

Mr. David Conway
ficbareview@gov.nl.ca

Re: Fishing Industry Collective Bargaining Act

September 9, 2022

Dear Mr. Conway,

Keeping within the limited terms of this review, I am submitting our company's views with respect to the history and current dysfunction of the price setting mechanism. As a first option, however, we are opposed to the Panel. It does not work, and it is not imposed on any other industry in our economy. That said, thank you in advance for your time and consideration of the following.

Introduction

We have lost our way since the birth of the Panel – but most do not know or do not remember why the Panel was first formed. It was a response to parties being unable to agree on crab prices, there being concern that crab and other fisheries would not take place, stemming from the crab price disputes of 1997. The Panel was always meant to get fisheries going, but the irony is that it achieves the opposite. By 2022, the Panel really has caused fisheries not to take place.

In Newfoundland, the FFAW exercises inordinate power through the Panel, as well as through DFO management functions. This has brought the processing sector in Newfoundland and Labrador to a stage of imminent collapse. While the FFAW is protected under Provincial legislation, it blames processors – who truly can't afford it – for any breakdown in negotiations. Meanwhile, fisheries in the Maritimes continue to take place, as always, based on normal negotiations between buyer and seller.

We must restore a process where minimum pricing can be negotiated in real terms, between parties. Alternatively, it should be based on full transparency and the decision of a professional arbitrator, who is independent and who has the prerogative to set a price. Minimum pricing should be intended to protect fishers – not to punish processors – and as such could serve as the basis for competition and increased value of the overall industry.

Minimum Pricing

The Task Force on Fish/Crab Price Settlement Mechanisms in the Fishing Industry Collective Bargaining Act of January, 1998 (known as the Vardy Task force) was established to review and make recommendations regarding the crab price impasse. They recommended that Government introduce modifications to the existing collective bargaining system and, at the same time, experiment with an auction system. Most industry people have a very high regard for David Vardy.

In designing a pricing model, one of the guiding principles of the Vardy Task Force was that government intervention should be minimized and responsibility should rest in the hands of the parties. That is how disputes on price and other issues are settled elsewhere in our economy, and in the fisheries throughout the world.

Newfoundland's mechanism instead increases such governmental intervention, and the Panel often establishes fish prices beyond all market reasonableness and without regard to any quality criteria or initiatives. The cost of all this is born by the processing sector, and yet we will still pay bonuses at the end of a money-losing season, because we must compete for stability of supply. The current notion of a "minimum price" is at best a red herring, and at worst a fraudulent distortion of what is actually achieved.

Competition and Outside Buyers

The Vardy Task Force recommended a price-to-market formula to reward quality, and the development of a pricing structure that recognizes and rewards high quality crab. Panel decisions, however, have not been made consistent with the legislation to establish minimum prices – which would allow processors to award better quality when the market allowed for these higher prices. This has not happened as the FFAW, despite perennial calls for "more competition", is only satisfied when all fishers are paid the same price irrespective of quality.

Vardy also recommended a controlled and closely monitored project and a full benefit-cost analysis, to be undertaken in 1998, which would allow sales to outside buyers by fish harvesters in all regions, but with limits on the amount of unprocessed crab to be exported. This would have been a good exercise, but there was no follow-up report. The FFAW wanted outside buyers, but it seems it did not want an Industrial Inquiry – which ASP would welcome (as we have repeatedly said in price negotiations).

We do not oppose outside buyers, but demand a level playing field. The FFAW would lose one of its weapons with government, which is the disingenuous (and disproven) narrative about "corporate concentration" or "lack of competition". Had the Vardy-led Task Force's recommendations been followed, we could have long-ago put this myth to bed.

The legal measuring stick is the Competition Bureau, which would surely rule that there is no corporate concentration in the NL fishing industry. Concentration occurs when the acquirer could materially influence the economic behavior of the business. An acquisition is only denied when a merger prevents or lessens, or is likely to lessen or prevent, competition substantially. The bureau will generally not challenge a merger when the post market share is less than 35%, or when the four largest firms are less than 65%.

Current Panel

Need for a different Panel was identified by Richard Cashin, past President of the fishermen's union, and the legislative framework was adopted with amendments to the Fishing Industry Collective Bargaining Act and passed in the House of Assembly in February, 2006. It was opposed by fish processors. Cashin recommended a Panel with a Chair appointed by government, but not that government appoint all three members. It is disconcerting to see these three individuals, all appointed by government, with clear political attachments.

What has evolved over the type of intervention which Vardy sought to avoid and which Cashin thought necessary has been a) a conflicted Panel, b) no consideration of a fair price, c) a disregard for the consideration of a minimum price and d) a price established by a Panel that only considers what "might" happen in the marketplace, and then insufficient rules to provide for in-season adjustment.

Governments of both stripes have done a poor job of naming individuals to the Panel, often driven by politics. The appointment of a person so conflicted as Earle McCurdy, another past president of the FFAW,

was a colossal mistake. Other appointees have often been lacking in sufficient knowledge to make decisions, with major consequences to both harvesters and processors.

History / Politics

I would rather not spend much time on the Cashin report, but its context is important. Danny Williams appointed Richard Cashin, following Richard's asking for the appointment after fishermen stormed the House of Assembly. Their opposition was to government's intent to introduce raw material sharing (RMS), which were shares for fish processors meant to level the field, as fishermen had individual quotas. This provided Cashin the opportunity to revisit issues surrounding collective bargaining, and to propose changes to how the Panel would operate in future. Cashin was a biased but clever individual. In the second paragraph of his report, he stated, "Early on I came to the conclusion that that RMS sharing was a very flawed concept in its application to the crab fishery," disregarding that Government had studied the RMS concept extensively and decided it was a good idea for many reasons (it would, indeed, serve to get fisheries going). Cashin further recommended that at such time as the processing sector would be organized, production caps become a matter for collective bargaining – a sure fire way to ensure that processors would never stably access raw material in the way that fishers and offshore quota holders do.

The Vardy Task Force had already evaluated the reason for the differences between crab prices paid in Newfoundland and elsewhere. The Task Force reported that differences in intrinsic characteristics were the major reason for the higher prices in the Maritimes and Quebec. Other studies have confirmed the same, but the FFAW chose and still chooses to not accept this reality.

The Task Force had also found that there was a greater potential for competition than before, due to several new processing licenses. The FFAW said there was a cartel. The Government of the day was misled by this and called in the Competition Bureau. Processors had joined together in a fully transparent manner to buy collectively and to distribute raw material in response to a glut of landings. Even Cashin had recommended a process for the transferring of raw material supplies, especially in times of temporary oversupply. The minimum element of such an approach would be a "glut desk" arrangement for crab.

The Competition Board raided companies' offices but found no collusion or anti-trust actions.

Single Arbitrator

Vardy recommended a single professional arbitrator, and that worked, albeit not always perfectly, until the legislative changes in 2006. To work better, what we need is full transparency as to costs of fishers and processors, and to market returns. This system already works to some extent in the halibut and lump fish fisheries, with a minimum price determined until final sales prices have been confirmed by audit. Allow the arbitrator to decide the price, rather than choosing from one of two positions. Today there is inadequate information to make a good decision, and I blame processors as much as the FFAW, but it is the three-person panel operating under final-offer selection that structurally ensures an adversarial relationship between the parties.

Industry would be better served by a professional in the field, rather than what we have had recently, people with industry bias and little or no professional expertise. A professional accountant would make the best arbitrator. However, he/she would require facts (costs from fishers and costs and revenues from processors) to arrive at a decision. The arbitrator might initially establish a price to be revisited later, with processors proving the financial ability to pay more later, if required. He/she would not be bound by the price proposals of either party.

What is fair?

A Conciliation Board chaired by Wayne Thistle was established during the crab strike of April, 1997. It endeavoured to establish a “fair” price for crab to harvesters and processors. A fair price was one where both shared in the wealth from the fishery. This is determined by considering the costs of each and then establishing a price deemed fair to all. This concept should have been pursued. The Union appointee filed a minority report, and nothing more was done.

A single arbitrator is truly the only workable path. An accountant is best. If we want him/her to make a decision, they will require more information than parties have been willing to supply under the present structure. This should be amenable to all if the information is only available to the arbitrator. Parties would be able to ask questions to the arbitrator, and he/she would provide answers without reference to specific processors or fishers.

Decision criteria for any price-setting process should also account for the levels of investment and market risk/exposure of the parties. In crab, for example, it has become accepted practice – without foundation – that harvesters get 80% or 90% of the market change paid out on raw material. This does not acknowledge respective levels of investments. It also means in short that harvesters’ gross margins are not capped, whereas processors are. This makes no sense. If we are to share the market, we should truly share the market on a sounder financial basis than the notions that have arisen – erroneously – over time.

The establishment of raw material prices in recent years has been distorted, being solely dependent on market price effects. The premises for establishing prices should, as would be customary in many business relationships, be based on risk/reward, e.g. the levels of investment and market risk/exposure of the parties. New consideration should be given to such premises, with clear guidelines established within the price arbitration mechanism.

Real Negotiations

The shortcoming of this present system is that it does not look at costs, which is necessary for a decision that considers risk and reward. Leaders must weigh important factors, both tangible and intangible, and the impact on themselves and employees before resorting to strike or lockout. Sometimes a strike or lockout is necessary to focus on our shared reality.

Our preferred path forward is to require good-faith negotiations between parties, without the ‘enabler’ of the current Panel. We should permit a return to a strike/lockout as part of collective bargaining, as it is in every other industry. Government can assist in conciliation, but not arbitration.

Moreover, fish processors must have an equal say on opening and closing dates of all fisheries, together with fishers and the FFAW. The history of the overlooked raw-material sharing proposals should be revisited in the context of the current monopoly held by the Union on recommendations for opening dates. It is processors who carry most of the financial risk and who maintain supply chains year-round, and yet we are given no say with regards to timing of raw material access (which directly impacts end-market value).

As part of establishing a base line for good faith and honesty between the parties, we would recommend the removal of all interprovincial trade barriers, which only serve to make up the straw man for the Union as demonstration of the supposed unfair way its members are treated and discriminated against. We can end these distortions by leveling the playing field.

Summary Remarks – Sections 19.1 through 19.4 of the Act

19.1 We are concerned over the composition and consequent decisions of the Standing Fish Price-Setting Panel (Panel), most especially since the appointment of Earle McCurdy, a past president of the fisherman's union. The record speaks for itself.

19.2 Duties of the Panel; It is not sufficient to collect only market information. It is equally important to collect information on costs associated with harvesting and processing. The duties as enumerated are beyond the competencies of this Panel.

19.8 Time limits for an agreement. We take issue with the Panel refusing to consider important matters referred to it, such as refusing to hear capelin price reconsideration in order to provide for a fishery to take place. This was in contravention of Article 19.3.a

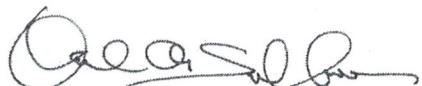
19.12 No cessation or lockout. It is commonplace for the FFAW to not fish, and to impose that will on fishers who wish to fish, regardless of a Panel decision.

More generally, this review is too narrow. The only way to get all the facts is through an Industrial Inquiry as provided for in the Labour Relations Act.

Conclusion

While Government may always differ because of the political profile of fisheries in this province, this Review should consider that the fishery be treated no differently than other industries. Let responsibility for getting fisheries going rest in the hands of the parties affected. The stakes are way too high for both parties to end up foregoing important fisheries, such as crab, due to a flawed and acrimonious process. It is not right for this mechanism to have devolved into a platform for political theatre and public campaigning, while the FFAW continues to ensure that the 20% of fishers who account for 75% of the fisheries value are held to ransom by the 75% who operate from small vessels. The current Panel, inadvertently through its basic dysfunction, is stripping our industry and Province of the greatest potential for our fisheries resources.

Sincerely,



Karl Sullivan
Vice-President, Barry Group Inc.