

STANDING FISH PRICE-SETTING PANEL

CAPELIN FISHERY - 2024

Procedural history

1. The Standing Fish Price-Setting Panel, hereinafter referred to as the “Panel”, issued its Schedule of Hearings for 2024, on March 6, 2024. Pursuant to Section 19 of the *Fishing Industry Collective Bargaining Act*, hereinafter referred to as the “Act”, the Panel set Monday, June 17, 2024, as the date by which collective agreement(s) binding on all processors in the province that process Capelin (“Capelin”) must be in effect or a hearing would take before the Panel to determine the price and conditions of sale of Capelin. The Panel was required to provide the minister with the price of Capelin no later than three days before that date, being Friday, June 14, 2024.
2. The Panel also noted at that time that it had been advised by the Department of Fisheries, Forestry and Agriculture, that the Association of Seafood Producers, (hereinafter referred to “ASP”) represented processors processing the majority percentage of the species Capelin. As a result, under Section 19(11) of the *Act*, should a hearing be required for Capelin, the parties appearing before the Panel would be the Fish, Food and Allied Workers’ Union, (hereinafter referred to as “FFAW”), and ASP. (FFAW and ASP are also referred to as “the Parties”).
3. The Parties were unable to successfully negotiate the terms of the collective agreement for the price and conditions of sale of Capelin for the 2024 season. Both FFAW and ASP asked for a postponement of the hearing date from June 6, 2024 to June 7, 2024. Given the joint nature of the request, and the Parties’ continued bargaining, the Panel granted the request.
4. On June 7, 2024, the hearing commenced, but as a result of a preliminary objection raised by FFAW, the hearing was adjourned to the afternoon of Monday, June 10, 2024 and took place via videoconference in order to accommodate the testimony of three witnesses.
5. The Panel was required to provide its decision on price to the Minister by Friday, June 14, 2024. It did so. Due to the number of preliminary objections, evidentiary rulings, and arguments presented by the parties in addition to their final offer for the price of Capelin, the Panel provided its decision on price, with notification that its reasons for the decision would follow in due course.
6. In its correspondence to the Minister on June 14, 2024, the Panel decided the following:

The Fish Price Setting Panel has met and has determined that the attached schedule shall constitute the price for the species Capelin for the 2024 fishing season, in accordance with section 19 of the *Fishing Industry Collective Bargaining Act*, RSNL 1990 c. F-18.

2024 MINIMUM CAPELIN PRICE

Minimum pricing for Capelin will be determined using the "Sampling Procedure" outlined in paragraph 5.0 and based as per the following:

For "A" price (\$0.25), the Capelin must meet the following specifications:

- 55 count and under
- Maximum 10% feed content
- Minimum 40% usable females, classifying less than 5.25 inch females as males for determining eligibility for the "A" price only.

Where one or more of the conditions set out above in paragraph 4.2 have not been met for "A" pricing, that is, Capelin is not 55 count and under, and/or exceeds 10% feed and/or not 40% useable female, the minimum price shall be determined in accordance with the price table below.

Price Table

Percent female and Count per kg are established using Ocean Run Capelin.

Percent Female Capelin	Price per pound - 70 or less count Ocean Run	Price per pound - 65 or less count Ocean Run	Price per pound - 55 or less count Ocean Run	Price per pound - 45 or less count Ocean Run
30%-34.9%	0.07	0.09	0.11	0.14
35%-39.9%	0.09	0.11	0.13	0.15
40%-44.9%	0.11	0.13	0.14	0.16
45%-49.9%	0.12	0.14	0.16	0.18
50%-54.9%	0.13	0.15	0.17	0.19
55%-59.9%	0.14	0.16	0.18	0.20
60%-64.9%	0.15	0.17	0.19	0.21
65%-69.9%	0.16	0.18	0.20	0.22
70%-74.9%	0.17	0.19	0.21	0.23
75%-79.9%	0.18	0.20	0.22	0.24
80% or greater	0.19	0.21	0.23	0.25
Capelin must have a minimum 23% roe content				

7. The following are the Panel's reasons for that decision.

Preliminary Issues

8. Prior to hearing the parties' positions on price for Capelin, there were several preliminary objections.

Preliminary Objection #1

FFAW objected to ASP filing three affidavits in support of its position.

Background:

9. Both parties filed their submissions with the Panel by 4 pm on the evening before the hearing was scheduled to begin, as required. ASP provided the Panel with three affidavits as part of its submission. The Affidavit of Willaim (Bill) Barry of Corner Brook attested to three redacted paragraphs, to the cost of raw material into the Barry Group plants in 2023, to the range of overhead and financing costs experienced by Barry Group in 2023, to the approximate difference between purchase volumes and sold volumes at Barry Group in 2023, to the fact that "Capelin is a marginal business incapable of competing with Norway and Iceland," and to the general cost structure in 2023 (the "Barry affidavit").
10. ASP's second affidavit in support of its submission was from Paul Grant of Beothic Fish Processors. It contains three paragraphs: his name and position with Beothic Fish Processors, a paragraph stating that the average cost per point to buy, produce, and market Capelin "as sworn by the Barry Group" [sic] is consistent with the average price per pound to Beothic, and that the information is true and accurate (the "Grant affidavit").
11. ASP's third affidavit in support of its submission was from Robin Quinlan, President of Quinlan Brothers Limited. Like the Grant affidavit, the Quinlan affidavit, too, has three paragraphs: one stating Mr. Quinlan's title, one stating that the average cost per pound to buy, produce and market Capelin as sworn by The Barry Group is consistent with the average price per pound of Quinlan Brothers limited and a statement that the affidavit was true and accurate (the "Quinlan affidavit").
12. With respect to the affidavits, FFAW argued that (i) the affidavits were not timely – as in, the affidavits were not filed within proper timelines and the FFAW was not given sufficient time to receive and consider the evidence in the affidavits; (ii) FFAW was not given the opportunity to question the affiants on the information in their affidavits; (iii) the first affidavit had been redacted and therefore the FFAW was not able to see the entirety of what was sworn; and (iv) the affidavits were not properly before the Panel.
13. The Panel noted that the affidavits had been filed with ASP's submission at the time prescribed by the Panel's Rules. Therefore, while the materials were filed with very little notice to each party, they were timely in terms of being filed within the scope of the Panel's procedures. The Panel also noted that FFAW directly referenced ASP's affidavits in the FFAW's written submissions to the Panel for this

hearing, thereby acknowledging that they had received, considered, and responded to the affidavits in their submissions.

14. Upon hearing the FFAW's arguments about cross-examination, ASP offered to produce the individuals for cross-examination on the next business day, being Monday June 10, 2024.
15. The Panel held that if ASP wished to use the affidavits and the individuals to be cross-examined, they ought to provide the unredacted affidavits. The Panel reminded the parties that procedurally, if a party wanted the Panel to consider evidence, the other party to the hearing is entitled to receive and test the evidence that is presented to the Panel. ASP argued that the information in the affidavits was commercially sensitive information which was not shared between and among ASP members and not shared between ASP and FFAW. The Panel reiterated that if a party wanted the Panel to consider evidence that is directly related and germane to the issues in dispute, the Panel and both parties to the hearing must be privy to it.
16. Upon questioning, FFAW withdrew its timeliness argument. The Panel determined that given FFAW withdrew its timeliness argument and given that FFAW referenced these affidavits in their brief, it is clear that they were aware that the affidavits were going to be or were appended to the ASP brief. Any allocation of weight or credibility of the affidavits will be reviewed and discussed by the Panel in its consideration of the matter.
17. The hearing was then adjourned so that ASP could present the three affiants for cross-examination by FFAW and the hearing could proceed at that time.

Use of the affidavits

18. The Panel was not ultimately provided with Mr. Barry's unredacted affidavit. Mr. Barry was cross-examined by FFAW on the contents of the affidavit as provided. His counsel objected each time he was asked to provide background information or documentation upon which he based his statement "Capelin is a very marginal business." Mr. Quinlan was also cross-examined by FFAW. Any questions put to Mr. Barry or Mr. Quinlan by FFAW about the profitability of their Capelin business and how they could quantify or explain their agreement with Mr. Barry's statement that "Capelin is a very marginal business" was met with an objection that the information was commercially sensitive and could not be disclosed.
19. ASP continued with its assertion that the Panel should conclude from the affidavits, with no information to show what supported the assertion, that Capelin is a "marginal business". This put the Panel in a difficult evidentiary situation. The Panel has been tasked with setting the price and conditions of sale of a fish species. ASP has proffered affidavits in support of its position that the Capelin fishery is "marginal" business for processors, in support of its position on price, but while ASP offered the three processors up for cross-examination, it then objected to any of the questions brought forward by FFAW when the questions approached any of the background information, statistics, and documentation that would back up the assertions in the affidavit.

20. The Panel, in its current format, is not aware of either of these parties calling evidence in this fashion at a Panel hearing on price. Many of the processors who are members of ASP have been engaged in arbitration with FFAW in the past, but not arbitration on the price of a fish species.
21. These parties are not inexperienced, not new to the Panel, and not new to arbitration. They each had experienced legal counsel representing them at the hearing. ASP knew or ought to have known that by putting affidavits forward in support of its presentation as to why their price ought to have been chosen in final offer selection the individuals who swore those affidavits could be subject to cross-examination on those affidavits and could be ordered to produce the documents or records that backed up their attestations. Even keeping the cross-examination to the limited scope of the affidavits provided, one might reasonably anticipate that FFAW would be entitled to cross-examine the affiants on what they meant by the term “marginal” in the affidavits, and upon what basis they made the statement. In the usual course, that might mean the processor would be asked to disclose its profit margin to prove its argument that the fishery is “marginal”. As argued by ASP and recognized by the Panel, this is commercially-sensitive information that has never been disclosed in a Panel hearing.
22. The Panel has determined that ASP cannot have it both ways: it cannot put the affidavits forward and put the witnesses forward to be cross-examined as proof of the assertion that Capelin is a “marginal” industry without providing evidence as to what “marginal” is. The witnesses did not answer all the questions asked about what they have sworn. Therefore, while the affidavits were entered into evidence, their evidentiary benefit is of very little value. The Panel cannot attach any weight to the affidavits or the very limited scope of the cross-examination on those affidavits with respect to the assertion that the Capelin processing industry is “marginal”.
23. In light of the history of bargaining between the parties, the novelty of the use of the affidavits and calling of witnesses at a fish Panel hearing, and in the interests of timeliness in coming to a decision on the question at hand (i.e. choosing one proposed final offer on price or the other), the Panel moved on. That is to say, the Panel has noted that the affidavits, redacted as they were, were entered into evidence, and the very limited scope of the cross examination. The Panel was not able to place any weight on the truth of those affidavits, given that the party proffering them was unwilling to allow the witness to explain what was meant by the term “marginal” and how he arrived at that conclusion.
24. With respect to the Grant and Quinlan affidavits, in essence their affidavits say ‘we agree with what Mr. Barry said.’ Given that Mr. Quinlan, too, refused to answer questions as to why the Capelin business is considered “very marginal” and continued to provide only vague and generalized answers as to the basis for that assessment, the Panel also placed very little, if any weight on their affidavits and answers in cross examination.
25. The introduction of the affidavits and the cross-examination of them provided very little assistance to the Panel in determining the ultimate price of Capelin this season. Should the parties wish to continue with the use of affidavit evidence at hearings in the future, they are hereby forewarned that the rules of evidence with respect to arbitration hearings will apply to the use of such affidavits, and that the opposing party will be entitled to a cross-examination on the affidavits, to the extent such is relevant to the matters in question before this Panel and permissible by law.

Preliminary Objection #2 – purported agreements

26. ASP brought a Preliminary objection to FFAW's written submission to the Panel. ASP alleged that throughout FFAW's brief are comments and references that ASP agreed to certain facts during negotiations leading to the hearing. ASP objected and said that these comments and references ought to be struck from the submission as though they were never stated, because the assertions are untrue. ASP denies any and all references in the FFAW brief that ASP agreed to any of the facts claimed as such in FFAW's brief.
27. ASP did not seek relief from the Panel, except a declaration from the Panel that it placed the objection on the record.
28. ASP argued that FFAW can either withdraw the comments or introduce evidence of such purported agreements on a case-by-case basis if they have any. To the extent that any such allegation of agreement is material to the issues in question at this hearing, ASP renewed its objection to each statement. The Panel noted the objection.
29. In response to the objection, FFAW apologized for any misunderstanding it may have had as to ASP's agreement on the matters referenced and agreed to acknowledge that it "understood" ASP to have agreed to such matters, rather than stating as a fact that ASP agreed to them. The objection having then been dealt with, the Panel moved to the merits of the application.

Setting the price of Capelin in 2024

30. As stated above, the parties engaged in negotiations on the price of Capelin in the weeks leading up to the hearing. The day before the hearing, in keeping with Panel rules and procedures, the parties exchanged briefs and documentation they intended to rely on.

Information considered

31. The documents relied on by the Panel in reaching its decision in this matter included the Parties' briefs, the *Fishing Industry Collective Bargaining Act*, and the data and Capelin industry reports provided to the Parties and the Panel by the Department of Fisheries and Agriculture ("DFA"). This included press reports from *Undercurrents*, (a fishing industry publication), Atlantic Canada Capelin Exports 2013-2014, Capelin Production 2019-2023, Japan Capelin Imports 2019-2024 (March); Japan Capelin Imports Q1 2019-2024; NL Capelin Monthly Exports 2013-2024; and "*What changed in Japan's Capelin Market in 2023?*" May 2024 Market Update from Meros consulting ("Meros Report"). Of note was also the Canadian Science Advisory Secretariat (CSAS) Technical briefing re Capelin Stock Assessment (March 5-6, 2024), as provided in ASP's presentation.
32. The information and documentation relied on by the parties in their submissions was largely the same. In the past, the Panel set the price of Capelin (or the parties agreed on a price) in accordance with a schedule. The schedule showed all sizes of Capelin.

33. There are three major exporting countries for Capelin: Iceland, Norway and Canada (NL). Russia produces Capelin, but is understood to be primarily for its home market. The Faroe Islands has a small Capelin fishery. Primarily, the largest Capelin fisheries are Iceland (459,000 tonnes in 2022/23) and Norway (117,500 tonnes in 2024). By comparison, the NL quota for 2024 is set at 14,533 tonnes. It has been accepted by the parties that there is a moratorium on Capelin fishing in Iceland this year, leaving Norway and NL as the primary exporting countries for Capelin.
34. ASP highlighted, and it has not been contested, that Norway and Iceland operate their Capelin fisheries in a highly industrialized manner, with refrigerated seawater vessels (“RSW”) with the ability to harvest large volumes and the capability to process at sea or land catches directly to processing plants at shore. This allows for higher raw material prices than NL, where Capelin are caught in smaller catches, and frequently need to be trucked from various landing sites to processing plants.
35. Based on the information provided in *Undercurrent*, the average price per pound of Capelin landed in Norway paid the Norwegian harvesters \$0.54 per pound in 2023 (9.1 NOK per kg) and \$0.327 per pound in 2024 (5.7 NOK per kg), a decline of 39%.
36. CFAS stock assessment (as articulated in the CFAS Capelin Advisory Report) concluded from the peer review of the recent stock assessment for Capelin in NAFO division 2J3KL that the 2024 biomass of Capelin will be similar or slightly lower than 2023.
37. CFAS also noted that the Capelin stock is facing challenges such as late spawning, maturing at earlier ages, and a population that is dominated by relatively young fish. “What this means for the stock is there are a high proportion of fish maturing at a younger age and since most fish die after spawning, we are not seeing older fish in the population. This means lower overall reproductive potential for the stock, since older and larger fish produce more eggs.” Consequently, CFAS predicted a “similar run of Capelin” this year as 2023 and noted that “productivity of the stock is at a low level.” They also noted that the size and maturity of the 2024 Capelin biomass will “will be similar or slightly lower than 2023.”
38. The Meros report concluded that Japanese processors prefer Icelandic Capelin because of its larger size. Norwegian Capelin is smaller and therefore not their first choice. In 2023, there were large quantities of good quality Icelandic Capelin available, so Japanese buyers were actively buying it. The Meros report quotes an industry expert who stated that the Japanese buyers in 2023 were less interested in Norwegian Capelin and they did not consider Canadian Capelin.
39. According to Meros, in the first three months of 2024, Japan imported 30% more Capelin than the same period last year, in anticipation of there being zero supply from Iceland this fishing season. There has been a decline in volume of Canadian Capelin in the Japanese market since 2015. The price in 2023 was the lowest since 2015. Meros reports that because the Icelandic and Norwegian Capelin seasons start earlier in the year than in Canada, after successful catches in the first half of 2023, Japanese importers already had enough supply for the domestic market, resulting in less demand for Canadian Capelin. From January – March 2024, the import price of Capelin to Japan was down 30% compared to the same period last year (Meros report, at p.19).

40. In response to an inquiry as to current Japanese Capelin inventories, DFA sought an update from Meros. Meros, at page 20, states, “Canadian Capelin will likely be in demand and its price is set to increase.” However, Meros gave no indication of the order of magnitude of such likelihood of increased demand or increase in price. Meros reported the following in follow-up correspondence provided to the Panel on June 4, 2024:

Japan does not track officially the inventory of Capelin and our interviewees this year mentioned that their “stock situation was good” and “we have enough stock.” One importer concretely commented that in 2023, Japanese importers knew that there will be no Icelandic supply in 2024 so they purchased extra volume. (June 4, 2024 email from DFA to parties and Panel)

Where the parties agree

41. The parties agree that there is a Capelin moratorium in Iceland this year. They also agree that Norway reported that the beginning of their season showed smaller size Capelin. They agree that larger size Capelin are more sought after and could demand a higher price than smaller size Capelin.

Summary of the parties’ offers

42. FFAW proposed that this year, there will likely be a “bifurcated market” for Capelin and the price table ought to reflect that. Because of the combined factors of a moratorium in Iceland, which has generally larger Capelin, and because harvest in Norway this 2024 season showed smaller size Capelin on average, FFAW argues that there is a real potential that there would be a premium for large size NL Capelin this year. Therefore, they proposed a roll-over on the price of NL Capelin from last year (i.e. offered the same price as what was agreed by the parties last year) for all but the largest Capelin. For the largest Capelin, they sought an increase in price to \$0.40 per pound (80% or greater female, 45 or less, count ocean run). FFAW’s full offer can be found on page 13 of their written presentation.
43. ASP proposed that in light of international markets and the research provided to the parties and the Panel, there be a roll-over of last year’s prices for all sizes of Capelin. ASP further argued that the Panel ought not to accept such a bifurcated offer. ASP’s full offer can be found on page 1 of their written presentation, placing Grade “A” Capelin (80% or greater price per pound 45 or less count ocean run) at \$0.25 per pound.
44. The Panel was required to choose one Party’s final offer on price or the other, as this was final offer selection in accordance with the legislation. The Panel is a creature of statute. As stated above, its authority comes from *FICBA* and the regulations thereunder, which prescribe final offer selection in the event that the parties are unable to agree on price. The Panel has on many previous occasions discussed the issues it faces with final offer selection (see, for example, the Panel’s April 6, 2023 decision on Crab, at paragraph 45, or April 25, 2023 decision on Shrimp, at paragraphs 6-9). The parties have expressed their frustration with the final offer selection process at multiple hearings. That does not change the fact that the Panel continues to exist in a final offer selection regime. Instead of the final offer selection process resulting in parties producing offers that are closer together, it has, in recent history, resulted in increasingly disparate offers from the parties. The issues with final offer

selection remain the same. The Panel reiterates those concerns as discussed by this Panel and previous others and reiterates that the Panel is unable to propose what it might consider to be the “best” or “most appropriate” price for the parties; rather, it is bound to select one offer or the other.

45. The Panel does not agree with ASP that the FFAW’s offer which rolls over 2023 prices for smaller Capelin while proposing an increase over 2023 prices for large Capelin, amounts to a structural change in the pricing table. In the Panel’s view, this ‘bifurcation’, as FFAW termed it, is a logical response to the very particular market forces at play in 2024. Otherwise, change in one segment of the Capelin fishery could be used to prevent any price change in another segment no matter how strong the market in that latter segment.
46. The Panel has determined that there is nothing precluding it from accepting an offer which suggests that the price be rolled-over from a previous year for certain sizes, but increased for others. Under *FICBA*, the Panel is tasked with setting the price and conditions of sale of fish by way of final-offer selection (with the exception of the species Crab, as of 2024). Parties are free to put forward their best final offer for the Panel’s consideration.
47. Therefore, the Panel concluded that the FFAW’s offer was a viable offer under the legislation and ought not to be dismissed outright, contrary to ASP’s assertion.

FFAW’s Arguments

48. FFAW admitted that it and ASP were proposing the same price for smaller Capelin. They diverge on the large Capelin at sizes greater than 55 count. FFAW argued that there was very little global supply of large Capelin on the market, since Iceland had a moratorium on Capelin, and the statistics from Norway this year have shown that their catches were primarily small Capelin. Therefore, larger Canadian Grade “A” will be in demand, if caught, and the FFAW argued that the price will go up for that size.
49. FFAW argued that ASP’s price, if adjusted for inflation, is the lowest price for Capelin across all grades. They argue that a price that low is unwarranted in light of the MEROS report and is not therefore a legitimate offer in light of current market prices, as extrapolated by FFAW from the data.
50. FFAW argued that if fishers were “lucky” this year and caught larger fish, then those larger fish would demand a higher price. They argued that the price for this larger Capelin should be closer to the price paid to Norwegian harvesters, which was approximately \$0.327 / pound this year, as reported in *Undercurrent*.
51. FFAW used a calculation in its submission (at page 7, table 1) it extrapolated from the information provided in *Undercurrent* to argue that the true price of the Norwegian Capelin toward the end of the Norwegian Capelin season was actually \$0.47 per pound, and therefore, FFAW proposed a price of \$0.40 / per pound for Grade “A” – i.e. 45 count or less ocean run 80% female or greater).

52. FFAW admitted that the Meros data showed that there has been a 30% decrease in the price of Capelin on the Japanese market in the first quarter of 2024. FFAW provided analysis in support of its argument that there is no correlation between a 30% decrease in the value of Capelin at the beginning of the year being predictive of a similar decline by the end of the year. FFAW argued that only 8% of NL Capelin are destined for the Japanese market and therefore the Meros report on the international price of Capelin is not applicable to the parties in this negotiation.
53. FFAW argued that to consider the aggregate average price of Capelin when setting the price would result in unfairness. When one considers the aggregate average, this hides the price processors were paid for large Capelin. They analyzed the data from Norway. FFAW argued that if we take the total Norwegian landings reported in Undercurrent for April 2024, the Norwegian prices for 2024 showed that at the beginning of the season smaller size fish were being landed. At the end of the season, FFAW says the price reflects the fact that harvesters began catching larger Capelin. FFAW backed out of the international reports on price what it estimated the price for larger Capelin to have been in the Norwegian fishery and argued that between April 2 – 12, larger Capelin were selling for what amounts to \$.47 / lb. (The calculations for this are seen at page 7 of FFAW's submission).
54. As a result, FFAW says that the price for large Capelin ought to be \$.40 / lb. paid to harvesters in NL for large Capelin. FFAW argued that there is "no uncertainty in the market for large Capelin, this is a strong market with high demand and historically low supply."
55. The Panel sought clarity from FFAW with respect to that calculation and assertion. The Panel questioned FFAW about the calculation at the hearing, but was not satisfied that it understood or could replicate the calculation and interpretation of the evidence put forward by FFAW that would lead to the conclusion that Norwegian harvesters "must have been paid" \$.47 per pound for larger Capelin, given that the data provided by Undercurrent showed the price of all Capelin throughout the Norwegian 2024 fishing season. When the Panel considered the data, it appeared that the price of Capelin dropped, it did not increase during the period of April 2-12, 2024 when the Panel took into account the fluctuations in currency that occurred at that time.
56. Following the hearing and during its deliberations, the Panel sought further clarity from FFAW. In an email of June 12, 2024, the Panel asked:

Dear Mr. Solberg,

During its deliberations, the Panel is having difficulty with the calculations in Table 1 page 7 of the FFAW's submission. In particular, during the presentation, a member of the Panel asked a question about that table and you offered to provide a copy of those calculations showing how FFAW arrived at the figures in that table. A member of the Panel accepted FFAW's offer to have those calculations provided. To date, we have not received those calculations. The Panel would like to see those calculations. Also, we would like to see how you converted the figures to CAD per pound. The question is that per NOK, the price appears to have dropped from 5.70 – 5.66, yet per CAD it jumped from \$.34- \$.47 which is a change of 13 cents, which is a 38% increase.

Please show your calculations so we can understand this. The column showing NOK per Kg shows a slight decline between April 2 – April 12, not an increase.

The Panel is concerned that there is a typographical error in the March 19, 2024 data in that table (landed tonnes are listed at 66,997 but the corresponding Undercurrent report of March 22 notes the total landed tonnes as 69,997).

Kindly provide this to us no later than noon on June 13, 2024. And provide the ASP with a copy as well.

If the ASP wishes to provide comment on this information, please provide it no later than 3 pm on Thursday June 13, 2024.

Thank you for your attention to this matter. ...

57. On June 13, 2024, FFAW provided the following response:

Response to the Panel: Table 1 Calculations

There were several typos in Table 1, provided by FFAW. These have been highlighted and corrected in the table below. Exchange rates have also been provided in the table, as well as in the attached excel spreadsheet. Exchanges rates were taken from the OANDA daily mid rate, as is done in the Lobster formula price calculation. The exchange rate used was the one for the specific date where the price was summarized. These typos do not change the final results, particularly the \$0.47 result in question from the Panel.

Date	Landed Tonnes	% Landed	NOK/KG	NOK-USD FX	NOK-CAD FX	USD/KG	CAD/LBS	Avg. Price from CAD Prior Date
12-Mar	40,645	35%	\$5.40	0.095378	0.128624	\$0.52	\$0.31	-
19-Mar	69,997	60%	\$5.28	0.093751	0.127193	\$0.50	\$0.30	\$0.29
02-Apr	109,035	93%	\$5.70	0.091775	0.124548	\$0.52	\$0.32	\$0.36
09-Apr	116,875	99%	\$5.66	0.093679	0.127176	\$0.53	\$0.33	\$0.47

The articles from the Undercurrent provide a cumulative average price at a certain time, t . You can calculate this cumulative average using the following equation:

$$P_t = \left(P_{i1} \times \left(\frac{C_{i1}}{C_t} \right) \right) + \left(P_{i2} \times \left(\frac{C_{i2}}{C_t} \right) \right)$$

Where:

P_t is the average price at time, t.

P_{i1} is the average price at interval 1.

P_{i2} is the average price at interval 2.

C_t is the total catch at time, t.

C_{i1} is the catch during interval 1.

C_{i2} is the catch during interval 2.

To solve for the price at interval 1, the following equation can be used:

$$P_{i1} = \frac{P_t - \left(P_{i2} \times \left(\frac{C_{i2}}{C_t} \right) \right)}{\left(\frac{C_{i1}}{C_t} \right)}$$

To illustrate, assume P_{i1} is the period between April 3 and April 9, and P_{i2} is the period between the start of the fishery and April 2, such that:

$P_t = \$0.33$ CAD

$C_t = 116,875$

$P_{i2} = \$0.32$ CAD

$C_{i1} = 116,875 - 109,035 = 7,840$

$C_{i2} = 109,035$

$$P_{i1} = \frac{.33 - \left(.32 \times \left(\frac{109,035}{116,875} \right) \right)}{\left(\frac{7,840}{116,875} \right)} = \frac{.33 - (.32 \times .933)}{.067} = \frac{.33 - .29856}{.067} = .47$$

The Panel noted that the price in NOK on April 2 was greater than the price in NOK on April 9, suggesting that the change in price was driven by the exchange rate and not an increased price to harvesters.

The 2024 Meros report (pg .11) notes that Norway negotiates their Capelin prices in US dollars. It is therefore likely that the Undercurrent was reporting NOK based on the negotiated price in USD. Reporting from the Undercurrent on April 12 said (emphasis added):

*“Despite challenges with sizes and low prices early in the season, an increase in quality towards the end of the season **led to a boost in prices**, Sildelaget has said since. The average price for the season ended at NOK 5.70 (\$0.53) per kilogram”*

We note that this price is different from the price listed in the same article on the side bar (NOK 5.66)—the price that we used in our calculations. All the same, the USD price is the same as our calculations. This reporting clearly says there was a boost in prices at the end of the season. The USD value being the same as our calculations also indicates that the price did in fact increase towards the end of the season due to higher quality (i.e., larger) product, and that our calculated increase is most likely correct. There is certainly no reason to think that the price went down. We further note that there is no mention of increased quality or prices for Capelin in the article summarizing the catch on April 2nd.

Taken collectively, this is strong evidence that the observed increase in price based on our calculations was accurate and that the price of large, high quality Capelin in Norway this year was roughly \$0.47/lbs. CAD to harvesters.

...

58. ASP did not provide any comment on the Panel’s request for clarification or on the response provided by FFAW.
59. The Panel continued to have difficulty with the FFAW’s calculation, in spite of the ‘clarification’ above. The Panel was not confident in the argument put forward, the typographical errors in the calculations, the use of a price not quoted in the Undercurrent article. In short, when the Panel repeatedly tried to use the calculation with the data provided and not extrapolated, it could not come up with a price that approximated that suggested by FFAW. Instead, the value was \$0.32 – \$0.33 per pound. Whether there was an error by FFAW in use of exchange rates or double use of exchange rates in the calculation remains to be seen. From an evidentiary perspective, the Panel found the calculation to be unreliable and therefore could place very little weight on it. The price paid to harvesters for large high-quality Capelin in Norway late in the 2024 season remains to be seen. The only reliable evidence we have been given was the overall price to Norwegian harvesters in the 2024 season.
60. FFAW acknowledged that the Norwegian Capelin fishery and the NL Capelin fishery are “fundamentally different industries.” It conceded that the large-scale processing of Capelin in Norway is vastly different and significantly more productive than that of NL. FFAW also argued that that the Norwegian fishery includes male Capelin, but that NL Grade “A” Capelin is 80% female.
61. FFAW extrapolated the price of large Norwegian Capelin from the numbers published in *Undercurrent* and argued that they “know” based on their calculation that the large product in Norway was therefore selling at \$0.47 / lb. Therefore, FFAW argued that ASP’s offer of \$0.25 per pound is less than half that of what FFAW has calculated the Norwegian price to have been this season for large Capelin.

62. From the Panel's perspective, when the Panel reviewed the evidence provided in *Undercurrent*, what the Panel has been able to determine for certain is that Norwegian harvesters received the equivalent of \$0.32 and \$0.33 per pound. It varied only a little over the course of the harvest, and it was at its highest at the end of the season. Whatever the reason for the difference in the FFAW's calculation - could be inaccuracies in the imputed calculation, or the mis-application of the exchange rate over time- whatever the cause, the only reliable information we have is the data provided in *Undercurrent* for what was actually paid for Norwegian Capelin in the 2024 season. That value was calculated by the tonnage of all Capelin landed - large or small, and *Undercurrent* reported that the Capelin landed in Norway were smaller.
63. FFAW said they "feel confident that there is high potential for big gains" if harvesters were successful in catching large Capelin. The Panel notes that there was nothing in the data provided to the Panel to support the confidence that there is "high" potential for "big gains" in the Capelin fishery this year, particularly in light of the stock assessment.
64. FFAW examined the information in the ASP affidavits, in particular, the information provided with respect to expenses incurred by the harvesters. Based on the information in the affidavits last year, with a \$1.20 export value on Capelin, the data shows that the processors would have made 17.5 cents per pound (\$0.175/lb.). FFAW argued that, based on the price of Capelin last year, this is also what harvesters made. This, they argue, is not a fair sharing of the price arrangement.
65. FFAW also argued that ASP's repeated assertions that the price being put forward as a minimum price is a "foundational price" upon which processors and harvesters can cover their costs, and that the rest is negotiated between the buyer and the seller later. This will be discussed further below. The Panel agrees that FFAW is the bargaining agent for harvesters. That is the purpose of collective bargaining. ASP is the bargaining agent for processors. While setting the minimum price in accordance with the legislation, all parties and the Panel must remain mindful that this is a Collective Bargaining process and not open market negotiations between individual buyers and individual harvesters. That is neither the spirit nor intent of the *Fishing Industry Collective Bargaining Act*.
66. FFAW argues that if the market for Capelin increases by 5% (see figure 5 of its submission) then ASP would receive a six-fold increase in its market share over the harvesters. According to FFAW's calculation, a 1% increase in the market results in a 6% increase in what the processors receive, and therefore harvesters should receive a 17% increase in the price this year. For the Grade "A" price, FFAW submitted that there ought to be a 60% increase in price to harvesters over last year.
67. FFAW argues that its analysis is that a 20% overall across the price table generally, equals a 5% increase in the market. FFAW argues that its calculation is "not out to lunch", that the table pays half the value of the market increase, and their price is rooted in the market.
68. FFAW argued that if one increased the price for Grade "A" to current inflationary values, the FFAW price is well within historic prices. The risk to fishers who put to sea ought to be recognized and rewarded in the price setting, just as the risk to processors is recognized.

69. The Panel accepted the FFAW's argument that the ASP price proposal does not take into account the potential that the ASP members could potentially benefit disproportionately if the Capelin caught were of a larger size and fetched a higher price on the market. However, the Panel remained mindful that the stock analysis does not show a biomass of larger Capelin, and importantly, the Panel was not confident in the number put forward by FFAW in its calculation: the price put forward for large Capelin far exceeded any calculation the evidence before the Panel could justify. The Panel was not persuaded by the details and calculations contained in FFAW's presentation and explanation of the data and the calculations it was therefore not able to attach sufficient weight to the presentation to accept it as a viable minimum price for the season.

ASP Arguments

70. ASP's primary argument was that the cost structure and market realities facing NL processors make it difficult for processors to earn a market return and cover costs in the Capelin industry. The Capelin fishery is structurally different from crab or lobster in that 2/3 of what is caught has "little to no value," the market is saturated by the time NL Capelin is caught, and the price is never set until the fish are caught. ASP argued that the risk equation is "entirely on the processors" given the timing of the fishery, the cost, and market dynamics. They argued that producers assume "by far" the majority of the financial risk of the Capelin fishery, such as interest rate inflation, market price volatility, currency exposure, transport costs to the plane, processing costs, packaging costs, freight to market, plus in-house or third-party selling expenses. In light of this "unbalanced risk" and the costs associated with the NL Capelin fishery, ASP argued that their offer was fair and reasonable and ought to be accepted by the Panel.

71. ASP argued that there is a fundamental difference of opinion between FFAW and ASP as to the setting of "minimum price" and the definition of the term "minimum price, and that there is nothing in the legislation or the Master Collective agreement that discusses "fair" price or "historical" price. Therefore, should the Panel consider such things in setting what is to be the minimum price, then the Panel is exceeding its jurisdiction. Likening the minimum price of fish to the minimum wage provisions in the *Labour Standards Act*, ASP argued that this is a setting of the minimum price.

72. ASP highlighted that Meros reported that the value of Capelin is down 30% this year so far over 2023. They further noted that the prices reported from Norway were 31-33 cents per pound paid to harvesters, in a highly industrialized industry with a much larger quota than the Canadian quota. ASP argues that the reality of the Capelin market is nowhere near that argued by FFAW – the reporting and facts don't support FFAW's submission.

73. As a result of there being a 30% downturn in the price of Capelin in the international market, in the first quarter of 2024, acknowledging that the Icelandic moratorium could cause an increase in demand for larger Capelin from NL, but balancing that fact with the CFAS data showing that the Canadian biomass is comprised of smaller size Capelin than in the past, ASP proposed a roll-over of previous year's agreed-upon price.

Analysis

74. The Panel considered the parties' arguments at length. Overwhelmingly, the Panel remained cognizant that in 2023, the parties were able to negotiate a price themselves. That negotiated price is what ASP proposed should roll over into 2024. FFAW agreed that the smaller size categories should roll-over from 2023 prices, with an increase in the larger categories.
75. The basis for FFAW's proposal that the Panel increase the price from \$0.25/ lb to \$0.40 per pound was a mathematical formula, which extrapolated data from reliable information (the *Undercurrent* data concerning the price paid to Norwegian harvesters) to predict what FFAW argued should be paid to harvesters for Capelin of that size. The Panel's concerns with that calculation and the reliability of the information provided by FFAW have been expressed above.
76. The Panel agreed that, based on the fact that there was no Capelin fishery in Iceland this year, there is a potential for higher demand for larger NL Capelin than in years when there was a fishery in Iceland and Norway. Nevertheless, the data provided by DFA showed the following:
- Stock assessments indicate that NL Capelin this year will be the same or smaller than 2023;
 - Japanese buyers were aware there was a high likelihood of no fishery in Iceland in 2024 and therefore purchased more stock in 2023, such that their demand for Capelin in 2024 was low (*Meros* report);
 - The Norwegian fishery is more industrialized and fishers land at the plant, generally resulting in higher quality Capelin, for which they are generally paid a higher price than NL harvesters;
 - The Norwegian fishers received the equivalent of \$0.31-\$0.33 per pound for Capelin in 2024;
 - The price of Capelin is down 30% in the first quarter of 2024.
77. The Panel is tasked with setting the minimum price for a species. As discussed above, that minimum price is the minimum that must be paid to a harvester throughout the province. As has been discussed in previous decisions, the minimum price is the price to be paid to all harvesters. The condition in which individual harvests arrive at a processing plant depend on many factors, like the type of vessel they were caught on, how they were stored at sea, for how long, how they were offloaded and stored dockside, and how long they were transported by truck to the plant before processing. Not all harvests arrive for processing in the same condition. The minimum price set by the Panel is the price that must be paid to every harvester. The Panel will not interfere with a harvester's ability to demand a premium for better quality, or a processor's decision to pay a higher price than the minimum to harvesters it knows will deliver product directly to its plant without the necessity for trucking, for example.
78. The parties agreed in 2023 that the minimum price per pound for Grade "A" < 45 count was \$0.25 per pound. Given the parties' consent on price last year, the Panel must then consider: what has changed since last season to warrant a 60% increase in the minimum price to be paid for larger sized Capelin? The biomass has not significantly changed, and there is a potential it could be smaller. Market conditions have changed, in that there is a moratorium in Iceland, which may lead to higher demand, but the data shows a 30% decrease in the price of Capelin first quarter 2024, Japan has indicated that they have sufficient stock already purchased before the opening of the 2024 NL Capelin season,

Norway's catches were of smaller size than previous years, and the price of Capelin paid to Norwegian harvesters in 2024 was significantly lower than 2023.

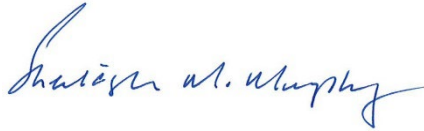
79. ASP made numerous, vociferous, and repeated arguments about what ASP feels ought to be considered by this Panel in setting the minimum price. ASP stressed the references in *FICBA* to the Panel implementing a minimum price. ASP went on to describe this as a “foundational price.” In past submissions, it has referred to a “true minimum” price. With respect, there is no reference in the *Act* to either of these terms “foundational price” or “true minimum price.” The Panel’s role is not to set an ultra-conservative price, and leave the meaningful negotiations to processors and harvesters on an individual basis. As emphasized above, the *Act* is called the *Fishing Industry Collective Bargaining Act*. The Panel’s role, as it sees it, is to receive representations from both parties, along with the market information provided by DFFA, and seek to arrive at a reasonable decision under the circumstances.
80. ASP argued that the Panel decision on pricing “...should be based on relative investment, risk and reward, rather than on historic sharing arrangements.” It is not clear to the Panel that historic sharing arrangements were not based on relative investment, risk, and reward. The Panel is aware of 19 years’ worth of its decisions wherein the Panel has made reference to matters such as sharing of the resource between these parties, and balancing risk and reward.
81. ASP further argued during the hearing that, “the *Act* says minimum price, not fair price or historic price.” At each hearing, the Panel is presented with two price offers, both involving minimum price structures. Nothing in the *Act* precludes the Panel, in selecting from these two final offers, from tying its decision to historic pricing or to what it considers to be fair pricing. Presumably, unfair pricing would not be the Panel’s goal.
82. The Panel is not persuaded by ASP’s assertions of “foundational price” and “true minimum price.” The Panel’s mandate comes from the legislation. The legislation and regulations thereunder come with defined terms. ASP argued that the true minimum price is akin to setting a minimum wage. The Panel takes note that that there are myriad factors that are considered when setting minimum wage. Having set the minimum wage, the Government regularly undertakes reviews of the legislation to ensure that the minimum wage is appropriate. (For example, in January of 2022, the Government of NL commissioned a Minimum Wage Review Committee, whose May 2022 report and non-binding recommendations were considered in updating minimum wage in the Province of NL. The current minimum wage rate adjustment process used a formula-based approach linked to the percentage increase of the annual Consumer Price Index (CPI), effective April 1 of each year, as outlined in Section 8 of the Labour Standards Act, 1990. The Committee then made non-binding recommendations to Government following a stakeholder review.) Minimum wage is the lowest hourly wage that an employer can pay employees. The minimum price per pound of fish is not an hourly wage. It is not a wage at all. It is the minimum price the processor can pay for harvested fish. Harvesters are not employees of the processors. From the Panel’s perspective, the only similarity that can be drawn is that an employer is not permitted to pay an hourly wage employee an hourly wage that is less than minimum wage. A processor is not permitted to pay a harvester an amount per pound of fish that is less than the minimum price negotiated between the parties or set by this Panel.

83. If the Panel were to carry along the ASP argument that the minimum price for fish is akin to the minimum wage, then the Panel would then have to consider factors like the cost of living, inflation and all the other things that are considered when the government sets a minimum wage. This is difficult to do when neither party provides the Panel with reliable detailed information as to their costs. Understandably, it would be difficult to provide this information, given that processors compete with each other and consider their costs and margins trade secrets, and harvesters operate multiple type types of vessels and crew arrangements for the Capelin harvest. The best evidence ASP provided was a bald assertion that the price producers pay to get a pound of Capelin to market is between \$0.95 - \$1.10 per pound. The NL export price for Capelin was reported to be \$1.17 / lb. ASP's evidence was that the "best case scenario" from producers was that for every dollar a processor was investing in Capelin, the return they saw was between \$0.05 - \$0.15 per pound. On a pound for pound basis, FFAW did not provide the cost outlay for the harvesters, whether on an individual or collective basis. This is understandable – harvesters have different sizes and types of vessels and crews and their costs can presumably be very different from enterprise to enterprise.
84. ASP's argument is that once the harvester catches the harvest, they are paid. The risk (of processing, packaging, storing, shipping, and selling the product) then remains solely with the processor. The Panel agrees with this statement, but reminds ASP that there is significant risk to harvesters in catching the harvest. Both parties have risk in this industry, albeit different risks.
85. As noted above, there were numerous arguments put forward by ASP that the Panel did not agree with. Nevertheless, the Panel's task at this hearing was to choose one of two submissions on price. Having found the FFAW presentation on price to have been problematic, particularly in not having confidence in or been persuaded by the details and calculations contained in FFAW's presentation and their explanation of the data and the calculations, the Panel was not able to accept that offer as the minimum price to be paid for Capelin in 2024.
86. The Panel, as a whole, disagreed with ASP's arguments on "true minimum price" and "foundational price," for the reasons noted above. The Panel was unable to rely on ASP's redacted affidavits, and ASP provided witnesses to support the assertions made in the affidavits, but objected to those witnesses being asked questions as to what facts and evidence supported those assertions, rendering the affidavits and the evidence of the witnesses to have been largely useless to the Panel in determining what the price of Capelin should be this year.
87. Tasked with choosing one price or the other, the Panel chose the price structure that the parties had agreed to in the previous year, 2023, in the face of evidence that shows that there may be an increase in the demand for Capelin, but only for larger Capelin if caught, in a year when the Capelin biomass is predicted to remain the same or smaller than it was in 2023, and in a year when the price of Capelin dropped 30% in the first quarter. The Panel acknowledges that this is not a perfect solution. It has chosen what it sees as a price that was accepted by both parties in the previous year in spite of the fact that the price for Norwegian Capelin is down 40% this year over last year when the price was set for this same fishery, balanced with the possibility that if larger Capelin are caught there may be an increased demand for them and a potentially higher price to be fetched.

Conclusion

88. In keeping with its mandate to set the minimum price for Capelin for 2024, and having heard and considered both parties' submissions, for the reasons above the Panel chose ASP's offer to roll over the price schedule from 2023 to 2024.

Dated at St. John's, the 9th day of August, 2024.



Sheilagh M. Murphy



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