

STANDING FISH PRICE-SETTING PANEL HERRING FISHERY 2019

The Standing Fish Price-Setting Panel, hereinafter referred to as “the Panel”, issued its Schedule of Hearings for 2019, on February 5, 2019. Pursuant to Section 19 of the *Fishing Industry Collective Bargaining Act*, hereinafter referred to as the “Act”, the Panel set Wednesday, June 26, 2019, as the date by which collective agreement(s) binding on all processors in the province that process Herring must be in effect.

The Panel also noted at that time, that it had been advised by the Department of Fisheries and Land Resources, hereinafter referred to “DFLR” that, the Association of Seafood Producers, hereinafter referred to as “ASP”, represented processors that process the majority percentage of the species Herring. As a result, under Section 19(11) of the Act, should a hearing be required for Herring, the parties appearing before the Panel would be the Fish, Food and Allied Workers’ Union, hereinafter referred to as the “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 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 be obtained.

In July 2019, at the request of both parties, the Panel extended its original hearing date to August 19, 2019. Subsequently, on August 13, 2019, a request to extend the deadline to have price and conditions of sale in place for Herring was approved by the Minister of Fisheries and Land Resources. As a result, the Panel set a new hearing date for Herring to August 30, 2019. At the request of all parties, it was subsequently moved to August 29, 2019, the date upon which the hearing for 2019 Herring was eventually held.

As well, on August 9, 2019 the Panel was advised of the withdrawal of Barry Group Inc., hereinafter referred to as “BGI”, as a member of ASP. As a result, ASP is no longer the majority processors’ organization for Herring. Given there is no longer a processors organization with the majority production of Herring, the FFAW may engage any combination of individual companies as well as processors’ organizations in collective bargaining. Any and all those companies and organizations may make a submission to and appear before the Panel, assuming they have met the legislative requirements to do so. Accordingly, in the event a collective agreement binding on all processors in the province that process the species Herring had not been achieved by August 28, 2019, the Panel will hold a hearing on the scheduled hearing date at which time it will hear presentations regarding price and conditions of sale.

Presentations would be accepted by the Panel from a processor, processors’ organization, and the FFAW representatives at the hearing. The Panel will decide on all matters in dispute between the parties relating to price and conditions of sale for the species Herring. The decision of the Panel would be final and binding on the parties and all other processors that process that species

of fish, to which the Panel's decision relates and constitutes a collective agreement or part of a collective agreement between them. In this case of non-majority representation, Final Offer Selection as is normally the case, does not apply. The Panel may select any offer or decide on price and conditions of sale based on a combination of specific components from any and all of the various submissions.

The Panel convened its hearing for the species Herring at 9:00 a.m. on Thursday, August 29, 2019, at the Ramada Hotel, 102 Kenmount Road, St. John's. Appearing before the Panel were the FFAW, ASP, Seafood Processors of Newfoundland and Labrador, hereinafter referred to as "SPONL", and BGI. The parties, having met the requirements and deadlines for exchanges of offers and final submissions, and filed copies with the Panel, (copies attached) supported their submissions in main argument and rebuttal, the order of which was agreed upon by all parties.

In preparing their positions, the parties had the benefit of Herring landings, production and export statistics provided by the DFLR. They also had the benefit of a recently completed report "Market Analysis of Squid & Small Pelagic Species; Used for Non-Human Consumption", which was prepared by TriNav Fisheries Consultants Inc. (TFC Inc.).

The FFAW believes that the primary challenge with Herring is that it serves three distinct markets. Two of those markets, bait exported out of Newfoundland and bait sold to harvesters in Newfoundland; are substantially higher than the third market which is Herring produced for food. They contend that harvesters have been paid according to the food market, at a low price that is not reflective of the bait market. Compounding this challenge is that the bait market for inshore landed Herring is substantially larger than the food market for inshore landed Herring as the majority of the food is serviced by the greater than 65' fleet which work for the BGI.

FFAW has proposed a two-tier pricing system like that in place for Squid. The first 5,500 tonnes of Herring landings would have a minimum price of \$0.33/lb. and \$0.24/lb. for all Herring landed in excess of 5,500 tonnes. The FFAW is also proposing that a study of the Herring fishery to analyze the three primary markets served; local bait, bait exports to the Maritimes and Herring for food, and, this study should include an assessment of market prices and the yield of various Herring products.

The BGI takes the position that the vast majority of Newfoundland Herring is utilized in products for human consumption (food). They dispute the position of the FFAW with respect to the importance of Herring as bait and that a dwindling supply of Herring will lead to higher bait prices. While the Atlantic Canadian supply of Herring has declined, Herring is but one source of bait for Lobster and Crab fishers in Atlantic Canada.

BGI's cured Herring production is sold almost exclusively in the USA and Canada and it occupies a small market niche. They seek to benefit from adjacency to markets, while not being undercut by European suppliers, who are often more competitive than BGI in many ways (volume, economies of scale, quality of raw material). They maintain the position that the establishment of a price on Herring also requires that a quality standard be established with consideration given to several distinct factors that determine value. BGI proposes that only Herring meeting their

proposed quality standard receive a price of \$0.15/lb. with \$0.03/lb. less for Herring that is trucked. This price would apply to both food grade Herring and bait.

ASP agrees that the market for Newfoundland and Labrador Herring consists of three parts, including the Maritimes bait market, Newfoundland bait sales and the export or food market, principally in the USA. They contend that ASP members do not typically produce for the food market, and where they do, it is only in limited volumes in relation to the total Herring fishery. Exports, offering the best market returns, have decreased in recent years. ASP contends that the price increase sought by the FFAW represents a flawed conception of the Herring business and collective bargaining. ASP proposes that quality standards be established, as per the BGI submission, and propose a price of \$0.15/lb. for all Herring.

SPONL submitted that the majority of its members have little involvement in the Herring fishery, apart from small quantities purchased for bait purposes. They point to consistent pricing for years with sporadic increases that generally could be traced to regional bait shortages or heavy competition on the wharf. SPONL proposes a price of \$0.12/lb. for all Herring with the stipulation that traditional conditions of sale be adhered, that being that the fish be freshly caught and held in insulated containers in slush ice.

As noted above, the parties have divergent views of whether Herring intended for bait processing versus for food processing should attract different prices. The FFAW claims that a significant percentage of Herring is sold locally or shipped to other Atlantic Provinces into the bait market which is more lucrative. BGI claims that this is an exaggerated claim in that most of the Herring landed in Newfoundland is processed as food for export or processed for the local bait market. BGI also claims that the margins in the bait market are much smaller than purported by the FFAW and bait production is more of a service to harvesters than a business.

There is little information available to the Panel, or submitted by the parties, to enable it to assess their respective arguments. DFLR production statistics do not capture all landings and production. Under provincial legislation, individuals and companies that process and label Herring for non-human consumption are not required to be licenced or to report that activity. As well, non-licensed Herring bait buyers/producers may ship salted or frozen bait out of Newfoundland, unreported. Fresh Herring for bait can also be shipped out of the Province. It is also likely that licensed Herring producers may not report all bait production (i.e. for non-human consumption) given it is not required to be fully reported. Processors may also sell Herring reported as round frozen food (versus labeled as bait) into the bait market.

Consequently, not all bait production is recorded. Herring landings in Newfoundland and Labrador were approximately 27,300, 21,300 and 14,300 tonnes respectively in 2016, 2017 and 2018. An estimate of the round weight equivalent of recorded Herring production in 2016 and 2017 suggested that there may be in the order on 2,000-4,000 tonnes of landed Herring that is not accounted for in production records. This presumably went to bait. Furthermore, production statistics that are available to the Panel, and the parties, are aggregated due to privacy concerns. This is especially relevant given that BGI produces almost all of the Herring food products. Based upon a thorough review of the information that is available, the Panel feels there is a substantial

quantity of Herring which is produced and sold as bait, likely several thousand tonnes annually. However, with the current reporting requirements, there is no way to accurately determine the volume of food versus bait production or the amount of landed Herring destined to either product segment.

The Panel considered the FFAW's proposed two-tier pricing system, but is not convinced it is a practical approach. Unlike in the case of Squid, where Squid is produced almost exclusively for bait, Herring is processed simultaneously for both bait and food. Even if the case for higher margins in bait could be verified, sequential pricing would mean that a price justified by bait margins would be applied to food production until the threshold is reached. There is also the practical challenge of being able to monitor landings to ensure an effective and timely change of prices once the threshold is reached. The case for higher margins in bait may hold some merit but the case currently before the Panel is not enough to justify the imposition of two-tier pricing.

Consequently, in setting minimum prices for 2019, the Panel must consider a blend of end uses of the landed Herring, bait and food production. BGI is the dominant producer for the food market and makes the assertion that pricing Herring too high will lead to the company not buying from inshore harvesters and relying only on their large vessels to supply their food market. This will result in lost opportunity for inshore harvesters to sell Herring and lost earnings for harvesters and plant workers.

BGI contends that to remain competitive at dockside and encourage landings, it has raised the landed price over the past three years. To encourage landings and maintain a supply for its traditional markets in 2019, BGI has until now been paying \$0.20/lb. It maintains that this price is not sustainable, and the Company's recent analyses reveal that it is losing money at this price. BGI's submission included an analysis prepared by accounting firm Grant Thornton to substantiate this claim, albeit, it is an unaudited report. BGI also notes there are many licensed Herring producers in Newfoundland, but none are in the food sector due to the tight margins. It maintains that minimum prices need to be in line with the viability of the food sector.

The average landed Herring prices to Newfoundland harvesters were \$0.136, \$0.162 cents and \$0.153/lb. in 2016, 2017 and 2018, respectively. Department of Fisheries and Oceans, hereinafter referred to as "DFO", reports that average annual prices in the other Atlantic Provinces were much higher than in Newfoundland during these three years. This is noteworthy but needs more analysis. The Panel feels it needs a better understanding in terms of possible differences between regions in DFO reporting methodology, as well as, the nature of the industry in these other Provinces. BGI and ASP make the case that there are different markets in food and bait at play in these Provinces. In some instances, the volumes are much higher, and in others, Herring is produced for the roe market. The roe market is apparently not an option for Newfoundland processors due to the nature of the local resource. There is also the proximity of these Provinces to the large lobster fisheries in Atlantic Canada and the Eastern Seaboard of the USA. As is the case for other species, they also point to the fact that Newfoundland processors have higher remittance costs related to payroll and workers compensation.

The Panel acknowledges the right of the FFAW to negotiate Herring and their assertion that more refinement may be needed in pricing for different markets. However, the Panel is also cognizant of the fact that Herring has not been negotiated for decades and moving to a new regime in one year is quite challenging. There is a considerable lack of information on the industry, production and markets, and more analysis is needed. Enhanced data collection and regulation by Government of the Herring which is bought and sold for non-human consumption (i.e. bait) also needs to be considered. The Panel supports the FFAW call for a study and one that addresses all the issues that have been identified through this arbitration. While it cannot impose a study as a condition of sale, the Panel will work with the parties and Government to facilitate it.

Given this is the first year for collective bargaining of Herring and minimum pricing for many years, there is no benchmark agreement and history of negotiated prices to use as a reference. There are also no agreed handling and grading protocols to guide the Panel. Multiple parties have made submissions of varying complexity and there were failed attempts to have effective negotiations leading up to the hearing. There is a significant lack of information on the industry and markets and much more work needs to be done. The Panel is also cognizant of the concern put forward by BGI that the Panel's decision does not place the Herring for food business in jeopardy resulting in the lack of a market for inshore landings.

It is for these reasons the Panel views this year's decision as formative, allowing time for the parties to gain experience with minimum pricing and to further explore the many issues and analyses that need to be addressed. It is reasonable to allow time for the issues and negotiations between the parties to mature. Presumably, all parties will engage in a meaningful process to improve the veracity and content of their positions. However, as the Panel has stated on previous occasions, no one party can veto change when change is warranted.

Should the Panel be needed in future years to set prices and conditions of sale, it will look for real attempts by all parties to resolve the issues and arrive at positions that fully reflect an enhanced understanding of all aspects of the Herring industry. Also, the Panel anticipates that any 2019 quality protocol will be reviewed after the fishing season to enable incorporation of quality grading in future negotiations, as well as, in any position on price and condition of sale that may be presented to the Panel in subsequent years.

The Panel is also persuaded by the view expressed by processors that a quality standard is necessary in order to establish minimum pricing for Herring, especially in the food industry. This seems a necessary component to maximize the value of the Herring industry for all to benefit. Ideally, Herring should be graded to identify fish that would be priced based upon quality grades of landed Herring.

Given the lack of negotiation on these quality grades, the Panel is limited in how far it can go in 2019 with setting conditions of sale as it relates to quality. Nevertheless, the Panel believes that some quality standard is needed in order to establish minimum pricing in the fishery and is pursuing this as an option, while recognizing more work needs to be done.

BGI contends that for the period within two weeks of spawning, the flesh of the fish is very poor and the Herring fishery should be curtailed, or the price left open between buyer and seller. While this position may have merit, there is no industry data or scientific information submitted to substantiate this claim. There is also no proposal of how the industry would implement such a condition and determine when this two-week period would have effect (i.e. herring has spawned). Any regulatory curtailment of the fishery would have to be arranged with the DFO as part of its management process. Until a more fulsome examination of this proposed measure is undertaken, the Panel is not able to support its implementation.

BGI also proposes that Herring subject to minimum pricing be at 0°C or colder, particularly due to the need to reduce the development of histamines within the fish flesh. They contend that the Food and Drug Administration (FDA) in the USA has become more vigilant on the issue of histamine content and this is an increasing concern in maintaining their markets.

The Panel notes that in the food and seafood industry globally, there is a concern with histamine food poisoning which is an allergy-like reaction, caused by eating fish or fermented foods containing a high concentration of histamine. Herring is one of the fish species where histamines are a concern. Most of the published guidance indicate that in controlling histamine formation, it is important that fish are iced or chilled by means such as use of refrigerated seawater or brine as soon as possible once bought on board so that it will begin to reduce in temperature. Maintaining the cold chain from point of catch through to processing is also important in order to control the formation of histamine. However, the guidance on holding temperature appears to vary with 0°C being at the lowest end. Without more study of this issue by the parties, it is difficult for the Panel to impose a strict, and definitive temperature protocol at this time. The Panel also feels there is a need for more negotiation on this issue and a better understanding of the impact of such a condition of sale on fish harvesters and how many harvesters can meet it.

Considering the positions of the parties, the need to ensure minimum pricing suits food and bait markets, the need to attempt to make progress on differential pricing based upon quality, and, after careful deliberation, the Panel has decided that the minimum price set by the Panel will be in respect of Herring that are:

1. Firm and wholesome and with no broken bellies;
2. Of a size greater than 150 grams, and
3. Transported and stored in seawater and slush ice.

In implementing these quality standards, the Panel expects that the BGI and FFAW will negotiate, as soon as possible, and by no later than September 25, 2019, a reasonable protocol for application of the grading standard at the wharf and/or the processing plant. This protocol will apply to all processors in the province with the expectation that the FFAW will negotiate practical and minor modifications as may be needed to adapt the protocol to specific operational realities of members of ASP and SPONL, while maintaining the intent and effectiveness of the protocol.

Once the prescribed grading protocol is in place, the minimum price for all Herring meeting the above quality standard will be:

- \$18.5 ¢/lb. for Herring delivered to a processing plant;
- \$0.03 ¢/lb. less for trucked Herring, and
- Any Herring not meeting the above quality standards will be purchased at a price to be set between buyer and seller.

In the event the parties fail to negotiate an implementation protocol for quality grading by September 25, 2019, the minimum price on all landed Herring will be:

- \$15.0 ¢/lb. for Herring delivered to a processing plant and
- \$0.03 ¢/lb. less for trucked Herring

In the interim, until either a protocol for quality grading is in place or, September 25, 2019, which ever occurs first, Herring will continue to be purchased at a price to be set between buyer and seller.

Dated the 11th day of September, 2019.



Wayne Follett



Bill Carter



Brendan Condon