

## **STANDING FISH PRICE-SETTING PANEL LOBSTER FISHERY 2018**

The Standing Fish Price-Setting Panel, hereinafter referred to as "the Panel", issued its Schedule of Hearings for 2018, on March 1, 2018. Pursuant to Section 19 of the Fishing Industry Collective Bargaining Act, hereinafter referred to as "the Act", the Panel set Thursday, April 5, 2018, as the date by which collective agreement(s) binding on all processors in the province that process Lobster must be in effect.

The Panel also noted at that time, that it had been advised by the Department of Fisheries and Land Resources that the Seafood Processors of Newfoundland and Labrador Inc., hereinafter referred to as "SPONL", represents processors that purchase the majority percentage of the species Lobster. As a result, under Section 19(11) of the Act, should a hearing be required for Lobster, the parties appearing before the Panel would be the Fish, Food and Allied Workers Union, hereinafter referred to as the "FFAW", and "SPONL".

Section 19.11(1) of the Act, and regulations made pursuant there to; require that the decision of the Panel must be in accordance with one of the positions on price and conditions of sale submitted to the Panel by the parties at the hearing. The Panel further advised, that no other positions would be accepted by the Panel and should other representatives of this species wish to attend the hearing, concurrence from both parties to collective bargaining must be obtained.

The hearing for Lobster, if required, was scheduled to take place at 10:00 a.m. on Friday, April 6, 2017 at the Ramada Hotel, 102 Kenmount Road, St. John's. Based upon a later request of both parties, the Panel agreed to extend the hearing date for Lobster and the hearing, if required, was re-scheduled to take place at 10:00 am on Friday, April 13, 2017.

The Panel convened the hearing for the species Lobster at 10:00 a.m. on Friday, April 13, 2017, at the Ramada Hotel, St. John's. The parties appearing before the Panel were the FFAW and SPONL. The parties having previously exchanged written submissions, copies attached, supported their positions in argument and rebuttal.

The Panel and the parties had the benefit of two market reports prepared for the Department of Fisheries and Land Resources. The market reports included the Lobster Outlook 2018 delivered by John Sackton of New Brunswick, March 20-22, 2018, hereinafter referred to as "Sackton", as well as the Urner Barry Lobster Insider's Report, February 2018, hereinafter referred to as "Urner Barry". Market research was also conducted by the Department of Fisheries and Land Resources, which included a number of recently published articles for the species Lobster by various analysts and market agencies. All reports provided detailed information as to the current market situation, supply and demand, competitive forces and

economic factors that could influence the market and Lobster prices for the duration of the year.

In their written submissions, the parties did not comment extensively on the market outlook for 2018, but generally agreed that the period of high prices seen in the last two years continues. However, it is uncertain whether the prices in 2018 will be slightly above or below the record high prices of 2017. The market reports suggest that market demand in Europe and China for Lobster continues to grow while noting this is the first full year of the Canada/EU CETA agreement and the removal of an 8% tariff. Sackton also notes that *"although the whole cook market is weak, China demand is not slowing"*. He states in respect of China *"Canadian exports of live Lobster and frozen increased"*. The reports indicate that the market for whole cooked Lobster has weakened, Lobster tail prices are up, and prices for meat have recovered. Urner Barry price reports indicate that the prices for live Lobster remain very high with prices in January and February, 2018, being higher than last year.

The focus of the hearing and both submissions was whether or not to implement a major amendment to the Lobster price setting formula. The existing formula, with prices derived by the use of Urner Barry price listings, has been the basis for setting the price to harvesters for the past seven years. Both parties are in agreement that the system is not ideal and past attempts have been made, without success, to agree on an alternative approach. The issues have been reviewed and reported on by the Panel extensively in its previous decisions.

SPONL put forward a proposal that the Lobster price setting formula in 2018 be based on actual market prices obtained by Newfoundland buyers/processors rather than the Urner Barry index. They point to a recent study which was commissioned by SPONL and completed by the public accounting firm Quinlan and Taylor. It identified a significant gap between actual market prices and Urner Barry prices applied to the formula in 2017 and 2018. This price gap varied greatly week by week. On an average annual basis, had actual market prices been used, the prices to fish harvesters under the formula would have been 15.4% and 13.9% less in 2017 and 2016, respectively. This resulted in higher payments to fish harvesters of \$6.9 million and \$5.0 million, respectively, in 2017 and 2016. SPONL's position is that these payments are excessive and created financial hardship for buyers and processors. They propose that all other aspects of the formula (i.e. percentage sharing at different price levels) remain the same in 2018 but the actual market prices realized by buyers/processors be used rather than the Urner Barry prices (less the \$0.15). SPONL contends they were forced to unilaterally commission the Quinlan and Taylor study since the FFAW placed excessive demands and pre-conditions on their participation in it.



The FFAW position is that the 2017 price schedule should remain intact for the 2018 season. It takes the position that the percentages in the sharing formula were based upon the use of the Urner Barry index and past attempts to get a fair price for harvesters in line with other provinces. They also believe the existing formula partially accounts for the gap in Urner Barry versus actual prices. Any move to change to actual prices should involve the negotiation of other changes in the formula. The result otherwise is quite punitive to fish harvesters with them obtaining significantly less for Lobster than fishers in other provinces. It will result in a windfall to buyers/processors. The FFAW contend that an offer was made in 2017 to work toward a new pricing arrangement and to participate in the Quinlan and Taylor study. However, SPONL broke off talks in the fall and there wasn't adequate process to enable a negotiation of a new system. They also point to the fact Quinlan and Taylor did not audit the pricing information provided by those participating in the study or examine the actual 2016 and 2017 sales receipts.

The positions of the parties are far apart. While the Panel is persuaded that the existing formula may result in tight margins for buyers/processors, the proposal by SPONL calls for a significant unilateral change in the pricing formula. Based upon the Quinlan and Taylor analysis the two proposals could mean a difference in price to fisher harvesters in the range of \$0.80 to \$1.10 per pound depending upon where 2018 market prices settle out. In making its decision, the Panel is aware that there was no real negotiation between the parties on the wording of the changes and there is an apparent lack of trust between the parties. This places the accountability on the Panel to ensure the proposed schedule is technically sound and will work effectively if implemented. The burden is on SPONL to convince the Panel of the legitimacy and veracity of its proposed schedule.

In making its decision, the Panel considered three main questions;

1. Was the process adequate and appropriate in the circumstances?
2. Are the legal and technical aspects of the new formula administratively sound and adequately justified?
3. Does the proposed new formula result in fair sharing of returns from the end market?

In respect of process, the Panel is of the view that no one party can thwart attempts to achieve change by refusing to participate or making unreasonable demands as a precursor to its participation in the change process. In this case, we see initial attempts by both parties to work toward the assessment of a market based pricing system. We are encouraged by that initial effort. However, that cooperation ceased to exist in the fall of 2017. We feel responsibility for this is shared by both parties. On the one hand, we feel the FFAW pre-conditions in order to participate in a study were excessive. On the other hand, it appears SPONL did not counter the FFAW demands before it proceeded with its own study. It also failed to keep the FFAW

apprised of future developments with the study and its findings until the eve of the formal negotiations. This left little time for discussion and analysis.

The Quinlan and Taylor study appears to have followed a sound analytical methodology and results in a very informative report. However, there was no provision for or audit of the pricing information provided by the buyers/processors. In its report, Quinlan and Taylor indicate "the report.... was not subject to any audit or review procedures and therefore we do not express an audit opinion on the information provided". Quinlan and Taylor also state "since the completion of the report we have received sworn affidavits (in the format attached) from the twelve participants in the sales analysis confirming that the sales information provided was complete and accurate". It is worth noting that the affidavits were completed after the report was finished and therefore would not have influenced the behavior of those preparing the information at the time it was submitted.

The lack of attestation as to the accuracy of the report makes it difficult for the Panel to fully rely on the study findings. This is important in that the study is not only the basis of claim that the system is failing processors, but the findings of the report are also built into the proposed formula going forward (i.e. should a Group A processor fail to report sales information, the price gap identified by the report is to be used to adjust Urner Barry prices in calculating prices to harvesters).

In respect of the legal and technical aspects of the new formula, the Panel is encouraged that under the proposal, the calculation of actual market prices would be based upon actual receipts and be subject to audit. The price calculation would also be performed by an independent accounting firm. However, the proposal contains no definition as to what being subject to audit will mean in practice. There are no plans for any ongoing systematic audit process or any indication of what would trigger an audit. There is also no basis for harvesters to request an audit should they suspect irregularities. Defined audit provisions are essential in quality assurance and to build trust in the pricing system.

The proposed market based system is totally reliant on processors to fully report sales information on a timely and accurate basis. However, the proposed schedule does not contain any penalties should they not comply in season or if irregularities are found after an audit. This weakens the efficacy of the reporting provisions. As well, the reporting of market prices is to be based primarily on the reporting from five processors contained in Group A. However, there is no rationale presented as to why these processors are representative of the full population of processors in terms of the percentage of coverage of total sales or product mix. The Panel has no basis for agreeing that these five processors are representative. As well, the proposed schedule recommends that should any of the Group A processors not adhere to the reporting provisions, the pricing would revert to the Urner Barry prices but with a \$0.96 reduction in



place of the \$0.15 reduction in the 2017 schedule. This option guarantees that the unaudited findings of the 2017 study are locked into pricing. Also, there may never be a reporting of 2018 actual market prices (which are subject to audit). This would result in a lack of data to support a market based pricing schedule for 2019 and beyond. As a final comment on the veracity of the proposed schedule, the Panel notes that the SPONL submission contains only an earlier draft of the proposed 2018 schedule which does not align with some aspects of the written proposal. The absence of final wording of the proposed 2018 schedule adds considerable uncertainty to the interpretation of the proposed schedule and potential outcomes.

In respect of sharing, SPONL makes the case that buyers/processors should receive the full benefit of changing from the use of the Urner Barry index to actual markets prices. The Panel could entertain the possibility that sharing has tilted in harvesters' favor in recent years and in a period of high prices. However, other than a passing reference to buyers/processors having a poor year in 2017, there is no analysis to support the claim that the full adjustment of moving to market prices should accrue to buyers/processors.

In their submission, the FFAW make the claim that the 2017 and earlier sharing formulas were developed based upon Urner Barry to allow wharf prices to fluctuate with seasonal changes in the market prices. This was an index approach against a base price that evolved over time. They presented an analysis which indicates that should the SPONL proposal be implemented; the disparity between Newfoundland wharf prices and those in the Maritimes would grow significantly. They purport that Newfoundland fish harvesters will be paid \$1.20 to \$1.40 less per pound than fish harvesters in the rest of Atlantic Canada. Such a significant gap was not challenged or justified by SPONL.

The Panel is encouraged by the efforts taken by SPONL to develop a pricing regime based upon actual market prices. However, as outlined above, we are not convinced enough has been done to support a decision by the Panel to implement a unilateral redesign of the current pricing regime. In light of this and following a review of the market reports and the submissions of the parties, it is the decision of the Panel to accept the final offer of the FFAW and a rollover of the 2017 schedule for Lobster pricing.

This decision will be binding on all processors that purchase the species Lobster.

Dated the 17<sup>th</sup> day of April, 2018.



Wayne Follett



Rosalind Walsh



Bill Carter