

**In the matter of the Fishing Industry  
Collective Bargaining Act and an  
application by the Fish, Food and Allied  
Workers requesting that the Standing  
Fish Price-Setting Panel reconsider its  
decision of April 2<sup>nd</sup>, 2013, setting price  
and conditions of sale for the species snow  
crab pursuant to Section 19.14 of the Act.**

The Panel received an application from the Fish, Food and Allied Workers dated the 10<sup>th</sup> day of April (copy attached), requesting the Panel to reconsider its decision concerning the price and conditions of sale for crab in 2013. The Panel issued its decision on crab prices for the 2013 fishery on April 2<sup>nd</sup>, 2013. The application is based on the assertion that since the Panel's decision processors: "*...offered to pay raw material prices significantly higher than ASP's final offer to the Panel.*" Since the release of the Panel's decision, the fishery has not commenced which is evidence of jeopardy to the conduct of the 2013 crab fishery. The crab processors, representing a majority of processors that process crab are represented by the Association of Seafood Producers, who received a copy of the application.

The Association of Seafood Producers responded to the applicants request by letter dated April 10<sup>th</sup>, 2013 (copy attached). The Fish, Food and Allied Workers by letter dated April 11<sup>th</sup>, 2013 (copy attached) responded to the Associations letter which provoked a further response from the producers to the Panel dated April 11<sup>th</sup>, 2013 (copy attached).

The Panel acknowledged receipt of the application on the morning of April 11<sup>th</sup>, which set in motion the time constraints specified in the Fishing Industry Collective Bargaining Regulations, 2011:

*" 3(3) a decision respecting reconsideration shall be made by the Panel within 48 hours from the time the Panel has acknowledged receipt of an application for reconsideration."*

The Panel requested that the parties meet with it severally on April 11<sup>th</sup>, to allow the Panel to explore the issues and permit the parties to amplify and expand on their written correspondence to the Panel. At the conclusion of the day it was not apparent to the Panel that the parties were capable of arriving at an agreement.

The Act is very prescriptive in outlining the conditions on which the Panel may reconsider a decision. It states clearly that the Panel "*shall only*" reconsider its decision where the "*criteria*" prescribed in the regulations "*have been met*". The only criteria set out in the regulations is to be found in 3.(1) which states in part "*...the Panel shall consider whether; market or currency factors have changed significantly from the time the Panel made its initial decision.*"

If the Panel were to reconsider its decision 3(2) of the regulations specifies that final offer selection shall be the “*only form*” of arbitration used whether one or more parties appear before the Panel.

It is clear that if the Panel were to reconsider its decision in this instance, the parties would have to submit final offers on price and the Panel would have to choose one of the two positions presented.

The facts with respect to “market or currency factors” have not changed significantly since March 28<sup>th</sup>, 2013, as required by the legislation.

The FFAW contends that the “*current tie-up is unequivocal evidence of jeopardy to the conduct of the 2013 fishery, market and currency factors notwithstanding.*” This is in contradiction to the clear language of the Act that requires the Panel to consider whether market or currency factors have changed significantly from the time the Panel made its initial decision. Section 19.14 (4) states that the Minister may make regulations:

“(a) respecting the criteria which the Panel shall consider in determining whether the conduct of the fishery to which its decision applies is in jeopardy under subsection (3).”

In effect, the regulations made under that section as noted above define jeopardy for the purposes of the Act and Regulations, which clearly requires that market or currency factors have changed significantly.

To support its argument of market change the FFAW states: “*The more optimistic market outlook implied by the most recent price offers to harvesters from ASP members and other buyers in our estimation constitutes a significant change in market factors.*” The price offer to harvesters made by crab buyers is not evidence of market price changes, in fact, the FFAW submission of March 28<sup>th</sup>, 2013 to the Panel refers to similar offers made up to the time of the hearing.

The language of the Act and the Regulations in this instance is, in the opinion of the Panel, clear. Certain criteria specified in the regulations have to be met, demonstrably they have not been met in the application before us.

If some assistance were thought to be needed in determining the intention of the legislation, it can be found in the words of the Minister responsible for the introduction of the legislation in the House of Assembly, December 14, 2010, wherein it is stated in part: “*...establishing that market and currency factors have to be changed significantly for reconsiderations to apply...*” (House of Assembly Hansard, December 14, 2010)

As set out in the Panels decision of April 2<sup>nd</sup>, 2013, having received the submissions of the parties and hearing their arguments, and with the information contained in the marketing report available to the Panel and the parties, the Panel concluded, that the position of ASP was the more reasonable in the circumstances. The Panel had the

responsibility to choose one of the two final offers presented, which price would be the minimum price for the 2013 crab fishery. The factors which influenced the Panel at that time, as set out in the decision, have not changed appreciably. There is no merit in the Panel having to make that same determination once again within the span of two weeks.

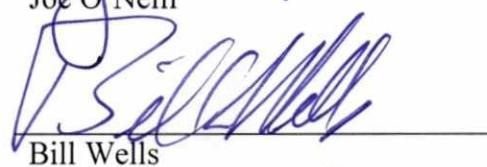
ASP in its submission to the Panel has pointed out the requirements of the Act and relied on the fact that the market and currency factors are substantially the same as they were on March 28<sup>th</sup>, 2013. It also references the fact that the minimum price set by the Panel is one that is intended to apply throughout the season for the fishery. It can only be changed on a reconsideration that meets the requirements of the Act and Regulations.

The Panel is compelled to observe the clear directives in the language of the legislation and in the regulations, and follow the clearly expressed intentions of the legislation.

The Panel is precluded by the Act and the Regulations from a reconsideration of its decision of April 2<sup>nd</sup>, 2013, by reason of the fact that the requirements to support a reconsideration have not been met.

DATED at St. John's the 12<sup>th</sup> day of April, 2013.

  
Joe O'Neill

  
Bill Wells

  
Max Short

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DAVID DECKER  
SECRETARY-TREASURER

April 10, 2013

Joe O'Neill  
Chair  
Standing Fish Price-Setting Panel  
Dept. of Justice  
Labour Relations Agency  
PO Box 8700  
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Dear Mr. O'Neill,

I am writing to request that the Panel reconsider its decision concerning prices and conditions of sale for crab in 2013. In doing so, we note that crab buyers who account for the overwhelming majority of crab purchases in the province have, subsequent to the Panel's decision, offered to pay raw material prices significantly higher than ASP's final offer to the Panel. The Panel's initial decision was premised on a market report from John Sackton predicting substantial slippage in current market prices for crab, and on ASP's final offer of \$1.83 per pound which in turn was presented on the basis of that projected in-season market price decline.

Section 19.14 (1) authorizes either of the parties to apply to the Panel to reconsider a decision respecting price and conditions of sale. S. 19.14 (2) empowers the Panel to reconsider and either confirm or vary its initial decision, and s. 19.14 (3) and (4) set out the conditions under which the Panel may reconsider its decision, and authorize the Minister to make regulations respecting reconsideration.

Section 19.14 (3) says as follows:

(3) *Notwithstanding subsection (2), the panel shall only reconsider its decision*  
*(a) where it believes the failure to do so would jeopardize the conduct of the fishery to which its decision applies; and*  
*(b) where the criteria for reconsideration prescribed in regulations made under paragraph (4)(a) have been met.*

We submit that the condition set out in (3) (a) has manifestly been met. Since the Panel's decision was released, crab vessels have remained ashore and there have been no landings of crab in the province – surely evidence of jeopardy to the conduct of the 2013 crab fishery.

With respect to (3) (b), regulation 3 (1) of Newfoundland and Labrador Regulation 5/11 says as follows:

*3 (1) In determining whether the conduct of the fishery to which its decision applies is in jeopardy under subsection 19.14 (3) of the Act, the panel shall consider whether market or currency factors have changed significantly from the time the panel made its initial decision.*

Regulation 3 (1) does not stipulate that these are the only factors to be considered by the Panel. It does not say that the Panel may vary its decision only if it finds that these factors have significantly changed. What it says is that, in making a determination as to whether failure by the Panel to vary its decision will jeopardize the conduct of the fishery, the Panel must consider whether these factors have changed. It is our contention that the current tie-up is unequivocal evidence of jeopardy to the conduct of the 2013 fishery, market and currency factors notwithstanding.

Furthermore, it is our contention that "market factors" have changed, as per the following.

In its submission to the Panel, under the heading "ASP FOS PRICE OFFER", ASP posed the question, "*What would be the right price right now on a market predicted to be between \$4.40 and \$4.60?*" and went on to propose \$1.83 (\$1.53 for <4" carapace) as the right price.

The latest Urner Barry market report that was available at the time of the Panel hearing reported a price of \$5.30 U.S. for 5-8 oz NL crab sections. If it were to continue throughout the season, this market price would support a raw material price well in excess of \$2.00 a pound. The ASP submission and Panel decision were tied to an expectation that there would be a considerable reduction in the market prices during the course of the 2013 season. As the Panel said in its April 2, 2013 decision, "*On the balance of probabilities it is more likely that the market will be no better or perhaps less rewarding in 2013.*"

**In other words, the "market factors" that the Panel considers are not primarily the existing market prices at the time of the Panel's deliberations, but the projected market prices for the upcoming season.**

Subsequent to the Panel decision, virtually all, if not all crab buyers in the province offered in individual conversations with harvesters to pay \$2.00 a pound for crab. Some offered to pay and receipt \$2.00 on a weekly basis throughout the season; others offered "\$1.83 plus 17 cents", and it was unclear in some cases whether the 17 cents would be receipted weekly or paid at the end of the season.

If \$1.83 is "the right price" at a market in the \$4.40 to \$4.60 range, the willingness of buyers to offer \$2.00 suggests that their assessment of the market is more positive than that indicated by ASP in its submission to the Panel. The regulation directs the Panel to consider whether market or currency "factors" have changed since the initial decision. The initial decision was based not on then-current market conditions, but on predictions that these prices would decline appreciably. The more optimistic market outlook implied by the most recent price offers to harvesters from ASP members and other buyers in our estimation constitutes a significant change in "market factors".

Regulation 3 (2) of NL Regulation 5/11 sets forth final offer selection as the form of arbitration to be used "...whether one or more of the parties appears before the panel respecting the reconsideration application." This implies a right for parties to appear in front of the Panel to make representations with respect to a s. 19.14 application.

We respectfully request an opportunity to appear in front of the Panel to present evidence as to the price offers that have been made by crab buyers since the Panel's initial decision on 2013 crab pricing (i.e., to document the change in "market factors"), and to make argument in favor of a final offer pursuant to this application. We propose that the Panel conduct an FOS hearing with both parties present.

We have called our negotiating committee into St. John's to finalize our final offer, and will be suggesting to ASP that we have one last crack at reaching a settlement prior to submissions to the Panel with respect to this application. This would give us an opportunity to structure a price agreement that we could build upon in future years with the objective of minimizing disruptions and divisive disputes.

We note that whatever price schedule ensues from negotiations and/or a Panel decision pursuant to this application, ASP retains the rights set forth in s. 19.14, should circumstances change as the season progresses.

We recognize the tight time lines under which the Panel is compelled by the Act and the Regulations to operate, and would be available at short notice to discuss procedural issues and appear before the Panel.

Yours truly,



Earle McCurdy  
President  
FFAW/CAW

10 April 2013

Standing Fish Price Setting Panel  
c/o Mr. Joe O'Neill, Chair  
3rd floor, Beothuck Building  
20 Crosbie Place  
P.O. Box 8700  
St. John's, NL A1B 4J6

Dear Panel Members:

On behalf of Member-Snow Crab Producers of ASP, I write in response to the FFAW reconsideration request related to crab prices 2013 dated today, April 10, 2013.

The position of ASP is that the reconsideration request should be denied on its face as not meeting the criteria that clearly prescribes the panel's powers in this regard, confirmed at the conclusion of the panel's own decision on a mackerel reconsideration dated November 8, 2012. In that decision, the Panel wrote:

"The first issue before the Panel is whether or not it should reconsider its earlier decision and if a failure to do so would jeopardize the conduct of the fishery going forward. As well the conduct of the fishery may only be considered to be in jeopardy when market and currency factors have changed significantly."

The Fishing Industry Collective Bargaining Act in section 19.14 (3) (a) reads " the panel shall only reconsider its decision (a) where it believes the failure to do so would jeopardize the conduct of the fishery to which its decision applies." That is the first and clear criteria.

The legislation also reads in section 19.14 (3) (b) that the panel shall only reconsider its decision "where the criteria for reconsideration prescribed in regulations made under paragraph (4) (a) have been met. Paragraph (4) (a) of that section says the minister may make regulations "respecting the criteria which the panel shall consider in determining whether the conduct of the fishery to which its decision applies is in jeopardy...."

The Newfoundland and Labrador regulation 5/11 dated January 13, 2011 set by the minister reads as follows, in section 3 (1): "In determining whether the conduct of the fishery to which its decision applies is in jeopardy under subsection 19.14 (3) of the Act, the panel shall consider whether market and currency factors have changed significantly from the time the panel made its initial decision."

Clearly, the determination of jeopardy related to the conduct of the fishery is prescribed as being significant market or currency change. That is how jeopardy is defined. It is not defined as being the contentions of the parties, or refusal to fish or buy. That is precisely what the legislation precludes, by definition. The legislation sets the basis of reconsideration to be significant market or currency change, not negotiations between buyers (producers) and sellers (harvesters). Again, as the Panel said in its reconsideration decision mackerel last year, "...the right to apply for a reconsideration of prices to harvesters is set out in the legislation in contemplation of a significant change in market returns."

The exchange rate has changed related to the Japanese yen which is now trading at 99 yen to the US dollar vis-à-vis the 96 reference at the time of the crab hearing. In addition, the US currency exchange rate has changed negatively since the crab hearing. Whatever market returns would be today, they have been negatively impacted by the exchange rates.

Furthermore, the allegations of the FFAW related to price and wharf talk are the same allegations made in their March 28, 2013 submission to the panel. Nothing has changed over the past week. It signifies nothing in respective of an alleged market improvement. The FFAW rejected the panel's decision and advised its members not to fish. That position remains the same today, and is no basis for a reconsideration.

Finally, regarding the FFAW request to meet again, the ASP bargaining committee met Saturday past with no change in the FFAW position. The chief negotiators met again on Monday morning, and confirmed their positions were unchanged. Meeting again to confirm status quo positions is of no avail.

ASP respectfully requests that in keeping with the legislative and regulatory provisions defining the basis for reconsideration - as confirmed in the Panel mackerel decision last year - that the FFAW request be denied. In the absence of any new market information, no hearing should be granted. We would be available to meet with the panel should you wish, at your convenience.

Sincerest regards,



Derek Butler  
Executive Director

**FISH, FOOD AND  
ALLIED WORKERS**

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DAVID DECKER  
SECRETARY-TREASURER

April 11, 2013

Joe O'Neill  
Chair  
Standing Fish Price-Setting Panel  
Dept. of Justice  
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PO Box 8700  
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Dear Mr. O'Neill:

This is in response to yesterday's letter to you from ASP regarding our request for reconsideration of the Panel's decision regarding crab pricing in 2013.

In our view this raises a critical issue of fairness under the Panel process. The approach ASP proposes suggests that the Panel should narrowly interpret s. 19.14 so as to effectively ensure that it is of benefit to processors only.

The Panel's decision was based on a projection that market prices would decline; otherwise the minimum price would have been considerably higher, as the current market would support raw material prices substantially higher than either of the final offers to the Panel. But ASP's argument is that if those projected declines do not occur, the Union has no recourse on behalf of its members via s. 19.14, even though the projection of the decline was the basis for setting raw material prices lower than the current prices could support. This argument has significance beyond this particular matter; it goes to the fairness of the reconsideration process in relation to the overall price-setting process, and potentially sets a precedent for future matters before the Panel.

ASP can't have it both ways. If the Panel accepts that it is limited with respect to reconsideration applications to the extent that ASP suggests, then it is our contention that the only reasonable way for the Panel to make initial decisions in future is based on actual market conditions in effect at the time of the decision. It is clear under the legislation that the bargaining agent for the processors could then apply for reconsideration at such time as there is an actual decline in market prices. This is precisely what happened in the case of mackerel in 2012. At least that way, harvesters could realize the benefits of higher prices for whatever period of time they remain in effect.

To put it another way, **if reconsideration can only be entertained in the event of actual market decline, then initial decisions should be based solely on actual market conditions, with the parties having access to the reconsideration process in the event of actual market changes.**

It is interesting to note that ASP cited the Panel's 2012 mackerel reconsideration at some length. We would be quite satisfied to have the Panel adopt on a consistent basis the approach it took in 2012 with respect to mackerel - make its initial price decision on the basis of the existing market conditions at the time of the initial hearing, then adjust as necessary via the reconsideration process should market conditions subsequently change. If the Panel chooses to make decisions on the strength of projected market declines that may or may not happen, it is our view that this carries with it a responsibility to apply the broadest possible interpretation of s. 19.14 to ensure that the Panel's application of this provision is consistent with the basis of the initial decisions, and that the reconsideration process is available to both parties.

Since ASP has raised the issue of the 2012 mackerel decision, I urge the Panel to re-read both its initial decision and its amended decision for mackerel for 2012. In its initial decision, the Panel said: "The Panel also acknowledges that it does not know if, or by how much the price may drop in 2012." When a significant drop actually did occur, the Panel granted ASP relief from the initial decision through the reconsideration process. The 2012 mackerel process is a potential blueprint for future negotiations for all species, particularly if the Panel accepts the interpretation of s. 19.14 put forward by ASP.

ASP has argued in the past that because these are minimum prices, bonus payments could pick up the slack if actual market conditions exceed the projections. The problem with this approach is that bonus payments are paid out very unevenly, if at all, with some license holders getting little or nothing. The objective of the Panel process should surely be to establish raw material prices that are applicable to all sales of the species in question and fairly share the returns from the market between the primary producer and the processor.

Yours truly,



Earle McCurdy  
President

11 April 2013

Standing Fish Price Setting Panel  
c/o Mr. Joe O'Neill, Chair  
3rd floor, Beothuck Building  
20 Crosbie Place  
P.O. Box 8700  
St. John's, NL A1B 4J6

Dear Panel Members:

We write in response to the FFAW/CAW letter of April 11, 2013 and their request for a reconsideration of snow crab pricing for 2013.

The FFAW/CAW contentions are wrong in both fact and interpretation.

First, prices set by the collective bargaining are minimum prices.

Second, the issue is not now on what basis the panel made its initial price arbitration decision, or what the basis of that decision should or might have been. The parties met over the course of two days for negotiations, made four offers/counteroffers each based on the reports and their negotiating committees' positions, and in the absence of agreement, submitted their fourth and final offers to the panel. The panel is of course mandated to pick one, and did so.

Under legislation, the parties have one chance per specie to seek a reconsideration under the rules and criteria in legislation. We addressed that in our letter of yesterday. An examination of the House of Assembly Hansard for December 14, 2010 when the legislation was proposed confirms what we said. The then-Minister Responsible for the Labour Relations Agency said:

Mr. Speaker, another key element is the streamlining of the appeals process - in this case, it is called the reconsiderations - by permitting the minister, through regulation, to establish four rules surrounding these applications. The four rules include:

- (1) requiring the use of final offer selection;
- (2) requiring that decisions be made within forty-eight hours;
- (3) establishing that market and currency factors have to have changed significantly for reconsiderations to apply; and,
- (4) allowing the parties to individually file a reconsideration application only once a year per species.

The former Minister responsible for the Labour Relations Agency was also clear, and shows the legislative intent to match the clear wording of the Act:

There is a new regulation making authority for the Minister of Fisheries and Aquaculture that will support a more efficient reconsideration process. Mr. Speaker, reconsideration should be a very last resort. It is not an opportunity to go back and say: I did not like the price, can we set another one? It is not about that. It is about looking at the situation itself. Therefore, the panel is going to have to make some decision around whether or not the conduct of the fishery is in jeopardy. In addition to that, it is going to have to look and say: Are there significant changes within the currency? Are there significant changes in terms of the international markets and so on?

Third, the legislation and regulations on reconsiderations does not effectively ensure reconsideration are only to the benefit of processors. Significant market and currency changes could result in some years in the FFAW/CAW seeking reconsideration to increase prices. What is prevented is someone saying 'I do not accept this price, therefore seek a reconsideration.' That is prevented in intent and language.

Fourth, to accept the FFAW/CAW representation would actually be prejudicial to settling prices in the interest of either party. We are all attempting to set a seasonal price. If the FFAW/CAW view prevails, then the price would always be set high when there is no volume or sales, and producers would be prejudiced with only a single change to adjust the price for the reality of the actual in-season adjustments, even though the market could adjust repeatedly – down usually, though sometimes up – through the season. In the FFAW model, we would need access to the panel repeatedly – as would the FFAW – to make all the necessary in-season adjustments as markets and currency change.

Finally, ASP does not want it both ways. We are all working to set a minimum price that works for the season, such that even reconsiderations would be limited. But when market and currency changes are significant, once per season per bargaining agent, a reconsideration can be sought. We are not there a mere 8 days after the panel's price decision, before most people start fishing, before NL crab is available in the market.

The only reason the fishery has not proceeded is because the FFAW continues to seek a higher price for crab even though there is no market or currency basis to support its position, as the panel said in its decision April 2, 2013. As evidenced by the clear analysis provided by market consultant John Sackton concerning last year and this, the market returns will be less than 2012.

Respectfully submitted,



Derek Butler

Executive Director