

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT BY DORLE AND EUGENE EASON
REGARDING OPERATIONS AT A BROILER FARM
LOCATED AT 22675 - 8TH AVENUE, LANGLEY, BRITISH COLUMBIA

BETWEEN:

DORLE AND EUGENE EASON

COMPLAINANTS

AND:

OUTLANDER POULTRY FARMS LTD.

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS ASSOCIATION
BRITISH COLUMBIA BROILER HATCHING EGG PRODUCERS ASSOCIATION
BRITISH COLUMBIA TURKEY ASSOCIATION
BRITISH COLUMBIA EGG PRODUCERS ASSOCIATION

INTERVENORS

DECISION

APPEARANCES:

For the Farm Practices Board

Ms. Christine J. Elsaesser, Panel Chair
Mr. Harley Jensen, Member
Mr. Richard Bullock, Member

For the Complainants

Mr. George Wool, Counsel

For the Respondent

Mr. Christopher Harvey, QC, Counsel

For the Intervenors

Mr. Tobin Robbins, Counsel

Date of Hearing

May 11-12, 14 and December 7, 1999

Place of Hearing

Langley, British Columbia

INTRODUCTION

1. On April 30, 1998, Dorle and Eugene Eason filed a Complaint with the Farm Practices Board (the "FPB") regarding the operations of Outlander Poultry Farms Ltd. ("Outlander"), a broiler chicken farm located immediately adjacent to their property. The substance of the Complaint was that the odour, noise, dust and flooding along their property line were not the result of normal farm practices by Outlander and should be enjoined under the *Farm Practices Protection (Right To Farm) Act*, RSBC 1996, c. 131 (the "Act").
2. By letter dated May 3, 1999, the British Columbia Chicken Growers Association, the British Columbia Broiler Hatching Egg Producers Association, the British Columbia Turkey Association and the British Columbia Egg Producers Association (the "Feather Associations") applied for Intervenor status. In its decision dated May 7, 1999 the Panel held "that the [Feather Associations] have a genuine interest in this Complaint and that their intervention will contribute to a proper resolution".
3. The Complainants commenced their case on May 11, 1999. On May 12, 1999, the Panel, the parties and their Counsel attended at the farm and the Eason residence to conduct a view. The hearing did not conclude on May 14, 1999 as scheduled, due to the unavailability of Mr. Wool's son and the Complainants desire to obtain decibel readings of the noise related to certain farm operations.
4. The hearing was to resume on July 26, 1999. However, as the parties were optimistic that a settlement agreement could be concluded, this date was adjourned. Unfortunately, settlement discussions stalled and this matter proceeded to hearing on December 7, 1999. Despite earlier representations, Counsel for the Complainants chose not to call the By-law Enforcement Officer from the Township of Langley to provide decibel readings of the noise resulting from the farm operations.

ISSUES

Odour

5. Does the odour emanating from the broiler barns result from normal farm practices?
6. Does the odour emanating from the incinerator result from normal farm practices?

Noise

7. Does the noise arising from the operation of the fans used to ventilate the barns result from normal farm practices?
8. Does the noise, including vehicle engines and people shouting, arising from the catching and loading operations result from normal farm practices?

9. Does the noise arising from the barn clean-out process result from normal farm practices?
10. Does the general traffic noise (workers, feed trucks, etc.) of vehicles arriving at and departing from the farm result from normal farm practices?

Dust

11. Does the dust discharged (by the fans) from the barns result from normal farm practices?
12. Does the dust arising from the barn clean-out process result from normal farm practices?

Other

13. Does the flooding along the property line result from a normal farm practice?

FACTS

14. The Easons have resided on their five-acre property at 22763 - 8th Avenue in Langley for approximately 29 years. The area in which they reside is known as Lochiel. It is a rural area with a number of smaller farms and hobby farms in the immediate area.
15. In 1991, Outlander purchased the two lots, totalling 50 acres, immediately adjacent to the Eason property for the purpose of building a large commercial chicken production facility.
16. Prior to construction, a representative of Outlander, Mr. Ken Hoschka and another producer, Mr. J. Shiells met with the Easons to advise them of the new development. Mr. Shiells advised that there would be hardly any dust or noise from the farm as it was going to be a very modern operation. Mr. Shiells invited the Eason's to visit his chicken production facility, which they did.
17. As a result of concerns raised by Mr. Eason, the Township of Langley required a 100' setback of the barns from the property line, 50' more than required by Langley's Municipal By-laws.
18. Initially, Barns #1 and #2 were constructed, housing 60,000 chickens. By 1998, Barns #3 and #4 were completed and the Outlander operation housed 120,000 broiler chickens.
19. On December 29, 1997, Mr. Wool, who in addition to being Counsel for the Easons is also their neighbour, filed a complaint with the FPB regarding the Outlander operation. He settled his complaint on April 9, 1998.

20. As a result of the settlement agreement, Outlander agreed as follows:
- a) to limit the time for feed deliveries to between the hours of 6:00 am and 7:00 p.m.;
 - b) to instruct truckers hauling live birds to not employ engine brakes on 8th Avenue and to shut off their engines immediately after arrival at the farm;
 - c) to restrict clean out operations to normally between the hours of 6:00 am and 6:00pm, Monday to Friday;
 - d) to not run empty feed lines unless absolutely necessary;
 - e) to update the incinerator by June 1, 1998 to reduce exhaust and odour, in conjunction with construction of Barns #3 and #4;
 - f) to minimise the use of 48" fans;
 - g) to install a hedge of approximately 55 *Thuja Plicata Excelsa* trees 14 - 16' in height along 8th Avenue to screen the barn from the Wool residence.
21. The Wools agreed to formally withdraw their Complaint once the new hedge described in paragraph g) was installed. On April 30, 1998, days after the Wool Complaint was withdrawn, the Easons filed their Complaint.

ARGUMENT OF THE COMPLAINANTS

22. The Complainants argue that the odour, dust, noise and flooding that has occurred as a result of the operation of the Outlander chicken production facility is unbearable and beyond what could be considered a normal farm practice.
23. The Complainants recognise that the production facility has been built in the Agricultural Land Reserve (the "ALR"). However, they argue that this is not a farm. It is agro-industry and properly belongs in an industrial park and not in what is essentially a residential neighbourhood. Hobby farms and small-scale commercial operations, such as a mink farm, typify the surrounding area of Lochiel. The Complainants argue that as Outlander is agro-industry and not a farm, the *Act* does not offer it any protection.
24. The Complainants gave evidence that the four chicken barns are situated 100' from the property line. Their house is approximately 70' from the property line. Thus, their house is situated less than 200' from the nearest chicken barn. They describe the odour emanating from the facility as pungent and nauseating. It is worse in the heat of the summer when the 48" ventilation fans are operating. The Complainants no longer sit on their balcony due to the dust and the pungent odour. They claim that since Barns #3 and #4 were constructed, their house smells like a chicken barn. The Complainants showed a video of the Outlander operation taken during the summer and fall of 1998, to document the noise and dust problems they have had to endure.

25. During the summer months, the Complainants state that sleep is virtually impossible due to the sound of the fans operating. Their bedroom window faces Barns #3 and #4 and as a result, they hear the noise from the 32 fans on those two barns and the 16 fans on each of the other two barns. On a warm night, these fans operate continuously, generating noise and dust. The noise is increased on those nights when the catching crew with their trucks and forklift come to empty the barns.
26. The Complainants have health concerns as a result of their exposure to poultry dust and odours. Mrs. Eason complains of a raspy throat, plugged nose and stinging eyes. Mr. Eason also has experienced a raspy throat for which he has sought medical attention. Both he and his family doctor are unsure of its cause.
27. The Complainants argue that the problem of dust and noise is amplified by the fact that the prevailing winds come from the south-west, blowing between Barns #3 and #4 and directly at their house. Given that the Complainants feel victimised by the degree of disruption caused by the Outlander operation, they have considered moving from the home that they have enjoyed for almost 30 years.
28. The Complainants called evidence from a number of neighbours from the area surrounding the Outlander operation. Mr. William Thomas, a neighbour who resides across the street and a half mile to the west of the Outlander barns gave evidence that the hauling of birds late into the night had caused him to lose sleep. With the farm now consisting of four barns, his sleep is disrupted more frequently. Given the location of his residence, odour was less of a problem. However, Mr. Thomas experiences odour, which varies depending on the season and the wind.
29. Mr. Cliff Blair, a long time resident of the Lochiel area also gave evidence. He resides across the street from the Outlander operation on approximately 11 acres of land where he has a small cow-calf operation. He has observed the smell of incinerated chickens in the early morning, which is magnified if there is an inversion. Dust can be observed when the barns are being emptied. The dust blows off the trucks as they travel west on 8th Avenue. The winds in the area of his farm blow from the south-west and accordingly, the odour is not as bad. However, when Mr. Blair takes walks along 8th Avenue with his wife, the odour intensifies as he travels east. His noise complaints relate to the late night hauling of trucks and to a particular "truck jockey" with the catching crew who revs his engine unnecessarily. This noise is a disturbance and periodically has awakened Mr. Blair in the middle of the night despite the fact he is hearing impaired and requires a hearing aid.
30. Mr Sidney Bosch was also called to give evidence. He is a steel fabricator who is building a house on an 8 1/2-acre property east of and adjacent to the Easons. He estimates that his house is approximately 150' from the Eason house and 300' from the Outlander barns. He gave evidence that the smell was at its worst in the spring when there were no leaves on the trees. The odour is also bad in the summer when the prevailing winds blow from the west towards the east. At its worst, the smell is awful. He must shut his windows and doors

before he can work on his house. He believes that the smell has worsened over time. He states that the smell from the farm is not unique - it smells like chicken manure. Mr. Bosch has given some thought to just finishing the house and selling it. However, his present intention is to move in.

31. He is not surprised that the owners of Outlander chose to put a chicken farm in the ALR but its location was a surprise. He describes the owners' conduct in placing their barns on the only wooded portion of the acreage as "malicious". This location required many loads of fill and was near to neighbours. He believes that there were many other locations on the acreage with good access to 8th Avenue, which would not have bothered neighbours and which would not have required fill. He observes that this placement results in the barns being in the furthest corner from the farmhouses on the property.
32. The Complainants argue that the odour, noise, dust and flooding caused by the Outlander operation does not result from a normal farm practice. They ask that the Panel order the operation to cease production of chicken until necessary modifications have been performed to deal with the concerns of odour, dust, noise and flooding. They argue that the onus is on Outlander to correct the pollution problems relating to dust and noise and resolve the flooding and drainage issues. There are alternatives open to Outlander. They could freeze and haul their dead birds instead of incinerating them. They could employ dust filters on the ventilation fans. They could install a 10' berm on their property topped with a fence and trees to deal with the noise problems.

ARGUMENT OF THE RESPONDENT

33. Outlander takes the position that the Complainants have proceeded on a mistaken interpretation of the law. They have failed to reference their grievances to a "normal farm practice". Instead they have proceeded on a site-specific analysis. This fundamental assumption is flawed. The Outlander farm is within the ALR and thus, is in an area where farming is protected.
34. The Complainants argue that agro-industry falls outside the ambit of the *Act*. The Respondent argues that this assertion is wrong. The *Act* was proclaimed on April 1, 1996, a time when most farming can be described as agro-industry. In addition, the definition of normal farm practice in s. 1 of the *Act* refers very specifically to "farm business".
35. Outlander concedes that the Complainants have lead evidence to prove that they are aggrieved by the odour, dust and noise coming from the Outlander operation as set out in s. 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.

36. However, there is no evidence before the Panel to demonstrate that the disturbances complained do not result from a "normal farm practice". The onus is not on Outlander to show that the disturbance results from a normal farm practice. It is up to the Complainants to show a departure from the norm. The Respondents argue that the Complainants have failed to prove their case.
37. In terms of the proper legal test to be applied, the Respondent refers to the September 22, 1997 decision of the FPB in the *Clapham Complaint*. In December of 1999, this was the only prior decision of the FPB. The Respondent argues that it provides useful assistance in interpreting the *Act*.

22. "Normal farm practice" is defined in Section 1 of the Act as follows:

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with:

- (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

- (b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

23. Section 6(1) of the Act directs as follows:

The panel established to hear an application must hold a hearing and must

- (a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or

- (b) order the farmer to cease the practice that causes the odour, noise, dust or other disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

25. A "hearing" (ss. 6,7) initiated by a "complaint" (ss. 3,4) must be "procedurally fair" as that term is applied in administrative law. The Panel must consider the evidence of the parties, and then make a decision in accordance with the law. 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.

26. It is important to emphasize that being aggrieved by "odour, noise, dust or other disturbance" from a farm operation is necessary, but not sufficient, to make a valid complaint under the Act. In this case, the evidence given by the Complainants satisfies the Panel that they have been aggrieved by the noise from the propane cannon.

27. Having proved that they are aggrieved by cannon noise, the Complainants must provide sufficient evidence in support of their Complaint to allow this Panel to enter into a proper inquiry as to whether the practice complained of is not a “normal farm practice” as defined in Section 1 of the Act - i.e., that it was not conducted in a manner consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”.
 28. The Panel has considered the following points regarding the meaning of the phrase “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. First, where a farmer is found to be carrying on a farm practice that is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, the complaint must be dismissed by this Board despite the subjective impact of the practice on the complainant (Section 6(1)(a)). Whether or not the farmer would also be exempt from a common law nuisance action for that farm practice, or be exempt from the operation of municipal bylaws, would depend on whether the farmer also meets the conditions set out in Section 2(2) of the Act. Neither of these latter determinations can be made by this Panel.
 29. Second, the balance between farmers and their neighbours has been established by the Act itself. Where a farmer is carrying out a practice in a manner consistent with proper and accepted customs and standards as established by similar farm businesses under similar circumstances, the complaint must be dismissed.
 30. Third, this Board must have regard to all the words in the definition of “normal farm practice”, not just the words “proper and accepted”. The Board’s task is not to inquire into whether the farm practice is “proper” in the abstract, but whether it is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. Therefore, a complainant cannot merely argue that a particular farm practice is not, in his opinion, “proper” because it encroaches on one’s lifestyle or sensibilities. It is implicit in the Act, that farmers who are similarly situated will develop customs and standards of practice. These customs and standards help define the term “proper and accepted”.
 31. Finally, the Act does not ignore the impact of certain farm practices on third parties. The reference to “similar farm businesses under similar circumstances” requires an examination of individual circumstances on a given farm and its vicinity. It does not assume that because a farm practice is conducted in one context, that it will necessarily be “proper and accepted” in all contexts. There may be some circumstances which are so unique - involving serious health and safety concerns on third parties - that it cannot be said that a practice on a particular farm is consistent with normal farm practice.
38. Turning to the facts, the Respondent argues that while the Complainants may have proven that they have a grievance, the evidence falls far short of proving that the Outlander farm does not follow normal farm practices. In fact, the evidence is to the contrary. Veterinarian, Dr. Stu Ritchie, an expert in the area of poultry medicine, nutrition and disease, and experienced in the custom of the industry, gave evidence. He has visited most of the more than 250 chicken farms in BC as well as viewed poultry operations around the world. In his opinion, the Outlander operation ranks among the top 10% of all poultry farms he has visited both in terms of the type of equipment used and the level of husbandry provided to the poultry. He describes the Outlander operation as "state of the art".
 39. In Dr. Ritchie's opinion, the systems in place at the Outlander operation actually minimise dust, noise and odour. The farm uses a very modern incinerator to dispose of dead birds.

This is preferable to on-site composting, as there is less associated odour and no attraction for rodents. The other option for dealing with dead birds is to freeze their carcasses and then deliver them to a rendering plant. According to Dr. Ritchie, this is not a practical solution for Outlander given the size of their operation.

40. Odour is dealt with by using a computerised ventilation system and maintaining optimum litter conditions. By following proper husbandry techniques with ventilation and watering, ammonia build up and thus odour problems are reduced. Dr. Ritchie's evidence is that both the ventilation system and the watering equipment at Outlander are computerised. The watering system is closed, resulting in less spillage and therefore, less disease. Dr. Ritchie's evidence is that the net effect of using these systems is odour reduction. In addition, Outlander contracts out its manure removal rather than storing it on-site. This results in better disease control and reduced odour.
41. Dr. Ritchie describes the Outlander barns as closed and insulated. Thus, during the growing cycle, the barns are quiet. Other noises associated with a poultry operation include the electric motors used to deliver feed into bins, trucks delivering feed and placing chicks, ventilation fans, shipping trucks, catching equipment and the sounds associated with barn clean-out.
42. In Dr. Ritchie's opinion, the systems employed at Outlander are standard in the industry. Outlander relies on contractors who work for a number of farms in the Fraser Valley. Outlander uses a new system for bird catching which brings the transport unit much closer to the barns. The result is less damage to the birds and less time to load in comparison to the old method.
43. Dr. Ritchie's opinion is that dust is an inevitable component of chicken farming. Birds produce dander which, along with feathers and manure, combine with the litter to form dust. When the birds scratch the litter, the dust becomes air-borne and can then be discharged by the exhaust fans. As dust is negative to bird health, proper husbandry techniques relating to air, water and space must be employed to minimise its effects. Outlander, like other farms, uses an "all in / all out" system where all chicks are placed in the barn at one time and all grown chickens are removed at one time, followed by a period of downtime. This method reduces pathogens, promotes disease control and minimises dust. Use of this method contains the majority of dust to the clean-out period.
44. In summary, Dr. Ritchie is of the view that the practices of Outlander are consistent with similar farms in similar circumstances.
45. With respect to the specific remedies sought by the Complainants, the Respondent takes the position that a berm is not a "normal farm practice". In fact, a berm is quite unusual. There is no engineering evidence to indicate that it will resolve the concerns of dust, odour or noise. In addition, the Complainants' desired placement of a berm and fence completely on the Outlander property would effectively result in a significant expropriation of the strip of land

to the east of the fence. There is no justification in the *Act* for such an expropriation. The Respondent argues that as Mr. Hoschka was not cross-examined on the issue of the berm, it should not be given any further consideration. Similarly, the Respondent argues that there is no evidence before the Panel that a fence would solve the dust, noise or odour problems.

46. The Complainants are angry and frustrated. However, there is nothing in the case they presented which establishes that the issues in their Complaint result from anything other than a "normal farm practice". Although there is a limited ability under the *Act* to give site-specific consideration, according to paragraph 31 of the *Clapham* decision, this power is very limited and must involve some unique circumstances involving either health or safety. There is no evidence before this Panel that such circumstances exist.
47. Finally, the evidence of both Dr. Ritchie and Mr. Hoschka supports the conclusion that similar farms operate under similar circumstances. Given that the Complainants have not satisfied the onus on them, the Respondents argue that the Complaint must be dismissed.

ARGUMENT OF THE INTERVENORS

48. The Intervenors have a genuine interest in the outcome of this Complaint. As representatives of the four Feather Associations, the Intervenors maintain that the "Right to Farm" which is protected under the *Act* was meant to recognise the vital role of agricultural producers such as those represented by their membership.
49. The Intervenors argue that there is no dispute that the *Act* applies to Outlander and that agro-industry is protected under the *Act*. Section 1 of the *Act* incorporates definitions for "farm business" and "farm operation" which include the activities of carrying on the business of farming. Clearly, what Outlander does, in using machinery, equipment, devices, materials and structures is what is contemplated by a "farm business". According to Dr. Ritchie, the face of the chicken industry in British Columbia is exactly that. Agri-business is what the *Act* was designed to protect. It was not designed to protect only the small farmyard with a few chickens or cows.
50. The Intervenors point to the News Release issued by the Ministry of Agriculture, Fisheries and Food on April 4, 1996, in which then Minister of Agriculture, Mr. Zirnhelt states:

The Farm Practices Protection (Right to Farm) Act recognizes the vital role farming has in British Columbia's future and will benefit many people. It supports farmers who farm responsibly. Working farms create noises, dust, and odours, which are part of normal business. As neighbourhoods continue to encroach on traditional farmlands, these realities must be recognized.

[emphasis added]

51. The Intervenors argue that the Complainants must recognise that in order for farming to be cost-efficient and competitive, both nationally and internationally, it must be more complex and intensive. The Outlander operation, which is within the ALR, is located in the Township

of Langley, within the Greater Vancouver Regional District ("GVRD"). The GVRD produces 27% of the BC's farm production, by value, on 1% of the land base. The Complainants are attempting to isolate the little community of Lochiel as a special area within the GVRD, which should only have small hobby farms operating on ALR land. This is unfair, as there are numerous other large poultry operations in the Township of Langley.

52. The Intervenors refer to a passage from a Ministry of Agriculture publication "The Countryside and You" which they argue supports the concept that farming is an industry:

Is country living for you? Remember, rural living is not 'wilderness living'. You are not moving back in time, just to another place. The world is busy everywhere, and the countryside is no exception. It is important to remember that the Agricultural Land Reserve was established to provide a home for farming and to provide food security for your future.

We deal with noises and smells in the city and enjoy the beautiful surroundings too. Similarly, there are noises and smells in the countryside, but from another source.

There is an industry and an important way of life to be found in the countryside, and it is called FARMING.

53. As to the evidence, the Intervenors agree with the Respondent that the testimony of Dr. Ritchie, both a Veterinarian and chicken grower, demonstrates that the grievances complained by the Complainants result from normal farm practices. Based on his evidence, the Intervenors argue that the only option is for the Panel to dismiss the Complaint pursuant to s. 6(1)(a) of the *Act*.
54. The Intervenors also rely on the *Clapham* decision of the FPB, referred to at Paragraph 37 above. In Paragraph 24 of that decision, it states that "the Panel must not only uphold its statute, it must also conduct itself objectively and independently". The Intervenors argue that the Panel has bent over backwards to give the parties a fair hearing. However, they suggest an adverse inference should be drawn against the Complainants as this hearing was adjourned at Mr. Wool's request because he felt it necessary to obtain noise readings from a By-law Enforcement Officer in Langley. No such evidence was adduced at the continuation of this hearing on December 7, 1999. As a result, the hearing likely could have concluded in the allotted time in May as Dr. Ritchie was then in attendance.
55. The Intervenors also rely on Paragraph 25 as the key paragraph in *Clapham*. It states the following with respect to onus. " 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."
56. In this case, the Complainants have not provided the Panel with any objective evidence with respect to noise so as to allow the Panel to determine whether it results from a normal farm practice. They have not tested the constituents of the dust or the smoke from the incinerator nor is there any evidence that either could cause illness. Mr. Eason's medical records do not demonstrate any cause for his complaints about "normal farm practice".

57. There is no evidence that Outlander violates any environmental or municipal statute, regulation or by-law. Most significantly, the Complainants have not called any evidence to demonstrate the farm practices of Outlander are being conducted in a manner inconsistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. As set out earlier in paragraph 30 of *Clapham* "a complainant cannot merely argue that a particular farm practice is not, in his opinion, "proper" because it encroaches on one's lifestyle or sensibilities." This is the Eason's argument.
58. Paragraph 31 of *Clapham*, also referred to by the Respondent, deals with the impact of a farm operation on third parties. The Intervenors argue that the Lochiel area is not unique. In it, like many other areas in Langley Township, hobby farms and residences co-exist in the ALR with farm businesses similar to Outlander. Lochiel is not an isolated island, unique from other areas in the Township. Further there is no evidence before the Panel of any serious health risk arising from the Outlander farm, which create a unique circumstance for the Easons. The only evidence comes from Dr. Ritchie who was unaware of any health risks associated with the operation of chicken farms in close proximity to residences.
59. Finally, the Intervenors argue that the Complainants in this case have made the same error in presenting their case, as did Mr. Clapham. Paragraph 47 of that decision provides:
47. Firstly, the Complainants' (sic) failed to accept any responsibility to produce any evidence whatsoever regarding the noise levels they assert are so fundamental to a determination of the various aspects of their Complaint. The Panel agrees with Mr. Clapham that it would be important for the Panel to know whether there is something extraordinary about the cannon noise from the Respondent farm, in order to make a meaningful determination for this Complaint. The Panel also agrees that it would be relevant to know whether and to what extent those sound levels do in fact give rise to demonstrable health or safety concerns. 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.
60. Here also, the Complainants' argument relies exclusively on anecdotal evidence. Despite being given an adjournment for that very purpose, there has been no attempt to present any objective evidence that any of the complaints in respect of dust, noise, odour or flooding give rise to any demonstrable health concerns.
61. The Intervenor argues that the evidence confirms that Outlander is a state of the art poultry operation. Despite this, Outlander has made real efforts to settle this dispute and come to a compromise with their neighbours; however, the Easons are not interested in a settlement. Given that the Easons have failed to prove that their complaints relating to noise, dust and odour do not result from a normal farm practice, as that term is defined in the *Act*, their Complaint must be dismissed.

DECISION

62. The Complainants seek an order from this Panel pursuant to s. 6(1)(b) of the *Act*, requiring Outlander to cease all chicken production until modifications have been performed to deal with their concerns regarding odour, dust, noise and flooding.
63. As a threshold question, the Complainants have questioned whether this Outlander operation, which it characterises as “agro-industry”, is even a “farm” which is protected by the *Act*. We found this to be a rather unusual submission, for if we are not here concerned with a “farm operation conducted as part of a farm business”, the Complainants have no standing even to complain under the *Act*: s. 3(1). On the facts before us, however, it is clear that the definitions of “farm business” and “farm operation” in section 1 of the *Act* are satisfied in the present circumstances. This then leads us to the merits of the Complaint regarding odour, dust, noise and flooding.
64. As recognised in *Clapham*, Complainants, both as a legal and practical matter, must not only assert that they are aggrieved by odour, dust, noise and flooding but they must also provide sufficient information to enable the Panel to enter upon an informed inquiry about whether the practices complained of are normal farm practices. As ss. 3(1) and 6 recognise, the Legislature has charged the Panel with forming an opinion, based on all the evidence, regarding whether the practice in question is a normal farm practice:

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.*

...

6(1) The panel established to hear an application must hold a hearing and must

- (a) dismiss the complaint *if the panel is of the opinion* that the odour, noise, dust, or other disturbance results from a normal farm practice, or
- (b) order the farmer to cease the practice that causes the odour, noise, dust, or other disturbance *if it is not a normal farm practice*, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

[emphasis added]

65. The *Act*, read as a whole, makes clear that the Legislature has given the FPB a process initiated by Complaint and requiring a hearing, and at the same time has charged the FPB with making a determination - forming an opinion – as to normal farm practice. While, as in *Clapham*, a Complaint will be dismissed where a Complainant offers no evidence whatsoever as regards normal farm practice in support of their Complaint, in practice it will obviously be in the interests of all parties to present evidence which best supports their respective positions. That is in fact what happened in this case, and thus we find ourselves able to resolve this Complaint bringing our judgment to bear on the question without the

necessity of resorting to legal burdens of proof. As noted by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (1999), at pp. 58-59:

In civil proceedings, the legal burden does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state of uncertainty, the legal burden is applied to determine the outcome. In *Robins v. National Trust Co.*, the Privy Council explained the operation of the legal burden in civil cases as follows:

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

66. In this case, the Panel had the opportunity to make a site visit to the Outlander operation and the Eason home. The general layout of the farm is set out in the survey certificate, which was introduced as Exhibit 6 in the hearing.

[EXHIBIT REMOVED]

67. Our observations confirmed that, in terms of growing chickens, the Outlander operation is indeed state of the art. It is extremely clean and from the outside more resembles a warehouse than a barn. There is no visible sign of farm animals or farm equipment. It is also huge. The four chicken barns housing 120,000 chickens sit approximately 100' west of the property line. There was an unmistakable odour on-site especially in the areas between the barns where the ventilation fans discharged.
68. The Eason residence sits approximately 70' east of the property line between Barns #3 and #4 (the two northern most barns in Exhibit #1 above). The Panel view occurred on a rainy day in May. The odour on the west side of the Eason property and on their porch, which faces the barns, was overwhelming. It was invasive and nauseating. We are prepared to take notice of the fact that the smell would be at least as bad, if not worse, in the heat of the summer when all the ventilation fans were operating at full speed in order to keep the barns cool. There would be more particulate discharged from the barns to be carried by the prevailing wind in the direction of the Easons' home.
69. A normal farm practice means a practice conducted in accordance with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. Applying that test to these facts has been difficult in the sense that these circumstances are quite unique in terms of scale of operation, location of barns and geography. Nevertheless, implicit in the test, as in all good chicken farming, is the existence of practices showing some threshold of consideration for one’s neighbours. In our judgment, it would be unwise to assume that because a farm practice is conducted in some circumstances and on an average scale, it will necessarily be “proper and accepted” where it is conducted in other circumstances and on a much larger scale. Just as similar farm businesses must follow proper and accepted customs for similar businesses under similar circumstances, qualitative differences – as for example, in the scale and siting of an

operation – must be taken into account by the FPB in determining whether practices complained of are “proper and accepted”.

70. In our opinion, it is not proper and accepted practice for farmers in the Fraser Valley to conduct farm operations in such a fashion so as to expose their neighbours to invasive and overwhelming odours, as arise in this case, without taking reasonable steps aimed at mitigating those effects. Certainly, when the Panel was taken on the view the odour noted at the Eason property was significantly worse than that present at an older but smaller operation managed by Mr. Hoschka, which the Panel visited shortly thereafter. We also note that Dr. Ritchie’s evidence was not informed by a visit to the Eason property.
71. The scale of a farm operation, small distances and prevailing winds can make a huge difference to a neighbour's exposure. In this case, the Easons’ house is approximately 170' from Barns #3 and #4. The prevailing winds blowing between these two very large barns create a wind tunnel effect blowing dust and odours directly at their home. The Panel finds that the odour from the Outlander farm does more than encroach on the Easons’ lifestyle and sensibilities. The Easons are not being overly sensitive or emotional when they complain of this odour. Nor can the Panel agree with the Respondent or the Intervenors that it is a normal farm practice to inflict upon neighbours the degree of odour present on the Eason property without first attempting reasonable steps aimed at mitigating that odour.
72. The Panel well appreciates that there are always odours, even very significant ones, associated with intensive chicken production. Such odours alone would not be sufficient to support a valid complaint under this *Act*. The Panel also appreciates that the installation of a screen or barrier *per se* is not typical on chicken farms. On the other hand, this is not a typical chicken farm. In the example of most chicken farms, the minimum consideration for one’s neighbours is reflected in the scale, location and other circumstances of particular farms. Where, as here, circumstances cause those odours to exceed the tolerance limits of a reasonable neighbour, proper and accepted customs and standards require, in our opinion, reasonable steps taken by the farmer aimed at mitigating those effects.
73. The Panel is very much aware that odour is not measurable in the same fashion as disturbances such as noise (decibels) and dust (volume of particulate). Great care must therefore be taken to ensure that FPB decisions on such questions are not idiosyncratic. However, the legislation specifically creates the board to which it has assigned the task of considering practices that, amongst others, cause odour. Acknowledging that great care must be taken in exercising these judgments, the Panel in this case, unanimously without hesitation, concludes that the odour from the Outlander operation has too great an impact on the Easons to be allowed without the installation of reasonable mitigation measures aimed at reducing the disturbance. As we will note below, significant odour may still remain after mitigation measures have been installed. However, proper and accepted practices require no more or less in a case like this than the taking of reasonable steps to attempt to ameliorate this impact.

Flooding

74. In his submissions, Counsel for the Respondent conceded that Outlander had created a flooding problem along the property line between the Easons and the farm. The fill brought on site prior to construction has disrupted the natural drainage resulting in standing water. Counsel for the Respondent concedes that this flooding does not arise from a normal farm practice. He advised however, that Outlander was in the process of getting an engineered modification approved by the Township of Langley to resolve the drainage concerns.

Noise

75. Based on all the evidence before us, the Panel dismisses the Complaint as it relates to noise. The Panel was not satisfied in this case that the noise complaint was associated with practices inconsistent with proper and accepted customs and standards as followed by similar farm businesses under similar circumstances. As noted above, the Complainants originally intended, and then declined, to lead any evidence about either the actual decibel levels they experienced or those experienced by other persons in similar circumstances. On the balance of the evidence before us, we are satisfied that the noise, which aggrieves the Complainants, results from normal farm practices.

Dust

76. We also dismiss the Complaint as it relates to dust. On this aspect of the Complaint, the Complainants did show a video taken during the summer and fall of 1998. Clouds of dust could be seen coming from ventilation fans. We agree, however, dust is inevitable on a chicken farm. There was no evidence that the dust problems they complain of are qualitatively different from those arising from similar farms under similar circumstances and on the balance of the evidence, we find that the dust arises from normal farm practices.

Remedy

77. Having found those portions of the Complaint relating to odour and flooding to be valid, we move to the question of remedy. For convenient reference, we repeat s. 6 of the *Act*:

6(1) The panel established to hear an application must hold a hearing and must

- (a) dismiss the complaint *if the panel is of the opinion* that the odour, noise, dust, or other disturbance results from a normal farm practice, or
- (b) order the farmer to cease the practice that causes the odour, noise, dust, or other disturbance *if it is not a normal farm practice*, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

[emphasis added]

78. In determining the appropriate remedy, we recognise that Outlander has demonstrated a willingness to work with its neighbours to try and find a reasonable solution to the various problems. The Complainants, however, either because of their own perspectives or their response to advice they have been receiving, appear to be far less willing to come to a negotiated resolution. Absent such a settlement, or an order by the FPB, no mitigation measures have been installed.
79. The Respondent's reluctance to take mitigative steps may have been informed by the unmistakable tone, reflected at the hearing, that the neighbourhood wishes to shut down the Outlander operation by any means possible. An additional concern of the Panel was the role of Complainant's counsel in this proceeding. Mr. Wool was the first neighbour to bring a Complaint before the FPB regarding the Outlander operation. He entered into settlement discussions with Outlander and obtained the concessions set out in Paragraph 20 above. Within days of that settlement agreement being signed, the Easons filed their Complaint with Mr. Wool acting as their counsel. The FPB needs to guard against the potential for its processes to be used to undermine genuine efforts made by a farmer to work with his neighbours to try and resolve a Complaint. In this case, the Panel did have an unresolved concern regarding whether Mr. Wool was acting solely as counsel or whether he was attempting to obtain further concessions from Outlander even though he had settled his Complaint.
80. That said, we have found a breach of *Act* insofar as the practices complained of result in odour and flooding. The Complainants seek an order requiring Outlander to cease operations until such time as modifications have been made, including installing a berm located completely on the Outlander property, placing a fence, shrubs and trees on the berm, adding dust filters on the ventilation fans and freezing and hauling dead birds as opposed to incinerating them.
81. In the circumstances of this case, we are not prepared to order Outlander to cease all operations. Instead, the appropriate remedy in this case is, consistent with the legislation, to order Outlander to modify its practices in a fashion that will render it consistent with normal farm practices. In this instance, such modification entails within 6 months from the date of this Order, addressing the flooding problem as represented by Counsel for the Respondent in his submission and taking reasonable measures aimed at mitigating the odour effects of the farm.
82. Section 6(1)(b) of the *Act* confers upon the Panel the jurisdiction to order the farm to modify the practice *in the manner set out in the order*, to be consistent with normal farm practice. As noted above, normal farm practice, as regards the odour disturbance, requires the installation of reasonable measures to attempt to mitigate those odours.
83. Outlander has already consulted with the GVRD Air Quality Branch and as a result has installed a more efficient incineration unit in a new location. In our judgment, however, more is required. The placement of the barns in relation to the Eason home has, in this

circumstance, created a wind tunnel effect. Particulate discharged by the ventilation fans is blown by prevailing winds directly at the Eason property. Common sense, which is here supported by the evidence of Mr. Bosch, dictates that some form of screen or baffle which intercepts this airflow would have a mitigating effect. In their settlement discussions, both parties recognised this as a potential solution. Outlander has also recognised the beneficial effect of baffling in their anticipated placement of its farm residence, to the north-west of the barns, screened by trees.

84. In our view, the installation of a barrier or screen would, in conjunction with the other steps the farm has taken, demonstrate a modification of the farm's practices which reflects reasonable and proper concern for their neighbours, in accordance with normal farm practices, given the acute nature of the disturbance in question.
85. The Panel orders that the screen operate as a year-round barrier and be of sufficient height to obscure the line of sight from the Eason's porch to the level of the top of the second story ventilation fans on the barns. The exact composition and placement of the screen - be it a fence, berm, wall, non-deciduous trees or other measure or any combination of the foregoing - is for Outlander to determine in accordance with its consultants. However, a screening system meeting the terms of this Order shall be installed within 6 months from the date of this Order.
86. In complying with our Order, we recommend that Outlander continue working with the GVRD Air Quality Branch. Given that Outlander intends to construct another two barns, we further recommend that such measures address the expansion.
87. The Complainants may or may not be satisfied with the farm's impacts even after it carries out its practices consistent with the works contemplated by this Order. Be that as it may, we wish to make clear our view that normal farm practices in this case require nothing more or less than the farm taking reasonable steps aimed at ameliorating the problem. If it does that, our view is that the farm will be compliant with the *Act*. If the Complainants find that those works do not address their concerns, it is open to them to turn to other agencies for relief.
88. We close this decision by making the following comments. First, we note that the parties attempted to settle this dispute prior to the continuation of the hearing in December. It should be noted that Outlander was prepared to go further to resolve this dispute than the Panel has now ordered. It is to be commended for the reasonable fashion in which it has approached this dispute. Unfortunately, the Complainants' real desire is to shut down the Outlander operation. They are not really interested in modifications to Outlander's practices. However, agri-business is the face of farming in British Columbia and the *Act* was designed to protect parties like Outlander as long as they follow normal farm practices. With the proper modifications, Outlander will be able to continue its chicken operation.

89. Second, some comments of a more general nature need to be made. Intensive agriculture brings with it a whole host of considerations beyond that of other types of development. Various municipal and government bodies need to be sensitive to issues relating to the particular site for a proposed agricultural operation. Setbacks of 50' may be unrealistic where intensive agriculture is concerned. In this case, the municipality in response to a request by Mr. Eason required a 100' setback. In hindsight, this was not enough. While 100' may work in some circumstances, it was not adequate here due to the size of the operation, the prevailing winds, the lack or removal of natural screening and the proximity of the Eason home to the barns. Had the barns been built on this site with a 250' setback with a good portion of the wooded area preserved, the disruption would likely have been minimised and this Complaint would likely not have occurred.
90. Third, the Ministry of Agriculture is in the process of reviewing land use by-laws in relation to farm practices throughout the province. As part of this review, it is critical that site specific considerations be borne in mind. Minimum setbacks may work for residential construction; however, they are less helpful where intensive agriculture is concerned.
91. 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.

Dated at Victoria, British Columbia this 10th day of March 2000.

FARM PRACTICES BOARD

Per

Original signed by

Christine J. Elsaesser, Panel Chair

Original signed by

Harley Jensen, Member

Original signed by

Richard Bullock, Member