

## STANDING FISH PRICE-SETTING PANEL

### LOBSTER FISHERY 2023

#### Background

1. The Standing Fish Price-Setting Panel, hereinafter referred to as “the Panel,” issued its Schedule of Hearings for 2023 on March 3, 2023. Pursuant to Section 19 of the *Fishing Industry Collective Bargaining Act*, hereinafter referred to as the “Act”, the Minister set Monday, April 17, 2023, as the date by which collective agreement(s) binding on all processors that process lobster in the province must be in effect.
2. The Panel also noted that it had been advised by the Department of Fisheries, Forestry and Agriculture that the Association of Seafood Producers (“ASP”) represented processors that process the majority percentage of the species lobster. As a result, under Section 19(11) of the *Act*, should a hearing be required for lobster, the parties appearing before the Panel would be the Fish, Food and Allied Workers’ Union (“FFAW”), and ASP. Section 19.11(1) of the *Act* and regulations made thereunder 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 positions would be accepted by the Panel, and should other representatives of this species wish to attend the hearing concurrence from both parties to the collective bargaining must first be obtained.
3. The hearing concerning lobster, if required, was scheduled to take place at 10:00 a.m. on Thursday, April 6, 2023. The Panel convened its hearing for the species lobster at 10:00 a.m. on Thursday, April 6, 2023 at the Sandman Hotel, St. John’s, NL after the parties advised that there remained an issue in question.
4. In keeping with the Panel’s Rules of Procedure, FFAW and ASP provided their written submissions at 4:00 p.m. on April 5, 2023. They appeared before the Panel and provided their arguments in support of their final offers, as well as rebuttal to each other’s arguments, and answered the Panel’s questions. The Panel thanks them for their submissions and attendance.
5. Prior to the commencement of bargaining, and in keeping with past practice, the Department of Fisheries, Forestry and Agriculture NL (“FFA”) provided the parties and the Panel with information on 2019-2022 NL lobster production, Urner Barry Commentary dated February March 2023, Urner Barry Quarterly Lobster Report, Atlantic Canada Lobster Exports 2018-2023, DFO landings data, Urner Barry 5-year pricing data, and various articles concerning lobster.

6. Overall, the information shows that NL lobster landings continued the strong growth of recent years, with record landings of more than 13 million pounds in 2022, for a landed value in 2022 of just over \$105 Million (FFAW presentation, at p 1). 2022 saw an increase in both the total landed value and the volume of lobster landed over 2021 numbers.

### **The “formula”**

7. In 2011, the parties, and / or their predecessor organizations, developed a formula setting the minimum price of landed lobster, which has been attached as a schedule to the Collective Agreement in place between these parties since then. The Urner Barry Index, which provides information on the price of live lobster in the US retail market on a twice-weekly (Tuesday/Thursday the week before) basis, has been used as the basis for determining the price for live lobster landed in Newfoundland since 2011. This has been referred to as the “formula” or the “UB formula” throughout the presentations.
8. In 2012, the ASP’s predecessor organization [“SPONL”], successfully argued for a reconsideration of the formula and the implementation of a \$0.15 deduction from the Urner Barry formula to reflect the fact that at that time, NL processors were unable to obtain UB prices for sales of lobster. The amount of any deduction, if any, has either been agreed to by the parties or set by the Panel each year since then.

### **The issue in dispute – proposed deduction**

9. In 2022, the Panel decided to not apply any price formula deduction. The sole issue for determination by the Panel this year is whether to apply a \$0.15 USD deduction from the Urner Barry price formula. This year, ASP argued that the deduction ought to be reinstated in order to offset the cost and price differentials between Newfoundland and the Maritimes, and increased expenses borne by the processors. FFAW argued for status quo, i.e., that there be no deduction from the UB price formula.

### **Statistics to be considered**

10. As argued last year and in previous years, a central issue of ongoing dispute between the parties is the significance of the Government of Canada’s export statistics and their use for determining lobster prices in this province.
11. ASP vociferously argued that the export data provided to the Panel and the parties as part of the “market research” package provided by FFA is unreliable. On March 22, 2023, ASP wrote to the Minister of Fisheries, Forestry and Agriculture, and to the Minister of Environment, Climate Change and Labour, requesting that FFA refrain from providing Federal export data as part of the “market intelligence” package provided to parties in advance of collective bargaining. In particular, ASP argued:

Federal figures on lobster exports have repetitively been demonstrated to be unrepresentative and materially erroneous. The data's inaccuracy has been recognized by DFFA, and until the shortcomings are addressed, it should be left to the Panel to decide if it is admissible and material in the context of collective bargaining. One of the primary roles of arbitrators is to determine the weight that should be given to evidence; however when a government provides data under the veil of 'market intelligence' it applies a level of legitimacy, which in this case is entirely unfair and misleading."

(ASP letter to Ministers Bragg & Davis, March 22, 2023)

12. The 'market research' was provided to the parties and the Panel by FFA on March 29, 2023 in preparation for bargaining. As in previous years, it included the Atlantic Canada Lobster Exports data.
13. In its presentation to the Panel, ASP showed that the Atlantic Canada lobster export data reveals a discrepancy in the trade data as compared to the production data provided by FFA provincially. The production data collected by the province shows a different number than the export data provided. ASP argued that the export data is supplied by the federal government, based on information the Government of Canada receives from US border patrol. The purpose of the information is not to provide market intelligence; rather it is about collecting taxes at the US-Canadian border. ASP argues that there is significant difference between the data collected with respect to lobster landings in the province of NL and the data provided by the federal government showing that point of origin of exports was Newfoundland.
14. ASP provided a customs document from a NL producer. The producer has a head office in NL, but has operations in both NL and New Brunswick ("NB"). ASP argued that the lobster exported to the US on that customs document was actually NB lobster shipped from NB, but because the company's head office was in NL, the export was "counted" as having been exported from NL. ASP argues that customs data is "famously inconsistent" with how actual product moves from one province to another. ASP argued that it cannot find any interprovincial trade data to show exactly how much of the product that is being attributed to NL actually originated here. The Panel is unaware of statistics on interprovincial trade data among Atlantic provinces. Because the export data is included in the 'market intelligence' package, ASP argues that it does not mean that the data is accurate or that it is reliable.
15. The Panel agrees with this discrepancy observation. Based on the information provided to us, there appears to be a significant discrepancy between the data provided as federal

export data and the data provided as provincial landings data. The Panel can note that the export data is there, and that it shows the volume of product being exported. Based on the discrepancies shown, the Panel cannot place any weight on the proposition that the export data shows the value of lobster being landed in and exported from this province. The export data shows how much lobster is being exported from Canada. The export data does not show inter-provincial trade or total landings in this province.

16. ASP further argues that the data is erroneous because it doesn't speak to the real value of lobster from this province, and notes that the problem is compounded if we were to put a value on that data without considering yield.
17. The Panel was alive to the issue of the reliability of the data provided, and specifically asked ASP what other data it could rely on. The Panel takes note of the fact that ASP, arguing for the past number of years that the Federal export data is not an accurate reflection of NL exports, and alleging that the information is "materially erroneous," brought its argument to the Ministers' offices on March 22 – a week before the negotiations it knew or ought to have known would have been proceeding at this time of the year, as it always does. In spite of having argued this alleged material error in the data for years, ASP provided the Panel with no other data upon which the Panel could base its decision.
18. The Panel recognizes that it has an obligation to consider the quality and relevance of the data provided to it. In the absence of any other data and argument, the Panel can only consider the information that has been provided to it.
19. In its alternative argument, ASP notes that the price per finished pound of lobster is inflated, making lobster exports appear more lucrative than reality, unless a yield factor is applied. According to ASP's submission at page 14, based on the average UB price per pound CAD per year, with yield factored into the equation based on the export data before Panel, the processors would be achieving 107% of the UB price in 2022, 102% in 2021, and 105% in 2020. Having accounted for yield, using the only evidence before the Panel with respect to export price per finished pound from Atlantic Canada Lobster exports 2018-2022, ASP has shown the Panel that it is possible to achieve the UB price averages with that data set.
20. The Panel yet again finds itself with no agreement on the correlation between time of raw material purchase and time of sales in the final market, and no agreement on the reliability of the Government of Canada export data. In spite of the Panel having requested that the parties consider using the actual sales receipts of Newfoundland producers as the basis for determining prices to harvesters, which the Panel has requested multiple times in the past when the ASP has brought this argument, it still has not been done. The information lies in the hands of the ASP processors. If the processors choose not to provide the actual sales

receipts or an anonymous form of the sales receipts collated for use to show the prices they are actually receiving from the market and timing of their sales into the market, then the Panel can only assume that the evidence does not exist or that the processors don't wish to provide it. In either case, the Panel can only apply the formula as it has been applied in the past, relying on the data that has been relied upon in the past unless the parties either (a) reach an agreement or (b) provide us with different data to rely on. Based on the data provided, it appears to the Panel that the reasoning for the original \$0.15 deduction is no longer supported by the data provided.

Why ASP is requesting the \$0.15 USD deduction be reinstated

21. ASP made arguments concerning inflation, increased costs of diesel and transportation, and quality, and argued that these increased costs ought to be the basis for the resumption of the \$0.15USD deduction from the UB formula. Again, ASP provided no recent or relevant data to the Panel in support of that argument. ASP has not provided the Panel with information from its producers as to what their operating costs are and how they have allegedly increased, they ask for a \$0.15 USD deduction from the UB price because of increased costs and inflation.
22. FFAW argued that increased inflation also affects harvesters. Increased fuel prices also affect the harvesters' bottom lines, increased interest rates affect their enterprises, and other generally noted increased costs as argued by ASP also apply to harvesters. As a consequence, FFAW argued that the \$0.15 deduction should not be reinstated.
23. The Panel notes that the purpose of the initial \$0.15 USD deduction was to account for the fact that the processors were not achieving UB pricing when they sold at market in 2012 and the economics of the 2012 lobster fishery did not support the formula without the deduction. The producers refused to purchase from the fishers without such deduction at that time. The deduction was based on an agreement to acknowledge that they were unable to achieve UB prices at that time. The ASP's submission this year seems to indicate, without further analysis or data other than the export data made available to us, that the producers can sell at UB pricing (at p.19). ASP is now seeking the deduction from the formula price for a different set of reasons – primarily due to increased operating and transportation costs. This was not the reason for the implementation of the deduction initially.
24. The Panel was not persuaded by ASP's argument. Producers and harvesters are both facing increased costs such as fuel, transportation, insurance, higher interest rates and other inflation-related costs that the Panel can note as being within the public domain. ASP has not provided any data or analysis showing (a) why the \$0.15 deductions whose existence in the first place was based on the processors' inability at that time to achieve UB average

prices should now be reinstated in a market where it appears that processors are better able to time sales into the market and (b) whether those increased costs to producers are being borne by the producers alone or disproportionately by producers versus the harvesters, and whether those costs actually equate to \$0.15 USD per pound. The argument is unsupported by data and evidence before the Panel.

25. FFAW provided the Government of Canada export statistics, which show export sales spread over a number of months, not simply limited to the time the fishery occurs. The Panel agrees with ASP that these export sales do not accurately reflect landings in this province, but they do show that lobster is exported from Atlantic Canada in months after the lobster fishery has closed, for higher prices than those achieved at the opening of the season. These statistics showed that in 2021 and 2022, September was the second most valuable export month. FFAW pointed to the substantial investment a number of large and medium-sized NL processors have made to significantly increase their holding capacity so they can sell into the market later in the year when prices have risen. There was no data provided to show exactly how much holding capacity there is in the province of NL versus other Atlantic provinces. ASP commented generally, that Atlantic Canadian processors have made larger investments in holding tanks in provinces outside NL than NL processors have in this province. Again, the data provided to the Panel is limited. If a party wishes to rely on other evidence of holding tank capacities or processors' ability to time sales, then they must bring it. While it may be trite to say so, the Panel reiterates the evidentiary burden that one who alleges must prove.
26. Both FFAW and ASP accepted that prices will decline once the fishery starts, which is usual in the NL lobster fishery, and that the price will then likely increase later in the summer. The function of the formula is to adjust the raw material price when this occurs. If the US market follows its "usual" pattern, prices throughout the year may follow a similar pattern to those of 2022.

#### 2018 Quinlan & Taylor Report

27. Again, this year ASP raised the findings of the 2018 Quinlan & Taylor report, tabled at the Lobster Hearing in 2018. The objective of that report was to determine the actual returns of Newfoundland Lobster buyers in comparison to the corresponding Urner Barry prices. ASP argued that buyers in this province receive less than UB prices. As the Panel said then, *"The Quinlan and Taylor study appears to have followed a sound analytical methodology and results in a very informative report."* The report claimed that producers paid \$0.79/lb. and \$1.08/lb. more based on UB in 2016 and 2017 respectively than they would have based on actual sales in each of these years. The Panel also said in its 2018 decision, that both parties bore responsibility for the lack of cooperation in advancing a receipts-based model of pricing: *"On the one hand, we feel the FFAW preconditions in order to participate in a*

*study were excessive. On the other hand, it appears the Seafood Producers of Newfoundland and Labrador (SPONL), an association of smaller producers who collectively held the majority percentage of production of lobster at the time, did not counter the FFAW demands before it proceeded with its own study.”*

28. The Panel maintains its 2018 position, as it has continued to do, that the 2018 Quinlan & Taylor report was informative, but was not subject to any audit or review procedures. Because it lacks attestation as to its accuracy, that makes it difficult for the Panel to fully rely on the study findings. This year, again, neither party provided receipts-based data to help determine a formula for pricing lobster. The Panel again encourages the parties to bring forward a mutually-agreed-upon, receipts-based formula for pricing lobster in the future.
29. As noted by the FFAW, the UB formula only tracks changes in the market, it does not track when NL processors/buyers actually sell their product. The Panel agrees. Buyers and processors may not obtain Urner Barry pricing early in the season due to price drops in the first four weeks of the season. However, as in the case of previous Panel decisions, we find that processed lobster or live lobster held and sold after the season has ended will usually realize a significantly higher price than Urner Barry at the time of landing. We recognize that this will occur on lower volumes.
30. The formula in its current format is based on the industry as it existed in 2011. When the formula was initially adopted, it was generally accepted that the lobster purchased in one week was shipped the next. However, the timing of exports as shown in the export data calls this into question. The evidence showing what was shipped from where later in the season is not clear. Whether the export data is NL lobster that was then held in a facility in another province for a period of time before ultimately being sold is also not clear. The Panel was provided with news reports about the lobster library and a general acknowledgement by ASP at the hearing that there are some lobster holding tanks in this province now but not as many as in other Atlantic provinces. As mentioned earlier and as demonstrated in the FFAW submission, September 2021 and 2022, two full months after the close of the lobster fishery, and three months after the majority of lobster is landed, was the second most valuable export month for export processors.

#### **Decision**

31. The parties have submitted their final offers based on an “average of Thursday-Tuesday” UB prices, with ASP seeking a reinstatement of the \$0.15USD deduction from that average, and FFAW seeking straightforward application of the average with no deduction.
32. The Panel agrees with FFAW’s position that ASP has not shown that producers have been unable to achieve UB prices. The purpose of the \$0.15 USD deduction from the formula

when implemented was to account for the fact that the producers stated they were unable to achieve the UB prices in their sales at that time, in a considerably different lobster market than exists today. In the ASP's submissions to the Panel in 2023, the export data – flawed though it may be - suggests that they are able to achieve UB prices at market when yield is accounted for, but they are requesting the deduction because of their increased production costs, which have not been specified or proven. Therefore, without evidence to support the \$0.15 USD deduction, the Panel does not reinstate the deduction at this time.

33. The Panel has selected the final offer of the FFAW. The prices for the species lobster will be determined by the established price to market formula and schedule, with weekly prices based on the average of Thursday-Tuesday Urner Barry prices without deduction. These prices will form a collective agreement or part of a collective agreement binding on all processors that purchase the species Lobster.
34. As it has done in the past, the Panel hereby recommends that lobster be identified as a species that needs further study by an independent consultant. The Panel encourages the parties to bring forward a mutually-agreed upon receipts-based formula for pricing lobster in the future.

Dated at St. John's, NL, this 13<sup>th</sup> day of April, 2023.




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Sheilagh M. Murphy




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Earle McCurdy

### **Dissent**

I respectfully dissent from the majority decision of the Standing Fish Price-Setting Panel with respect to 2023 prices for Lobster. The main reason for my decision is that the Panel states the \$0.15 deduction was not intended to cover costs but in at least a couple of Panel decisions, costs were referenced. In particular, 2017 SPONL refers to the case that the \$0.15 is still needed and costs were referenced. In that year the Panel accepted SPONL.



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