IN THE MATTER OF:
The Fishing Industry Collective Bargaining Act, RSNL 1990 c F-18 *("FICBA)*

And

IN THE MATTER OF:
An Arbitration Concerning a Dispute between the Parties in respect of a Collective Agreement executed by the Parties on September 17, 2020

BETWEEN

ASSOCIATION OF SEAFOOD PRODUCERS INC. **GRIEVOR**

AND

FISH, FOOD AND ALLIED WORKERS UNION (FFAW/UNIFOR) **RESPONDENT**

Appearing for the Grievor:	Stephen F. Penney G. John Samms
Appearing for the Respondent:	Kyle Rees Duncan Wallace
Dates of Hearing:	January 22 & 24, 2024

INTRODUCTION

The Association of Seafood Producers Inc. ("ASP") and the Fish, Food and Allied Workers Union (FFAW/Unifor) ("FFAW") are parties to a Master Collective Agreement ("MCA") signed on September 17, 2020. The agreement remains in force.

The FFAW is the certified bargaining agent for fish harvesters, independent self-employed fishers. The ASP is the accredited bargaining agent for processors, independent companies which buy fish from harvesters, process it, and sell it. The MCA regulates "the first-hand sale of fish... and the conditions under which it is sold". (Article 1.01) The MCA collective bargaining regime is also subject to the *Fisheries Industry Collective Bargaining Act,* RSNL 1990 c.F-18 ("FICBA"), of which more later.

As of April 10, 2023, the commencement date of the snow crab fishing season, the harvesters who fish for crab tied up their boats and did not fish until May 20.

The ASP says that this tie-up by fishers was contrary to the MCA and that the FFAW breached the MCA by declaring and/or authorizing the tie-up. It seeks damages on behalf of its members. A grievance was filed with the FFAW on June 15, 2023, and this arbitration followed. On October 23 I filed a decision concerning a jurisdictional aspect of the grievance. (The "jurisdiction decision") This present decision addresses whether, in the circumstances of the tie-up, the FFAW breached the collective agreement. Should a breach be established, a subsequent hearing will address the entitlement to, and quantum of any damages suffered by the members of ASP.

As noted, the crab fishery was scheduled to start on April 10 and was to run until August 31. The fishery did not start until May 20, almost six weeks after the scheduled start of the season. However, by the end of the season, over 95% of the permitted quota had in fact been landed and processed.

The history of the fishing industry in Newfoundland and Labrador could not be described as that of a tranquil sea, the gentle sounds of the waves accompanied by harmonious chords from the blended voices of the participants. Regrettably and unfortunately for the

province and its residents, that history shows long-standing animosity – including episodes of violence – not only between but also among the representatives of the diverse interests. Specifically speaking of the relationship between harvesters (fishers) and processors, FFAW president Greg Pretty put it this way on April 6, 2023 – "... they (the harvesters) gave up kissing the processors' ass 50 years ago". He went on to say in par.14 of his affidavit that "The FFAW inshore membership is fractious and opinionated".

Over the years, the government of the province has made various attempts to ensure that the critical resource represented by the fisheries of the province is prosecuted in a responsible, productive and, importantly, timely manner. Accordingly, the government has passed legislation which attempts to anticipate and avoid issues which could delay or conceivably cancel fishing activity for a season. The current legislation set out in FICBA establishes a framework for the determination of the terms and conditions under which harvesters and processors will sell and buy fish. I will continue this discussion below.

ISSUES

The primary question is whether or not the FFAW acted contrary to s.19.13 of FICBA – In the jurisdiction decision, I found that this provision had been incorporated into the collective agreement.

> s. 19.13 (1) A fisher shall not engage in a cessation of business dealings and a bargaining agent representing the fisher shall not take a vote as to cessation of business dealings between fishers and processors or authorize or participate in taking a vote or declare or authorize a cessation by that fisher.
>
> (2) A processor or a processors' organization shall not lock out a fisher.

While this decision will discuss whether or not there was in fact a cessation of business contrary to FICBA and the collective agreement, the primary question for determination is whether or not the FFAW declared or authorized a cessation of business within the meaning of and contrary to s. 19.13. A cessation of business is an act of fishers, not of

the union. The prohibition against a declaration or authorization of a cessation of business is directed to the bargaining agent, here the FFAW. Determination of these questions requires interpretation of a number of words or phrases, which interpretation must be in accordance with the accepted principles of statutory and contractual interpretation. The facts must then be assessed in light of such interpretations.

I am grateful to the parties for providing comprehensive affidavits setting out the relevant facts. Each deponent was subject to cross examination but overall, there is little if any dispute on the facts. How those facts are properly characterized is of course another matter.

STATUTORY STRUCTURE

FICBA was introduced in 1971 and gave the fishers, for the first time, a right to bargain collectively. The statute has been subject to a number of amendments. The current version of FICBA was introduced in 2006.

In the jurisdiction decision, I said, at page 3:

> ... I believe it is fair to say that the central feature of FICBA - and that which gives it its unique quality - is the establishment of the "Standing Fish Price - Setting Panel", an independent three person panel which, should a bargaining agent and a processors' organization fail, by a set date, to agree on a price for a particular species of fish for a fishing season, is required to establish a price through final offer selection.
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> It is clear from the Hansard references during the second reading of FICBA amendments in February 2006 that the government considered it essential "to ensure a timely start to the most critical fisheries of this province". (Hansard, February 23, 2006, p. 22 - tab 7 of the FFAW authorities)
>
> Two extracts from the speeches of the responsible minister illustrate the concern:

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Mr. Speaker, I take one quote. You can take a lot of quotes from Mr. Cashin's report, but there is one I guess that sticks out, especially when it comes to collective bargaining. I will quote: "...a system that does not force timely settlements to enable early starts to the season is a recipe for disaster for the rural economy" - of Newfoundland and Labrador...[1]

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Mr. Speaker, the one that stands out and the one that is newest and is getting the most attention is the Panel... The panel I will leave until last, Mr. Speaker, but basically there are six other specific ones that we will try to just touch on, and I am sure we have some more discussion here today.

One is, of course, that the grievance arbitration process will be improved.

Number two, the right to strike or lockout has been replaced with binding arbitration. Fines and penalties have been increased to deal with organized work stoppages. Mr. Speaker, these are brought into line now with the *Labour Relations Act*, the same type of penalties...

The Panel, as I said earlier, is the most significant part of this amendment. It is new, it is something Mr. Cashin had recommended, Mr. Speaker. I will just briefly go down some of the points of the Fish Price-Setting Panel. The Panel will provide the basis for a timely start for the fishery each year. However, the panel will not take away from the ability of the parties to negotiate their own collective agreements. I think that is very important, Mr. Speaker. The key to the panel's mandate is to act as an arbitration panel and

[1] Report of the Chairman RMS Review Committee, Richard Cashin, November 2005

to set fish prices as well as conditions of sale. This is only when - and I repeat again, this is only when - the parties involved in negotiations are unwilling or unable to agree; this panel will make final and binding decisions. Now, Mr. Speaker, that is something that I guess, in the whole essence of this whole debate, is about a decision that is final and binding, that, in fact, leads us to a start-up of the season on time. This will guarantee that the binding collective agreements will be in place no later than three days before the normal scheduled opening date of the fishery.

In a later comment, the Minister of Fisheries referred to the collective thrust of the proposed legislation:

Page 31 MR. RIDEOUT: Can we guarantee that the fishery will stay started once it starts? No. Mr. Speaker, we cannot guarantee it. I said before, I said yesterday, and I say again, we cannot force an individual harvester to harvest. We cannot do it. What we can force is an organized circumvention of the act that, in every other way, amounts to a strike. We can do that.

Can I force a processor in this Province to process fish? No, I cannot, but the Legislature can provide a framework that will make sure that a significant number of processors, in concert, acting together, do not stop processing. That is what this framework, Mr. Speaker, at the end of the day, is all about.

Page 32 I guess, Mr. Speaker, in closing, I would like to say this: We cannot continue to have a situation in our Province where the most important industry to the largest number of people can be highjacked, for

> whatever reason - good, bad, or indifferent, but can be highjacked - for weeks on end, maybe months on end. We cannot have that situation continue, Mr. Speaker.

The clear intention of FICBA is to ensure that there are no 'price disputes' that would "hijack" the fishery in question. Thus, FICBA provides that in the event that the parties cannot reach an agreement on price, that price will be determined, before the commencement of the season in question, by an independent panel and will be considered to be a term of the collective agreement between the parties. In other words, the primary term or condition of the collective agreement governing the seller-buyer relationship – the price of the product – will not be left undecided. Before the commencement of the season, that term will be established, either by agreement of the parties or a decision of the Panel.

The objective of FICBA to ensure a timely start to the fishery is reflected in the prohibition against lockouts by a processor or a cessation of business by a fisher. As already mentioned, in the jurisdiction decision I found that the prohibition in s.19.13 of FICBA is incorporated into the MCA. Resolution of the present dispute involves an interpretation of s.19.13 and the application of the factual circumstances to that interpretation.

In the circumstances, the principles of interpretation applicable to both contracts and statutes are involved. These principles are well established and do not need to be repeated here. As to statutes, see *Archean Resources* v. *Newfoundland* (Minister of Finance), 2002 NFCA 43; and as to contracts – *Sattva Capital Corp*. v. *Creston Moly Corp*., 2014 SCC 53.

I consider it in accordance with the principles of interpretation to consider other sections of FICBA when interpreting s.19.13, even though such sections may not be a contractual term of the MCA. To refer again to the jurisdiction decision at page 5:

> I have set out the above historical references not to assist in interpreting FICBA but to confirm that, unlike the more general 'employment-related' legislation - human rights, employment standards and the like - FICBA was passed with the sole objective of establishing a collective bargaining regime for the fishery in Newfoundland and Labrador. The *Act* and the collective agreements made under it - either negotiated or imposed - must be considered as together constituting the scheme under which the fishery is regulated.

I turn now to the issues of interpretation.

Cessation of business dealings

I repeat s.19.13 for ease of reference:

> s. 19.13 (1) A fisher shall not engage in a cessation of business dealings and a bargaining agent representing the fisher shall not take a vote as to cessation of business dealings between fishers and processors or authorize or participate in taking a vote or declare or authorize a cessation by that fisher.
>
> (2) A processor or a processors' organization shall not lock out a fisher.

The term "cessation of business dealings" is not defined. It is applicable only to a fisher. When referring to similar activity on the part of a processor or processors, the phrase used is "lock out".

"Lockout" is defined:

> s.2 (1)(m) "lockout" includes a closing of a processor's business premises, a suspension of work in that premises or a refusal by a processor to continue to take fish from a fisher or fishers, done to compel the fisher or fishers, or to aid another processor to compel a fisher or fishers to agree to terms or conditions concerning the supply of fish to that first-mentioned or last-mentioned processor.

In *F.F.A.W. – C.A.W.* v. *Quinlan Brothers Ltd.*, 2003 NLSCTD 86, Mercer, J. considered an application by the FFAW for an injunction to restrain what was said to be an illegal lockout by 3 crab processors – the inverse of the situation now under consideration.

The decision is instructive both for its discussion of the interpretation of lockout and its comments on the assessment and relevance of the intention of those conducting the lockout.

The definition of lockout is the same as that in the current version of FICBA. Mercer, J. referred to 2 elements that must be established:

> Par. 14 - It is clear that a lockout – and the determination whether or not there has been a lockout – involves both an objective and a subjective element...
>
> Par. 15 - Here, the objective element would be the refusal to take fish, in this case crab. That there was a refusal by the defendants to take crab is essentially undisputed...
>
> Par. 16 - The contentious issue in this case is over the second aspect of proof of a lockout, mainly the subjective element. The intent of the refusal, in this case refusal to take crab, must be to compel the fishers to agree to terms and conditions concerning the supply of fish...

I will discuss later Mercer, J's comments on the assessment of the intention involved.

Thus, for a refusal by a processor to do business with a fisher to be contrary to FICBA, that refusal must be for the purpose of compelling or forcing agreement on the terms or conditions of the supply of fish – essentially the price. Avoiding an impasse to the establishment of the price of fish is, as noted, the primary objective of FICBA and the main task of the independent Panel established to set that price when needed. Thus, the prohibition against a lockout is directed to those situations where a mandatory agreement – making mechanism is already in place. A processor cannot use economic pressure to persuade a fisher to accept a certain price; rather, any disagreement is referred to an independent party for a final decision.

For some reason, the legislature chose not to provide a definition of "cessation of business".

Given the context in which it is used in s.19.13 – the apparent equivalence of lockout and cessation of business - and the objective of ensuring that disputes over price are referred to and resolved by the Panel other than by resort to the exercise of economic pressure, I consider that it is appropriate to interpret cessation of business dealings as used in s.19.13

as being a suspension of fish harvesting in order to 'compel a processor or processors to agree to terms or conditions concerning the supply of fish to the processor or processors'.

That some qualification is needed to the apparently blanket prohibition in s.19.13 is also suggested by s.30.

> s.30 Where a fisher engages in a cessation of business dealings between the fisher and a processor which is not contrary to this Act, no action lies against that fisher or against a bargaining agent acting on behalf of that fisher in respect of damages in contract for which the processor has become liable to another person as a result of that cessation, but nothing contained in this is section exempts a fisher or bargaining agent from liability for a tortious act. (emphasis added)

Thus, FICBA contemplates that a cessation of business dealings by a fisher may not necessarily be contrary to the legislation. Some definition of what cessation is prohibited by s.19.13 is required.

I note also s.41.1:

> s. 41.1(1) Section 18.1, section 122, except subparagraph (1)(b)(iii), paragraphs (1)(d) and (e) and paragraphs (2)(b) and (c) of section 122, and sections 123, except paragraph (5.1)(b), and 124 of *the Labour Relations Act* apply to matters within the scope of this Act with
>
> (a) the words "trade union" replaced by the word "association";
>
> (b) the word "strike" replaced by the words "cessation of business dealings"
>
> (c) the word "employee" replaced by the word "fisher";
>
> (d) the word "employer" replaced by the word "processor"; and
>
> (e) the words "employers' organization" replaced by the words "processors' organization".

Accordingly, s.18.1(1)(a) of the *Labour Relations Act*, for the purposes of incorporation into FICBA, reads:

> 18.1(1) Where, on the complaint of an association ... processor or processors' organization, the board is satisfied that
>
> (a) an association... declared or authorized or threatened to declare or authorize an unlawful cessation of business dealings...

Thus, for the purposes of FICBA, s. 18.1 of the *Labour Relations Act* qualifies a cessation of business dealings by "unlawful" which, in my view, supports the conclusion that the prohibition on a cessation of business dealings in s.19.13 refers to a cessation conducted for the purpose of reaching an agreement by economic force or pressure rather than allowing the price to be established through the mandatory structure of the panel.

Finally on this point I refer to s.38:

> s. 38(1) A processor who declares or causes a lockout contrary to this Act is guilty of an offence and liable upon summary conviction to a fine not exceeding $1,000 for each day that the lockout exists...
>
> (3) An association that declares or authorizes a cessation of business dealings contrary to this Act is guilty of an offence and liable upon summary conviction to a fine not exceeding $1,000 for each day that the cessation exists.

The fact that a cessation of business dealings which is contrary to s. 19.13 may also constitute a summary conviction offence and render the participant(s) subject to prosecution reinforces the need for a clear definition of the unlawful aspect of the cessation.

There are many reasons why a fisher or fishers would not fish at any particular time. FICBA as a whole, and common sense, suggest that for a cessation of business dealings to be contrary to FICBA and to constitute a summary conviction offence, such cessation must be capable of being clearly defined and that such definition should reflect the objective of the statute.

For the above reasons I conclude that, in line with the analysis in *Quinlan Brothers,* a cessation of business dealings by a fisher, in order to be contrary to s.19.13 and thus the MCA, must be for the purpose of attempting to compel processors to agree to terms and conditions concerning the supply of fish – in this case, the price, rather than allowing the Panel process to run its course or, in the case of a price having already been set by the Panel, accepting that price as a term of the collective agreement.

FICBA contemplates that, failing agreement, the price will be set by the Panel and only by the Panel. A party may seek one reconsideration per year per species. Presumably, a decision of the Panel may on appropriate grounds be challenged by way of judicial review. A cessation of business dealings is contrary to s.19.13 when its objective is to circumvent or ignore the price-setting process in FICBA and to achieve an 'agreement' on price through the use of economic pressure.

Declare and authorize

Section 19.13 provides that a bargaining agent cannot "declare or authorize" a cessation of business dealings by a fisher.

What do these terms mean in the context of FICBA and, perhaps more importantly, the MCA?

The terms are often used in labour relations legislation, but one must be careful to consider the context in which the terms are used in FICBA and the MCA. Harvesters, as fishers, are not employees. As pointed out by Jeff Loder, the Executive Director of ASP at p.9 of his affidavit:

> 9. Unlike a traditional bargaining unit, harvesters are individuals and do not share a common employer. Like in the past, a harvester holds their own individual license, operates either as a sole proprietor or through a corporate entity, and may employ employees. Regardless, the harvesters are members of the FFAW and subject to the collective bargaining process established in the FICBA.

In a similar vein, par. 10 of Greg Pretty's affidavit:

> 10. Fishers are not employees, and processors are not employers. Fishers are independent business owners (enterprise owners) or independent contractors (crew). They untie their boats or join a vessel when personal and economic circumstances suit them. They sell their catch to a processor and share in the proceeds. If an enterprise owner deems that the risks outweigh

> the likely rewards of setting their pots, they will not untie. If they think that they are likely to get a better price if they fish later in the season instead of earlier, they are free to tie up until then, and many do.

Thus there is no employee – employer relationship, although there may be some variations of the fisher – processor relationship in the case of a vessel owned or otherwise controlled by a processor.

I was referred to a number of authorities which have considered the meaning of "authorize." Although the contexts differ, the conclusions are similar, each referring to the dictionary or commonly understood meaning of the word. For example, in *Smurthwaite* and *British Columbia*, Re, 2006 CarswellBC 4547 (BC Forest Appeals Commission), the Chair said this at par.74:

> 74. The verb "authorize" is defined in *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995) as follows:
>
> > 1: to establish by or as if authority: SANCTION <a custom *authorized* by time>
> >
> > 2: to invest especially with legal authority: EMPOWER <*authorized* to act for her husband>

Similarly, in *Couture* v. *R,* 2008 FCA 412, the Court of Appeal said at paras. 12 – 13:

> 12. *The Shorter Oxford English Dictionary*, 3d ed., defines authorize as follows:
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> 1. To set up or acknowledge as authoritative;
>
> 2. To give legal force to; and
>
> 3. To give formal approval to; to sanction, countenance.
>
> *Black's Law Dictionary*, 7th ed., defines authorize as follows:
>
> 1. To give legal authority; to empower; and
>
> 2. To formally approve; to sanction.
>
> 13. Each of these definitions states that "authorize" can be taken to mean "to give formal approval to" or "to formally approve."

I see no reason to depart from the accepted use of the term for the purpose of s.19.13 of FICBA. However, the word 'authorize' is perhaps included in FICBA simply as a result of adopting terminology from other legislation – for example s.18.1 of the *Labour Relations Act* – and it does not fit well with the actual relationship of the parties encompassed by FICBA. As FICBA makes clear, a fisher is a "self-employed commercial fisher" – an independent businessperson who is a member of a bargaining unit for the purpose of having a bargaining agent negotiate the terms under which that fisher sells product to a processor. The *Act* contemplates the regulation of a sale and purchase of the product at the point of landing. Other than what is contemplated by such provisions as s.19.13, neither the *Act* nor the MCA addresses the actual carrying on or conduct of the business of harvesting or processing activities. The evidence is clear that the FFAW cannot direct or control the harvesting activities of fishers. From Greg Pretty's affidavit at par.15:

> ... the FFAW does not (nor do we desire) to control the actions of fishers. They do not do what we tell them and are independently minded.

And further at par.17:

> "The FFAW cannot tell its members whether or not to fish."

The constitution of the FFAW was included in the material provided. I see nothing in it reserving to the FFAW the authority to direct its harvesting members to fish or not to fish. I am comfortable in adopting the above definitions as an appropriate interpretation of the word "authorize" in s.19 of FICBA and the MCA. In the circumstances, and based on the evidence before me, I am equally comfortable in concluding that there is no ability of the FFAW to exercise any authority over or bestow any empowerment on the fishers to engage or not engage in harvesting activity. In my view, the word "authorize" has no application in the circumstances of this arbitration.

What of the word declare?

In everyday terms – from the *Concise Oxford Dictionary*:

> **declare -**1. Make known, proclaim publicly, formally, or explicitly.

And from *Merriam-Webster*:

> **declare**
>
> 1 a: to make known formally, officially, or explicitly
>
> b: to make known as a determination

As with the word authorize, in looking at the word declare as used in s.19.13 (and therefore the MCA) I see no reason to depart from its common meaning – a clear and public statement in order to make something known.

The same word is used in Article 9 of the MCA, the article expressing the parties' intention with respect to a cessation of business dealings in the absence of FICBA. Article 9:

> Article 9 – Cessation of Business Dealings
>
> 9.01 In the event that Section 19.12 [now 19.13] of the *Fishing Industry Collective Bargaining Act* ceases to apply, then:
>
> (a) When, during the term of this Agreement, a Schedule or Schedule(s) expire(s), either party may apply to the Minister of Labour for the services of a conciliation officer. Should there be no agreement to a replacement Schedule within 7 days of the request, either party may declare a cessation of business dealings in respect only of those species and/or gear type(s) and/or geographic area(s) covered by the said Schedule or Schedule(s) in dispute. (emphasis added)
>
> (b) The parties agree that the fishers and Processors who are involved in a cessation of business dealings in respect of any Schedule shall, whether personally or by agents, cease any activity in respect of the purchase or sale or harvesting of the species pertaining to or contemplated by the Schedule under dispute, until such time as the dispute is resolved.

I note that the word "authorize" is not used in this article. In executing the MCA, and in agreeing to the words "declare a cessation", the parties must be taken to have been aware of the context – the surrounding circumstances – and in particular, the lack of authority in either party to compel their members to harvest or process or not as the case may be.

Clearly, the word declare as used in s.19.13 of FICBA (and incorporated into the MCA) and in Article 9 of the MCA should carry the same interpretation. Thus, I cannot conclude that "declare" was intended by the parties or by the legislature to mean or carry any suggestion of an invocation of authority or an indication that a particular course of conduct will indeed follow.

In the case of FICBA and the MCA, any declaration must be more than a simple statement of fact. This conclusion is reinforced by subs. 38(3) of FICBA which stipulates that a declaration of a cessation of business dealings is a summary conviction offence.

In my view, a declaration for the purposes of s.19.13 and Article 9 of the MCA must be a public statement that can reasonably be interpreted by its intended recipients as a statement intended to persuade those recipients to take a particular course of action – in this case a cessation of business - which is for the purpose of exerting economic pressure on, in this case, the processors, to agree to terms or conditions under which the harvesters will supply fish to those processors. In other words, the declaration, viewed objectively, must be one intended to persuade harvesters to engage in the prohibited act. This interpretation gives the wording agreed to by the parties in the MCA a meaning which is consistent with the intention of the MCA read as a whole and which reflects the context or surrounding circumstances known to the parties at the time of signing the MCA. Further, such an interpretation is, I believe, consistent with the reasoning in *Quinlan Brothers*.

To be clear, that which gives a declaration its 'breach' or 'offence' quality is its intention, not its effect. The declaration either is or is not contrary to FICBA and the MCA at the time of its making. Any consequences or effect of the declaration may be relevant to a question of damages, but they do not affect or determine the nature of the declaration. As noted at the beginning of this decision, any actual cessation of business is an action not of the union, but rather of the fishers. A declaration by the union is separate act – a public statement intended to persuade harvesters to act in a particular fashion.

I would add this. Should there in fact be a prohibited cessation of business, a declaration (or authorization) contemplated by s.19.13 of FICBA or article 9 of the MCA - and likely, by s.38 of FICBA – is a statement (or action) that precedes or is at least contemporaneous with the commencement of the cessation of business dealings. That is, a declaration or authorization once a cessation of business is in progress would not, in my view, offend the provision in question. The obvious intention of s.19.13 is to prevent the cessation of business from occurring. Thus, a declaration must be a statement that was intended to persuade – in this case, harvesters – to bring about a cessation. Statements after the commencement of any cessation may be of help in assessing or confirming the nature or intention of the earlier statement but they cannot, in my view, be considered as independent declarations or authorizations in their own right.

THE PANEL DECISION

In early 2023, the parties held discussions about the price to be paid for snow crab for the 2023 season. No agreement was reached. The parties then made 'final offer' submissions to the Panel. By regulation NL Reg 79/22, 'final offer selection' is the process the Panel must use in arriving at a final decision on price.

On March 30, ASP offered $2.15/lb, the FFAW $3.53/lb. The Panel directed the parties to continue bargaining and to provide new offers. After some exchanges, the ASP made a new offer of $2.20/lb and the FFAW $3.10/lb. On April 1, the parties made their final submissions the Panel. On April 6, the Panel issued its decision. In part:

> Conclusion
>
> 45. Because this is a final offer selection process, the Panel must choose one of the two final positions that it considers to be closer to likely outcomes. The Panel recognizes that the "correct" price may be somewhere between the two positions, but the parties have not negotiated this price, and the Panel is left with having to choose one position or the other. The Panel also recognizes there is much uncertainty ahead. There are some "bright spots" highlighted by the research that, if they materialize, may change this outlook. Predictions are difficult to make. We can only consider the market as it currently exists, and that the evidence provided to us with respect to how the market is currently behaving and will likely behave this season.

46. The Panel thanks the parties for their efforts to come together and reach their own negotiated price. Their willingness to return to the bargaining table was noted and their efforts to make material changes to their offers to meaningfully attempt to settle this matter are applauded.

47. In making its decision, the Panel is keenly aware of the fact that the parties have an opportunity to bring a request for a reconsideration to address any significant market changes that may arise once the 2023 fishery gets underway. We would encourage them to do so, should such changes materialize.

48. Considering the overall decline in Crab markets in the past year, inflation, financial instability in the US, significantly decreased demand in the market, increased quotas, and the significant probability that pricing trends will hold (i.e., that the price will continue to decrease at least until the substantial leftover holdings from the 2022 season have cleared and a demand is created in the market), and after a thorough review of the market reports and submissions of the parties, the Panel has accepted the ASP's final offer.

49. The minimum price to be paid for Snow Crab in 2023 will be:

- $2.20/lb – 4" carapace and up.
- $1.90/lb – for legal size under 4".

These prices will form a collective agreement or part of a collective agreement binding on all processors that purchase the species Snow Crab in 2023.

This decision was released to the parties by email at 4pm on April 6. The reaction from the FFAW was immediate. It is interesting to note that, at 3:52pm, Courtney Glode, Director of Public Affairs for the FFAW, sent an email to "FFAW Communications" containing the text of the release issued by the FFAW shortly after 4pm. This commenting in advance of the release of the Panel decision was explained by Ms. Glode as likely the result of her having prepared drafts of responses to both possible decisions of the Panel.

In any event, on April 6, shortly after the release of the Panel decision, the FFAW issued a public statement. This statement forms the basis for much of the ASP's argument. It is useful to set it out in full:

> **PANEL DECISION ON CRAB SIGNALS ECONOMIC CRISIS FOR NL**
>
> April 6, 2023
>
> The Standing Fish Price Setting Panel announced their decision on the price of snow crab for the start of the 2023 fishing season, selecting the Association of Seafood Producer's (ASP) second price submission of $2.20, over the Negotiating Committee's price of $3.10. Crab Committees throughout the province have made the unanimous decision to not fish at the unsustainable price and will review this position in the coming weeks.
>
> "The Panel's decision today has put our industry in the most precarious situation it's ever been in. The Final Offer Selection (FOS) process has completely lost its way when bottom of the barrel prices are being selected without absolutely any merit," says FFAW-Unifor President Greg Pretty. "People can't fish at $2.20. They can't hire crew, they can't generate enough to pay business loans, insurance, purchase fuel or bait, and still break even at the end of the day. When it comes to dollars and cents, this catastrophe rivals the cod moratorium. It's absolutely remarkable that the largest crab fishery in the world can induce poverty right across our province in the blink of an eye." Pretty says.
>
> Initial price offers were submitted on Friday, March 31, however parties were sent back prior to arguments and instructed to submit new price offers later that same night. The Negotiating Committee's initial price was $3.48, and second offer was $3.10. ASP's first offer was $2.18, followed by a second offer of $2.20. Market conditions, international politics, and current storage reserves and have all contributed to the impact on prices this year.
>
> "The Negotiating Committee felt it was important to show good faith bargaining with the second price offer, so the fact that ASP's second offer hardly budged while our committee made meaningful movement, is a second kick in the gut to harvesters who put their faith, and their future, into the hands of this process," says Pretty.

"In choosing ASP's offer, the province has passed $108 million dollars from communities to processing companies. The entire downturn in the market is being shouldered by fish harvesters while the companies, as always, escape unscathed," says Pretty.

"We're sending off an urgent request to meet with Premier Furey because this is a provincial problem that's going to need some real solutions," Pretty says. "Our Union is also solidifying plans for further political action because this decision today just highlights how broken our system is. Companies will survive this year and in a few years, this will be nothing but a distant memory. But hundreds of enterprises will not survive this year. There will be bankruptcies and there will be thousands of people out of work," he warns.

FFAW-Unifor will be meeting with all Crab Committees throughout the province to review the ongoing situation and further updates will be provided to members as available.

The "Crab Committees" referred to are, in the words of Greg Pretty, "the Union." They are local union committees established under the constitution of the FFAW to represent the union at various locations and, through their understanding of the views of the members in the different regions, to be the official union voice of those members. Members of the Crab Committees also participate in negotiations. It is not contested that a decision or statement by the Crab Committees, collectively, is in fact a decision or statement of the FFAW.

A further statement from the FFAW came on April 8, two days before the scheduled start of the season. In full:

HARVESTERS DISCUSS PLANS FOR SNOW CRAB, NO FISHERY AT 2.20

April 8, 2023

Leadership from around the province met virtually for nearly three hours this morning to discuss the crisis facing the snow crab fishery and determine next steps. On the call were the Inshore Council and Crab Chairs with representation from every area of the province having the opportunity to provide input.

Harvesters were once again united in their decision to not pursue a fishery at the price of $2.20 per pound, making it very clear that vessels big and small face certain economic disaster at this price. Harvesters also reiterated the validity of their

Negotiating Committee's initial final position to the Panel of $3.53 being a price that would make enterprises financially viable. Considering the rising costs of fuel and bait, even harvesters with little or no business debt to service expect to be fishing at a loss with a price of $2.20.

"The price selected by the Panel is an economic bombshell to the province, and the effects of this will be felt further than those who own an enterprise or work on a crab boat or in processing plants," warns Greg Pretty, FFAW-Unifor President. "The snow crab fishery is the most important fishery in our province, and our members know very well the value it brings to their communities. They're willing to do whatever it takes to protect that value and what it means to rural and coastal sustainability," Pretty says.

"It's better to go bankrupt tied to the wharf, than it is to pursue this fishery at a potential loss," one harvester noted on the call.

Harvesters have asked for meetings with Premier Furey and the provincial fisheries minister, Derrick Bragg, to discuss how they plan to help. "We need to sit down with the province and our harvesting leadership to re-examine how we got here and look at ways to ensure the crab fishery is prosecuted in an orderly fashion," Pretty says.

Once again, harvesters reiterated their concerns surrounding the import of out-of-province crab for processing and urged companies to reconsider any actions that will further provoke harvesters whose livelihoods are in a precarious state.

"This is not a strike. The price of $2.20 is so far removed from the reality of markets and of fishing, that it is entirely untenable. There are no economic arguments that can be made to pursue a fishery at this price, and we're gravely concerned about the long-term implications on this vital industry," Pretty says.

Additionally, the Union has sent requests for meetings with the federal government to provide emergency supports for harvesters and plant workers who will experience delays this year.

The Union will be planning further political action pending the outcome of meetings with provincial and Federal officials in the coming days.

A further release by the FFAW on April 10, the scheduled start day for the crab fishery:

In part:

> **FFAW-Unifor Discuss Way Forward for Snow Crab with Minister Bragg; Request to Meet with Premier and Minister Davis**
>
> April 10
>
> This evening, April 10th, FFAW-Unifor had an urgent call with Minister Derrick Bragg to discuss the current predicament facing the industry as a direct result of the Panel's price decision for snow crab, $2.20 per pound. The consequences locally in our province means the normally economically sustainable snow crab fishery is
>
> delayed and its fate this year is unknown. FFAW President Greg Pretty and Courtney Langille, Government Relations, were on the call for FFAW, and attending from the Minister's office were Deputy Minister Jamie Chippett, and Executive Assistant Dana English.
>
> Pretty immediately set the tone for the call by affirming that harvesters are resolved not to fish for the $2.20 price, and this is not a strike, this is a decision based on their economic position. The complete consensus from Crab Chairs that have been consulted steadily since the Panel's decision was announced early evening April 6th, is that $2.20 is not an operational price for enterprises and a complete economic disaster.
>
> Minister Bragg insisted that he must approach the Minister of Labour to determine how provincial government can legally navigate the collective agreement. He explained that the legislative process with an arbitrator brought forward last year was the best solution they could offer for remodelling. However, the process is proving to be worse after remodelling with the starting price for snow crab a non-starter for the fishery. On this, Pretty requested a meeting with the Premier as well as Minister Davis to make the position of our members known. Further, it is understood that the Panel's decision was not unanimous, and as such, both parties should be called together with the province to see if there is like-mindedness. Given the magnitude of the issue, and that we are all in a place where we have never been before, open communication is critical for exploring merit in a delayed fishery or another alternative agreed on by both sectors and supported by government...

There was no harvesting from April 10 until May 20; on May 19, the FFAW and the ASP reached an agreement.

That agreement:

Agreement

The Association of Seafood Producers ("ASP") and Fish, Food and Allied Workers ("FFAW"), (together, "the Parties") met today, 19th day of May, 2023 at the Confederation Building in St. John's, NL.

The Parties agree to commence the 2023 crab fishery as follows:

$2.20 to start, and as the minimum price for the season
$2.25 at $4.85
$2.30 at $4.95
$2.60 at $5.50
$2.75 at $6.00

Reconsideration after $6.01

All reference prices at low NL Urner Barry

The Parties further agree to meet weekly to establish and enforce workable trip limits.

Greg Pretty
FFAW

Jeff Loder
ASP

Harvesting started on May 20. Exhibit JL 1 outlines, for each week of the season, the amount of crab harvested and the price in effect at the time.

Week		RMP (Raw Material Price) $/lb		Pounds graded
21-May	27-May	$	2.20	4,541,188
28-May	3- Jun	$	2.20	9,886,531
4-Jun	10-Jun	$	2.25	11,180,666
11-Jun	17-Jun	$	2.25	10,210,128
18-Jun	24-Jun	$	2.30	11,664,255
25-Jun	1-Jul	$	2.23	10,614,629
2-Jul	8-Jul	$	2.23	11,136,057

9-Jul	15-Jul	$	2.30	10,224,357
16-Jul	22-Jul	$	2.23	8,695,613
23-Jul	29-Jul	$	2.23	7,228,361
30-Jul	5-Aug	$	2.23	5,808,289
6-Aug	12-Aug	$	2.60	3,104,516
13-Aug	19-Aug	$	2.60	3,066,715
20-Aug	26-Aug	$	2.60	1,733,838
27-Aug	2-Sep	$	2.60	759,136
				109,854,279

DISCUSSION

Before considering whether all or any part of the statements preceding the tie-up constitute a declaration within the interpretation I have discussed, it is perhaps helpful to determine whether or not there was in fact a cessation of business – as I have defined it – within the contemplation of s.19.13 of FICBA and in turn the MCA. However, to repeat, it is the intention, not the effect, of any declaration that is relevant to the question of whether there was a breach of s.19.13.

It is acknowledged that there was a *prima facie* cessation of business. It is also accepted that harvesters cannot be required to fish. But, harvesters cannot refuse to fish if that refusal is intended to extract price concessions from the processors and substitute the pressure of economic warfare for the independent – and civil – price-setting process of the Panel.

The FFAW argues forcefully that the cessation was not a positive step taken with a view to extracting a higher price for crab. Rather, says the FFAW, it was a simple recognition of the fact that harvesters could not afford to fish for $2.20/lb and that harvesters "would prefer to go bankrupt tied to the wharf than fish for those prices" (comment by Greg Pretty in "The Broadcast" radio program, CBC, May 2, 2023).

I appreciate that not fishing because it is uneconomic to do so and not fishing in order to exert economic pressure on the buyer to pay a higher price than offered are essentially two

sides of the same economic coin. However, the purposes are different and an objective analysis is necessary to discern the purpose of any particular cessation.

One purpose - and that which supports a legal cessation of business – is to avoid losing money by not fishing. The other is to in fact intend to fish but to delay fishing in order to achieve a higher price by withholding product from the processors. In other words, one purpose is to avoid economic hardship on the fisher, the other is to impose economic hardship on the buyer/processor.

In *Quinlan Brothers*, referred to earlier, Mercer J. recognized the close relationship between a decision based on "normal economic grounds" and one taken "to exert compulsion upon the fishers to agree to an alteration in the terms and conditions of the supply of fish...". He pointed out that it was important, in such circumstances, to distinguish between intention and motive.

Speaking of the assessment of the evidence of the processors, he said at par. 18:

> The evidence from the McCurdy affidavit, many parts of which were not essentially disputed by Mr. Woodman, attributes many direct statements to the processors which linked the shutdown, or the possibility of a shutdown, to the changing the system governing the supply of crab to the plants. I've considered Mr. Woodman's affidavit and cross-examination and my view of it is that it is not enough to say that processors, or a particular processor, acted as they did for economic reasons or for business reasons or upon the advice of their banker in order to make money, that it is a business decision. This would be almost always the case when you're faced with any company making a decision. Their motivation presumably always will be to make money, to maximize their return. I certainly would accept that it was the motive of the processors for acting as they did. Their motive was to do what was in their best interests. Their intention, however, in acting as they did, must be taken or proven expressly or inferentially from the evidence. So I examined and reviewed the evidence at some length to consider whether the shutdown by these processors was done to exert compulsion upon the fishers to agree to

> an alteration in the terms and conditions of the supply of fish or whether it was done for normal economic grounds.

Previously he had noted the concerns of the processors over the then supply process – at par. 17:

> It is clear on the evidence that there has been concern in the crab industry this year over premiums which have been paid by processors and which have eroded margins. The processors were of the opinion that one possible solution to this problem was production sharing or quotas and there were discussions with certain persons, including government officials, and with the union over the possibility of such a system. No agreement was reached and subsequently there has been a shutdown of the crab processing plants.

The similarity with the 2023 crab impasse is clear.

Mercer, J's assessment of the evidence before him at paras. 20 - 22:

> 20. There has been no contention before me, and in fact it was dealt with in the evidence of Mr. Woodman, that the crab processors would lose money if they were paying the minimum prices established by the collective agreement. The problem as acknowledged, is that the intense competition amongst processors to secure supply has resulted in increasing premiums and the resultant reduction, if not elimination, of margins.
>
> 21. It is also clear that the shutdown is not intended by the processors to be a permanent abandonment of the crab fishery. They're shutting down until they determine that it would be economic for them to reopen to make money. The only evidence before me is that the way in which they propose to reopen and make economic sense of the crab fishery is by changing the terms and conditions of the sale of fish by going to production quotas or sharing. Allusion was made to the possibility that there may be other methods of achieving an economic

solution satisfactory to the companies but there was no specificity to that suggestion, no evidence of that. In fact, I would find it difficult to envisage how margins could change without the terms and conditions of the supply of fish changing.

22. In short, the intention of the processors clearly was to refuse to take crab until the fishers alter the terms and conditions of the supply, either through production sharing or quotas or some other mechanism. So the shutdown, I'm satisfied, is to force a solution to the economic problems by an alteration in the supply process and I find that that is a lockout as defined under the *Act*. I therefore find that the plaintiff has established a *prima facie* case, indeed I would say a strong *prima facie* case, that this a lockout. (emphasis added)

It must be recognized that in the present case, the FFAW has taken the position and strongly asserted that harvesters would in fact lose money if they were to harvest at $2.20/lb. More of this later.

A final comment on *Quinlan Brothers*. Underlying the dispute was a serious concern of processors over the supply process. In this case, there have been serious and repeated concerns expressed by the FFAW over the price-setting process. Mercer, J. pointed out the limitations of the court process:

Par.24 With respect to whether there need be proof of the balance of convenience, it is generally accepted that, again, there need not be proof of the balance of convenience in labour matters where it appears likely that the granting of the injunction may resolve the differences between the parties. In this case it was disputed whether it would resolve the differences. In considering whether it would resolve the differences between the parties the focus really has to be on resolving the difference that is before the Court, not in resolving the wider dispute or the wider problems in the crab industry. This Court is not asked to address and cannot address the wider problems in the crab industry. What this Court is asked to do is determine whether certain actions taken for a certain purpose constitute a lockout and that is the

> dispute between the parties at this stage. Whether the granting of the injunction will resolve that matter at this stage is what I consider...

Similarly, this arbitration must focus on the legal aspects of the cessation of business and not on any wider problems in the relationship between harvesters and processors.

I did not receive direct evidence from any fishers.

There are however a number of statements from FFAW representatives that suggest that the tie-up was because fishers could not afford to fish:

April 6 – per FFAW President Greg Pretty:

> "People can't fish at $2.20. They can't hire crew, they can't generate enough to pay business loans, insurance, purchase fuel or bait, and still break even at the end of the day..."
>
> "...But hundreds of enterprises will not survive this year. There will be bankruptcies and there will be thousands of people out of work."

April 8 – FFAW release reporting on a call with FFAW representatives:

> Harvesters were once again united in their decision to not pursue a fishery at the price of $2.20 per pound, making it very clear that vessels big and small face certain economic disaster at this price.
>
> Considering the rising costs of fuel and bait, even harvesters with little or no business debt to service expect to be fishing at a loss with a price of $2.20.
>
> "This is not a strike. The price of $2.20 is so far removed from the reality of markets and of fishing, that it is entirely untenable. There are no economic arguments that can be made to pursue a fishery at this price, and we're gravely concerned about the long-term implications on this vital industry," Pretty says.

April 11 – Per FFAW President Greg Pretty during a radio interview:

> "Harvesters are not prepared to fish on $2.20"

April 13 – FFAW Greg Pretty in a letter to the Telegram:

> The price of $2.20 is simply not viable for fish harvesters. With the increased costs of fuel, bait, and food, they'd be fishing at a loss, and so the choice was made to go bankrupt at the wharf unless some movement can be made.

April 21 – FFAW release:

> Most importantly, all Inshore Council members and Crab Chairs have agreed that the fishery cannot proceed at the unviable price of $2.20.

There are other comments throughout the period to the same effect.

However, in all of the circumstances, I am not able to accept that it has been established that the tie-up was because a crab fishery at $2.20/lb was uneconomic for all fish harvesters and that to fish at that price would result in harvesters – or at least a majority of them – losing money. This is a fundamental factual assertion which must be supported in the evidence. As noted, I received no direct evidence from harvesters.

I was not provided with the number of crab harvesters. But in a release dated April 17, the FFAW said that the FFAW "... represents over 14,000 people in the province, including all 10,000 professional fish harvesters and some 3,000 processing workers...". There is also a reference to the value to the province of the 2022 crab fishery being some $800 million.

Suffice it to say that there are thousands of crab harvesters who fish from a variety of vessels – including some owned by processors – with a varying number of crew members. With this number and variety, and given the absence of direct evidence from any harvesters, it is difficult to conclude, on a balance of probability standard that, province-wide, pursuing the crab fishery would result in harvesters – or the majority of them – losing money at $2.20/lb. This inability to conclude that the cessation was to avoid losing money is largely based on the

lack of any supporting evidence. However, there is some evidence – albeit second hand – to suggest that pursuing the fishery would not necessarily result in a loss to at least some harvesters.

In his affidavit Jeff Loder deposed that at par.95:

> "Various producers reported to ASP that harvesters reached out to express concerns that they were willing to fish at $2.20/lb but felt too intimidated to fish before the larger group decided to fish".

Although the evidence was not seriously challenged, given its hearsay nature – and in the absence of direct evidence from any processor - it cannot be given significant weight.

Similar hearsay evidence appears in a newspaper report of an interview with the Minister of Fisheries on May 4, 2023. The late Derrick Bragg is reported as saying:

> "I've been following social media (and) I've seen the threats, and I've had threats myself. And a lot of fish harvesters are reaching out and saying they want to go fishing but they don't want someone to pour diesel over my crab when I get back in."

That same news report also says:

> In the last week of April the FFAW phoned 1,000 harvesters to find out how many would fish for $2.20.
> Some harvesters, including at least one inshore council member, were critical of that poll and the question.
>
> Nelson Bussey, as vice-chair of the FFAW's crab committee for the 3L region, told SaltWire the union posed the question, "Do you think $2.20 is a viable price?"
>
> Bussey said that wasn't a fair question.
> "If they had asked, 'Are you willing to fish for $2.20 if that's all the market gives,' I think 90 per cent would have said yes," he told SaltWire.
> "From my understanding," he added, "a lot of responses that came back added that (point) to it, even though the survey didn't ask for that."

> Terry Ryan of LaScie, who holds inshore crab licences in the 3K fishing zone, told SaltWire on Thursday he was one of the harvesters contacted for that telephone survey.
> "I was asked, is it viable for our enterprise to fish at $2.20?
> "My response was I can make my enterprise viable at $2.20. I won't go fishing happily but I can make it viable for this year. I won't go in the hole. I will make a little bit of money and my crew will too," he said.

An FFAW release on May 17 noted that, presumably in relation to the phone survey, "over 70% of harvesting members said they would not fish for the price of $2.20/lb. **This is a strong majority opposition**" (emphasis in original)

At a press conference on May 17 FFAW Secretary-Treasurer Jason Spingle said:

> "I attended a meeting with the chairs at this table, one of the largest fleets in numbers – maybe the largest fleet in numbers. We had over 100 harvesters there. There was a mixture of enterprise owners and crew members. We had a significant discussion that was last Friday for well over 2 hours. Discussed all aspects of the price and the situation, and on the 2.20, basically there was a vote done just as an indication. Everyone in the room felt that was the best way to get everyone's opinion and 77.5% - and a very very good discussion, no I would say argument just discussion on how difficult the 2.20 was for a viable price and 77.5% of those harvesters voted to say that we're not going fishing for 2.20 under the current conditions that are there".

The above comments provide limited support for the conclusion that the tie-up was not, bargaining-unit wide, directed to avoid conducting money-losing harvesting.

As noted, agreement was reached between the FFAW and ASP on May 19. Harvesting commenced on May 20.

Exhibit JL 1 – reproduced above – shows that of the 109 million lbs of crab harvested/graded, some 14.4 million lbs was priced at $2.20/lb and 43.48 million lbs at $2.23. Thus over half of the 110 million lbs harvested from May 20 to the end of the season was priced at either

$2.20/lb or $2.23/lb. I find it difficult to accept, in light of this actual harvesting data, that, bargaining unit wide, harvesters would lose money at $2.20/lb.

Viewed as a whole, and assessed objectively, the evidence satisfies me that the predominant objective of the tie-up – ignoring the Panel decision and the resulting binding collective agreement – was both to force a higher price and to persuade government to establish that the price of crab should be set, not through the present final offer selection process, but by a formula that, in the view of the harvesters, would reflect a more equitable sharing of the financial benefits and risks as between harvesters and processors.

Accordingly I conclude that the cessation of business engaged in by harvesters from April 10 – May 19, 2023 was for the purpose of applying economic pressure on the processors/buyers represented by the ASP in order to obtain a higher price for their product than that set by the Panel.

But the question before me is not whether harvesters engaged in a cessation of business dealings contrary to s. 19.13. The central issue for determination is whether or not the ASP has established that the FFAW 'declared' a cessation of business within the meaning of s.19.13 of FITBA – and article 9 of the MCA. Such a declaration must be, as I have already concluded, made with the intention of persuading fishers not to fish until a price higher than that set by the Panel – and incorporated into the collective agreement – is achieved. That is, any declaration, viewed objectively, must have has its objective not the conveying of information as such but rather the enlisting of the support of the harvesters – through a refusal to fish – in order to achieve the setting of a higher price for crab outside and through other than the legislated Panel process.

It is clear that the FFAW recognised the fine line between exerting pressure on the processors to pay higher than the Panel price (contrary to FICBA/MCA) and conveying the statement of fact that harvesters would lose money at $2.20/lb. (not contrary to FICBA/MCA). From Courtney Glode's affidavit:

> 5. As the FFAW approached the 2023 crab fishery and began to prepare for the lobbying of increased crab prices, we were aware of our obligations imposed pursuant to the FICBA and the curated messaging necessary to comply with the same. We were very clear from the onset that this was not a strike, but

rather a decision of enterprise owners to not fish at the price of $2.20/lb because it was unsustainable for their businesses; our members relayed to us consistently that they could not afford to fish at the Panel's price. This was not a decision that was being made by the Union or crew members, it was owner-operators telling us that $2.20/lb was not viable for their business.

6. On many past occasions we have seen the opposite of the present dispute, whereby processors refused to purchase harvester's catch when the Panel's minimum price was set too high. It was a decision made by individual businesses based on economic conditions. Processor's refusal to purchase did not constitute a lock-out, and harvester's refusal to fish does not constitute a strike. We were emphatic in our messaging that these are decisions being made based on the profitability of our member's businesses and that it was explicitly not a wildcat strike position.

It must be acknowledged that, from the date of the announcement of the Panel decision on April 6, the FFAW was in an almost impossible situation, bound on the one hand by a legal structure designed to ensure a timely start to the fishery, but charged on the other hand with advancing the interests of their members who were subject to a particular price and, importantly, to a regulated price-setting provision of final offer selection that the FFAW considered unfair and not reflective of the economic risks faced by harvesters.

In addition, the FFAW had to deal with a challenge to its very existence. In Greg Pretty's words, "the FFAW inshore membership is fractious and opinionated" (affidavit of Greg Pretty par. 14) The affidavit continues:

15. The challenges of representing a disparate and vulnerable membership has led to conflict in the past. In 2018 a would-be rival Association named FISH-NL sought to raid the FFAW inshore membership and made application to the Labour Relations Board for certification. While FISH-NL failed, their organizing efforts gathered together thousands of dissatisfied fishers and generated divisive commentary which survives to this day on a social media page known as the Fisherman's Forum Facebook page administered by former FISH-NL executive and FFAW antagonist Jason Sullivan. In the past 4 years, our office has been the focus of anti-FFAW protests, one of which was so severe that after

the doors were locked for employee safety a rope was tied between the doors and a pick-up truck in an attempt to pull down the doors before police attended the scene. In April of 2021, our office was the subject of arson, where someone threw a propane tank and accelerant through our main floor window and ignited a fire in an attempt to burn down the building. I recount these things for two reasons. First, the FFAW does not (nor do we desire) to control the actions of fishers. They do not do what we tell them and are independently-minded. Second, the vocal minority galvanized by Jason Sullivan and the Fisherman's Forum means that the FFAW must constantly broadcast its initiatives and advocacy efforts so that its members do not rely upon the misinformation and rumormongering so prevalent in that group Many of our members have long-term and dependent financial relationships with specific processors that can lead to them having closer relationship with processors than they do with their own union. There are many challenges to representing a membership with such divergent allegiances.

Mr. Pretty went on to relate the difficulties encountered by the FFAW during the 2023 round of bargaining:

34. The FFAW always has to address the belief that fishermen can't work together. There is a perception, partially based on truth, that the FFAW faces difficulties getting its membership to present a united front on its initiatives. It is true that the FFAW's membership regularly differs in its collective bargaining interests. On the first day of collective bargaining, over 100 FFAW members with an allegiance to FISH-NL arrived at the Sheraton Hotel protesting the FFAW. These are our own members that attempt to discredit the FFAW in support of FISH-NL and have been violent in their attempts to do so. They have threatened me, the FFAW's staff, bargaining committee and inshore counsel,[sic] and have threatened to damage the FFAW's property and our personal residences. They disrupted the first, third and fourth days of collective bargaining whereby they actually searched the floors of the Sheraton Hotel where bargaining was ongoing, looking for me and the FFAW's bargaining committee. These members' defiance of the FFAW elevated to such a point that the RNC were required to escort the FFAW's bargaining committee out of the hotel to ensure our safety that day.

As of April 6, a spark fell on an already volatile situation. But what was said in that situation must now be looked at in an objective – and perhaps cool – legal light to determine whether any statements made by the FFAW contravened the MCA or any term of FICBA incorporated into the collective agreement.

As I have already noted, I consider that any declaration, in order to be contrary to the collective agreement, must be before or contemporaneous with the start of the cessation of business dealings. However, subsequent statements may be referred to should they assist in assessing the intention or purpose of the previous declaration.

The FFAW release of April 6 is reproduced above. It is clearly an official public statement – a declaration within the dictionary definition.

What is its intention or purpose?

There is reference to the $2.20/lb being an "unsustainable price" and to an inability to break even, given the cost of loans, insurance, fuel, bait, and crew. However, there is also anger expressed at what the FFAW views as a lack of good faith on the part of the ASP when responding to the Panel's requirement for a further offer. In the words of Greg Pretty – "a second kick in the guts to harvesters who put their faith, and their future, into the hands of this process."

There is also reference to the risks placed on harvesters and the benefit to processing companies:

> "In choosing ASP's offer, the Province has passed $108 million dollars from communities to processing companies. The entire downturn in the market is being shouldered by fish harvesters while the companies, as always, escape unscathed."

Objectively read, the statement (declaration) says that the tie-up will remain for "the coming weeks" while the Crab Committees (the FFAW) "review the ongoing situation" and the FFAW pursues "political action."

The release of April 8, also reproduced above, reports on the discussion of next steps by FFAW leadership. There is reference to unity in the decision not to fish at $2.20/lb and the expectation that $2.20/lb would mean "fishing at a loss".

As for the future, the release goes on:

> "Harvesters have asked for meetings with Premier Furey and the Provincial Fisheries Minister Derrick Bragg to discuss how they plan to help. "We need to sit down with the province and our harvesting leadership to re-examine how we got here and look at ways to ensure the crab fishery is prosecuted in an orderly fashion" Pretty says.

The release recognizes the statutory provision against a cessation of business dealings:

> This is not a strike. The price of $2.20 is so far removed from the reality of markets and of fishing, that it is entirely untenable. There are no economic arguments that can be made to pursue a fishery at this price, and we are gravely concerned about the long-term implications on this vital industry," Pretty says.

Mr. Pretty echoed this in a release of April 10, reporting on a telephone discussion with the Minister of Fisheries:

> Pretty immediately set the tone for the call by affirming that harvesters are resolved not to fish for the $2.20 price and this is not a strike; this is a decision based on their economic position. The complete consensus from Crab Chairs that have been consulted steadily since the Panel's decision was announced early evening April 6, is that $2.20 is not an operational price for enterprises and a complete economic disaster.

It is clear that the Crab Committees, considered by Mr. Pretty to be the "Union" and representing almost 100% of the fishers, are declaring that they will not fish at $2.20/lb. The release confirms the unity of this position among the harvesters and the objective of prosecuting the crab fishery "in an orderly fashion" – presumably through a process which would arrive at a price more acceptable to harvesters.

It is important to appreciate that while the above releases are releases of the FFAW, they are releases which refer to decisions of the Crab Committees – the harvesters – not to fish. That

is, while the FFAW as such cannot tell its members not to fish, those members, through the Crab Committees, constitute the Union and individually, although in effect collectively, make their own decisions not to fish. Thus the FFAW cannot effectively divorce itself from decisions of the Crab Committees.

In my assessment, in the releases of April 6, 8 and 10, the FFAW is publicly declaring that its members, through the union Crab Committees - are unanimous and united in their decision not to pursue the fishery. The objective is to continue that tie-up until the crab fishery can be prosecuted in "an orderly fashion."

Assessing these releases objectively, it is difficult to read them other than as a declaration that the tie-up will continue – not to avoid losing money – but rather, whether through actions by government or otherwise, in order to achieve a price more acceptable to fishers. As I said above, the distinction between not fishing in order to avoid losing money and refusing to fish until a higher price is set is a difficult one to draw and may be thought by some as a distinction without a difference. But in my view, the distinction is real and must be recognized, particularly in light of the use of the word "declare" in article 9.01 of the MCA.

Subsequent comments make it clear that the objective of the tie-up is to achieve a higher price and to establish a process other than the regulated final offer selection for setting that price. For example:

April 11 - Greg Pretty interviewed by the CBC Radio program "The Broadcast" on April 11, 2023:

> As everyone knows, we don't have a crab fishery. Harvesters are not prepared to fish on $2.20. As a result of that, there is no fishing taking place and the industry is virtually shut down...
>
> ...This was a decision that downloaded the entire hurt of this industry onto the back of harvesters. Here it is, [it is] April 11 and there is nobody fishing and, you know, we need to highlight that. I am asking for a meeting with the

Premier and if we don't get it, we'll be taking other political actions.

...There has to be another price. That's our target, that's what we're going for, so stay tuned...

...We control the crab in the water. That's a pretty powerful position as you can see – it's April 11th, and we're shut down...

The short-term issue is that if we're gonna have a fishery, we're gonna need more money. People are not gonna fish for $2.20 – that's a very clear signal from our harvesters and our members. So that's what has to happen and that's what we'll be going for. And without that, it's gonna be a long haul.

April 14 - Greg Pretty again interviewed on The Broadcast:

On April 14, 2023, Pretty was again interviewed on the Broadcast. Pretty stated that it would take more money to get the fishery up and running. He also stated "We're going to get together on Monday at the Confederation Building at 11am". Then asked about the message for the demonstration, Pretty stated:

Well, the message is, we need the province to intervene. That's very simple. It's going to take more money to do this. The parties need to get back together and to figure out a way to ... kick start this fishery... We need to talk about this season and kicking starting this season to make sure we get to work on the water and in the plants.

April 21 - FFAW release:

> Most importantly, all inshore Council members and Crab Chairs have agreed that the fishery cannot proceed at the unviable price of $2.20. In addition, the vast majority recognize that it will almost definitely be a few weeks to determine if the situation will improve. The possibility of a lost season was also discussed, an outcome no one wants.

April 24 - FFAW release:

> Just two weeks after harvesters decided 2.20 was an inviable price for a fishery to proceed, the merchants are getting desperate for folks to break ranks and deliver on cheap crab. Important price updates will come from Umer Barry on Tuesday and Thursday of this week, so we're asking all our member to sit tight for the next few days. On Wednesday we'll touch base with the Inshore Council and crab chairs, and on Friday morning this group will do a thorough assessment of the most up-to-date market information and provide a further update to all members...
>
> ... all snow crab license holders will be directly consulted by the Union this week via telephone.

May 2 - FFAW release:

> The inshore Council and Crab Chairs held a call this evening to review today's events ... [H]arvesters are determined to hold strong for their fair share of the market price. The overwhelming majority of regions and fleets remain firm that the price of 2.20 per pound remains unviable for their enterprises and a fishery will not proceed.

> Leadership continues to call on province to intervene, lobby for snow crab pricing formula reform.

May 6 - FFAW release:

> Yesterday, ASP presented a new offer to the FFAW Bargaining Committee for snow crab, offering a minimum price of 2.20 for the entirety of the 2023 season with the ability for higher reconsiderations if markets improve. The proposal included trip limits as well as an overage fund. The Committee convened yesterday afternoon to review the proposal and consulted with their respective fleets over the last day. The majority of harvesters strongly oppose the proposal. (emphasis underlining in original)
>
> The bottom line is this crisis isn't ending here today. We need immediate action from our provincial government on a snow crab marketing board, and to mandate a pricing formula. Provincial intervention is desperately needed to work on long term solutions to protect this industry," Pretty says.

In an interview with CBC the next day, Pretty is reported as saying:

> "Leadership throughout the province have been clear today: the crab is staying [in] the water until harvesters get a higher share of the price," Pretty said. "FFAW-Unifor will formally reject ASP's proposal, and the bargaining committee is preparing to meet for further discussions...

The statements of the FFAW subsequent to the April 10 tie-up confirm that the objective of the tie-up – and hence the persuasive object of the April 6 and April 8 declarations, was to exert economic pressure on the processors to agree to a higher price and political pressure on government to revamp the "foolish" price setting process and to substitute it with a

formula-setting mechanism that would provide harvesters with, according to the FFAW, their fair share of the revenue from the fishery.

To repeat, it is not the fishers' cessation of business itself that is the determinant of whether or not the declaration(s) in question is in contravention of FICBA and the MCA. The question that must be considered is whether or not the declaration by the FFAW was made with the intention of persuading the union members - the harvesters - to engage in a cessation of business that was contrary to FICBA and the MCA.

In my view, the public statements of April 6 and April 8, read in context and interpreted in light of later statements of the FFAW are reasonably and objectively read as an attempt to persuade fishers to conduct a cessation of business that was contrary to FICBA and the MCA.

In the April 6 release, the references to a "unanimous decision not to fish", "solidifying plans for future political action", to "review this position in the coming weeks", to "meeting with all Crab Committees throughout the province to review the ongoing situation" and to the provision of "further updates" when available, when read together, indicate a request to harvesters to commence and continue the tie-up and see what develops.

The April 8 release refers to the harvesters – the Crab Chairs and the Inshore Council - as still united in the decision to continue the tie-up. The release confirms that the harvesters remain "willing to do whatever it takes" to protect the value of the fishery to harvesters and their communities. The references to the unity of the harvesters and to the Crab Committees – representing more than 99% of the harvesters – and to a willingness to do "whatever it takes" convey a strong message intended to persuade any fisher who may be inclined to go fishing not to do so.

A number of subsequent statements reflect the intention to persuade harvesters not to fish. By way of example only:

April 24 – FFAW release:

> "Important price updates will come under Urner Barry on Tuesday and Thursday of this week, so we're asking all our members to sit tight for the next few days. On Wednesday we'll

touch base with the Inshore Council and crab chairs, and on Friday morning this group will do a thorough assessment of the most up-to-date market information and provide a further update to all members," Pretty says.

April 28 - FFAW release:

Nearly 50 fish harvesters who represent their fleets on the Inshore Council and Crab Committees participated on a call this evening to discuss the latest situation in the crab fishery. The resounding result of the call is that fish harvesters are holding fast in their resolve to ensure a fair share of the fishery.

Over one thousand snow crab license holders have been directly contacted by the Union over the last two weeks, and the consensus from respondents is that the price of 2.20 is unviable for their enterprise.

"Fish harvesters are not willing to fish at such a low share of the market, no more today than they were 2 weeks ago," says FFAW-Unifor Secretary-Treasurer. "This group has agreed there will be no further meetings until there are significant changes in either the market or in ASP's position," he adds.

Union leadership have also been very clear in their disappointment with the provincial government and their inaction on this crisis," Spingle says. "For years, the FFAW has been asking for improvements to the price setting process, and the last two years have proven that the system is broken. This isn't just about a price of 2.20," he says.

May 6 – Pretty – interview with CBC

The most important thing here is to remain united in our objective of standing up for a fair share. We cannot allow

> ourselves to fight against each other, we cannot resort to threats of violence or intimidation, and we cannot let it erode the leadership structure of our organization," says Pretty.

May 8 – FFAW Statement

> The Committee is firm that no movement will be made by harvesters until there is movement in the minimum price.

May 14 - FFAW Facebook page:

> The snow crab Negotiating Committee is planning to reconvene tomorrow in person in an attempt to get the companies back to the table to find a solution to the stalemate. We encourage all harvesters to stay strong and maintain solidarity as we look to find a suitable resolution.

The references to unanimity, "the crab is staying in the water", a "resounding result", and "no movement will be made by harvesters", read objectively and in context, send a strong message that any fisher inclined to fish would be on their own and would be acting directly contrary to the position and views of their union and fellow fishers. The statement of May 8 is of particular note since it clearly conveys the position of the Committee – the Union – that its members will not move. This is reasonably read as an intended direction from the FFAW to the fishers, notwithstanding the FFAW's lack of legal authority over the fishers.

Once an agreement was reached with the ASP on May 19, the FFAW asserted that the agreement had been reached only because of the solidarity of union members:

May 19 - FFAW Release

> "This historic shut-down of the snow crab fishery has not gone unnoticed by provincial or federal decision makers. A chain-reaction has been started as a result of the solidarity that has been shown over these several weeks, and we are encouraged

> by the Premier's commitment to review this entire process," Pretty concludes.

May 23 - FFAW Release

> "To say we are no better off than when the Panel price came out is incorrect. The final offer selection process didn't give harvesters a formula. But the Union did. Our members' solidarity did.

These statements further support the view that, in the weeks following the tie-up, the FFAW felt that, in order to achieve a better price or price-setting process, the economic pressure on the buyers/processors had to be maintained by the refusal of all harvesters to fish.

As noted earlier, the FFAW was in an extremely difficult situation. It needed to be an advocate for its members in an effort to change what the union – and its members – saw as an unfair price setting process while at the same time trying to address the challenge from those fishers who were antagonistic to the FFAW and who sought, in effect, to "break" the Union.

In his affidavit, Greg Pretty offered a number of comments regarding the FFAW's advocacy obligation and the need for members to stick together in the face of competing groups such as FISH-NL. For example:

Par. 34 - We were worried that if there was a perception that the FFAW membership did not support our political advocacy that no one would take the concerns seriously. When we referred to 'splintered groups, pitted against one another,' we were not referring to people who were not respecting the tie-up and wished to go fishing for $2.20 (since they did not exist), we were referring to our critics in the FISH-NL/Fisherman's Forum Facebook page who undermined our advocacy within our own membership...

Par. 38 - There exists a real concern that if the membership does not see the FFAW advocating for them, they will act on their own behalf

and by less peaceful means. Members expected and demanded daily updates, and if the FFAW is not regularly advocating on their behalf, they will take individual action (as evidenced by members threats to FFAW's personnel and its property). Without the FFAW attempting to reach a resolution that better represented harvesters' financial interests, chaos would ensue; we have not seen tensions this high among harvesters since the cod moratorium. So when I make a request for our members to 'sit tight,' I am not asking them to continue to tie up. I'm telling members that with the Urner Barry price updates expected as scheduled, they will be in a position to know if the change in price (the Panel's price fluctuates in accordance with the Urner Barry formula), they might be able to make the decision to fish. At this point in time, some enterprise owners were trying to make the decision about if they would fish at all in 2023. I was asking those people not to make a hasty decision, since the new Urner Barry numbers might change the economics, or even make an application for reconsideration viable. This is the point of the statement in the release that "With crab starting to enter the market from the gulf, its possible we may [have] an upswing in market prices." ...

Par. 51 - Our Facebook communication to our membership was part of our communications plan to keep our members informed. Our request for harvesters to stay strong and maintain solidarity was a request to membership to remain united in supporting the bargaining committee and fellow members of FFAW. Coinciding with these comments, significant pressure had been imposed by FFAW members on the bargaining committee members regarding competing views of viable fishing prices. Some members believed no sum less than $3.50 per pound was viable, whereas other members believed marginal increases to the Panel's established minimum price would be economically feasible. We experienced resignation of bargaining committee members because of the undue pressure imposed on them and

> the impacts to their health, in addition to the threats they periodically experienced, and it was therefore incumbent on myself as President to ensure that our members remained dedicated to the mechanisms employed by the FFAW to achieve an increase in the minimum price of crab. The request to maintain solidarity was not a directive to stay tied up.

Courtney Glode expressed a similar view in her affidavit:

> Par. 7 - As the tie-up progressed, we experience an increase in member-to-member conflicts; members of the FFAW negotiating committee were receiving threats from harvesters, and fleets that did not want to engage in fishing were being intimidated by those that didn't. From a public relations standpoint, it was imperative that we address the threats of violence between our membership – it was necessary that our members work together in resolving this dispute and that they did not resort to infighting. We therefore employed a communication strategy that sought to unite our members in their allegiance to the FFAW and to encourage members to work together in arriving at a better solution, with continual reference to terms such as "solidarity" and "stick together," among others. These were not used to encourage the continued refusal to fish, but to ensure that our members did not resort to violence. This is language that we use frequently in the majority of our communications and have proved effective.

In my assessment of the evidence, I have not considered as relevant comments from other than FFAW authorized representatives nor have I commented on the protests or other activities presumably intended to influence decision makers. Neither have I considered as relevant comments from members of FISH-NL whose apparent objective was to persuade fishers that the FFAW was not adequately protecting their interests.

From my assessment of the relevant evidence – in large measure public statements of the FFAW – objectively and in the context of the Panel decision of April 6, the tie-up from April

10 – May 20 and the eventual agreement of May 19, it is evident that the FFAW was indeed trying to address the challenges - including physical violence posed by some harvesters opposed to the FFAW. But it is also abundantly clear that, from April 6 – May 19, the primary and consuming task of the FFAW was to achieve, through economic and political pressure, a better 2023 price for crab and a price setting process more acceptable than the "foolish system" imposed by FICBA. It is also clear that the FFAW was consistent throughout in its message to all its members that, in order to reach a satisfactory resolution, the pressure needed to be applied by the fishers acting as a cohesive whole in order to 'keep the crab in the water.' Indeed, the FFAW acknowledged as much in its public statements following the May 19 agreement.

The communications difficulties faced by the FFAW were real. But the fact that the union was 'caught between a rock and a hard place' cannot be allowed to condone or ignore disregard for a legal framework designed to prevent the very situation that existed as of April 10.

CONCLUSION

The evidence leads me to no other reasonable conclusion than that, in its statements of April 6 and April 8, interpreted in context and in the light of subsequent statements, the FFAW made declarations – public statements – with the intention of persuading all its harvester members not to engage in the crab fishery as of April 10, notwithstanding the existence of a collective agreement and a statutory prohibition against a tie-up, for the purpose of compelling processors to agree on different terms or conditions concerning the supply of crab. Consistent with this conclusion is the complete absence of any evidence of the FFAW having advised its members of the existence of the collective agreement and of their legal obligations under that agreement and under FICBA.

I conclude that the FFAW declared a cessation of business dealings contrary to s.19.13 of FICBA and the Master Collective Agreement.

In its Notice of Arbitration, the ASP also claims at par. 19 – "... that the Union failed in its duty to take steps to end the illegal cessation of business. To the contrary, the Union actively sanctioned the cessation of business and declared victory in pointing to the purported fruits of having undergone said cessation of business."

This aspect of the claim was not strongly pursued by the ASP in argument but it did provide some general textbook statements to support its position:

From Adams, G, *Canadian Labour Law, 2nd Edition at §11:22 Grievance Arbitration*

> Furthermore, union liability in cases of illegal strikes will be found not only as a result of acts done by (or ascribed to) the union; liability may result from inaction. There is substantial arbitral authority which states that failure by union officers to take prompt affirmative action to prevent or end an unlawful strike may result in union liability. Arbitrators have held that there is an obligation on the union to show not only that it did not encourage or condone a work stoppage or an illegal strike but also that it took all reasonable and possible steps to discourage or end such results.

From Brown & Beatty, *Canadian Labour Arbitration, 5th Edition §9:20 Liability for an Unlawful Strike – Union- Vicarious Responsibility*

> Even if the union's officers have not in any way directly initiated or participated in the unlawful strike, the union may still be held accountable if those officers failed to take prompt and affirmative action to prevent it or bring it to an end. Precisely what they must do depends on the circumstances of each case but, in general, arbitrators have insisted that a union must ensure that all its officials withdraw from and show no support for any unlawful activities and must advise any employees participating in the strike of the unlawfulness of their conduct and tell them to return to work. Professor Laskin (as he then was) set these standards in the earliest cases and they have been adhered to ever since. Failure to do so will expose the relevant union organization which is signatory to the collective agreement, including the international, to liability in damages, even if all of the officials and officers involved in the walkout hold office only in the union local. Against these standards, it has been held that the union did not satisfy the obligation to take all reasonable steps to bring the strike to an end simply by passing a formal motion at a meeting, by declaring its opposition to the walkout or by responding to the situation in a half-hearted, dilatory way.

> The onus is on the union to show that it took all reasonable steps to terminate the strike.

Other than these general conclusory statements, I was not provided with any authority which discusses the nature of such union liability – whether in tort, breach of collective agreement, or otherwise, or the principles applicable to the assessment of any damages following a finding of liability.

It is readily acknowledged by all parties that the collective bargaining regime imposed by FICBA on self-employed harvesters and independent processors is unique. A collective agreement reached under this regime is also unique and cannot be readily compared to collective agreements governing employees and employers and which have been negotiated under 'usual' labour relations legislation.

In the circumstances, and without fuller argument, and particularly given my finding of a breach of the collective agreement, I do not propose to address further the claim based on a breach of duty.

The ASP pleaded but did not pursue common law claims of conspiracy, intentional interference in economic relations, negligence and vicarious liability.

The conclusion that the FFAW declared a cessation of business dealings in breach of s.19.13 of FICBA and the MCA, disposes of the liability phase of this arbitration.

The question remains to what, if any, damages ASP members may be entitled as a result of this breach of the collective agreement.

In it's Notice of Arbitration at par.28 - the ASP seeks on behalf of its members:

(a) Complete indemnification of the Claimants' losses and costs, to be assessed at arbitration;

(b) Punitive damages commensurate with the level of punishment required to deter the Union from future unlawful conduct injurious to the ASP's

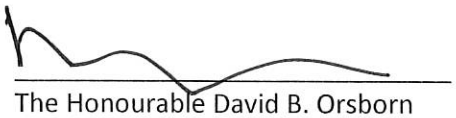
constituent members as well as the public good as reflected in the Act; and,

(c) All other damages to be assessed.

Any assessment of entitlement to and quantum of damages will be in accordance with the legal principles applicable to the assessment of damages for breach of contract. Such principles include causation, mitigation and remoteness. Any assessment of entitlement to punitive damages, if any, will also be made in accordance with applicable legal principle applied to the circumstances of this unfortunate situation.

Other than the finding that the FFAW committed a breach of FICBA and the Master Collective Agreement, nothing in these reasons should be taken in any way as applicable to the determination of the entitlement to and assessment of damages.

Dated this 7th day of February, 2024



The Honourable David B. Orsborn
Arbitrator