

SNOW CRAB FISHERY - 2008

The Standing Fish Price-Setting Panel, hereinafter referred to as "the Panel" issued its Schedule of Hearings for 2008 on February 13, 2008. Pursuant to Section 19 of the *Fishing Industry Collective Bargaining Act*, hereinafter referred to as "the Act", the Panel set Monday, March 24, 2008, as the date by which collective agreement(s) binding on all processors in the province that process snow crab must be in effect.

At that time, the Panel noted that it had been advised by the Department of Fisheries and Aquaculture that the Association of Seafood Producers, hereinafter referred to as "ASP", represented processors that process the majority percentage of the species snow crab. As a result, the Panel advised that in accordance with Section 19(11) of the Act, should a hearing be required for snow crab, the parties appearing before the Panel would be the Fish, Food and Allied Workers, hereinafter referred to as "FFAW", and ASP. Section 19.11(1) of the Act, and regulations made pursuant thereto require that the decision of the Panel must be in accordance with one of the positions on price and conditions of sale submitted to the Panel by the parties at the hearing. The Panel further advised that no other submission would be accepted by the Panel and, should other representatives who process this species wish to attend the hearing, concurrence from both parties to the collective bargaining must be obtained. The hearing for snow crab, if required, was scheduled to take place at 2:00 p.m., Wednesday, March 26, 2008, at the Labour Relations Board Hearings Room, Beothuck Building, 20 Crosbie Place, St. John's.

The parties formally met jointly in negotiations with respect to price and conditions of sale on March 24 and on March 25, 2008. The facilitator advised that no agreement had been achieved and the parties were to exchange positions by 11:00 a.m. on March 26. The location of the hearing had been moved to the Battery Hotel and the parties were advised of this change on March 19, 2008.

The parties having exchanged positions, the Panel convened the hearing at 2:00 p.m. Under a previously established procedure, the Chair invited the Association of Seafood Producers (ASP) to proceed.

The Panel was advised by Mr. Butler representing ASP that they had preliminary objections. The Panel was further advised that ASP had been joined in the negotiations on crab by the Seafood Processors of Newfoundland and Labrador (SPONL) and representatives of the Labrador Fishermen's Union Shrimp Company. There were two preliminary issues; with respect to affidavits that might be submitted to the Panel, Mr. Darren Stratton Counsel for ASP, would be speaking on behalf of ASP, as well, there was an issue of bargaining in bad faith which ASP wished to raise.

Mr. Stratton began by suggesting that the Panel should disregard affidavits if they were submitted to the Panel by the (FFAW). He stated that the time ASP would require

to deal with affidavits is beyond the time the Panel had (in terms of a decision by the Panel before the commencement of the crab fishery). Paraphrasing Mr. Stratton's comments (the proceedings are not recorded) he indicated the parties should attempt to negotiate an agreement. Processors may pay above the minimum price of the collective agreement, yet the union wanted to provide evidence to the Panel of the bonuses paid, in the form of affidavits. The FFAW had gathered the affidavits some time ago but had just presented them to ASP the previous day during the negotiations. The affidavits were sworn to before the FFAW staff and had been in the possession of the union for some time as many appeared to have been dated in February. The FFAW had withheld information that was available for disclosure. As a result, ASP had no time in which to deal with the subject matter or the circumstances under which the bonuses were allegedly paid. Accordingly, they have not had the opportunity to provide a response to the FFAW with respect to the payment of bonuses. That denial constitutes bargaining not in good faith. The Panel would be left with information that is inherently misleading if they accepted the affidavits.

Questions of whether all processors pay bonuses, whether they are of the same amount, whether all fishermen are paid a bonus, raise issues that ASP does not have the time to deal with. The only appropriate remedy would be for the Panel to rule in advance of the hearing that the affidavits would not be considered by the Panel in making its decision. Such a ruling would be consistent with the obligation on the parties to bargain in good faith. At this point, the Panel notes it had not been tendered any affidavits.

The FFAW responded that it had acted in good faith, referring to a letter to the Chair of the Panel, dated March 14, 2008, expressing concern about the limited amount of time remaining to deal with the 2008 crab schedule (see appendix 13 of FFAW submission). He outlined the contents of the letter and recommendations made to deal with the issues described as the "price to market formula". The FFAW then referred to a series of e-mails exchanged with ASP over an extended period related to the issue and the intention of the FFAW to submit evidence of bonus payments to the Panel, in the absence of achieving a collective agreement and in the absence of an agreed statement of facts between the parties. The FFAW contended that ASP would not meet or deal with the issue. To suggest based on the evidence of the correspondence exchanged, that the FFAW negotiated in bad faith was not justifiable.

Mr. Stratton responded that the fact remained that the information was not provided to the processors and now there was no time to properly respond. The FFAW could have forwarded the affidavits, they had been asked the previous week do you have anything to give us, to which there had been no response. In fact they did not receive the affidavits until Monday, March 24th. It was noted by Mr. Stratton that one third of the companies named in the affidavits were not members of ASP or SPONL and they were not in a position to get the required information on such short notice.

The other preliminary matter raised by ASP, with respect to bargaining in bad faith, and not with the intent of reaching an agreement, was outlined as follows. The position of the FFAW in its submission to the Panel on price was not tabled with ASP

during negotiations. In fact the FFAW final offer was further away from the ASP position than the previous position tabled with ASP.

The FFAW was of the view that they had the right to table the final offer as they saw fit. Inadvertently the offer previously tabled with ASP would have left no incentive for processors to obtain a higher price for their product because any increase would have been passed on to the harvester. The final offer is different or amended to provide for a better result.

The Panel was not actually requested to provide a response or take any action on the issue of bargaining in bad faith.

On the objection to the introduction of affidavits it was confirmed that approximately 170 affidavits had been provided to ASP by FFAW. ASP stated that they had a right to cross examine deponents and a time requirement in which to properly prepare for any cross examination. Following a discussion with the parties, the Panel confirmed the following.

No affidavits would be accepted into evidence without the other party having the right to cross examine the deponent. The FFAW should advise ASP of the affidavits it intended to present and confirm that the deponent would be available for cross examination. On receipt of such information, ASP would determine the time required to properly prepare for cross examination. The FFAW confirmed that it would select a number of affidavits and advise ASP of the availability of witnesses. The Panel adjourned on that undertaking, having requested ASP to update the Panel by 2:00 p.m. the next day as to their situation. The Panel reaffirmed that ASP would have whatever time they required to prepare for cross examination. The hearing would convene when the Panel was advised to that effect. It was understood that the FFAW would have a significantly reduced number of affidavits selected for submission, a matter subsequently confirmed by the receipt of a copy of an e-mail to ASP identifying eleven affidavits, (copy attached), confirming the availability of deponents, and naming two FFAW staff who would also be called to give evidence on the resumption of the hearing.

On the morning of March 27, the Chair received a telephone call from Mr. Butler of ASP advising that processor members of ASP and SPONL would no longer be engaging in collective bargaining with FFAW. The Chair requested that this decision be confirmed in writing to the Panel. Subsequently, the Panel received a letter dated March 27, 2008, (copy attached), addressed to the Chair and signed on behalf of ASP and SPONL. The letter stated:

"I am writing on behalf of Producer-Members of the Association of Seafood Producers and Seafood Processors Association of Newfoundland & Labrador in follow-up to our conversation earlier today to confirm Producers will not be engaging further in the collective bargaining exercise with the FFAW-CAW."

The Fishing Industry Collective Bargaining Act (the *Act*) requires that the Panel must set a date by which a collective agreement binding on all processors must be in effect, failing which, a hearing must be held and the Panel must decide on the matters in dispute, relating to price and conditions of sale, prior to the normal scheduled opening date of the fishery.

The withdrawal of ASP and SPONL, and more particularly ASP, from the process meant that processors would have no representation at the hearing. No hearing had been concluded. In fact only preliminary objections had been dealt with and were yet to be finally resolved depending on the outcome related to the number of affidavits and the availability of witnesses.

The Panel's notice to all processors and the FFAW of the Schedule of Hearings for 2008, issued the 13th day of February 2008, (copy attached), had stated that for the species shrimp, snow crab, capelin, and mackerel that ASP represented processors that process the majority percentage of those fish species. As a consequence, should a hearing be required, in this case for snow crab, the Panel had stipulated that the parties before the Panel would be the FFAW and ASP. In accordance with the provisions of Section 19.11 of the *Act* the Panel said

"no other positions will be accepted by the Panel, and should any representative of this species wish to attend the hearing, concurrence from both parties to the collective bargaining process must be obtained".

The withdrawal of ASP would result in no processors having representation if the hearing were to continue or in fact be held. As ASP stated in the preliminary objection to the Panel, one third of the affidavits received from the FFAW referred to processors who were not members of either ASP or SPONL.

The *Act* is clear, Section 19.8 says the Panel shall annually set a date by which a collective agreement, binding on all processors, related to a fish species is to be in effect. The Panel issued its notice and proposed hearing dates on February 13, 2008. This notice was issued following consultation and meetings with the parties on the timing of negotiations and potential hearing dates, in the absence of agreement, in relation to the normal start of a fishery.

The notice and schedule of hearing dates is done pursuant to Section 19.9. Section 19.9 (2) stipulates that the Panel shall hold a hearing in relation to the matters considered to have been referred to the Panel for discussion. Section 19.9 (3) stipulates that the Panel shall

"immediately after the conclusion of the hearing... the Panel shall decide on the matters in dispute between the parties relating to price and conditions of sale for the fish species and the decision of the Panel is final and binding on the parties and all other processors in the province that process that species of fish..."

Of particular importance, in this instance is the fact that Section 19.9 (3) is replaced by Section 19.11 where the parties to collective bargaining include a processors organization that represents processors in the province that process the majority percentage of a fish species and, "... those parties appear before the Panel under subsection 19.9 (2)..."

Section 19.11 also provides, in conjunction with regulations made pursuant to the *Act* that, for the purposes of subsection 19.11 (1), the decision of the Panel shall be in accordance with one of the positions on price and conditions of sale submitted to the Panel by the parties at the hearing. Subsection (2) of the Regulations identifies the process in subsection (1) as "final offer selection" which must be applied unless the parties otherwise agree.

Upon the withdrawal of ASP from the process, the Panel had yet to conclude its hearing. In fact it had not concluded any position on the preliminary objection related to affidavits, even if one were to presume that the hearing had actually commenced. The Panel was of the opinion that it was obligated to inform all crab processors in the province of the changed circumstances. It therefore issued a notice to all crab processors and the FFAW on March 28, 2008 (copy attached). The essential point of this notice is contained in the second paragraph on page 2, which states:

"In an effort to ensure all parties who may be affected by the decision of the Panel on price and conditions of sale of the species snow crab for 2008, have an opportunity to be heard, the Panel hereby gives notice that it will reconvene its hearing on the species snow crab, for the purpose of receiving representations on price and conditions of sale pursuant to Section 19.9 of the *Act*".

The notice of February 13, 2008, had effectively barred other processors from appearing before the Panel. The withdrawal of ASP, prior to the commencement of the hearing on "price and conditions of sale", left all other processors without any representation of their interests. Presumably, the processors who are members of ASP and SPONL were satisfied with the course of action they had taken. The Panel was of the opinion that if no majority processors association was going to be present, others had a right to appear should they wish, and they should be advised of the changed circumstances. In any event, when the hearing reconvened if in fact such an association did appear, Section 19.11 would have replaced Section 19.9 (3).

The Panel did not send the notice of March 28, 2008, to either ASP or SPONL. It was sent to their member companies who processed crab. Instead, by letter of same date to both ASP and SPONL (copy attached) the Panel sought clarification from both associations as to their bargaining authority. More importantly, the Panel advised that it intended to convene the hearing on snow crab, and would endeavour to provide as much notice as possible of the fact that ASP would not be appearing. This is indicative of the Panel's view that ASP was not a party in the proceedings.

On April 1, 2008, the Panel received a letter from ASP (copy attached) advising that it had been provided with a copy of the Panel's notice to all crab processors. ASP stated in part:

"The notice wrongly presumes that the Panel had not received submissions concerning price and conditions of sale from the parties. On the contrary, prior to ASP's withdrawal, ASP provided a copy of its submission to the Panel, as did the FFAW. It was subsequent to this occurrence that ASP informed the Panel of its withdrawal from the process by letter dated March 27, 2008, a decision that does not alter the fact that it had already filed its submission to the Panel. The Panel has no jurisdiction to alter those submissions or the manner of proceedings"

ASP, notwithstanding the fact that they had withdrawn from the process which, at their insistence did not get past the stage of preliminary objections, seemed to be insisting that the Panel must choose between their position or that of the FFAW. Submissions to the Panel are governed by the Hearing Procedures, set out on page 8 of the Panel's Rules and Procedures.

This aspect of the Panel's decision will most likely be reviewed in another forum. However, the Panel is compelled to note that if ASP had wanted to ensure that as a party to the proceedings the Panel had no choice other than to proceed under Section 19.11 of the *Act*, they could have appeared before the Panel, affirmed their written submission and rested their case. However, they would have made it abundantly clear that they were still a party to the proceedings, with all that is implied under Section 19.11 and the regulations. They chose to "withdraw" from the process and now claim to have filed their submission with the Panel under the circumstances described.

A clear impression was left with the Panel that ASP would review their position on receipt from the FFAW of the number of affidavits they intended to place in evidence. ASP was told that they would be given time to prepare their case, and were asked to update the Panel in approximately 24 hours. This would have given the Panel some indication of when the hearing could proceed. In fact, the FFAW provided the information to ASP shortly after the adjournment, as noted previously. The Panel subsequently found out that the affidavits in question contained one, and at most two short sentences.

The implication of the last paragraph of the ASP letter of April 1, 2008, to the Panel, become clear when the Panel was served with copies of an Originating Application to the Supreme Court of Newfoundland, naming the Panel as First Respondent. ASP is seeking to have a declaration that Sections 19.1 to 19.15 of the *Act* are void under Section 52 of the Constitution *Act* and that any decision of the Panel made

"... following the filing of this originating application with respect to crab in 2008 should be quashed on the grounds that the hearing giving rise to

such decision violated ASP's right to procedural fairness and natural justice..."

These matters notwithstanding, the Panel is compelled by the *Act* to ensure that price and conditions of sale are in place for the 2008 crab fishery. Its conduct with respect to the procedure applied and processes followed will obviously be subject to judicial review.

The Panel afforded ASP every opportunity to state its objections, and made every attempt to provide ASP with the opportunity to address the affidavit evidence the FFAW was seeking to present to the Panel in support of its position. The Panel was also trying to ensure that the parties had an opportunity to make their presentations as long as it was not prejudicial to the other party.

The Panel, since its inception, has always tried to be fair and open with all parties and ensure they have every opportunity to make representations to the Panel. The setting of dates, the timing of hearings following negotiations, the procedures to be followed, have all been developed in consultation with the parties. In fact it was through consultation with the parties that the process to resolve the preliminary objection had been set in motion.

To proceed with a hearing, in the absence of a majority processors' organization which had withdrawn, without providing an opportunity to others affected by the Panel's decision was, in the Panel's opinion, neither fair nor correct. It would deny others subject to the Panel's decision the opportunity to be heard. The panel was obligated to convene the hearing and provide that opportunity to the FFAW which had an enforceable right to be heard, and as well to others.

The Panel convened the hearing with respect to the species snow crab at 2:00 p.m. on April 3, 2008. Only one party appeared before the panel at the time, that being the FFAW. The FFAW did inform the Panel that in the interim, following the announcement by ASP, they had contacted two of the larger crab processors who had advised that ASP was their representative for the purpose of collective bargaining.

The FFAW informed the Panel that they had sent a list to ASP within one hour of the adjournment on March 26. The FFAW advised that they wished to call two witnesses, and had affidavits from eight fishermen who were present and would be called to confirm their affidavit. This evidence was in support of the written submission to the Panel which would be supported by oral presentation.

Mr. George Feltham, a fishermen and a vice president of the FFAW was sworn. On examination by Mr. McCurdy of the FFAW he testified that he was a Commissioner of Oaths and had been involved in collecting approximately 50 affidavits from fishermen. Some of the affidavits had been obtained at meetings of fishermen, and others in individual settings. He said he explained to fishermen the union was getting the affidavits to submit them to the Panel. Mr. Feltham said it was left up to individual

fishermen whether they wanted to sign an affidavit or not. Some did, some refused. He said 15 or 16 companies were named in affidavits sworn before him. Twenty seven of the affidavits said the bonus payment was 30¢ per pound, one said 40¢, eighteen said 25¢, two said 20¢, one said 15¢, and one said 10¢.

On questioning by the Panel, Mr. Feltham confirmed that as a fisherman he had received bonus payments for crab, first in 1987 at 30¢ a pound. He was licensed to fish crab in the 34' 11" to 44' 11" category. Sometimes he would get a call from a processor offering a bonus and other times he approached a buyers representative to ask what bonus was going to be paid.

As a member of the FFAW bargaining team he recalls being asked by a fisherman why had the bargaining committee signed for a price when he (the fisherman) could get 20¢ more than that. He said that the range of the bonus payments was quite wide and that he had only put in the affidavits sworn before him the figure shown on a receipt to the fisherman. He also testified that he had offers of a range of entitlements for his crab including free bait, free fuel and free unloading or loan assistance. He did not think the payments related to quality. There had been offers of free bait or bait at reduced prices plus a bonus. He also said some fishermen do not know what others are getting. He noted that one company buying at the same locations paid three fishermen a bonus of 30¢ per pound and one fisherman 15¢.

When asked what he would like to see happen, he responded that he would like to see less paid "under the table", a bonus in the order of 10-11¢ would be fine but not in the order of 40-50¢. He said some fishermen don't get any bonuses. He did say that he would like to have some competitive aspect in the pricing of crab to fishermen.

Mr. John Boland, staff representative for the FFAW, was sworn. Mr. Boland was also a Commissioner for Oaths. He testified that he witnessed 24 affidavits from fishermen. He advised fishermen they were collecting affidavits for submission to the Panel.

Of the 24 affidavits four named Golden Shell as the purchaser and the bonus paid was 30¢ per pound. Five named Quinlans, the bonus paid 30¢ per pound. Six named Cold North – five were paid 30¢, one 20¢, three Beothic Fish paid 30¢, one named FPI paid 30¢, two named Summerville Fisheries paid 20¢, one named Allen Fisheries paid 20¢.

Mr. Boland has been a staff representative of the FFAW for 30 years. On questions by the Panel, he testified that bonus payments in the crab fishery were a feature back in the 1990's. He said such payments were controversial, sharemen don't get any benefit, and they do not get paid in areas where there is no high competition for crab. In his view some fishermen liked the system others did not. He was of the opinion that it did not do anything for the collective bargaining process. He said people were cynical of the whole process. In his view processors can only pay a certain amount for crab. Many of the bonus payments come from some who were paid no bonus, or got less than they

ought to get. He said if a crew is not paid, the processor can go after the competition. Bonuses meant something extra out of the other guy.

Bruce Button, a fisherman was sworn and confirmed his affidavit (copy attached), sworn to on the 3rd day of March, 2008. He confirmed that the bonus noted was paid to him in 2007 not 2008 as appeared on the affidavit. He fished in the less than 40 ton category in area 3L. On questioning by the Panel he said bonuses paid earlier were as low as 17¢ per pound or sometimes no bonus. In the 90's there was more money under the table. He stated that he wanted to see the price for crab on the table and get paid for what it's worth. He said in 2003 when the fishery reopened after a shut down in mid season, no bonuses were paid.

Mr. Hedley Butler, a fisherman was sworn. He confirmed his affidavit (copy attached). He testified that he had sold to FPI above the negotiated price. A group of fishermen in Bonavista had said on the wharf that they should get companies to come in to get a better price. One company came in and offered a bonus of 43¢ pound. He sold his crab to FPI, the local company, at a bonus of 30¢, because as Deputy Mayor and with relatives in the plant he stuck with FPI. He said bonuses have been in play since the 90's and that you "hear stuff" about free bait or a better price. His preference would be to see the top price we can get up front, don't have anything excluded put the top dollar on the table.

Tony Doyle, a fisherman was sworn and confirmed his affidavit (copy attached). He testified he had fished since the 70's and since 95 had fished crab in the less than 35' category. He thought that bonuses were getting larger while in earlier years there were none or some 5¢ a pound. At another time following a demonstration by fishermen the bonus was 40¢ a pound plus free bait. After the resumption of fishing in 2003 there were no bonuses paid. In his opinion the negotiated price does not reflect what crab is worth. With the negotiated price he knows what he is going to get which will go up or down with the formula. On the other hand the bonus is not certain, sometimes you can get nothing. He said he knew of a crewmember who did not get a cent on 500,000 pounds, the bonus was paid to the skipper and not shared with the crew. Bonuses are uncertain and could be something up to 30¢ a pound, or free bait but he anticipates it could return to zero. The uncertainty with respect to the bonus is a concern.

Gerard Hounsell, a fisherman was sworn and confirmed his affidavit (copy attached). Mr. Hounsell testified that he was told by Beothic that he could calculate an extra 30¢ a pound for his crab. He had three in his crew and fished in the under 35' category with a quota of 15,500 pounds. The extra money in his view should not be something of choice.

Kevin Slaney was sworn and confirmed his affidavit (copy attached). He testified that he had sold to two processors in 2007. His quota was in the under 40 ton category at 105,000 pounds. One year a company went bankrupt and he lost the promised bonus money. In his view crewmembers take "the biggest crack", in one instance, a bonus of 86¢ a pound was not shared with the crew. He said he paid his crew bonus money but

that does not occur on company owned boats. He said we are seeing people getting 60-70 or 80¢, afraid they are not going to have a crew. In his view the most vulnerable are the shareman. He felt processors are making money on his crab. At times you could receive free fuel, free rope, free bait. In his view if a 60' vessel on 480,000 pounds is paying a bonus of \$6000, he is paying bonus for the other fellow, the cost is not to the processor.

Larry Tremblett, a fisherman was sworn and confirmed his affidavit (copy attached). A fisherman since 1980 he testified that he fished in the less than 35' category and had fished for crab since '95 or '96. He said that a company from Tors Cove had come to Bonavista in 2007 and offered a bonus of 43¢ a pound. apparently, 10 to 16 boats sold to that company. He sold to FPI for 30¢ a pound bonus plus 10¢ a pound back on bait. He stuck with FPI because he felt his money was guaranteed and would not take the risk to sell to another company. He would prefer that everybody get the same amount. A bit extra would reduce the upper level competition for crab.

Albert Johnson, a fisherman was sworn and confirmed his affidavit (copy attached). He testified that he fished the less than 40 ton category, a quota of 105,000 pounds. He testified the company OCI approached him with an offer of 35¢ a pound and then come back with 40¢. In his view some companies can pay more than some others. If a more realistic price were set, it would eliminate more competition.

Mr. George Feltham was sworn and confirmed his affidavit (copy attached) he had previously testified as a witness.

In support of the FFAW presentation Mr. McCurdy said the purpose of introducing the affidavits was to present some facts concerning what everybody knows, that bonus payments are part of the crab fishery. In his view it was clear from the evidence, that there was a prevalent practice of paying bonuses and they reflected a core of payments with varying amounts on either side. In his recollection bonus payments were made in the 80's but were not all that much and therefore relatively small in relation to the negotiated price. Another factor was that the market for crab had fundamentally changed, the government had earlier required that 85% of the crab had to be sold as meat, the purpose being to generate employment in the plants. At that time New Brunswick had a premium market in gas frozen sections and therefore a significantly higher market return.

That differential disappeared when the US became a sections market. John Sackton has noted that in the market the differential between our snow crab and the New Brunswick crab is approximately 5¢ per pound. The FFAW submission included price reports from the Maritimes and e-mail exchanges with persons in New Brunswick to indicate the prevailing level of port prices compared to the prices paid in 2007 in our province.

Mr. McCurdy then reviewed the "price to market formula" that exists as part of the collective agreement with processors. The essence of the FFAW argument is that the

formula is not reflecting the true value of the raw material at this time. That is why bonus payments are much higher than they have been in the past, and why the negotiated price is so low in comparison to other prices paid for crab in the Atlantic provinces.

The formula has a number of components including yield, pack mix and market distribution, prices and exchange rates, all designed to produce a "weighted average market" price. This price is then applied to what is referred to as the "look up table" in the price agreement and it provides the minimum raw material price to be paid under the collective agreement. The "price to market formula" is applied every two weeks after the start of the fishery and prices for raw material are changed to reflect market circumstances.

The "price to market formula" originated in 1997, was refined in 1998, and has been applied since then. The FFAW contends that yields on crab, which have not been reviewed since 1998, are better due to larger mesh sizes and larger crab being landed. The FFAW questions how the market returns can be improved in this process to reflect the current reality. There are three ways to change the price based on the formula: update the yield, add additional packs, change the "look up" table.

One simple method would be to change the "look up table" which was amended by the agreement of the parties in 2003. The point being that there is nothing sacrosanct about the formula. The "price to market formula" is part of the collective agreement and it was alleged that processors have refused to discuss its review or revision. The FFAW had requested that the Department of Fisheries and Aquaculture do a study on yield, but DFA required the consent of both parties. The FFAW referred to the discrepancy in the reported figures on catch and product export which could be indicative of higher yields.

The issue for the FFAW is that the "price to market formula" as it now exists does not reflect the fair value of the crab being landed. The evidence in support of this position is the price paid for raw material in other provinces, and the extent of the bonus payments as a component of the prices actually paid in this province for raw material.

The FFAW is proposing in their submission that the "look up table" of the reference index be increased by 16¢ a pound at each interval. The formula then would provide the opening price as there had been previous agreement on the market prices for the opening of the fishery. Changes in the market will be reflected in the raw material price should some of the negative aspects explained in Mr. Sackton's market report actually materialize. Mr. McCurdy then spoke to the submission he had received from ASP (copy attached) just in case the Panel were to take it into account.

In the earlier negotiations ASP and FFAW had agreed on the current market prices for crab. Applying the current "price to market formula" will result in a predicable raw material price to be paid to harvesters. That price will be subsequently adjusted, up or down, every two weeks, based on the application of the formula and the inputs provided.

The FFAW make a point in saying that the components in the "price to market formula" are not fixed for all time. They are correct in saying that yields may vary, the appropriate mix of packs may change, the calibration of the reference price may require revision. The issue is that the parties to the negotiations could not agree on the methodology or the number of issues involved, which may have resulted in a joint review of the "price to market formula", including the inputs if and where required from third parties, for example, whether the Department of Fisheries and Aquaculture would ensure an independent study of current yields. The exchange of correspondence between FFAW and ASP dated June 22, 2007, and July 13, 2007, attached to the FFAW submission is illustrative of that issue.

In an effort to resolve the matter from its perspective the FFAW, in bringing the matter before the Panel is seeking to have the Panel change the reference table in the formula. In their terms it's the simplest way to have the "price to market formula" produce a price to harvesters that is more reflective of the value of the raw material. In support of that proposition, they have provided evidence, which in their opinion shows, that bonus payments in the order of at least 30¢ a pound on average were paid to fishermen above the price resulting from the collective agreement and the application of the formula. They also use the price differential between those prices and prices paid in other Atlantic provinces. The specific request is to add 16¢ a pound at each market interval in the "look up table".

If accepted, this would be a significant adjustment to the "price to market formula", involving the transfer of millions of dollars, and one which the Panel is just not in a position to accept. The Panel does not have the information or the capability at this time to adjust one aspect of the formula. It does not have any appreciation of the impact or what may result by just adding cents per pound to each market interval. The matter is far more complex and requires the effort and attention of a thorough review.

The fact remains that the "price to market formula" is part of the collective agreement between harvesters and processors. It is an item on which the parties must be prepared to bargain. No party to the agreement can refuse to bargain or limit the parameters of that bargaining issue. This *Act*, similar to other collective bargaining legislation, is designed to ensure the settlement of disputes between the parties. If there is no reasonable way to settle disputes within the structure, parties may be forced into taking an approach with attendant foreseeable and undesirable consequences.

For the past two years, the FFAW has raised the issue of the "price to market formula". In 2007 they sought to address the issues on changes in yields, however they could not, nor could they be expected to, provide reliable specific information in support of such a change. This year they propose a change in the reference table. Again, the Panel finds itself in a position where it is unable to properly address this issue based solely on the information presented to it at this time. To amend any aspect of the formula in isolation of the effect on the total formula would amount to tinkering. The "price to market formula" was first introduced in 1997 and further refined in 1998. The formula has provided for some degree of stability in the industry and no one appears to be

suggesting its removal. However, that does not imply that the components of the formula should not be reviewed from time to time to ensure its effectiveness in determining minimum raw material prices.

When the formula was first devised one of the inputs was revenue margins for processors. This yardstick was used by the arbitrator in 1998 to assist in arriving at a decision related to the formula at that time. He stated in his report, 1998 Crab Prices, FFAW/CAW and FANL, April 1, 1998, at page 3:

"In the absence of price submissions based on income and expenditures of processors and fishers, the arbitrator is left to assess the reasonableness of the parties positions on the basis of revenue margins for processors... The conciliation board appointed to deal with the 1997 dispute ... made a recommendation on the basis of a curious formula... However, it is my view that the sections of the report dealing with revenue margins are most instructive as a benchmark... In its calculation of raw material prices to be paid to fishers in the context of a "price to market formula", the conciliation board applied a revenue margin of \$1.00 pound for processors..."

The fact is that unless the parties agree to a change or an amendment, there must be a thorough examination of the components and inputs to the formula before any change is made. The Panel, in the absence of an agreement, is prepared to accept representations from the parties on each and every point in issue that would properly be included in a thorough review of the "price to market formula". Such a review should also incorporate all matters that have a pertinent relation to the determination of the value of landed crab as, for instance, the quality. The Panel can not be placed in this situation again with respect to the "price to market formula". A thorough and independent review of all of the aspects must be conducted, and a report on the findings of that review completed well in advance of the commencement of the 2009 crab fishery. To that end, the Panel will be contacting all crab processors and the FFAW to invite submissions and representations on the factors related to the "price to market formula". While the Panel is aware that it can not make this request compulsory, it is aware of its duties under the *Act*, including the duty to make recommendations under Section 19.2(f), if required.

On the point of bonus payments the Panel stated in 2006, page 3, Panel Report, Snow Crab Fishery 2007:

"Since the actual amounts paid and to whom they are paid form no part of the collective bargaining neither the FFAW nor the Panel is in a position to exercise any control over what actually occurs. The practice is embedded in the current system".

The bonus payments arise from competition between processors, they are not gratuitous payments. The problems in the snow crab sector of the industry which resulted in major protests by fishermen in 2005, led to the report of the Chairman RMS

Review Committee in 2005 (The Cashin Report). That report resulted in the amendment of the *Act*, and the creation of the Panel. The primary intent was to ensure that there is an effective dispute settlement process. The RMS report outlines in detail the issue of the bonus payments and minimum prices in the crab sector, and the differing views. It should be read in conjunction with this report, if one is to fully understand the issues simmering beneath the surface which this Panel does not have the time to fully review in this report due to time constraints with respect to the opening of the fishery. While the bonus payments are not part of collective bargaining the "price to market formula" is part of that process. It is incumbent to ensure that there is a means available to effectively provide a resolution of that item within the collective bargaining process.

This Panel is clearly of the view that this very serious issue of "price to market formula" has the potential to become the lightning rod for future unrest in the fishing industry. It is for that reason the Panel is strongly advising all parties within this industry to address the matter on a timely basis and in the appropriate forum. To simply ignore it will be to our peril. As indicated, the Panel remains ready and willing to assist the industry parties in resolving this issue on a timely basis.

DECISION:

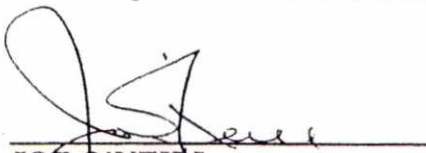
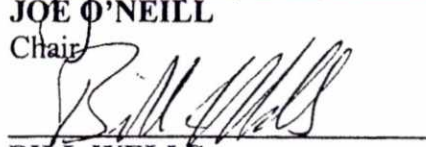
It is the decision of the Panel that the opening price for the 2008 snow crab fishery will be determined by applying the current formula in the 2007 agreement and these market prices:

US Combo \$8.75
US Sections \$4.35
Japan Sections \$4.25

The current formula will be applied as per past practice, that is without any change, using the two week currency average from the date of the Panel's decision to determine the opening price for snow crab in 2008. All other provisions of the 2007 crab schedule are to apply, subject to any agreements signed off by parties in negotiations, and changes to properly reflect term and dates.

The Panel notes that it has not reviewed market conditions and the market report of Mr. Sackton. Under the circumstances this is unnecessary in that the current market prices had been agreed by the parties in negotiations and the "price to market formula" will apply to reflect ongoing market conditions.

Dated the 10th day of April, 2008.


JOE O'NEILL
Chair

BILL WELLS