

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

BETWEEN:

RYAN AND VANESSA FLEISHMAN

DARREN AND RAYANNE HOFFMANN

SCOTT LAWRIE

TANIA HREBICEK

COMPLAINANTS

AND:

FRIND ESTATE WINERY

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board:

Peter Donkers, Chair/Presiding Member
Gunta Vitins, Vice Chair
Pawan Joshi, Member

For the Complainants:

Darren Hoffmann, self-represented
Tania Hrebicek, self-represented

For the Respondent:

Wayne Ford, self-represented

Date of Hearing:

August 28 – 30, 2024

Place of Hearing

Kelowna, British Columbia

A. INTRODUCTION

1. This decision relates to four 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 between June 22, 2023 and July 24, 2023.
2. The complaints were filed by Ryan and Vanessa Fleishman, Darren and Rayanne Hoffmann, Scott Lawrie, and Tania Hrebicek (the **Complainants**). The Complainants all own cottages at Boucherie Beach Resort in West Kelowna (the **Resort**), which is located next to Frind Estate Winery (the **Respondent**).
3. In brief, the Complainants state that they are aggrieved by the continuous and excessive noise generated by the Respondent's wine chiller unit (the **Chiller**) throughout the day and night, which they state is so excessive and disruptive that it detrimentally impacts their lives and their enjoyment of their respective properties. The Complainants argue that the Respondent's use of the Chiller is inconsistent with normal farm practice.

B. BACKGROUND

4. The Respondent is a winery located on West Bay Road in West Kelowna on an acreage located in the Agricultural Land Reserve (**ALR**). The property is 5.4 hectares with 2.63 hectares of grapes. The property was purchased in 2017 and began producing wine in 2019. The property includes a processing plant, and the Respondent processes grapes grown on site and from other parcels of land in the Okanagan.
5. On March 24, 2020, complaints were filed by Karen Tidball, Ryan and Vanessa Fleishman and Steven and Shirley Wedan regarding the noise generated by the same Chiller as is the subject matter of the current complaints.
6. The March 24, 2020 complaints were resolved by way of a settlement agreement between those Complainants and the Respondent dated February 14, 2023 (the **Settlement Agreement**). That Settlement Agreement included the following terms:
 13. The Respondent (Frind Estate Winery) agrees to obtain a plan for professional acoustic sound proofing and to have the associated work completed no later than April 30, 2023, including:
 - a. Evaluation and assessment of the current noise level.
 - a. Comparison between the current noise level and the reduction in noise when a mitigation plan is in place.
 - b. Design specifications of any sound proofing barriers.
 - c. Replacement of the vegetative barrier between the Complainants' and Respondent's properties with mature cedars, and ensure irrigation is functional.
 - d. Final post-sound barrier noise level readings to be equivalent to the air conditioner units on site at BBC.

14. The Respondent agrees to have the chiller turned off between the hours of 10:00pm and 7:00am.
 15. The Respondent agrees that no additional chillers or similar noise making equipment be placed between the homes of Boucherie Beach and Frind Estate Winery.
 16. The Respondent agrees to maintain correspondence with a representative from BBC for the purpose of transparency.
7. The current complaints arise in part due to the Complainants' belief that the Respondent did not follow through with the terms of the Settlement Agreement.
 8. Carl Withler, P. Ag., Consulting Agrologist of Greenspark Consulting was retained by BCFIRB as a knowledgeable person pursuant to section (4) of the Act to provide a report setting out his expert opinion regarding the Respondent's use of the Chiller and its noise management practices (the **KP Report**). Mr. Withler is a retired agrologist from the BC Ministry of Agriculture and Food (the **Ministry**).
 9. The BCFIRB hearing panel (the **Panel**) conducted a site visit of the Complainants' and Respondent properties on August 27, 2024, and the hearing of the complaints was conducted in person in Kelowna on August 28, 29 and 30, 2024.

C. ISSUES

10. There are three issues for the Panel to resolve with respect to the current complaints:
 1. Are the Complainants aggrieved by the noise generated by the Respondent's Chiller?
 2. If the Complainants are aggrieved, is the Respondent operating the Chiller in accordance with normal farm practice?
 3. If the Respondent is not operating in accordance with normal farm practice, are there measures that the Respondent can take to bring their operation back within normal farm practice?

D. THE LAW

11. Section 3(1) of the Act reads as follows:
 - 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 determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

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

Normal farm practice means a practice that is conducted by 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 (a).

E. COMPLAINANTS' EVIDENCE

Ryan and Vanessa Fleishman

13. The Fleishmans provided their evidence and submissions by way of written materials and did not attend in person for the hearing. As such they were not available for cross examination by the Respondent or for questions from the Panel. The Fleishmans were previous complainants and were parties to the Settlement Agreement.
14. The Fleishmans are long-time residents at the Resort. Their residence is located approximately 15 meters from the Respondent's Chiller.
15. Mr. Fleishman noted in his submission that immediately upon the Respondent's installation and use of the Chiller in the autumn of 2019, the excessive noise emanating from the Chiller was extremely disorienting and disruptive to his family's daily life at their cottage.
16. Mr. Fleishman wrote that the noise adversely impacts their ability to get a good night's sleep. In the two bedrooms facing the winery, they are unable to open the windows to allow a breeze since opening the windows allows disorienting noise into the bedrooms which disrupts and prevents proper sleep.
17. He noted that they are no longer able to enjoy activities at the front of their cottage facing the Chiller such as working out and playing games without using headphones.
18. Mr. Fleishman stated that he is concerned that the noise level, measured as 67 decibels (dB) at the front of his cottage, is very close to the level at which hearing damage occurs when exposure to the noise is prolonged (70 dB), as noted in the KP Report. Mr. Fleishman is further concerned about the risk of hearing damage since the Respondent runs the Chiller much of the time, thus exposing neighbouring residents to the noise for extended periods.

19. In his submissions, Mr. Fleishman referred to a written statement and sound recording from Doug Oliver, Property Manager of the Resort, that indicates the Chiller was running at 10:30pm on May 7, 2024, which contravened a term of the Settlement Agreement which states that the Chiller will be turned off between 10pm and 7am.
20. Mr. Fleishman referred to the City of West Kelowna Bylaw No. 0249 section 4.2.5 which states in part:

Noise levels for facilities must not exceed 65 dB at parcel boundary or 20 meters away, whichever is closer.
21. While Mr. Fleishman provided an acknowledgment that the Respondent is not bound by the City of West Kelowna bylaws, he provided that the Respondent should implement some reasonable noise mitigation measures since the Resort residents and the Respondent are all very much a part of West Kelowna.

Darren and Rayanne Hoffmann

22. The Hoffmanns provided written submissions for consideration by the Panel and Mr. Hoffmann attended the hearing to give evidence and provide further oral submissions.
23. The Hoffmanns purchased their residence at the Resort in 2013. They noted they were drawn to its proximity to ALR land, envisioning a serene environment protected for farming.
24. The Hoffmanns stated that since the installation of the Chiller in 2019, they find that the constant noise of the Chiller has subjected them to on-going stress and anxiety and has significantly impacted their overall well-being.
25. The Hoffmanns described the noise emanating from the Chiller as a constant, low, tonal droning sound that varies when the wind changes direction or the compressor moves through different stages. They stated that the noise of the Chiller persists 24 hours a day, 7 days a week.
26. The Hoffmanns noted that they are unable to enjoy their property due to the constant noise pollution, even having to keep their doors and windows closed throughout the day and night. Their sleep is constantly disrupted by the Chiller noise and Mr. Hoffmann is unable to sleep without earplugs.
27. The Hoffmanns stated that noise from the Chiller forces them to speak loudly when conversing which they find frustrating and distracting, and which often awakens their children when sleeping. The Hoffmanns no longer use the area facing the winery for activities such as playing sports, washing their vehicles, tinkering with projects, reading, visiting and conversing with friends due to the constant Chiller noise that is irritating and fatiguing.

28. The Hoffmanns stated that the noise from the Chiller affects the guests that rent their cottage as well. The Hoffmanns further noted that the location of the Chiller and its increased noise will devalue the properties located on the winery side resulting in increased difficulty selling or renting and negatively affecting the residents financially.
29. The Hoffmanns referred to the KP report which indicates the noise reading averages 67 dB at their cottage entry facing the Chiller. They are concerned that the noise is more than double the World Health Organization's (WHO) recommendation of 30 dB maximum in bedrooms for a good quality sleep.
30. At the hearing, Mr. Hoffmann confirmed his evidence from his written submissions and further testified that he knew that he had purchased a cottage next to ALR land in 2013, as indicated by the covenants on his purchase agreement. He did not expect, however, the Agricultural Land Commission (**ALC**) to approve expansion of the processing facility so that it covered 33% of the Respondent's property, rather than the 5% coverage which is the normal standard for buildings and structures on the ALR. Mr. Hoffmann acknowledged that BCFIRB has no jurisdiction over ALC decisions on land use.
31. Mr. Hoffmann stated that the Respondent has had a history of not responding meaningfully to neighbouring residents' noise complaints and recounted the events leading up to this hearing. He explained that the Respondent had indicated their intent in 2020 and 2021 to relocate the Chiller to the other side of the processing facility but then reneged in 2022, stating supply shortages for piping and unreasonable price increases. The Respondent then stated that they would add more noise suppressing barriers to reduce the noise. The actions of the Respondent were not sufficient which then led the parties to negotiate a Settlement Agreement, with the assistance of BCFIRB staff. At the time of this hearing, the Respondent had failed to fulfill the terms of the agreement which had a deadline of April 30, 2023.
32. Mr. Hoffmann provided guidelines from the WHO which state that the average night noise outside bedrooms should not exceed 40 dB to prevent adverse health effects. Children are more vulnerable to noise, as are shift workers whose sleep structure is under stress. Mr. Hoffmann testified that he and his wife are shift workers and both are disturbed by the noise of the Chiller when sleeping.
33. Mr. Hoffmann stated that there was an increase in noise from the Chiller when the noise dampening blanket was lifted and tied back from August 19 – 22, 2024.
34. In cross-examination, Mr. Hoffmann stated that he had previously lived in Alberta and wasn't aware of the ALR until it was disclosed to him in the purchase agreement for the cottage.

35. He noted that he had purchased a decibel reading meter and measured noise levels around the Resort property a few years ago but did not document the readings. He believed he recorded a noise level of 55 dB for his air conditioner.
36. Mr. Hoffmann stated that he did not see anyone working on the Chiller from August 19 – 22, 2024 when he noted that the noise dampening blanket was lifted and tied back.
37. Mr. Hoffmann acknowledged that he does not know whether his property value has decreased due to its proximity to the Chiller since he hasn't tried to sell his cottage. He noted that he is not aware if the Resort has implemented any efforts for noise buffering on their property. He also acknowledged that he had spoken to one other winery (Black Swift Winery) and learned that they had also received noise complaints.
38. In response to Panel questions, Mr. Hoffmann advised that both he and his wife are commercial pilots with erratic work schedules and often suffer from jet lag. He confirmed that prices varied between the cottages at the time of his purchase but the variations were based on the presence of driveways, proximity to the lake or to the entrance road, and not whether the cottage was facing the ALR land or was on the opposite side of the Resort.
39. Mr. Hoffmann acknowledged that he is able to rent his cottage at his desired rental rate and he confirmed that he owns the cottage and land, and that the common property is strata. The common property includes the pool and area behind the cottages.
40. Mr. Hoffmann stated that he believes that the strata council is reviewing the fencing of their community, but he is not certain since he's not a current member of the council.

Scott Lawrie

41. Mr. Lawrie provided evidence and submissions for the Panel by way of written materials and did not attend in person for the hearing. As such he was not available for cross examination by the Respondent or for questions from the Panel.
42. Mr. Lawrie purchased his residence at the Resort in 2015. He confirmed that since the installation of the Chiller in 2019, he has lost the use and quiet enjoyment of the area of his property that faces the winery.
43. Mr. Lawrie referred to the KP Report which indicates that the Chiller noise averages 67 dB at his cottage while normal conversation is carried out at 60 dB. Mr. Lawrie wrote that he cannot have conversations with friends and neighbours at a normal volume due to the excessive and disruptive noise of the Chiller. He finds that continually speaking up and repeating himself is very frustrating.

Tania Hrebicek

44. Ms. Hrebicek provided written submissions for consideration by the Panel and attended the hearing in person to give evidence.
45. Ms. Hrebicek purchased her residence at the Resort in 2014. The KP Report indicates the distance from Ms. Hrebicek's front door to the Chiller is 14.7 meters.
46. Ms. Hrebicek stated that the Chiller runs every day and cycles on and off numerous times throughout the day, especially when the weather is hot. She noted that she refrains from opening the window on the side of the cottage facing the Chiller due to the excessive noise. She noted that the excessive noise from the Chiller affects not only her family but also her tenants that rent her cottage for three to four months during the year.
47. Ms. Hrebicek stated that the 67 dB reading at her cottage door and the 72 dB at the fence line exceed the maximum noise level of 65 dB at the parcel boundary specified in the City of West Kelowna's Bylaw No. 0249.
48. Ms. Hrebicek also referred to Bylaw No. 2931, 2022 of the neighbouring Regional District of Okanagan-Similkameen that states the maximum daytime noise level of an activity district is 60 dB and 55 dB at night.
49. Ms. Hrebicek confirmed her evidence from her written submissions. She further testified that she was not concerned when she heard that there would be a winery next to her cottage because she was never aware of chillers or noise from chillers at the wineries that she had visited. She stated that she was very surprised at the time the Chiller was installed to see that it was so close to her cottage and only 2.6 meters to the fence line/ALR boundary.
50. Ms. Hrebicek stated that the Respondent never approached or communicated with the Resort community or strata council about their commercial farming enterprise, their production processes, or their intentions for expansion. Ms. Hrebicek stated that she believes that the Resort residents would have a greater understanding and a positive relationship with the Respondent if the Respondent had shared information about their investigative work on the costs and challenges of noise mitigation and chiller relocation. The continued lack of transparency and information sharing from the Respondent was very frustrating for the Resort residents especially when it contravened one of the terms of the Settlement Agreement.
51. Ms. Hrebicek confirmed that she is a member of the Resort strata council and stated that the council had decided not to get involved with the Chiller issue since it didn't impact the entire Resort. The council left it up to the individual residents that were most impacted by the noise from the Chiller to communicate with the

winery representatives. Ms. Hrebicek further explained that the strata council had expected the noise issue to be adequately addressed when the Respondent first promised to relocate the Chiller and then again after the Settlement Agreement was signed, so there wasn't a need for the council to investigate buffering options on the Resort side.

52. In cross-examination, Ms. Hrebicek acknowledged that the relationship is strained between the Respondent and the neighboring residents. She believed that the winery owner did not appreciate their concerns. She acknowledged that she had never personally reached out to the Respondent to set up a meeting to better understand winery processes or to discuss noise mitigation but is aware that other residents have tried without success.
53. Ms. Hrebicek acknowledged that residents have complained to winery staff about other issues such as the noise from propane cannons and disruptive winery patrons wandering around the Resort property.
54. Ms. Hrebicek explained that the strata council had not explored buffering options as they have limited space to place buffers due to the access road, and they would have to take down the fence and the cedar trees intertwined with the fence which is all on the Respondent's property.
55. In response to Panel questions, Ms. Hrebicek advised that she has been a member of the strata council for three years and that she is a resident of Alberta and spends two months per year at her cottage, plus a few other sporadic visits. She acknowledged that she has no difficulty renting her cottage and has never received a complaint from a renter about the Chiller noise.
56. Ms. Hrebicek stated that her real estate agent had not pointed out that she was buying property next to ALR land. When she learned that there would be a winery next door, she wasn't too concerned because she found out that only 5% of the land could be allocated to processing. She didn't expect the processing plant to cover 33% of the land and process grapes from other parcels of land, thereby requiring large chillers.
57. Ms. Hrebicek agreed that chillers are part of the wine-making process, but she objected to the proximity of the Chiller to their residences and to the Respondent's lack of noise mitigating measures to reduce the noise to a more reasonable level of 60 dB.

Complainants' Witnesses

Alison Decotis

58. Ms. Decotis and her husband purchased a residence at the Resort before the development of the winery. She testified that she was initially excited that a winery was being built next door but her husband, who is in construction and development, was concerned about the potential size and scope of the winery.
59. Ms. Decotis stated that the noise of the Chiller has impacted the enjoyment of her property, her ability to speak at normal volumes with her neighbours, and her ability to sleep with the windows open.
60. Ms. Decotis stated that when she had a conversation on May 12, 2020 with Marcus Frind, the owner of Frind Estate Winery, he said that the chillers would be moved to the other side of the winery. He also said that they tried to make the Chiller quieter but it hadn't worked.
61. Ms. Decotis responded in cross-examination that she was concerned not only about the chillers but also about the height of the expanded processing building. She noted that she had asked Mr. Frind to consider lowering the building, since it would be looming over them and shading them. She acknowledged that she was surprised that Mr. Frind was amicable when speaking with her.
62. In response to Panel questions, Ms. Decotis advised that she is a resident of BC and that she wasn't concerned about being next to ALR land when she purchased the cottage or about the winery, initially, since she was expecting a small structure to be built on the property.

Karen Tidball

63. Ms. Tidball testified that she and her husband purchased a residence at the Resort in 2019. She is semi-retired and lives at the cottage four to six months a year. She stated that when she purchased the cottage, there were already small structures on the winery property, including the first processing building. She noticed the noise of the first chiller when walking by the area.
64. Ms. Tidball explained that she became involved with the other owners of the cottages in 2020 when the winery began expanding the processing building and adding chillers. She and her husband were particularly interested in the building expansion since she has a farming background and her husband is in construction and development. They were concerned about the location of other chillers and compressors and the potential noise pollution impacting the residents.

65. Ms. Tidball testified that she contacted Chris Oliver, planner for the City of West Kelowna, to learn if and how the municipality was addressing the winery's expansion and chiller placement. Mr. Oliver suggested to her that the residents could ask the Respondent to baffle and/or move compressors or chillers.
66. Ms. Tidball stated that she was one of the residents that filed a complaint with BCFIRB in April 2020 about the noise generated by the chillers. Since the Respondent indicated their intention to relocate the first chiller and situate the second chiller so that it wouldn't bother the Resort residents, the complaint was adjourned. The relocation of the first chiller was expected to be completed by the fall of 2020.
67. Ms. Tidball became the spokesperson for the Resort on the Chiller issue. She tried several times to communicate with the Respondent to find out how the work was progressing, but she never received a response. Instead, she asked BCFIRB staff to contact the Respondent and she received updates through BCFIRB.
68. When she and the other original complainants realized that the Respondent would not be relocating the first chiller, they agreed to try alternative dispute resolution to reach an agreement with the Respondent, with the assistance of BCFIRB staff. Ms. Tidball is one of the signatories of the Settlement Agreement issued on February 14, 2023.
69. Ms. Tidball stated that she initiated communication with the Respondent after the Settlement Agreement was issued but did not receive any information or progress reports from the Respondent. As such, she was not able to assess whether the Chiller was turned off between 10pm and 7am, as stipulated in the Settlement Agreement, since she was not documenting the on/off periods.
70. Ms. Tidball stated that the strata council was under the impression that the Complainants were making progress with the Respondent once the Settlement Agreement was issued and, therefore, did not consider getting involved at that point. She stated that that she and the other signatories of the Settlement Agreement believed that the Respondent was fully committed to the Settlement Agreement and would fulfill the terms in good faith.
71. Ms. Tidball acknowledged in cross examination that Resort residents had approached winery representatives to complain about several issues including winery patrons wandering around the Resort property, being disruptive, or mooring boats at their dock.
72. In response to Panel questions, Ms. Tidball acknowledged that her cottage is located a distance away from the Chiller so that she is not as impacted by the noise as the residents that are closer to the Chiller.

73. Ms. Tidball stated that she was not aware if the City of Kelowna held public hearings about the Respondent's building plans. She noted that she didn't try to speak to the winemaker or someone else at the winery, including Mr. Frind, when she didn't receive any communication from Mr. Ford, the Director of Construction and Development for the Respondent. She believed that members of the strata council had been trying to reach out to representatives of Frind Estate Winery.

F. RESPONDENT'S EVIDENCE

Wayne Ford

74. Mr. Ford is the Director of Construction and Development for the Respondent (Frind Estate Winery). He replaced Ruth Hanbury, past General Manager for Frind Estate Winery, in 2021 as the contact person with the Resort residents and BCFIRB.
75. At the hearing, he referred to his written submission which included 2012 and 2019 documents from the ALC and 2013 documents from the Kamloops Land Title Office regarding the Resort.
76. Mr. Ford stated that he believed that the Resort was developed without any concern for the ALR land that was adjacent to it. He stated that the Resort owners did not comply with the Ministry's edge-planning guidelines for buffering nor the covenants in the Kamloops Land Title Office Doc # CA3130881 dated May 16, 2013 which stipulated that a fence and 3 meter vegetative buffer be installed on the Resort in an area next to the ALR land. He also believed that the Resort owners did not fully acknowledge the covenant that states the property is beside ALR land and there may be adverse conditions from normal farm practices. He reiterated that they only do farming on the property and that the chillers and the buildings are there for farming purposes.
77. Mr. Ford acknowledged in cross-examination that the area identified in the ALC and Kamloops Land Title documents that required fencing and the 3-meter vegetative buffer on the Resort side is not the area where the Chiller is situated. He further acknowledged that the winery owner thought that moving the Chiller would be a good idea before the processing building expansion was completed but due to COVID and the resulting supply chain challenges and price increases, the owner decided not to move the Chiller. The owner was also concerned that if the Chiller was moved to the other side of the processing building, they would get additional noise complaints from residents on the other side of the winery who were already complaining about the noise from the roof mounted chiller.
78. Mr. Ford confirmed that the main supply chain issue impacting the relocation of the Chiller was the lack of supply for the George Fisher piping that was used throughout the entire processing facility. They couldn't switch to another type of piping to relocate the Chiller without replacing all of the piping in the processing facility, which would be impractical and very costly.

79. Mr. Ford explained that the refrigeration design engineer at Gateway Mechanical determined that placing the Chiller on the ground next to the processing plant was a better option than roof mounting the Chiller. Mr. Ford stated that wineries with roof mounted chillers, such as Quail's Gate Winery, get many noise complaints because the sound carries great distances due to the elevated height of the chiller. He further explained that mounting a chiller on the ground is less costly than placing it on a roof and there would be noise complaints with either chiller placement.
80. Mr. Ford acknowledged that the closest residence on the other side of the winery is approximately 100 meters from the roof mounted chiller, which is a much greater distance than the 14.7 meters for the closest residence to the ground mounted Chiller.
81. Mr. Ford confirmed that they had obtained a plan for professional acoustic sound proofing, in accordance with the agreement, and tried several options to reduce the noise of the Chiller. They tried changing the speed of the fans by changing the pulleys, and they installed more sound deadening material which they had to remove because it caused the Chiller to overheat. They explored building a brick wall around the Chiller but it was a costly option which they weren't sure would reduce the noise to an acceptable level for the residents.
82. Mr. Ford acknowledged that they had not completed the final part of the sound proofing plan which was to obtain noise level readings equivalent to air conditioner units at the Resort cottages. He explained that they did not replant cedars to fill the gap in the hedgerow because they had difficulty sourcing similar cedars and they missed the fall planting window for mature cedars which is also harvest time for the winery. They were also hesitant to try coordinating with the Resort, due to their strained relationship, to bring in equipment on the Resort side to take down the fence and plant the trees.
83. Mr. Ford acknowledged that it was an oversight on his part when he agreed to complete the terms in the Settlement Agreement by April 30, 2023, and stated that it was taking them longer than expected to complete the work. He also wasn't aware at the time that he signed the agreement that there was an optimal time to plant mature cedars. He noted that the next planting window is fall 2024.
84. Mr. Ford explained that they had also experimented with turning off the Chiller between 10pm and 7am but it caused temperature problems for the winemaker. He and the winemaker believed that they would be able to turn off the Chiller during the night hours when he signed the agreement, but they learned that it caused problems during a six-week trial run.

85. Mr. Ford acknowledged that he didn't correspond with a representative of the Resort to notify them that they were making progress but couldn't complete the work by the deadline. He explained that they were very busy dealing with many priorities at the winery and didn't have the time to address all of the terms of the agreement, including communicating with a representative.
86. Mr. Ford acknowledged that the sound dampening blanket was lifted and tied up periodically over a few days in August 2024, as depicted in Mr. Hoffmann's photo evidence. He explained that the Chiller had failed and was being serviced by Gateway Mechanical during that time.
87. Mr. Ford confirmed that he obtained a cost estimate of \$450,000 from Gateway Mechanical to relocate the Chiller but he did not provide a quote as evidence for the hearing. He further acknowledged that he did not provide evidence of the work that had been done by the professional acoustical sound company because they were in a rush submitting evidence by the submission date and didn't realize that they could provide evidence after the deadline. He also acknowledged that he did not provide evidence of the servicing of the Chiller by Gateway Mechanical.
88. Mr. Ford stated that the Respondent does not have a department that is in charge of neighbour relations, unlike other wineries such as Mission Hill Winery and Quail's Gate Winery. He stated: "... *the owner doesn't feel that he should incur the cost just to fend off complaints that are never-ending through all the properties that we have throughout the valley.*" He further noted they are inundated with complaints from all of their properties about lights, increased traffic, deer, noise, etc., and they know that some people complain no matter what steps are taken to mitigate the problems. He stated that many residents at the Resort are not very welcoming so they try to minimize interactions.
89. In response to Panel questions, Mr. Ford noted that the cedars in the hedgerow died due to a lack of water when the irrigation hoses were disconnected. He believed the incident occurred when someone was working in the area and accidentally disconnected the hoses attached to the irrigation line. By the time their landscapers noticed that there was a problem and reconnected the hoses, the trees had been too long without water in the heat of the summer and were not able to recover.
90. Mr. Ford stated that Gateway Mechanical recommended locating the first processing facility close to the ALR boundary where it wouldn't obstruct the road that led to the original house and didn't require the removal of grape vines.
91. Mr. Ford confirmed that they are willing to consider more options to reduce the noise of the Chiller and that they are currently seeking solutions. He noted that the cost to build a block wall around the Chiller was estimated at \$25,000. He further noted that relocating the Chiller would be very costly, estimated at \$450,000, and involve considerable building modifications and construction challenges. The

easiest solution would be to place the Chiller on the ground at the other side of the building but the waste treatment system is there. They would have to build a mezzanine to lift the Chiller off the ground or move it to the upper deck of the building, which would require extensive piping and electrical modifications and the addition of a buffer tank inside the building to move glycol to the relocated Chiller.

92. Mr. Ford confirmed that the Respondent owner, Mr. Frind, is well aware of the noise complaint and is committed to resolving the issue. Mr. Frind is concerned, however, that once this noise issue has been resolved, complaints about other issues will arise.
93. Mr. Ford stated that he understands why the Complainants filed their complaint. He advised that he has the authority to make decisions that cost \$100,000 or less, in his position at the winery. He explained that they have a good relationship with Gateway Mechanical, but the company did not want to be a witness at the hearing since they feel that it's a bigger issue and it's "not their fight."
94. The Panel notes that first-hand evidence from Gateway Mechanical, the principal design and construction contractor with respect to the Chiller, presumably would have provided valuable evidence to the Panel on the decision making around the original siting of the Chiller, the costs to further mitigate the noise of the Chiller, and the costs and logistical hurdles in relocating the Chiller. The Respondent had ample opportunity to provide that evidence and, if necessary, to compel a representative of Gateway Mechanical to attend at the hearing. The Respondent's failure to do so, and its reliance on hearsay statements, limits the weight that the Panel can place on the Respondent's submissions as to the alleged costs and difficulties in mitigating the noise of the Chiller or in relocating the Chiller entirely.

G. KNOWLEDGABLE PERSON'S EVIDENCE

95. Mr. Carl Withler, P. Ag, provided a knowledgeable person report dated January 3, 2024, which was included as an exhibit at the hearing and relied upon by the parties and the Panel. Mr. Withler's professional expertise is described as a "Treefruit and Grape Industry Specialist". Mr. Withler retired in early 2020 from his position with the Ministry. He has more than 30 years of experience in his field of work. Mr. Withler has assisted with converting orchards to grapes and designing vineyards in BC and New Zealand. He conducted site visits of the Complainants' and Respondent's properties on August 17 and September 14, 21, and 26, 2023. During his site visits, the Chiller was turned on for his benefit and evaluation.
96. The KP Report indicates that, in 2013, the ALC approved exclusion of the waterfront portion of 3750 West Bay Road in West Kelowna, which was rezoned for residential and short-term tourist accommodation. A condition of rezoning was the placement of covenants making known to developers and purchasers their proximity to ALR lands and potential normal farm practices.

97. The KP Report states that Frind Estate Winery purchased its property on Boucherie Road in 2017, began planting 2.63 acres of Foch grapes in 2018 and, in 2019 started converting the residential structures to winery structures. Building expansion continued in 2020 which included crush pad development and expanded chilling capacity.
98. The KP Report indicates that the Respondent installed the Chiller in 2019. The purpose of the Chiller is to control temperature in the production of wine.
99. The KP Report further indicates that the Chiller was placed on the east side of the processing building very close to the property boundary of the Resort and that noise complaints were sent to the City of West Kelowna, the Ministry, and BCFIRB immediately upon start up.
100. The KP Report notes that the Respondent added a second chiller when the processing plant was expanded in 2020. This chiller was placed on a sundeck style structure on the roof on the west side of the building, approximately three meters above the ground. This chiller does not face the Resort and is not the subject of the current complaints.
101. Mr. Withler notes in the KP report that the majority of the residences at the Resort are used from June to August with other uses such as rentals, sporadic trips, and seasonal holidays.
102. The KP Report describes the location of the Complainants' residences in relation to the Chiller. The closest linear distance from the Chiller to a Complainant's cottage is 14.7 meters and ranged up to 30.1 meters to the other Complainants' cottages. The KP Report refers to the Ministry'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 setback distance of 50 meters for refrigeration units measured from the ALR/urban boundary on the farm side. In addition, the Guide proposes an urban-side residential setback distance of 30 meters from the ALR boundary, which would include a 15 meter wide vegetative buffer.
103. A single row cedar hedge on the farm side and a chain link fence separate the Respondent's property from the Resort. On the Resort side, there is a paved access road and a driveway leading up to each cottage; no buffering/landscaping in sight. The KP Report concludes that the distance from the Chiller to the residence door and site measurements do not meet any recommended buffering distance and has none of the design features specified by the Ministry in developing properties near the ALR boundary.

104. The KP Report notes that the Respondent had covered the Chiller with a styrofoam lined shield and a sound dampening blanket which reduced the noise by 6 dB, from 86 to 80 dB. The report indicated that the current general manager is willing to work with the layout of the Chiller to ensure efficient operation of the unit and a further reduction in noise.
105. The KP report also indicated that the Respondent committed to replacing the dead cedars that were removed from the cedar hedge on the ALR boundary between the properties. They have been looking for cedars of similar species and height to maintain the aesthetic features of the hedgerow.
106. 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.
107. During the three site visits by Mr. Withler in September, he assessed the Chiller noise using a cell phone app at ten locations around the Resort including at the fence line separating the properties, at the Complainants’ cottage doors facing the winery, and at the pool behind the cottages.
108. As noted in the KP Report, the noise readings taken at the Complainants’ cottage entries averaged 67 dB and measured 72 dB at the fence line. Noise readings taken at the pool in the common area behind the Complainants’ cottages measured 60 dB. The KP Report indicated that normal conversations can be carried out at noise readings of 60 dB, and that hearing damage can occur at prolonged exposure to noise measuring 70 dB.
109. During the August 17, 2023 site visit, Mr. Withler stated that conversations took place at normal volumes four feet from the chain link fence. He also stated that residents in the area behind their cottages were able to read their books, enjoy refreshments and converse socially. Mr. Withler said: *“They had a hard time defining the chiller noise as irritating or bothersome.”*
110. During the September 21, 2023 site visit, Mr. Withler interviewed Synergy landscaping staff who maintain the Resort grounds. The staff stated that they were not troubled or concerned about the Chiller noise. They described it as “white” and not intrusive.
111. In the KP report, Mr. Withler compared the noise readings of the Respondent’s Chiller with other chillers of similar capacity and/or which were deemed similar due to their proximity to residences. He measured noise levels of 82 – 84 dB taken three feet from chillers that did not have noise dampening modifications. In contrast, Mr. Withler recorded noise levels of 67 and 69 dB taken three feet from two chillers that were enclosed in noise dampening structures. The KP report

indicated that the noise dampening enclosures around these two chillers had reduced noise levels by 14 – 15 dB. In comparison, the Respondent's sound dampening measures reduced noise levels by only 6 dB, from 86 to 80 dB.

112. The KP report concluded that little can be done to change the current physical layout of the Respondent's winery and the residential buildings of the Resort. In reviewing the guidelines of the Ministry's reference materials against the development that has taken place at both properties, Mr. Withler stated: "*This is a very good example of very bad setback requirements, buffering and fencing between rural and urban neighbours.*" He further states that it would likely cost up to \$450,000 to make the physical changes necessary to relocate the Chiller.
113. The KP report provided the following five recommendations which Mr. Withler believed may reduce sound noise to a more acceptable level from the Complainants' perspective:
- 1) The General Manager of Frind Winery can provide approximate scheduling of harvest, crush and chiller use activities to the Resort strata council to "make known" winery activities. This information should be forwarded each spring (May/June) to ensure residents are made aware of the annual activities of wine production.
 - 2) A tour of the winery and its operations should be held during early June to show Resort residents the size, complexity and process of wine making, including requirements for juice chilling and fermentation.
 - 3) Frind Estate winery staff should continue to work with Gateway Mechanical staff to baffle sound from the Chiller while allowing air flow to ensure maximum efficiency of the Chiller. Consideration may be given to placing the Chiller in the ground as outlined in the operations manual if baffling does not bring sound levels to 60 dB as recorded at Unit 28 entry.
 - 4) Resort strata council should replace the existing chain link fence between the properties with a solid structure fence to a maximum of 10' (refer to City of West Kelowna bylaw) to reduce noise, maintain the residence aesthetics and reduce reliance on vegetation which may be challenging to grow.
 - 5) Should chiller upgrading or replacement be required, all efforts should be made to roof mount, or mezzanine mount the chiller.
114. At the hearing, Mr. Withler summarized his findings in the KP Report. He also confirmed that while he was not able to find chillers that were an exact match to the Respondent's Chiller, he compared chillers from other wineries of similar capacity to the Respondent's that were processing between 50,000 to 80,000 cases of wine per year, such as Mission Hill Winery and Quails Gate Winery. He also sought chillers that were in similar proximity to residences such as the chillers at Black Swift Winery and Scenic Road Cidery. Mr. Withler noted that the noise dampening structures surrounding the chillers at Volcanic Hills Winery, Scenic Road Cidery and at the Respondent's winery have reduced the noise levels to some degree.

115. Mr. Withler acknowledged that an updated 2020 guide of bylaws on lot line distances for wineries and distilleries is available, however he used the 2015 versions of the Ministry's Strengthening Farming Program on agricultural urban edges for the KP Report.
116. In cross-examination, Mr. Withler acknowledged that during his August 17, 2023 site visit people may have been raising their voices in order to have conversations close to the property line. Mr. Withler further acknowledged that the reference to landscape staff not being troubled or concerned about the Chiller noise does not represent a fair assessment of the impact of the Chiller noise on residents of the Resort. He concurred that the landscape staff are on-site for only a few hours per week and they use ear protection when using noisy machinery such as lawn mowers and blowers.
117. Mr. Withler confirmed that he used a cell phone app to measure noise levels and that he tried to replicate the position of every measurement taken when recording #1 noise levels at different locations at the Resort and at other wineries. He acknowledged that he did not know whether the sound recording app on his cell phone meets the requirements of a legal sound recording device.
118. Mr. Withler confirmed that there is a linear progression in sound reduction as one moves further away from the Chiller.
119. Mr. Withler confirmed that the Chiller was fully shrouded with the noise dampening blanket when he measured noise levels at different distances from the Chiller. He believed that the Chiller was working at full capacity when he measured the sound levels since the recorded measurements were consistent when taken during three separate site visits.
120. Mr. Withler explained that the Ministry's updated 2020 bylaw guide¹ specified a 7.5-meter setback from lot lines for winery processing facilities, in contrast to the 50-meter set back from boundary lines for refrigeration units stipulated in the 2015 edge planning guide. The reference to refrigeration units was omitted in the 2020 guide.
121. Mr. Withler stated that the City of West Kelowna did not enact bylaws for the rural-urban setbacks recommended by the Ministry when it approved development plans and issued building permits for the Resort and the Respondent's winery.

¹ Ministry of Agriculture, 2020 Guide for Bylaw Development in Farming Areas, Section 2.4 The Minister's Bylaw Standards, pg. 21. Table 1: Maximum Minimum Setbacks for Farm Buildings, Structures, and Facilities - Brewery, Cidery, Distillery, Meadery or Winery processing facility should be set back a minimum of 7.5 meters from lot lines.

122. Mr. Withler acknowledged that the Complainants would have to modify their layout, move the cottages, and take out the access road to accommodate the 30 meter set back from the ALR boundary in compliance with the Ministry's edge-planning guidelines. He has never seen such drastic modifications undertaken but stated that placing a vegetative edge could help buffer the sound. Placing a sound barrier like a concrete wall between the hedgerow and the chiller is also possible and is one of the recommendations in the KP Report. He stated that it's quite common to see buffering on the residential side.
123. Mr. Withler described the function of chillers in winemaking and how they cool glycol to chill the wine. Chillers can also be used for limited heating, to heat wine to encourage fermentation and also to provide heat directly to the production facility.
124. Mr. Withler testified that of the 256 wineries in BC, approximately 95% have chillers. He explained that the advantages of a roof mounted chiller are that they are easy to service and the noise emanating to surrounding areas from the chiller is reduced since it is not bouncing off hard surfaces and dissipates with distance.
125. Mr. Withler acknowledged that he didn't measure the distance of the closest residence to each comparable winery's chiller for the KP report. He reviewed and verified google maps of the wineries and distance measurements provided by Mr. Hoffmann which were accepted as evidence at the hearing. The distance measurements are presented in Table 1 below:

Table 1. Distance of Closest Residence to Chiller at Processing Facility

WINERIES & FACILITIES WITH CHILLERS*	CLOSEST RESIDENCE
Black Swift Winery	21 meters
Day's Century Orchard (roof mounted)	45 meters
Dirty Laundry Winery	130 meters
Grizzli Winery	162 meters
Mission Hill Winery Chiller	140 meters
Quail's Gate Winery (roof mounted)	40 meters
Scenic Road Cider Company	20 meters
Volcanic Hills Winery	150 meters

*Chillers are located on the ground beside the processing facility unless described otherwise.

126. Mr. Withler stated that it's not uncommon for chillers of wineries and cideries to be located close to property lines, such as at Black Swift Winery and Scenic Road Cider Company, but that these tend to be smaller capacity operations, plus some have roof mounted chillers and or/buffering structures.
127. Mr. Withler acknowledged that none of the large capacity chillers comparable to the Respondent's Chiller, such as at Quail's Gate Winery and Mission Hill Winery, were located as close to a residence as the Respondent's chiller was. Although the chiller at Quail's Gate Winery is quite close to a residence 40 meters away,

noise is reduced since the Chiller is roof mounted.

128. Mr. Withler explained that chillers will run 24 hours per day for large production facilities, such as the Respondent's winery, and could run continuously year-round. Mr. Withler further explained that his estimate of \$450,000 to relocate the Chiller was obtained from a representative of Gateway Mechanical. He was unable to obtain a detailed quote. He stated that Gateway Mechanical was generally uncooperative and reluctant to provide additional information.
129. Mr. Withler testified that the purpose of the first two recommendations in the KP report was not for noise reduction specifically, but for the parties to build understanding of the complexity and industrial nature of wine production and to discuss each other's concerns. He stated that the Respondent is making a good effort to control the noise by using the sound dampening blanket which also allows the Chiller to run at optimum efficiency. Mr. Withler explained that he recommended roof or mezzanine mounting the chiller if it's to be replaced or updated, so that the chiller is out of sight and out of the way of the residents which will also benefit the winery.
130. In response to Panel questions, Mr. Withler stated that he assumed that the \$450,000 estimate to relocate the Chiller included costs for a concrete pad, the crane to lift the chiller, re-piping, and electricity.
131. Mr. Withler stated that noise recordings of the Chiller would be similar whether measured at night or early morning since 'noise is noise'. He added that he recorded 46 dB the one time the Chiller was turned off during a visit so there is other ambient noise around the Chiller as well. He stated that he believed that his cell phone app provided a fairly standard measure of sound and that even if it's off by one to two dB, the baseline and trends remain relatively constant.

H. ANALYSIS

Are the Complainants aggrieved by the noise generated by the Respondent's Chiller?

132. Based on the evidence submitted by the Complainants, including the voluminous video recordings of the Chiller noise, 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.
133. It is worth noting that the Respondent did not seriously contest the Complainants' assertion that the noise from the Chiller is negatively affecting the Complainants' wellbeing and their enjoyment of their respective properties. Mr. Ford's acknowledgement that further efforts can and should be made to mitigate the noise coming from the Chiller essentially confirms the Complainants'

aggravement.

134. Likewise, Mr. Withler’s evidence demonstrates that the noise levels are of the character that would support the finding that the Complainants are aggrieved. While Mr. Withler noted in one instance that it was possible to have a conversation over the noise of the Chiller, he also acknowledged that the people involved in that conversation may have been raising their voices. The actual decibel measurements taken by Mr. Withler are just shy of the noise levels noted in his report to cause hearing damage with prolonged exposure. This is not a case where the Complainants are particularly sensitive or unrealistic in their expectations of their neighbour’s conduct. The evidence shows that the noise from the Chiller is fairly represented by the Complainants as being detrimental and disruptive to their daily lives.

Is the Respondent operating the Chiller in accordance with normal farm practice?

135. 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.”
136. This test requires a consideration of general industry practices, together with the specific contextual circumstances of the Respondent farm (winery) in relation to properties around it. The analysis may involve asking what, if any, reasonable steps the Respondent 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).
137. 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 Pyke² as adopted in BCFIRB decisions, are the principles that best achieve the objects of the FPPA. Only a fully contextual approach can meaningfully account for the words “proper” and “similar circumstances” in their context, and achieve the balancing of interests that is inherent in the very creation of a complaints structure.

² Pyke v. TRI GRO Enterprises Ltd. (2001), 204 D.L.R. (4th) 400 (Ont. C.A.)

This also means, as set out by the BC Supreme Court in Ollenberger³ 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.

138. The first step is to carry out a general assessment of industry standards – to determine proper and accepted customs and standards for the use of chillers in the BC wine industry. On this point, there is little 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 and are employed by the vast majority of wineries in the province and particularly in the Okanagan Valley. The use of chillers is specifically documented in Mr. Withlers’ KP Report and the Complainants have not suggested at any point that it is the use of a chiller generally that is causing them to be aggrieved.
139. The central issues for the Complainants are the close proximity of the Chiller to their residences and the Respondent’s inadequate noise reduction measures resulting in excessive noise levels measured at their residences. As such, it is the context in which the Chiller is being operated which the Complainants point to as being outside of normal farm practice.
140. The KP Report provides reliable measurements of the noise experienced by the Complainants. Mr. Withler’s sound measurements were consistent over multiple site visits and in multiple locations. Mr Withler noted that variation in noise levels was less than 3 dB during the 10 second recordings. Mr. Withler’s sound measurements were not contested by any of the parties.
141. The sound readings at the cottages and distance measurements to the Chiller that were provided in the KP Report are captured in the following table:

Table 2. Sound & Distance measurements for Resort Cottages Located Near the Chiller

Cottage #	Sound measurement (dB)	Distance from Chiller
Cottage # 25	63	n/a
Cottage # 27 (Mr. Fleishman)	67	15 meters
Cottage # 28 (Ms. Hrebicek)	67	14.7 meters
Cottage # 30	64	n/a
Cottage # 33 (Ms. Decotiis)	55	approximately 30 meters

142. The KP report did not provide sound measurements at Mr. Hoffmann’s Cottage # 26 and at Mr. Lowrie’s Cottage # 29, however both Complainants inferred that the noise levels averaged 67 dB at their cottage entries. The Panel accepts their inference since their cottages are right next to #27 and #28 which have noise level

³ Ollenberger v. Farm Practices Board, August 10, 2006, Chilliwack Registry No. S16527

readings of 67 dB. All four cottages are located across from the Chiller, however, the KP report did not provide distance measurements to the Chiller for each cottage. The Panel notes that Cottage #33 is not located across from the Chiller and, since noise dissipates with distance, the sound measurement at the cottage is understandably reduced, measuring 55 dB.

143. The WHO guidelines submitted by the Complainants indicate that a normal conversation averages 60 dB. The Settlement Agreement stipulates that the Respondent obtain post-sound mitigation noise level readings equivalent to the air conditioner units on site at the Resort. Neither the Complainants nor the Respondent provided noise level readings of air conditioners at the Resort in their submissions. However, Mr. Ford did acknowledge in cross examination that the Respondent had not met that requirement of the agreement.
144. Since the noise readings at the Complainants' cottages exceed WHO guidelines for normal conversation and the typical noise generated by air conditioner units, the Panel find that the Chiller noise experienced by the Complainants is excessive and intrusive. As noted above, the Complainants are not being unreasonable when they submit that the noise levels that they experience at their properties materially affect their wellbeing.
145. In addition to the magnitude of the noise, the Complainants submit that the duration of the Chillers' constant use over a 24-hour period exceeds any reasonable normal farm practice. They further note that the Chiller runs 24 hours a day even though the Respondent agreed, in the Settlement Agreement, to have the Chiller turned off between the hours of 10:00pm and 7:00am.
146. The Respondent acknowledged that he and the winemaker believed that they would be able to turn off the Chiller during the specified hours when he signed the Settlement Agreement, but they learned that it caused temperature problems during a six-week trial run.
147. Mr. Withler testified that chillers will run 24 hours per day for large production facilities, such as the Respondent's winery, and could run continuously year-round. The Complainants did not challenge the evidence that the continuous year long use of chillers is a practice used by other similar wineries to the Respondent.
148. Since running a chiller for 24 hours per day is consistent with industry standards and is practiced by wineries of a similar capacity to the Respondent's winery, the Panel finds the duration of the Chiller's use is consistent with normal farm practice.
149. Upon reviewing the location of chillers at comparable wineries/facilities to their closest neighbouring residence, the Panel finds that the Respondent's Chiller is indeed located closer to a residence, at 14.7 meters, than the other wineries' chillers. However, when compared to 21 meters for Black Swift Winery's chiller and 20 meters for Scenic Road Cidery's chiller to their closest neighbouring

residence, the location of the Respondent's Chiller does not clearly delineate its proximity as outside of a normal farm practice.

150. The steps taken by the Respondent to mitigate the Chiller noise to an acceptable level is the key contextual factor to be considered in these complaints and the key concern for residents living close to wineries/processing facilities.
151. The KP Report compares the results of the Respondent's noise mitigation efforts versus those of comparable wineries/processing facilities with chillers. The information in Table 3 compares distance and sound measurements of comparable wineries/facilities. The Panel finds that the Respondent's noise mitigation efforts reduced the noise by only 6 dB when compared to the 14 - 15 dB noise reduction of the noise dampening structures used at Scenic Road Cider and at Volcanic Hills Winery. The other wineries/facilities presented in Table 3 had roof mounted chillers and/or had chillers that were located more than 50 meters away from the closest residence so were not directly comparable to the Respondent's situation.

Table 3. Description of Chillers and Sound/Distance Measurements

WINERIES & FACILITIES WITH CHILLERS	CLOSEST RESIDENCE	DESCRIPTION OF CHILLER	NOISE READINGS 3 ft FROM CHILLER	REDUCTION IN NOISE FROM NOISE DAMPENING STRUCTURE
Black Swift Winery	21 meters	chiller beside building & buffered with physical barriers placed more than 3 ft away from the chiller	84	n/a
Day's Century Orchard	45 meters	roof mounted chiller	83	n/a
Dirty Laundry Winery	130 meters	chiller beside winery building	83	n/a
Frind Estate Winery	14.7 meters	chiller beside building & enclosed in noise dampening structure	80	6 dB (from 86 to 80)
Grizzli Winery	162 meters	chiller beside building & on concrete pad & with high ceilings	n/a	n/a
Mission Hill Winery Chiller	140 meters	chiller beside winery building	82	n/a
Quails Gate Winery	40 meters	roof mounted chiller	84	n/a
Scenic Road Cider Company	20 meters	chiller beside building & enclosed in noise dampening structure	69	14dB (from 83 to 69)
Volcanic Hills Winery	150 meters	chiller beside building & enclosed in noise dampening structure	67	15dB (from 82 to 67)

152. Although the sample size of the comparable wineries with chillers is small, the information from the KP Report and Table 3 clearly indicates that the Respondent can and should reduce the Chiller noise further by using more effective noise mitigating measures. In fact, the Respondent's representative acknowledged that it can do better in that regard. As such, the Panel finds that the Respondent's use of the Chiller with its current noise mitigating measures, given its proximity to the neighbouring residences, is not consistent with normal farm practice.

Are there measures that the Respondent can take to bring their operation back within normal farm practice?

153. The cost to relocate the Chiller is \$450,000 according to the KP Report and the Respondent, but detailed costs estimates were not provided and would be needed to verify that cost. During cross-examination of Mr. Ford, it became clear that relocating the Chiller would require extensive building modifications and construction costs. Although the Respondent's current use of the Chiller without adequate noise mitigation measures is not normal farm practice, the Panel is not inclined to order the Respondent to relocate the Chiller unless the noise of the Chiller is not reduced to a maximum of 60 dB recorded at the closest residence, as set out further below. A maximum noise level recording of 60 dB meets WHO guidelines for normal conversation and is equivalent to the typical noise level reading for air conditioning units.
154. The Complainants argue that the Respondent's noncompliance with the terms of the Settlement Agreement needs to be considered since that conduct contravenes the "good neighbour principle." They do not trust the Respondent to take their concerns seriously and to act in good faith, or to communicate with them in the interests of transparency. In addition, the Respondent has not undertaken adequate noise mitigation measures, including restoring the vegetative barrier, by the agreed upon deadline. The lack of visible progress on adequate noise mitigation measures 15 months past the agreed upon deadline, and refusal to communicate with a Resort representative leaves the Complainants with little confidence that such efforts will be made in the future.
155. The Panel finds that the Respondent did not adhere to all of the terms of the Settlement Agreement. Again, the Respondent's representative essentially acknowledged that failure. He noted that the Respondent had obtained a plan for professional acoustic sound proofing and tried several options to reduce the noise of the Chiller, but that they did not share this information with a Resort representative. The Respondent also did not share information about the challenges of adhering to the terms of the agreement generally, including the deadlines set out in the agreement.
156. The Panel agrees with the Complainants that the Respondent did not act in accordance with the "good neighbour principle". The Respondent did not communicate transparently or duly consider the residents' concerns. The

Respondent did not treat the agreement seriously and thereby undermined the trust of their neighbours.

157. The Complainants argued that the Respondent did not comply with the setback requirements of the Guide when first placing the processing building and Chiller close to the ALR boundary in 2019. However, the KP Report indicated that development of both the residential buildings at the Resort and the winery's first processing facility did not follow the Guide's requirements for setbacks, buffering and fencing between rural and urban neighbours. The City of West Kelowna did not enact Ministry bylaws and recommendations regarding setbacks, buffering and fencing when approving and issuing building permits for the Resort and winery, which is unfortunate. However, the City of West Kelowna's decision does not prevent either party from taking responsibility for noise mitigation and does not shield the Respondent from complaints in circumstances where it is operating outside of the bounds of normal farm practice.
158. The Complainants stated several times that the winery owner had promised to relocate the Chiller to the other side of the processing plant, and then reneged two years later when supply shortages and increased prices for supplies made relocation very costly. Again, the representative of the Respondent did not deny that such statements were made and then reneged upon. The Panel has no ability to adjudicate or enforce such promises if they were in fact made, however, such statements are another instance of the Respondent undermining a trust relationship with its neighbours.
159. The Respondent's representative stated that they are making slow progress on noise mitigation measures, but that they are willing to continue to work towards further reducing the noise of the Chiller. Given the Panel's finding that the current use of the Chiller is not compliant with normal farm practice, the Respondent will need to do much better in that regard. The evidence from the KP Report with respect to mitigation efforts that have been made by other wineries indicates that such efforts can be successful and should be obtained. The only alternative would be the relocation of the Chiller which is obviously a result which the Respondent would prefer to avoid.

I. ORDER

160. The Panel orders the Respondent (Frind Estate Winery) to obtain a plan for professional acoustic sound proofing and to have the associated work completed no later than June 30, 2025 at the Respondent's cost, including:
 - a. Evaluation and assessment of the current noise level;
 - b. Comparison between the current noise level and the reduction in noise when a mitigation plan is in place;
 - c. Design specifications of any sound proofing barriers;
 - d. Replacement of the vegetative barrier between the Complainants' and Respondent's properties with mature cedars, and ensure irrigation is

functional;

- e. Final post-sound barrier noise level readings of 60 dB or less recorded at the cottages located directly across from the Chiller. The noise level readings will be recorded by an accredited sound engineer and that person will provide a report to the Respondent which will be provided to BCFIRB staff.
161. The Respondent will not place additional chillers or similar noise making equipment between the cottages of the Resort and Frind Estate Winery.
162. The Respondent will meet monthly with a Resort representative until the mitigation work noted at paragraph (160) above is complete and provide written progress reports, signed off by both parties, to BCFIRB staff no later than 7 days after the monthly meeting.
163. Finally, if the Respondent does not comply with the orders set out above at paragraphs (160), (161) and (162), then the Panel orders that the Respondent will relocate the Chiller to a site on its property such that the Complainants do not experience noise levels in excess of 60 dB from the operation of the Chiller at their respective cottages. The Respondent will have until December 31, 2025 to relocate the Chiller, if necessary, in accordance with this term of the Order.
164. There is no order as to costs.

Dated at Victoria, British Columbia, this 30th day of December 2024.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Peter Donkers, Chair & Presiding Member



Gunta Vitins, Vice Chair



Pawan Joshi, Member