

September 9, 2022

Mr. Dave Conway
Independent Review Consultant
FICBA Review 2022

Via email ficbareview@gov.nl.ca

Dear Mr. Conway:

The Association of Seafood Producers is pleased to make the following submission to the FICBA review announced by Government on July 21, 2022. We acknowledge that the review is limited in scope and our input is likewise confined in similar extent.

The limited scope of the review signals that government's intent is to address the arbitration mechanism, whether by changing the composition or criteria of the Panel, or changing reconsiderations, etc. There was also some discussion that government may be interested in changes under the Act that would also serve to bring the parties closer together in their offers, or even address the limitations of FOS.

ASP would be remiss if we did not acknowledge that some feedback from Members expressed support for wholesale change, beyond the scope of this review. ASP is pleased to make this submission to advance things in this limited review, and then continue to advocate for the additional changes we might desire.

The current Panel model for arbitration was implemented as a result of the Cashin RMS review, for the start of the 2006 season. It has been in existence since then, with slight modifications. Two members of the Panel are nominally representative of the respective sectors, with the chair being independent, though this is not formally, and has been deviated from on occasion.

Over time, the parties have become increasingly critical of the Panel process. Many feel it has served its time and a new model is required. Panel decisions are increasingly criticized by the parties and other stakeholders, publicly and privately. Confidence in the Panel process and collective bargaining to provide the required solutions - negotiated or arbitrated - generally has eroded.

For example, the parties' positions have moved further apart, representing more hardline bargaining positions adopted by the FFAW (we respectfully contend; granted, they would say the reverse). While producers have chosen not to buy on some decisions, the FFAW has more frequently prevented harvesters from fishing. Capelin 2022 was an instance where the FFAW position was selected, and yet the FFAW still worked to prevent a fishery because not all companies were in a position to buy at the price selected. Spring shrimp fisheries have failed to occur in most recent years as well.

Politically, the FFAW prefers to lose to the Panel than to negotiate agreements with the ASP. This is the politics of the Union. Their price offers are increasingly more divorced from market realities than previously. In spring 2022, they acknowledged in negotiations that their shrimp spring 2021 offer of \$1.50 was 'just politics,' yet their 2022 spring offer was \$1.42. A spring fishery did not occur in either year. It was the same politics at play.

The politics of the arbitration process is evident in the number of dissents from Panel decisions that have occurred. While limited over time, only once has the 'processor' representative dissented from a Panel decision. The harvester representative has dissented 3 times, most recently in summer 2022.

Panel members have also come in for strong criticism from the parties. ASP vigorously opposed the appointment of the former FFAW president to the Panel (the FFAW acknowledged going to government to seek the dismissal of the former harvester representative, Brent Condon, to create the opening for Mr. McCurdy). The FFAW opposed the continued service of immediate past chair Wayne Follett, and the appointment of the current chair Dave Lewis. The FFAW complained about Mr. Follett repeatedly (under whose stewardship all Panel decisions were unanimous), and alleged he was in conflict at the start of 2022, which government confirmed was not the case. Mr. Follett ultimately resigned as he felt he did not have the confidence of the parties to continue. Panel decisions are also often the subject of media releases from the parties, more so on the FFAW side, but also ASP.

The above context has meant that Government has had difficulties in securing candidates to serve on the Panel. Given the schedule and public criticism the Panel comes in for, possible candidates are obviously dissuaded from serving. The required timelines are such that hearings take place on Thursdays or Fridays, with work through the weekend before decisions are issued the following Tuesday or Wednesday.

ASP respectfully submits that the arbitration process, if it is to be maintained (versus moving to traditional strike/lockout), should be changed to allow a **single professional arbitrator per arbitration**, who would be selected from a list for each arbitration. This would reduce the onus on one person or even a Panel to deal with multiple arbitrations through repeated weekends in the spring and summer. A list of single arbitrators would reduce obligations on one sole arbitrator for the whole season, or even a Panel of three who are engaged on 12 or 13 species, year after year.

A single professional arbitrator would help ‘depoliticize’ the Panel process, who serves, who represents who, etc. A single professional arbitrator would be more adept at ensuring proper hearing conduct without the politics of apprehension regarding criticism from the parties. A single arbitrator would help reduce public criticism of the arbitrator decisions.

A single professional arbitrator could be assisted by additional ‘panelists’ who advise but have no say in decisions made. A single professional arbitrator should have a CPA designation such that they can more appropriately judge financial considerations at play in the decisions made. Where not possible, a CPA could be relied on for additional expertise.

The decision criteria for the Panel should take into account 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 the respective levels of investments or market risk/exposure of the parties. 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 more sound financial basis than the notions that have arisen - erroneously - over time.

Part of this reality is harvesters are essentially given raw material, secured only at the cost of harvesting. This is a limited input cost. They are then paid every week. Producers’ costs are highly variable, as they must buy raw material from harvesters, and then process, hold, distribute and market at our cost before being paid, often up to a year or more depending on species. The consequences of this model were most dramatically illustrated in crab this year. Harvesters enjoyed their highest earnings ever, while processors lost tens of millions on the crab fishery. Both sides should make money when there is money to be made.

Consideration should also be given to some mechanisms to bring the parties closer together in offers, before arbitration decisions are made. One option could be that in instances where the final offers are made and are 5% or more than the average of the two offers, the arbitrator would send the offers back and ask the parties to negotiate again. A second set of offers could result in either the arbitrator again refusing to arbitrate, or making a decision on a non-FOS basis.

When initially created, the Panel process allowed for multiple reconsiderations. The Panel was more likely to reject requests, and the parties could then make a second or third application as circumstances merited, which the Panel could in turn accept or reject.

The government changed the process to permit one reconsideration per party per species. The Panel in that era rejected fewer reconsiderations, because the stakes were higher: most requests for reconsideration were at least granted a hearing or meeting to discuss. Since the new Panel in 2022, two reconsiderations have been rejected outright by the Panel for not

having met - in the Panel's view - the requirements under regulation. The FFAW also opposed both reconsiderations, and have opposed every reconsideration request of ASP since reconsiderations were established.

The FFAW is of the view that an additional reconsideration per party per species is required. This will principally apply to species for which there is clear market information like crab and shrimp, with defined indexes available. Species like capelin are penalized in reconsiderations by the lack of timely market information on market changes.

Additionally, indexes in crab typically move down slower than up, prejudicing ASP when it must decide to apply for a reconsideration on a declining market. The UB index this year has lagged actual market declines: the value chain and end users are typically more reluctant to lower pricing to reflect the actual market in the hopes of maintaining value on more expensive inventory. There is a lag between UB and actual market pricing in a declining market which often prevents us from pricing raw material accurately going down, placing all the market risk on producers.

This means that reconsiderations to adjust downwards place the producers at a disadvantage compared to proposals to increase the price. Some additional measures might help mitigate that disadvantage. A few ideas are proposed below:

- require the party requesting the reconsideration to state the new price they wish, and the other party can respond;
- grant all reconsideration requests a full hearing; the Panel can reserve the right to hear from the parties and still decide not to vary their initial decision;
- deny second reconsiderations. The FFAW has the option of accepting a market price formula in crab which would adjust prices based on the market. They opposed this when it existed, and succeeded in removing it. Two reconsiderations per party plus the original price could mean a new price every 3 weeks, which is in essence a market price formula (prices changed every 2 weeks). The market learned to use this against us;
- most other species/fisheries are over/finished before a second (or even first) reconsideration could be feasible;
- a second reconsideration risks destabilizing the market, with crab prices potentially changing 5 times in one season; customers would wait as they have in 2022; and/or
- grant a reconsideration only on demonstrated cases of the market changing 10 or 15% or more, *currencies excepted*.

In lieu of a second reconsideration, consideration might be given to the development of a *force majeure* clause wherein prices would change based on demonstrated financial loss under precise criteria, i.e. where the party requesting the reconsideration can show a real loss, a second and final reconsideration could be granted. Considerations must be given to what data is used, who would have access to it, and how it might be verified. It risks a full intrusion into the operations of processors.

An escrow account model could be a substitute for the above. A model could be developed to pay harvesters a portion of the minimum raw material price, with a balance paid into an escrow account until the market results are known. That would have mitigated the losses in crab this year. This could be tied to the principal selling season, and the Canadian export pricing available from Statistics Canada for that season, representing 80 or 90% of all sales.

Given the review limitations, it does not address the main issues that render collective bargaining a challenge. A more comprehensive review is required to address the host of issues and challenges not included in this more limited review:

- All raw material pricing established under FICBA is minimum pricing, i.e. processors and buyers may pay more but not less than the prices established. Pricing in recent years has increased beyond minimum pricing, evidenced by the failure to secure fisheries - often on the FFAW price offers being selected - because the prices are not in accordance with market realities. Producers are then placed in a position where they can not buy raw material at clear risk of losses, and industry loses opportunities for certain fisheries, or fisheries are delayed from optimal times for landings and quality. Renewed emphasis must be placed on minimum pricing, such that fisheries can be started in a timely manner. Getting fisheries started was the original mandate of the Price Panel.
- The premises for establishment of raw material prices have in recent years been distorted, in relation to the levels of investment and market risk/exposure of the parties. In crab, which the parties recognize covers a sizeable portion of the industry's value and returns, the notion has arisen that harvesters should receive 70, 80 or even 90% of changes in the market, i.e. if the market value of crab increases by \$1.00, \$0.90 should go to harvesters and \$0.10 to producers. Some of this stems from the 1997 Conciliation Board report (and a resulting crab market formula which priced raw material every two weeks) which referenced the first \$1.00 from the market going to producers to cover production costs, and subsequent additional market returns being shared between the parties. New consideration should be given, and clear guidelines established within the price arbitration mechanism, to ensure that price decisions take into account and are more reflective of the commensurate market risk and investments of the respective parties.
- Despite provisions in the Act against strike/lockouts, such strike/lockouts have occurred. If the Act will not be enforced, the provisions limiting strike/lockouts should be removed. The Act, practically speaking, is not an appropriate vehicle for rendering judgement on whether a party (harvester or producer) to a collective agreement should operate. These are autonomous actors who should and must make practical business decisions on if and when to operate.

- While falling within federal authority, not provincial, producers should play a larger role in when seasons are open for respective fisheries. We have sought and should receive provincial support for an equal role when DFO seeks input for fishery openings. We need some mechanism or formal meeting process that gives producers a seat at the table, so that fisheries open when producers are ready and able to buy (price disputes notwithstanding).
- The collective bargaining process is very political. We should have full mediation with facilitators working with the parties as in most professional collective bargaining, not leaving the parties to meet face to face to waste time or conduct theatrics for the sake of respective memberships.
- The FFAW calls for outside buyers and additional plant capacity, which would undermine existing operators in the province. This approach is very one-sided: it is all about allegedly forcing up raw material at the expense of plants and plant workers. There is no corresponding call to increase harvesting licenses when harvesters do not fish. ASP supports any and all measures that would ensure fish is caught when existing harvesters choose not to fish for a common property resource that would add value to the provincial economy.
- The FFAW has called on the province to address corporate consolidation. Corporate concentration has occurred because the viability of smaller operators was limited, and quotas reduced. We can not build or scale up an industry simply in response to annual quota changes. Corporate consolidation, to the extent it has happened, has strengthened the processing sector vis-à-vis the market, allowing it to extract higher market prices and provide better returns to the province. ASP's own analysis shows the harvesting side has consolidated more than the processing side.
- The FFAW has also asked the province to increase licenses to provide for more competition, and to allow in outside buyers. New licenses only reduce the work available to existing plants. The experience of 2022 shows that competition exists within the province's processing sector, to the point that companies did not close when losing money on crab even. Outside buyers would reduce work in NL; this should not be supported by the province. Many producers proceed to buy even at risk or when they otherwise might not, to secure work and maintain essential workforce capacity for future years.
- Repeated industry reports have said we require less reliance on EI and longer work seasons. The FFAW have participated in all these reports and acknowledged these goals. More licenses and outside buyers is going in the wrong direction.

ASP appreciates the opportunity to have provided this input to the FICBA review. Our key recommendations are summarized below. We look forward to any additional engagement to discuss our perspectives in the days ahead, and we are available to discuss any questions you might have.

Respectfully submitted,

Derek Butler
Executive Director

ASP Recommendations, FICBA Review 2022

1. The panel be comprised of a single professional arbitrator
2. A mechanism to bring the parties closer together on price offers be implemented
3. No second reconsiderations be granted
4. A *force majeure* clause be introduced
5. Decision criteria be developed to represent the respective levels of market risk/exposure of the parties
6. A more comprehensive review of collective bargaining and price setting be instituted
7. A more wholesome collective bargaining regime as per traditional formats be adopted, with full mediation