Decision of the Standing Fish Price-Setting Panel on:

Preliminary Motion on Reasonable Apprehension of Bias

Overview of the Issue:

A hearing of the Standing Fish Price-Setting Panel, hereinafter referred to as the "Panel" was scheduled for 10:00 a.m., Friday, March 25, 2022, to hear final offers related to Snow Crab prices and conditions of sale for the 2022 fishery. At the beginning of the hearing, the Association of Seafood Producers, hereinafter referred to as "ASP", filed a preliminary motion, requesting the recusal or removal of Mr. Earle McCurdy as Panel Member of the Standing Fish Price-Setting Panel. The grounds for this motion are that Mr. McCurdy's sitting as a member of the Panel gives rise to a reasonable apprehension of bias as towards ASP. ASP further stated that in the absence of recusal or removal of Mr. McCurdy as a Panel Member, they would seek a judicial review of the matter. As a result, the Snow Crab hearing was postponed until such time as the preliminary matter could be dealt with. After consultation with legal counsel for both parties, it was decided to schedule a hearing on the preliminary matter for Tuesday, March 29, 2022.

A hearing to address the preliminary matter raised by the ASP was scheduled for 12:30 p.m. on Tuesday, March 29, 2022. The hearing was held via WebEX virtual meeting capabilities.

ASP's motion arises from Mr. McCurdy's past involvement with the Fish, Food and Allied Workers' Union, hereinafter referred to as "FFAW", which spanned approximately 21 years, Mr. McCurdy's relationship with FFAW's President and chief negotiator, Mr. Keith Sullivan, and Mr. McCurdy's recently published book, "*A Match to a Blasty Bough: How FFAW-Unifor Confronted Power and Shared the Wealth*" (the Book), which was released on October 15, 2021.

FFAW submitted their response to ASP's motion on March 28, 2022. In their response, the FFAW stated that the application by ASP constituted a collateral attack upon the appointment by the Lieutenant-Governor in-Counsel and the Independent Appointment Commission (IAC). They additionally assert that Mr. McCurdy's previous relationship with the FFAW and public comments about and during his tenue with the FFAW and those made since his appointment do not give rise to a reasonable apprehension of bias. The FFAW also point to Mr. McCurdy's experience as fitting the qualifications listed by the IAC for appointment to the Panel.

Documents and References

At the hearing the following documents were referenced and are attached to this Decision.

- Motion of the ASP for Recusal or Removal of Mr. McCurdy as Panel Member (Exhibit 1)
- Affidavit of Derek Butler (Exhibit 2)
- ASP Book of Authorities (Exhibit 3)
- Affidavit of Thomas Johnson (Exhibit 4)
- Response of the FFAW to the Motion of ASP (Exhibit 5)

Panel's Decision to Address the Motion:

The Standing Fish Price-Setting Panel is created through the *Fishing Industry Collective Bargaining Act* (FICBA) (Exhibit 1, Tab 1). Specifically, section 19.1 states the following regarding the composition of the Panel:

> **Appointment of Panel**
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> 19.1 (1) The Standing Fish Price-Setting Panel is established consisting of 3 members appointed by the Lieutenant-Governor in Council.
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> (2) The Lieutenant-Governor in Council shall appoint one of the members of the Panel as chairperson.
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> (3) A member of the Panel shall serve for a period of up to 3 years and is eligible to be reappointed.
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> (4) Where a member of the Panel resigns or, due to absence, incapacity or other cause, is unable to carry out his or her duties as a member, the Lieutenant-Governor in Council shall appoint a person in his or her place who shall serve for the remainder of the term of the member being replaced.
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> *Fishing Industry Collective Bargaining Act,* RSNL 1990, c F-18, section 19.1

The duties of the Panel are specifically listed in the Act as follows:

> **Duties of the Panel**
>
> 19.2 The duties of the Panel are
>
> (a) to facilitate access by parties to collective bargaining to market information relating to the sale of fish
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> (b) to establish criteria that are not inconsistent with this Act relating to collective bargaining under this Act
>
> (c) to provide assistance to parties engaged in collective bargaining under this Act

(d) to set prices and conditions of sale for a fish species where parties have engaged in collective bargaining and have been unable to agree or where parties have refused to engage in collective bargaining
(e) to review and report on matters related to the price and conditions of sale of a fish species that may be referred to it by the minister responsible for fisheries and aquaculture; and
(f) to make recommendations on matters falling within its mandate to the minister responsible for fisheries and aquaculture and the minister responsible for fisheries in the Government of Canada.

Fishing Industry Collective Bargaining Act, RSNL 1990, c F-18, section 19.2

The Panel is given a wide degree of discretion in terms of their procedure and powers:

Procedure of the Panel

19.4 The Panel may establish rules and procedures for the purpose of carrying out its duties under this Act.

Powers of the Panel

19.5 The Panel has all the powers that are or may be conferred on a commissioner under the Public Inquiries Act.

Fishing Industry Collective Bargaining Act, RSNL 1990, c F-18, sections 19.4 and 19.5

The decisions of the Panel are final and binding:

Privative Clause

19.9 (3) Immediately after the conclusion of the hearing referred to in subsection (2), but in any event not later than 3 days before the date set by the minister responsible of fisheries and aquaculture under section 19.01, the Panel shall decide on the matters in dispute between the parties relating to price and conditions of sale of the fish species and the decision of the Panel is final and binding on the parties and on all other processors in the province 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.

The Panel was mindful of time constraints given the requirement that it establish price and conditions of sale for Snow Crab by April 1, 2022, as directed by the minister responsible for Fisheries, Forestry and Agriculture (FICBA 19.01). The Panel also realized that a failure to address the motion could be considered a breach of its obligation to ensure procedural fairness and result in the striking down of all future price decisions where Mr. McCurdy was a member of the Panel for those decisions. Having determined that there is nothing in the Act which prohibits the hearing of such a motion, the Panel decided to hold a hearing on the motion on March 29, 2022 to hear briefs from the parties on the motion and to then decide whether there is reasonable apprehension of bias related to Mr. McCurdy's participation on the Panel.

The Process to Hear and Decide the Motion

At the start of the hearing, Mr. McCurdy was asked whether he would recuse himself from the Panel, and he indicated he would not. He was then provided the opportunity to provide disclosure on the matter through oral commentary on the motion.

The Chair of the Panel then asked Mr. McCurdy to step aside from the Panel while the motion was being heard, to ensure a fair process for addressing the motion. His doing so would not be indicative of his future role with respect to the Panel in the hearing and deciding of fish prices and conditions of sale.

The Chair was of the view that two options were available to him to hear and decide the motion. The first was to proceed with the remaining two Panel members to address the motion. The second would be to call on an alternate Panel member to restore the Panel to three members.

The Chair was cognizant of the need for an affective and timely process to address the motion which would avoid undue delay, given the impending deadline for the setting of Snow Crab prices, and therefore decided to call an Alternate Panel member, Mr. Brendan Condon, to join the Panel to participate in the hearing of the motion. While there is no legislative requirement for a balancing of Panel membership between members who have a strong harvesting sector background and those who have a strong processing sector background, it is a matter of practice that the pool of Panel members include a neutral chair, and two members with a harvesting background and two with a processing background. With Mr. McCurdy stepping aside, the remaining Panel member other than the Chair was a member with a processing background. Mr. Condon has a harvesting background, so calling him to the Panel struck a balance between the two and helped ensure a fair process.

ASP presented its brief, followed by the FFAW presenting its brief and rebuttal of ASP points. Then ASP was given the opportunity for rebuttal.

After the briefs and rebuttals were heard, Mr. McCurdy was asked whether, based on his hearing of the presentations he had reconsidered his recusing himself from the Panel for price arbitrations. He indicated he was unprepared to recuse himself. Mr. McCurdy was then given the opportunity to make final comments on the matter. After his comments, the hearing was concluded, and the Chair advised the parties that the Panel would deliberate on the motion and provide its decision on as timely basis.

Disclosure by Mr. McCurdy

A summary of Mr. McCurdy's opening statement follows:

- He had reviewed the written briefs submitted by the parties.
- He had retired from the FFAW in 2014, some 8 years ago.
- He is removed from all decision making processes of the FFAW.
- He had applied to the Independent Appointments Commission (IAC) for a position on the Standing Fish Price-Setting Panel because of his general interest in the fishery, and the importance of the Panel to the fishery.
- The IAC sent him a form to be completed, which included a competency profile and qualifications (Exhibit 4). He felt he was a good fit based on his skills and background experience. He has a lot of experience in the industry.
- The IAC also provided a conflict of interest declaration, which he completed and returned.
- His understanding is that IAC provided the names of three suitable candidates to the Minister. He heard nothing further until he was advised of an upcoming press release indicating his appointment to the Panel. His understanding is that the IAC recommends candidates, but the Lieutenant-Governor in Council (LGIC) – i.e., Cabinet, decides.
- He noted that the Panel is comprised of three members, of which he would be one, and a decision would require agreement of two or more members.
- He noted that ASP is stating that his response to a Broadcast interview question (Exhibit 2) as to whether he could see himself siding with processors when they present their price is indicative of a reasonable apprehension of bias because he didn't simply say "yes". However, he points out that his response was more balanced than that put forward by ASP, and that he referenced the hope that the Panel would continue to reach decisions on a collegial basis which has rarely resulted in a minority report position.

A summary of Mr. McCurdy's closing statement follows:

- He provided context to his writing of the Book (Exhibit 2). He cited "Politics in Newfoundland", a book published in 1971 which, amongst other issues, provides a good overview of the circumstances of the Newfoundland fishery of the time. The past 50 years have seen many very significant changes in the fishery, such as the Northern Cod moratorium. Given his journalistic past, time to dedicate to writing the book as a retiree, and his extensive background in the fishery of that period, he saw himself as a suitable author to capture this history while many of the key players are still living. His use of "we" in the Book in various references to the union was because the period covered in the book predates his role.
- He noted that the Book was released in October, 2021 and his appointment to the Panel was not announced until February, 2022.
- The ASP brief contains several pictures showing Mr. McCurdy appearing with various members of the FFAW. He noted that in one case a picture was of a meeting opposing anticipated Crab quota cuts which would have impacted both the harvesting and processing sectors. In other instances, he was involved in his capacity as leader of the NDP, such as a rally on the Last In First Out (LIFO) policy on shrimp allocations, an issue which was extremely important to all of rural Newfoundland and Labrador.
- He noted that he has the relevant background related to the IAC criteria for appointment, and he understands his obligations with respect to the expectations of Panel members.

Summary of ASP's Position

The motion of the Association of Seafood Producers (ASP) seeks the recusal of Mr. Earle McCurdy as a member of the Standing Fish Price-Setting Panel. If Mr. McCurdy refuses to recuse himself, ASP moves that the other members of the Panel find Mr. McCurdy disqualified from serving as a Panelist. The grounds of the motion are that having Mr. McCurdy sit as a member of the Panel gives rise to a reasonable apprehension of bias towards ASP and, subsequently, a denial of procedural fairness and natural justice owed by the Panel to ASP.

Upon review of the list of key issues that need to be determined on this motion, as put forward by ASP, the Panel agrees that it owes a duty of fairness to ASP. As an administrative body, it is a matter of settled law, that the Panel owes a duty of fairness to ASP.

ASP offers extensive argument and cites several cases that aim to determine what that duty of fairness entails. ASP claims that the Panel performs an 'adjudicative' function in conducting a hearing and deciding on impasses between ASP and the FFAW concerning price and conditions of sale of any given fish species. As such, Panel members should not only be free of bias (impartial) but also free of reasonable apprehension of bias.

It references Justice Cory in Newfoundland Telephone Co. vs. Newfoundland (Public Utilities Board) (Exhibit 3, Tab 2) “The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased.... An unbiased appearance is, in itself, an essential component to procedural fairness. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator. Those who adjudicate proceedings and render decisions ... must always do so without bias or prejudice (be impartial) and must be perceived to do so and be so.

As stated by the Supreme Court of Canada, each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who sit in judgement of him (them) and his (their) affairs.

ASP refers to the Supreme Court of Canada’s test for reasonable apprehension of bias, as referenced by Justice Cory in Newfoundland Telephone, noting that in Baker v. Canada (Minister of Citizenship and Immigration) (Exhibit 3, Tab 3), states, “what would an informed person, viewing the matter realistically and practically – and, having thought the matter through – conclude. Would he think that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly.”

ASP maintains that the duty of fairness applies to all administrative tribunals. The extent of duty will depend on the nature and the function of the tribunal. The standards for reasonable apprehension of bias, like other aspects of procedural fairness, vary, depending on the context and function. Justice Cory in NL Telephone referenced Committee for Justice and Liberty v. National Energy Board – Chief Justice Laskin held that the member’s prior activity in examining the feasibility of the Mackenzie pipeline raised a reasonable apprehension of bias in his assignment to a Panel considering competing applications to undertake the pipeline.

When considering the spectrum of administrative bodies, functions vary from being almost purely adjudicative to being political or policy making in nature. While statements made by members of a body may give rise to appearance of bias, they may not satisfy the test. ASP offers some discussion on the diversity of boards and suggest that those that are primarily adjudicative will be expected to comply with standards applicable to courts. The conduct of members of these boards should be such that there could be no reasonable apprehension of bias with regard to their decision. They maintain the Standing Fish Price-Setting Panel is an adjudicative board. Boards at the opposite end of the spectrum (ie. policy) would be subject to standards that are much more lenient. The question raised by this motion is “What standard of impartiality would reasonable and right minded persons, fully informed, realistically expect of Panelists?

ASP references Yorkton (City) v. Yorkton Professional Fire Fighters Association (Exhibit 3, Tab 7). The governing legislation in that case provided for matters to be referred to a three-member arbitration board, constituted by the parties each nominating an arbitrator and the nominated arbitrators to agree on a third arbitrator. This allowed for some partiality in a representative arbitrator towards the party that nominated him/her. Similarly, in the case of the Association of Allied Health Professionals v. Eastern Regional Integrated Health Authority (Exhibit 3, Tab 9), the Labour Relations Act expressly provided for 'representative' Panelists. ASP states that no such degree of impartiality is tolerated of Panelists under the Fishing Industry Collective Bargaining Act.

ASP references the powers of the Panel. It claims that the Panel has power, pursuant to Section 19.4 of the Fishing Industry Collective Bargaining Act to set its own procedures and govern its own proceedings. Section 19.4 authorizes the Panel to establish rules and procedures for carrying out of its duties. They maintain that the Act does not contain any provision that either explicitly or implicitly directs a composition of 'harvester' and 'processor' representatives as Panelists.

With respect to the question of whether Mr. McCurdy meets the standard of impartiality owed to ASP, they submit that he clearly does not meet the standard of impartiality owed by the Panel to ASP and that a reasonable apprehension of bias exists, constituting a denial of natural justice.

Consideration of whether an informed person, viewing the matter both realistically and practically, and thinking the matter through, would conclude it more likely than not that Mr. McCurdy would be impartial requires careful reflection upon both the relationship of favouritism between Mr. McCurdy and the FFAW, and the relationship of animosity between Mr. McCurdy and ASP. Additionally, they insist that a reasonable apprehension of bias may be found to exist when a decision maker's impartiality can be said to be impaired because of his personal relationship with one or more of the parties whose case is being decided or some other person who has a significant role in the case. They maintain that it is settled law that actual or reasonably perceived personal relational bias – bias arising because of a previous or existing personal relationship between a decision maker and someone involved in the proceeding, is justification for a finding of reasonable apprehension of bias.

ASP maintains that once a matter reaches a hearing stage, a greater degree of discretion is required of a member. Procedural fairness requires conduct of members so that there could be no reasonable apprehension of bias. In the present case, the relationship between Mr. McCurdy and the FFAW is a stigmatizing circumstance that is overwhelmingly connected to the matters before the Panel, sufficient to establish a reasonable apprehension of bias.

ASP believes that Mr. McCurdy fails to meet several of the criteria of the competency profile detailed by the Independent Appointments Commission for Panel members. The position calls for someone who is fair-minded, has a willingness to consider others' opinions and can keep an open mind. They believe Mr. McCurdy's history and circumstances support their apprehension of him as a person who does not meet these requirements. ASP submits that while the IAC does consider conflict of interest, there is no indication it considers reasonable apprehension of bias. ASP further states that it is not challenging the authority of the LGIC to make decisions on the appointment of Panel members, but rather the quality of the decision. The LGIC does not have the authority to appoint a person about whom there is a reasonable apprehension of bias.

ASP is of the position that they cannot reasonably expect a fair hearing. Given the past contentious relationship, the animosity and the various public campaigns against ASP members led by Mr. McCurdy, such history is not easily set aside and does not support a presumption of impartiality. ASP submits that any fair-minded, reasonable person, having considered the totality of the facts of this matter, would perceive Mr. McCurdy as someone to be apprehensive of, as being likely biased or unfairly partial towards the FFAW.

ASP submits also that the practical consequence of Mr. McCurdy failing to recuse himself from serving on the Panel will be a denial of fairness to ASP by the Panel, which constitutes an impermissible excess of jurisdiction. The net result of which would be an invalidation of any resulting decision from these proceedings and will ultimately be a rendering of any decision made by the Panel void.

Further to this, ASP believes that if Mr. McCurdy refuses to recuse himself, the remaining Panel members have the authority, conferred by Section 19.4 of the *Fishing Industry Collective Bargaining Act*, to determine that Mr. McCurdy is disqualified from serving on the Panel due to reasonable apprehension of bias. They further submit that the remaining members of the Panel can strike the Panel, so that a new one may be constituted.

The Panel is only authorized to hear the motion in a manner that affords ASP procedural fairness and natural justice. Failure to do so constitutes an excess of jurisdiction, causing any resulting decision by the Panel to be invalid and void.

Summary of FFAW Position

The FFAW denies ASP's assertion that Panelist Earle McCurdy is biased and that he must recuse himself or be removed from this Panel. The FFAW states that ASP's application constitutes a collateral attack upon the appointment by Lieutenant-Governor in-Council (and the Independent Appointment Commission) and further, that Mr. McCurdy's expertise and experience in the fishery were taken into consideration upon his appointment. Further, Mr. McCurdy's previous

relationship with the FFAW and public comments about and during his tenure with the FFAW and those made since his appointment do not give rise to a reasonable apprehension of bias requiring his recusal or removal from this Panel. ASP's application should be denied and the Price-Setting hearing should proceed without further delay.

The FFAW also took exception to the timing of the ASP application which was filed on March 25, 2022, at the outset of the scheduled 2022 Snow Crab hearing by this Panel without warning or notice, and caused an immediate postponement of the hearing so the issue could be addressed by the parties. They suggest that ASP has been working for weeks preparing its application, but declined to advise either the Panel or the parties of its intention to file same.

They state that it is disingenuous for ASP to refer in its brief, to the potential crisis that will be caused by a delay in obtaining a decision from this Panel if it is required to seek judicial review of this conflict decision, all the while having held its materials back from presentation until the last possible moment. Doing so has placed both fishers and processors in the unfortunate situation of having to endure a delay in a decision from this Panel on the merits when the start of the fishery is imminent, as opposed to having proceeded on the merits on March 25, 2022.

The FFAW points to a list of factors that a reasonable person would consider in determining a reasonable apprehension of bias. They submit that since the Panel's inception in 2006, it has always had members who have been involved with the union (harvesters) or processor side in their careers. They claim that it is important for Panel members to have backgrounds in the fishing industry and who, as stated by the Minister, are able to "bring significant knowledge, skills and experience" to the work of the Panel. They acknowledge that those who have been directly involved in collective bargaining in the fishing industry, will have, from time to time, been at loggerheads with the opposite side.

They note that the Panel has been chaired by former fish company executive and former president of the Fisheries Association of Newfoundland and Labrador, Mr. Bill Wells, and that Mr. Max Short, a founding member of the UFCW and a certified bargaining agent representing fish harvesters and plant workers has been a member of the Panel.

They offer that Mr. McCurdy has been retired for eight years, which is much longer than the 'cooling off' period required, even for judges.

They note that Earle McCurdy's long history in the union movement on behalf of fish harvesters was well known to the Minister and the Lieutenant Governor in Council and that, it can be assumed, it was that long history that caused the Minister to state publicly, that Mr. McCurdy

would bring significant knowledge, skill and experience to the Panel. They state that it is hard to fathom that anyone with a knowledge of province affairs would not be aware that Earle McCurdy was a strong advocate for fish harvesters.

In addition, they submit that Mr. McCurdy was appointed to the Panel following the merit based process of the Independent Appointments Commission. They note that while the Act does not expressly call for individuals with experience from the harvester or processor sides, it has been practice to appoint individuals with extensive experience or association with one side or the other. The IAC description of the Panel states that "while not required by legislation, the Panel members have a strong background in the harvesting or processing sector and an independent chairperson who has no association with either sector."

The FFAW notes the qualifications for the Panel as follows:

a. In depth knowledge of and experience in industry, preferably harvesting or processing
b. Labour relations experience working as an arbitrator, conciliator, human resources practitioner or on administrative tribunals
c. Ability to interpret market information related to various fisheries
d. Experience working for an employers' association or labour organization

The FFAW regards this as a clear demonstration that this is a valuable qualification and not a drawback for a Panel member to have experience working for a labour organization or employers' organization.

The FFAW submits that a reasonable person would also consider that Mr. McCurdy has not said anything about this hearing before it started. ASP's claim that Mr. McCurdy's response to the question of being able to select the ASP position on price offer and the fact that it makes future submissions futile is meritless.

The apprehension of bias must be a reasonable one held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. The test is: what would an informed person, viewing the matter realistically and practically — and having thought the matter through, conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable; and the apprehension of bias itself must also be reasonable in circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances.

The FFAW maintains that a reasonable and right-minded person would see the benefits of Mr. McCurdy's experience in the industry, as Government has in this case, that these experiences and associations are desirable qualifications for members of the Panel.

The FFAW notes that much of the purported "evidence" presented in the application and sworn to in the affidavit of Derek Butler is Mr. Butler's own argument which was part of ASP's campaign to have Mr. McCurdy's appointment rescinded. The value or relevance of what Mr. Butler thinks of Mr. McCurdy's appointment does not assist the Panel in properly considering the within issue, and should be viewed as mere advocacy.

The FFAW submits that this motion is, in essence, an application to curb and override the Lieutenant-Governor in Council's appointment of Mr. McCurdy under the guise of a procedural fairness argument. To that end, the application is wrongly made and would constitute an unauthorized use of the Panel's discretion if granted. It believes that any complaint regarding Mr. McCurdy's appointment to the Panel should be addressed with Government, and not with the Panel itself. The FFAW submits that the within application constitutes an attempt to challenge the Independent Appointment Commission process and Cabinet's discretion without having to challenge those entities directly.

The FFAW maintains that the Panel does not have the power to determine its own Panelists. It cannot appoint Panelists, it cannot renew their terms, and it cannot remove them from the Panel. These are rights strictly reserved for the Lieutenant-Governor in Council. ASP has asked the Panel to do something for which it has no authority, and has provided no legal basis to do so.

The FFAW does not agree with ASP's contention that the "Duties, functions and powers of the Panel evoke a standard of impartiality resembling that required of judges." It would serve no useful role to hold this Panel to a standard of "judicial neutrality." It would, in fact, undermine the legislature's goal of having price and conditions settled in a timely manner since it would encourage the appointment of those who had never been actively involved in the field.

In summary, the FFAW believes that ASP has not demonstrated a real likelihood or probability of bias in this matter. They request that the within application of ASP be dismissed.

Considerations

ASP has the burden of proof. They are not seeking to prove bias, but rather the reasonable apprehension of bias on a balance of probabilities; in other words is it more likely than not that Mr. McCurdy has the appearance of bias to an informed observer?

The Panel will first address other matters which were raised during the hearing of the preliminary objection. Firstly, the FFAW took exception to what, in their view was a delay on the part of ASP to table the motion, specifically that they would appear to have been working on the motion for a considerable period of time without providing notice that they intended to table the objection. The result has been to delay the Panel's consideration of final offers related to Snow Crab prices and conditions of sales. Snow Crab is currently the most valuable species harvested in Newfoundland and Labrador. ASP has countered that it was not them that was responsible for delaying the setting of crab prices, but rather Government in appointing Mr. McCurdy to the Panel. Although the timing of the motion did create time pressures in dealing with it and the setting of crab prices, the submitting of the preliminary motion was within the prerogative of the ASP.

The FFAW also submits that the motion represents a collateral attack on the authority of the LGIC to make appointments to the Panel, and that their issue with the appointment of Mr. McCurdy should have been directed for judicial consideration rather than attempting to use the Panel to do something for which it has no authority. The Panel addressed this at the outset when it decided to proceed with the hearing of the preliminary motion. The Panel was put in a difficult position in that the motion has significant implications for the setting of fish prices, which is the Panel's prime responsibility; failure to address the motion could result in a finding that the Panel failed to ensure the principles of natural justice, which would result in all decisions to which Mr. McCurdy was party becoming void. The Panel's view is that if it decided to hear the motion, that would not be a challenge to the authority of the LGIC to appoint Panel members, but would rather seek to determine whether a particular appointment gives rise to a reasonable apprehension of bias. The Panel was cognizant of its responsibility to foster orderly fisheries through the effective setting of fish prices when parties are unable to achieve collective agreements. While the FICBA does not specifically address the Panel's ability to decide such motions, the Act provides significant power to the Panel, as detailed earlier in this document, to achieve its primary responsibility – namely to set fish prices in a timely manner. Consequently, the Panel decided to proceed to hear the motion.

Procedural fairness is paramount when discussing the function of administrative boards and tribunals. Additionally, it is not enough for fairness to be achieved, but the appearance of fairness must also be considered so as to uphold the public's confidence in boards and tribunals that play an adjudicative role.

The Supreme Court of Canada decision Baker v. Canada (Minister of Citizenship & Immigration) [1999] (Exhibit 3, Tab 3) provides the test for whether a reasonable apprehension of bias can be made:

> 46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369 (S.c.c.) at page 394:
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> > *"...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... That test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."*

It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved.

Baker (Exhibit 3, Tab 3)

A reasonable apprehension of bias is separate from actual bias and is concerned with the perceptions that may reasonably be formed in the circumstance.

In Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board) the Supreme Court of Canada discussed how the structure and purpose of the particular board/ tribunal affects the standard for a reasonable apprehension of bias:

> 27 It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a

> test might undermine the very role which has been entrusted to them by the Legislature.

Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied with the role and function of the board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

> Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)

A key question to be addressed is what standard is appropriate for the Standing Fish Price-Setting Panel. The Panel is an administrative Panel responsible for facilitating collective bargaining for fish prices and conditions of sale of fish, and for deciding prices where the parties to negotiations are unable to reach an agreement. This would suggest a strong standard which is nearer that required of the judiciary. On the other hand, while the FICBA does not require that Panel members have a strong background in either the fish harvesting or fish processing sector, it has been a matter of practice that this is the case. A review of past membership of the Panel includes some individuals who have had a very strong background and role in the fishery, such as Mr. Max Short, a founding member of the union in Newfoundland and Labrador, and Mr. Bill Wells, whose past roles included President of the Fisheries Association of Newfoundland and Labrador, President of the Canadian Saltfish Corporation, and Executive Vice-President of Fishery Products International. The expectation of a high level of experience and expertise in either the fish harvesting or processing sector is also included in the qualifications for Panel members as outlined by the Independent Appointments Commission. Therefore, the standard on the degree of impartiality that should apply to the Panel appears to be between that applicable to purely administrative adjudicators and those who have much more specific interests at the policy end of the spectrum.

ASP submits that Mr. McCurdy's background in the FFAW and his lead role in the bargaining of fish prices over many years, in an adversarial relationship with fish processors, renders it virtually impossible to be impartial in his duties to the Panel. Furthermore, they contend that he has demonstrated a closed mindedness which gives rise to a reasonable apprehension of bias, as shown in his interviews related to his appointment to the Panel, notably in his non-specific

response to the question of whether he could see himself accepting the price submission of fish producers. In addition they note that he has recently published a book on the history of the FFAW in the Newfoundland and Labrador fishery, which was promoted by the FFAW and in which he refers to the union using possessive language. The FFAW brief countered that Mr. McCurdy's past is a very visible matter of public record, and that the IAC and LGIC would have certainly been aware of this when he was recommended and appointed to the Panel. They further submitted that ASP's evidence was largely focused on the experiences of Mr. Butler in his collective bargaining relationship with Mr. McCurdy, which was often adversarial in nature. Mr. McCurdy, in his statements during the hearing outlined his expectation of a collegial role on the Panel and understood his responsibilities related to his role. With respect to his book, he stated that as a former journalist and current retiree he felt he could capture the history of a very significant period in the development of the Newfoundland and Labrador fishery before the passing of the remaining key players and the resultant loss of historical perspective.

The Canadian Judicial Council's *Ethical Principles for Judges* (Exhibit 4, Tab 4) refers to a cooling off period:

> c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period", often established by local tradition at 2, 3, or 5 years …

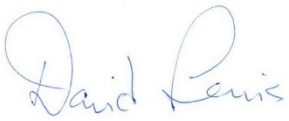
The Decision

The Panel notes that Mr. McCurdy retired from the FFAW in 2014, some 8 years ago, longer than a cooling off period often applicable to judges. The Panel also accepts Mr. McCurdy's explanations with respect to the writing of his book on the history of the FFAW. Although a more straightforward response to the Broadcast's question of his ability to support a processor price position (i.e., "yes") would have been clearer, a full reading of his response does not indicate closed mindedness. The Panel concludes that the IAC and LGIC would certainly have been aware of Mr. McCurdy's history in the fishery and fish price bargaining, and that as a matter of policy the Panels of the past and the IAC selection criteria and required qualifications of the present, value an "<u>in depth</u> knowledge of and experience in the fishing industry, preferably in the processing or harvesting sector".

Finally, using the test outlined in Baker v. Canada "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not than the decision maker, whether consciously or unconsciously, would not decide fairly"? The Panel believes such a person would acknowledge the strong personalities with extensive fisheries backgrounds that held Panel positions in the

past, and see Mr. McCurdy in a similar light. They would conclude that the experience of such persons would strengthen the ability of the Panel to achieve its responsibilities, and the possession of a strong personality does not equate with a biased individual.

ASP's motion to recuse or remove Earle McCurdy from the Standing Fish Price-Setting Panel on the basis of reasonable apprehension of bias, is rejected.



David Lewis, Chair

Bill Carter, Member

Brendan Condon, Member

Dated this 30th day of March, 2022.