejudicial to submit evidence once a hearing had concluded.

125. Ms. Bingley alleges the noise has caused her depression and anxiety. The Panel has already acknowledged that she is aggrieved by the chiller noise, especially since mid-August 2019. However, as stated, the Panel's mandate under the *Act* is to address farm practice issues only. Furthermore, at paragraph 47 of the Clapham decision, the hearing panel confirmed the test for breach of the *Act*:

...While the Complainants' anecdotal descriptions of the noise and its impact were useful, **the Panel reiterates that this is not a nuisance statute and that the test for breach of the Act is not merely whether a farm practice causes emotional upset and frustration.** The Act is designed to protect the right to farm. The 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. [Emphasis added.]

Panel Observations and Conclusion

126. The Panel would like to share general observations of the complainants. Ms. Ward left dealing with the respondent and the pursuit of this complaint to Ms. Bingley, so Ms. Ward's involvement was minimal before the hearing. The Panel does commend her efforts to reduce the impact of the noise she hears by installing a water fountain and wearing earbuds and listening to music when she working in the garden.
127. Ms. Bingley has been preoccupied with this complaint soon after moving into her residence in March 2015. She lodged her first complaint about the chiller noise in June 2015 to the RDOS and approached the respondent in September 2015. She kept meticulous notes of the dates when the chiller was on and the dates and times when maintenance trucks were on the respondent's property. She provided thorough submissions describing how she is aggrieved to the Panel.
128. The Panel understands Ms. Bingley wanted to prove her case but there may have been times when she crossed the line. Ms. Campbell and Mr. Wolaniuk came across as credible when they described Ms. Bingley approaching the respondent's staff to question them while they were working and asking for phone numbers of staff members. Ms. Bingley acknowledged talking to the respondent's staff in cross-examination. They also stated Ms. Bingley has consistently taken photos of the staff on the crush pad and of the chiller. Ms. Bingley did not deny this. Therefore, in keeping with being a "good neighbour", the Panel requests that Ms. Bingley refrain from speaking with the respondent's staff about the chiller and the winery's processes and taking photos or videos of the respondent's property, the chiller and its staff, going forward.
129. Mr. Wolaniuk explained that if he is experiencing a problem with a wine or it is a very hot day, he has to turn the chiller on right away because he risks ruining the quality of the wine. He cannot wait three or four days so that emails can be

delivered to the complainants. Although other hearing panels have found that providing emails alerting parties of certain actions is consistent with the “good neighbour principle”, the Panel finds emails are not necessary in this case given we have found that the noise is not unreasonably intrusive. Furthermore, the Panel acknowledges that the respondent is running a business in a competitive market. The Panel members are not winemakers and in no position to tell Mr. Wolaniuk when to use the chiller and how to make his wine. Therefore, the Panel states that unless the respondent chooses to do so, the respondent is not obligated to send emails to the complainants about if and when the chiller will be on.

130. Although the Panel is not issuing any order in this matter, we request that the respondent continue to act as a “good neighbour” and bear in mind the complaints heard during this hearing. The Panel requests that the respondent try, to the extent possible, to reduce its use of the chiller during the summer months. The Panel also supports Mr. Withler’s recommendations #2 (possible relocation when the chiller’s replacement is contemplated) and #3 (installation of an evergreen buffer and a steel roof) in the KP Report. The respondent may wish to consider these two recommendations, as and when it deems appropriate.
131. As for the shed enclosing the chiller, the complainants testified that the shed has not made any difference in reducing the noise generated by the chiller. It is clear from the evidence that the shed is only serving to damage the chiller and shorten its life expectancy. Therefore, the Panel states that the respondent is at liberty to take down and remove the shed, at its own expense, if the respondent wishes to do so.

H. ORDER

132. The complaints are dismissed.
133. There is no order as to costs.

Dated at Victoria, British Columbia, this 23rd day of September 2020

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Harveen Thauli, Presiding Member



Dennis Lapierre, Member



David Zirnhelt, Member