

2025 01G

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

ASSOCIATION OF SEAFOOD PRODUCERS INC.

APPLICANT

AND:

**HIS MAJESTY IN RIGHT OF NEWFOUNDLAND
AND LABRADOR as represented by the
HONOURABLE MINISTER OF FISHERIES, FORESTRY
AND AQUACULTURE**

FIRST RESPONDENT

AND:

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

SECOND RESPONDENT

ORIGINATING APPLICATION
(Inter Partes)

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s)	2025 01G
Date of Filing Documents	March 28, 2025
Name of Filing Party or Person:	The Applicant, Association of Seafood Producers Inc.
Application to which Document being filed relates:	Application for an order of certiorari and a declaration pursuant to section 19.01 of the <i>Fishing Industry Collective Bargaining Act</i> , R.S.N.L. 1990, c. F-18 and Rule 54 of the <i>Rules of the Supreme Court, 1986</i> , S.N.L. 1986 c. 42 Schedule D.
Statement of Purpose in Filing:	To commence the Application

The Application of the Applicant, Association of Seafood Producers Inc. ("ASP") says as follows:

NATURE OF THE APPLICATION

1. Where the Crown, or one of his agents/servants, takes *ultra vires* and unreasonable executive action without jurisdiction, this Honourable Court may grant a prerogative order of certiorari to quash that action and/or declaratory relief.
2. In continuing a pattern of political interference on the independent price setting process, the First Respondent (the “**Fisheries Minister**”) has exceeded his jurisdiction by purporting to set a new date by which the price and conditions of sale for snow crab in the absence of the required joint request of the parties to collective bargaining, which is contrary to section 19.01 of the *Fishing Industry Collective Bargaining Act*.
3. The legislature saw it as “**essential to ensure a timely start to the most critical fisheries of this province**” when it enacted the *Fishing Industry Collective Bargaining Act*.¹ The Fisheries Minister has acted contrary to that very statutory objective by attempting to unlawfully delay the 2025 crab season without legal authority. ASP therefore seeks an order quashing that action.
4. This matter is urgent. The fishery was to have started on April 1, 2025. The Fisheries Minister has improperly interfered with the operation of the Panel as the purported date change is *ultra vires*. Certainty for this season and future seasons is required to ensure the independence and integrity of the Standing Fish Price-Setting Panel.

MATERIAL FACTS

5. The *Fishing Industry Collective Bargaining Act* (“**FICBA**”)² governs the labour relations regime governing collective bargaining as it relates to the price and conditions of sale for various fish species. The Standing Fish Price-Setting Panel (the “**Panel**”) is *FICBA*’s central feature. The Panel is an independent three-person panel appointed by the Lieutenant Governor in Council which, should a bargaining agent (the FFAW) and a processors’ organization (ASP) fail to agree on a price for a particular species of fish for a fishing season by a set date, is required to establish a price through final offer selection arbitration.

¹ *Association of Seafood Producers Inc. v Fish, Food and Allied Workers Union*, 2024 CanLII 85294 (NL LA) [Tab 1]

² RSNL 1990, c F-18 [Tab 2].

6. The FICBA contemplates that the Fisheries Minister must set the date by which the price and conditions of sale for a fish species must be set. The Fisheries Minister has discretion to vary the date set upon joint request of the parties to collective bargaining:

19.01 (1) The minister responsible for fisheries and aquaculture shall set the date by which the price and conditions of sale for a fish species shall be set in a year.

(2) Notwithstanding subsection (1), the minister may, upon the joint request of the parties to collective bargaining, vary the date set under that subsection.³

[emphasis added]

7. On February 18, 2025, the Fisheries Minister set March 15, 2025, as the date by which prices and conditions of sale must be in place for snow crab in accordance with section 19.01(1) of FICBA.⁴
8. On February 28, 2025, ASP and the FFAW, through the Panel's facilitator, jointly requested that the Fisheries Minister vary the date set under subsection 19.01(1).⁵
9. On March 21, the Fisheries Minister responded to the joint request of ASP and the FFAW and stated that the new date by which the prices and conditions of sale must be in place for snow crab would be April 1, 2025.⁶
10. There have been no further joint requests for a change of the section 19.01 date.
11. In accordance with the Panel's direction, ASP prepared and submitted its materials to the Panel on March 22, 2025 in preparation for the price to be set by April 1, 2025.
12. At 9:26 PM, Wednesday, March 27, 2025, in a letter to the Panel, ASP, and the FFAW, the Fisheries Minister unilaterally purported to alter the section 19.01 date at the sole request of the FFAW:

RE: Change of Date – Snow Crab

The Fish, Food, and Allied Workers (FFAW) has advised me that due to exceptional and unforeseen circumstances involving its lead

³ *ibid* at s 19.01.

⁴ Affidavit of Jeff Loder dated March 28, 2025, at Exhibit A.

⁵ *ibid* at Exhibit B.

⁶ *ibid* at Exhibit C.

negotiator, they are in the process of replacing this key position. The FFAW has therefore requested a new date by which a price must be reached for snow crab.

*Given the nature of the circumstances before me, and the importance of the preparedness of the key participants for each party to a fair negotiation process, in accordance with Section 19.01 of the **Fishing Industry Collective Bargaining Act**, and as supported by Minister responsible for Labour, the Honourable Lisa Dempster, please be advised of the date by which prices and conditions of sale must be in place for snow crab.*

The date for snow crab for the 2025 fishing season is April 13, 2025.⁷

13. This correspondence came as a shock to ASP. ASP had not been advised of any such issue relating to the FFAW's lead negotiator. On the evening of Thursday, March 27, 2025, ASP sought further information as to the rationale for their request for a delay. ASP was told that the FFAW's President was taking a medical leave, but ASP was not told of any developments relating to FFAW's main negotiating representatives.⁸
14. At 9:59 PM on Thursday, March 27, 2025, the facilitator for the Panel appeared to accept the Fisheries Minister's direction in relation to the new date by stipulating that the hearing before the Panel would now occur on April 7, 2025,⁹ rather than the originally scheduled March 29, 2025.¹⁰
15. On March 28, 2025, ASP wrote to the Panel indicating that the Fisheries Minister was acting *ultra vires* and the Panel should proceed as scheduled.¹¹ The Panel replied indicating that it would be following the Fisheries Minister's direction.¹²
16. The Panel had acknowledged on March 25, 2025, that pursuant to subsection 19.01(2), the "Minister's date can only be amended with joint request of the parties."¹³
17. These events are not the first instance of inappropriate political interference from the executive branch of government on the Panel's operation at the behest of the FFAW. On

⁷ *Ibid* at Exhibit F.

⁸ Affidavit of Jeff Loder at para 12.

⁹ *Ibid* at Exhibit G.

¹⁰ *Ibid* at Exhibit E.

¹¹ *Ibid* at Exhibit K.

¹² *Ibid* at Exhibit L.

¹³ *Ibid* at Exhibit D.

March 22, 2025, the facilitator for the Panel wrote to ASP and stated that “the hearing of the Standing Fish Price-Setting Panel for crab has been postponed to Friday, March 28 at 2:00 as per the request of the Minister Responsible for Labour” (emphasis added).¹⁴ This was in response to the FFAW’s request that the Standing Fish Price-Setting Panel delay the hearing in relation to determining the price for snow crab “until after tariffs are announced,” with possible dates being the 3rd or 4th of April.¹⁵

18. On March 24, 2025, ASP wrote to the Standing Fish Price-Setting Panel and said as follows in relation to the inappropriate political interference, as well as the FFAW’s unilateral request for postponement:

Dear Mr. George,

We write in response to your correspondence dated March 24, 2025, in which you sought ASP’s submissions on the Union’s request for a postponement until “after the tariffs are announced”, with possible dates being the 3rd or 4th of April.

ASP is requesting disclosure of the Panel’s and GNL’s complete record as it relates to decisions respecting any postponements to date that ASP did not concur with. In particular, we refer to your correspondence dated Saturday, March 22, 2025 in which you stated “The Hearing of the Standing Fish Price-Setting Panel for crab has been postponed to Friday, March 28 at 2:00 as per the request of the Minister Responsible for Labour.” Without limiting the generality of our request for the Panel’s complete record, ASP is particularly seeking any documents or information relating to the request of the Minister Responsible for Labour, which you confirmed occurred in your March 22 correspondence.

ASP reserves its right to make further submissions once this information has been disclosed in accordance with the rule of law and generally accepted principles of procedural fairness.

In the absence of full and fair disclosure, ASP respectfully submits at this juncture that “until after the tariffs are announced” is not a reasonable request. Tariffs have been threatened for months – there is no guarantee that there will be any further modicum of certainty by the 3rd or 4th of April. It is an uncertainty that the parties, and indeed the Panel, must consider in setting the price. Delay will only achieve one thing: destroy value. It is well accepted that the value of snow crab in this province deteriorates to the extent the season pushes into the summer months. In any event, the Act is clear: pursuant to section 19.01(1), the Minister “shall set the date

¹⁴ *Ibid* at Exhibit H.

¹⁵ Affidavit of Jeff Loder at Exhibit I.

by which the conditions of a sale for a fish species shall be set in a year." This date is only modifiable by a "joint request of the parties to collective bargaining" under subsection 19.01(2). There is no joint request from the parties, thus a price must be decided by April 1, 2025.

We would like to remind all parties that any political interference in this quasi-judicial process is deeply inappropriate and contrary to the Act.

Regards,

Jeff Loder¹⁶

LAW

19. Section 19.01 of *FICBA* states as follows:

19.01 (1) The minister responsible for fisheries and aquaculture shall set the date by which the price and conditions of sale for a fish species shall be set in a year.

(2) Notwithstanding subsection (1), the minister may, upon the joint request of the parties to collective bargaining, vary the date set under that subsection.

[emphasis added]

20. The Fisheries Minister's decision to amend the date under section 19.01 upon a unilateral request by the FFAW should be quashed for the following reasons:

- (a) The Fisheries Minister's decision was *ultra vires* their statutory authority under *FICBA*. The legislative language in section 19.01 is clear and unequivocal in its requirement for the Minister to receive a joint request prior to exercising their authority under subsection 19.01(2) to change the date of the Panel.
- (b) The Fisheries Minister is *functus officio* upon setting "the date by which the price and conditions of sale for a fish species," unless the parties to collective bargaining jointly request that date to be varied.
- (c) The decision to change the date was an unreasonable exercise of statutory authority. The decision was made without any reasons, documentation or evidence substantiating the decision or the procedure by which the decision was made. As

¹⁶ *Ibid* at Exhibit J.

a result, the Fisheries Minister's chain of analysis is entirely unknown and insight into the decision-making process cannot be gleaned from the Minister's limited correspondence. Rather, the only reasons offered in support of the decision described the unilateral request made by the FFAW.

- (d) The Fisheries Minister's decision was procedurally unfair. The ASP did not have any knowledge of the FFAW's request and was not offered a chance to respond. Subsection 19.01(2) contemplates that, at the very least, the ASP would be notified of a request made to the Fisheries Minister to alter the date. However, ASP was not given notice or consulted in relation to the FFAW's request or the decision. In making this decision without consulting ASP, the Fisheries Minister has contravened ASP's rights to procedural fairness.

RELIEF SOUGHT

21. ASP therefore seeks an order:

- (a) Declaring that the First Respondent must forthwith deliver the order, decision or reasons for the decision to vary the section 19.01 date, together with the process commencing the proceeding to vary the section 19.01 date, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in their custody
 - (b) By way of certiorari quashing the Fisheries Minister's purported decision under section 19.01 as stated in his letter dated March 27, 2025;
 - (c) Declaring that the Fisheries Minister cannot alter the date by which the price and conditions of sale unless in accordance with subsection 19.01(2); and
 - (d) Awarding ASP its costs of this application; and
 - (e) For such further and other relief as counsel may advise and this Honourable Court deems just.
-



STEPHEN P. PENNEY
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL
Canada A1C 6K3
Solicitor for the Applicant

TO: Supreme Court of Newfoundland and Labrador
General Division
Court House, Duckworth Street
P.O. Box 937

AND TO: The Honourable Minister Gerry Byrne
Minister's Office
Department of Fisheries, Forestry and
Agriculture
Petten Building
30 Strawberry Marsh Road
P.O. Box 8700
St. John's, NL A1B 4J6
First Respondent
c/o Mark P. Sheppard, Department of Justice
marksheppard@gov.nl.ca
Solicitor for the First Respondent

AND TO: Dwan Street
Fish Food and Allied Workers Union
368 Hamilton Avenue
St. John's, NL A1C 5H5
Second Respondent
c/o Kyle Rees, O'Dea Earle
krees@odeaearle.ca
Solicitor for the Second Respondent

ISSUED at St. John's, in the Province of Newfoundland and Labrador, this
March, 2025

day of

COURT OFFICER

2025 01G

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

ASSOCIATION OF SEAFOOD PRODUCERS INC.

APPLICANT

AND:

**HIS MAJESTY IN RIGHT OF NEWFOUNDLAND
AND LABRADOR as represented by the
HONOURABLE MINISTER OF FISHERIES, FORESTRY
AND AQUACULTURE**

FIRST RESPONDENT

AND:

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

SECOND RESPONDENT

NOTICE TO THE RESPONDENT

You are hereby notified that the foregoing application will be heard by the judge presiding in the Chambers at the Court House in the City of St. John's, Newfoundland and Labrador on the day of , 2025 at the hour of 10 a.m.

AND TAKE NOTICE that you are hereby required forthwith after service of this originating application on you to return to the Supreme Court of Newfoundland and Labrador at _____, Newfoundland and Labrador, the order, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in your custody, together with this notice.

AND FURTHER TAKE NOTICE that on the hearing of the application, the judge may make an order in favour of the Applicant in your absence and without further notice unless you or your solicitor cause to be delivered to the Applicant or the Applicant's solicitor at the address named herein for service, not later than two clear days before the hearing of the application, a true copy of any affidavit or other material that you or your solicitor intend to read on the hearing of the

application, and appear on the hearing of the application at the time and place appointed for the hearing.

TO: Supreme Court of Newfoundland and Labrador
General Division
Court House, Duckworth Street
P.O. Box 937
St. John's NL, A1C 5M3

AND TO: **The Honourable Minister Gerry Byrne**
Minister's Office
Department of Fisheries, Forestry and
Agriculture
Petten Building
30 Strawberry Marsh Road
P.O. Box 8700
St. John's, NL A1B 4J6
First Respondent
c/o Mark Sheppard, Department of Justice
marksheppard@gov.nl.ca
Solicitor for the First Respondent

AND TO: **Dwan Street**
Fish Food and Allied Workers Union
368 Hamilton Avenue
St. John's, NL A1C 5H5
Second Respondent
c/o Kyle Rees, O'Dea Earle
Solicitor for the Second Respondent

ENDORSEMENTS

Received on _____, the _____ day of _____, 2025.

This Originating Application was served by me on the solicitors for the Respondent, on _____ the
day of _____, 2025 before the hour of _____ .m. in the _____ noon.

Endorsed on the _____ day of _____, 2020.

(Signed)

(Address)

2025 01G

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

ASSOCIATION OF SEAFOOD PRODUCERS INC.

APPLICANT

AND:

**HIS MAJESTY IN RIGHT OF NEWFOUNDLAND
AND LABRADOR as represented by the
HONOURABLE MINISTER OF FISHERIES, FORESTRY
AND AQUACULTURE**

FIRST RESPONDENT

AND:

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

SECOND RESPONDENT

ORDER

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s)	2025 01G
Date of Filing Documents	
Name of Filing Party or Person:	The Applicant, Association of Seafood Producers Inc.
Application to which Document being filed relates:	Application for an order of certiorari and a declaration pursuant to section 19.01 of the <i>Fishing Industry Collective Bargaining Act</i> , R.S.N.L. 1990, c. F-18 and Rule 54 of the <i>Rules of the Supreme Court, 1986</i> , S.N.L. 1986 c. 42 Schedule D.
Statement of Purpose in Filing:	To support Application

BEFORE THE HONOURABLE

JUSTICE

:

UPON IT APPEARING that the Applicant has made an Application pursuant to Rule 54 of the *Rules of the Supreme Court, 1986*, and section 19.01 of the *Fishing Industry Collective Bargaining Act*, R.S.N.L. 1990, c. F-18;

AND UPON HEARING Stephen F. Penney on behalf of the Applicant;

AND UPON HEARING Solicitors on behalf of the First and Second Respondents;

IT IS ORDERED that, the First Respondent must forthwith deliver the order, decision or reasons for the decision to vary the section 19.01 date, together with the process commencing the proceeding to vary the section 19.01 date, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in their custody;

IT IS ALSO ORDERED the First Respondent's decision to vary the date by which the price and conditions of sale for a fish species shall be set under section 19.01(2), as stated in his letter dated March 27, 2025, is quashed;

IT IS ALSO ORDERED that the First Respondent cannot alter the date by which the price and conditions of sale must be set unless in accordance with subsection 19.01(2); and

IT IS ALSO ORDERED that the Applicant is entitled to its costs of this Application against the Respondents, payable forthwith.

DATED at St. John's, in the Province of Newfoundland and Labrador, this day of , 2025.

REGISTRAR

APPENDIX A

2025 01G

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

BETWEEN:

ASSOCIATION OF SEAFOOD PRODUCERS INC.

APPLICANT

AND:

**HIS MAJESTY IN RIGHT OF NEWFOUNDLAND
AND LABRADOR as represented by the
HONOURABLE MINISTER OF FISHERIES, FORESTRY
AND AQUACULTURE**

FIRST RESPONDENT

AND:

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

SECOND RESPONDENT

RECORD OF THE FIRST RESPONDENT

(Rule 54.08)

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2025 01G
Date of Filing Document:	April ,2025
Name of Party Filing or Person:	The First Respondent
Application to which Document being filed relates:	Application for an order of certiorari pursuant to section 19.01 of the <i>Fishing Industry Collective Bargaining Act</i> , R.S.N.L. 1990, c. F-18 and Rule 54 of the <i>Rules of the Supreme Court, 1986</i> , S.N.L. 1986 c. 42 Schedule D.
Statement of Purpose in filing:	Compliance with Rule 54.08

Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say,

- (i) the order or decision (or as the case may be) and the reasons therefore,
- (ii) the process commencing the proceeding and the warrant issued thereon,
- (iii) the written submissions filed for the hearing;
- (iv) all other papers or documents in the proceeding,

and I hereby certify to this Honourable Court that I have truly set forth all the papers and documents in my custody and power in the proceeding set forth in the originating application.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this ___ day of April, 2025.

**The Honourable Minister of Fisheries,
Forestry and Agriculture**

**AN ARBITRATION INVOLVING
THE ASSOCIATION OF SEAFOOD PRODUCERS INC.
(THE “EMPLOYER”)**

AND

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

PRELIMINARY AWARD

For the Employer:	John Samms and Meghan Foley
For the Union :	Adrienne Ding
Grievances:	Currency Provision Grievances (FFAW Grievance numbers 3752, 3728, 3729, 3730, 3731 & 3732)
Arbitrator:	Christopher Peddigrew, KC
Dates of Hearing:	June 19 – 20, 2024
Date of Preliminary Award:	September 10, 2024

Introduction

1. The parties to this matter are the Association of Seafood Producers (“ASP”) and the Fish, Food and Allied Workers (FFAW/Unifor) (“Union” or “FFAW”).
2. The issues in dispute between the parties concern the operation of Appendix A of the Snow Crab Schedule of the 2020 Master Collective Agreement between the parties (the “MCA”) and the currency exchange adjustments applicable to the price of crab in the 2022 fishing season, pursuant to the currency provision in Appendix A of the Crab Schedule.
3. The issues in dispute between the parties have resulted in six grievances being filed by FFAW:
 - i) Grievance #03752, dated June 29, 2022, between FFAW and ASP (the “Original Grievance”);
 - ii) Grievance #03728, dated September 12, 2022, between FFAW and ASP (the “Extended Grievance”);
 - iii) Grievance #03729, dated September 21, 2022, between FFAW and Independent Fish Harvesters;
 - iv) Grievance #03730, dated September 21, 2022, between FFAW and Barry Group;
 - v) Grievance #03731, dated September 21, 2022, between FFAW and Ocean Choice International; and
 - vi) Grievance #03732, dated September 21, 2022, between FFAW and Notre Dame Seafoods.;
4. FFAW grievances #03729, #03730, #03731 and #03732 shall be collectively referred to herein as the “Individual Grievances”.
5. Collectively, all six grievances shall be referred to in this Preliminary Award as the “Grievances”. When testifying, the witnesses sometimes referred to the “grievances”

6. By agreement of the parties, this Preliminary Award will not deal with the merits of the Grievances. Rather, it will deal only with ASP's preliminary objection that the Grievances are not arbitrable.
7. Briefly, ASP's preliminary objection is that FFAW failed to comply with time limits and other procedural requirements in article 10 and article 11 of the MCA with respect to serving each of the Grievances and processing each Grievance to arbitration. ASP submits that as a result, the Grievances are not arbitrable.
8. With respect to ASP's preliminary objection, the parties agreed: (i) to my appointment as arbitrator; (ii) that I have jurisdiction to deal with the issues arising with respect to ASP's preliminary objection; (iii) that all prior steps in the grievance procedure have been followed or are waived; (iv) that witnesses would not be excluded prior to giving evidence; (v) that an agreed statement of facts, plus my notes of witness testimony and the exhibits submitted into evidence, will constitute the record of the proceedings; (vi) that there were no interested parties who had not been notified of the hearing; (vii) that I will remain seized with jurisdiction for a period of 60 days following receipt of the Preliminary Award by the parties to deal with matters of interpretation, application or compensation, provided written notice is given by one party to the other within 60 days of receipt of the Preliminary Award; and (viii) that other than ASP's preliminary objection, there are no other preliminary issues to be addressed.

Master Collective Agreement

9. The following are the relevant articles in the MCA:

Article 10 – Grievance Procedure

10:01 The parties to this Agreement are agreed that it is of the utmost importance to adjust grievances and disputes as herein defined as quickly as possible. Should a processor(s), the Union, or a fisher, a member of the

bargaining unit, allege a breach of this Agreement, the matter or matters in which it is alleged that the Agreement has been violated shall be indicated promptly to the other party in writing. An individual fisher may take the matter up directly with the Processor or in conjunction with a Union representative. No complaint shall be considered a grievance if the circumstances occurred or originated more than thirty (30) days prior to the written grievance being served on the other party.

10.02 If the matter has not been settled to the satisfaction of the Processor, individual fisher or the Union within thirty (30) days of its initiation as a grievance it may be referred to arbitration within a further ten (10) days.

10.03 Should a dispute or difference arise between a Processor and the Union, or between a Processor and another Processor bound by this Agreement, as to the interpretation or application of this Agreement, or should there be an allegation that there has been a violation of this Agreement, the matter shall be taken up by notices in writing to the Processor, the Union and/or affected person. If a satisfactory settlement of the dispute is not reached within ten (10) days, the matter may be referred to arbitration within a further ten (10) days by either the Union or the affected Processor.

10.04 Time limits specified may be changed by agreement in writing between the parties. No grievance shall be denied through error in form or technical irregularity.

Article 11 - Arbitration

11.01 Matters in dispute involving individual fishers or groups of fishers or the parties to or bound by the Agreement arising out of the interpretation, application, administration or alleged violation of this agreement and including any question as to whether a matter is arbitrable may be referred to arbitration by any of the parties involved in the dispute after exhausting the grievance procedure established by this agreement...

11.02 The party or affected person desiring to submit the matter to arbitration shall deliver to the Processor, the Union and/or any other affected person a notice of intention to arbitrate. This notice shall state the matter at issue and shall state in what respect the Agreement has been violated or misinterpreted. The notice shall also stipulate the nature of the relief or the remedy sought.

11.03 Within 10 days after the date of delivery of the foregoing notice, the parties involved in the dispute giving rise to the arbitration shall endeavor to agree on the appointment of the arbitrator.

11.04 Should the parties involved in the dispute fail within 10 days to agree on an arbitrator, the Minister of Labour of the Province of Newfoundland and Labrador may be requested by the representative of either of them to appoint a person who shall be the sole arbitrator.

11.05 after the arbitrator has been appointed by the foregoing procedure, he/she show me with the parties involved in the dispute and any grievor wishing to be present and hear the evidence of the parties involved in the dispute and render a decision within twenty one (21) days after the completion of taking evidence.

11.06 The time limits herein specified shall be deemed to be exclusive of Saturday, Sunday and find holidays and may be extended by mutual consent of the parties involved in the dispute or by the sole arbitrator.

11:07 The decision of the arbitrator on the matter at issue shall be final and binding on the parties involved in the dispute but in no event shall the arbitrator have the power to add to, subtract from, alter or amend this Agreement in any respect.

11.08 ...

Evidence

10. The parties submitted an Agreed Statement of Facts (the “ASOF”). In addition to the ASOF, each party called one witness.
11. Renae Butler was ASP’s sole witness. Ms. Butler began employment with ASP on November 1, 2018. She has been in her current position – Manager of Collective Bargaining – since August 1, 2023.
12. The majority of Ms. Butler’s direct evidence came in by way of an affidavit sworn June 18, 2024 – the day before the hearing of ASP’s preliminary objection commenced. At the

hearing, prior to being cross examined, Ms. Butler gave additional direct evidence to clarify and correct a few points in her affidavit.

13. Appended to Ms. Butler's affidavit are 28 documents, which form part of the evidentiary record by consent of the parties.
14. Dwan Street was FFAW's sole witness. At the times material to ASP's preliminary objection, Ms. Street was an FFAW Staff Representative. This position involves liaising with FFAW members and addressing their concerns, working on price negotiations, and involvement with filing grievances and the arbitration process. Ms. Street has been employed with FFAW since October 2014.
15. Ms. Street gave *viva voce* evidence at the hearing. 15 documents were submitted into evidence through Ms. Street, with the consent of ASP. These documents form part of the evidentiary record by consent of the parties.

Background Facts

16. It is useful to provide background with respect to the relationship between the parties and the process for setting the price of crab each fishing season.
17. ASP is the processor's organization representing seafood producers in Newfoundland and Labrador. ASP members produce a majority percentage of fish species within the meaning of section 13.2 of the *Fishing Industry Collective Bargaining Act*, RSNL 1990, c. F-18, as amended (the "Act").
18. Each fish harvester, whether operating as a sole proprietor or through a corporate entity with employees, holds their own fishing licences. Fish harvesters are represented by the FFAW.

19. Fish harvesters and seafood producers are subject to the collective bargaining process established in the Act. The Act sets out a process for negotiating collective agreements on the price to be paid to harvesters by producers as well as conditions of sale for specific fish species in time for the start of a fishing season.
20. The MCA governs the relationship between fish harvesters (represented by FFAW) and seafood producers (represented by ASP).
21. The fundamental bargain between FFAW/harvesters and ASP/processors is that harvesters have the right to collectively bargain for the price and conditions of the sale of fish, while processors have a guarantee that fishers will not engage in an organized cessation of business dealings.
22. In February 2006, the Standing Fish Price-Setting Panel (the “Panel”) was established under the Act to address collective bargaining provisions that failed to ensure a timely start of critical fisheries in this Province. Essentially, the Panel has been established to determine prices when the parties are unable to agree on pricing prior to the start of a fishing season. The Panel can also determine the other conditions of sale besides price, if necessary.
23. Section 4 of the Act requires final offer selection. This means that when the Panel is engaged to determine the price, the Panel must select one of the pricing positions put forward by one of the parties.
24. The price selected by the Panel then becomes the minimum price for that season pursuant to article 3.04 of the MCA. There is nothing prohibiting processors from paying harvesters more than this minimum price.
25. Practically, the price setting process is as follows:

- a) the Minister of Fisheries, Forestry and Agriculture establishes a date by which the price and conditions of sale for each particular fish species must be set;
- b) the Panel consults with the parties to establish opening dates for species to be bargained for the coming season;
- c) the Panel provides the parties with written notice of the date by which binding agreements must be in effect for each species, and potential hearing dates;
- d) if the parties cannot reach an agreement for a species by the date set by the Minister, the matter shall be considered to be referred to the Panel for a decision;
- e) the parties present final offers and make submissions before the Panel;
- f) the Panel selects one of the parties' final offers;
- g) the Panel's decision is final and binding on the parties;
- h) the minimum price (and if applicable the other conditions of sale) as determined by the Panel form part of the collective agreement for the season, as if agreed to by the parties; and
- i) each party can request reconsideration by the Panel one time per year for each species. Generally, reconsideration is based on evidence of a significant market change throughout the season.

Conditions of Sale for Crab

26. In recent years, the minimum price of snow crab has been determined by the Panel through the final offer arbitration process.
27. In most years, the parties have typically agreed to a snow crab schedule that has included various terms and conditions of sale other than the minimum price (the "Snow Crab Schedule"). Therefore, besides price, the Panel has not had to decide terms and conditions for sale. In some years the Snow Crab Schedule has not been signed.

The Currency Provision

28. Processors pay harvesters for landings of raw materials in Canadian dollars. Processors generally export processed materials to global markets in U.S. dollars. Therefore, the exchange rate between USD and CAD affects the value of crab in Canadian dollars from the processor's perspective. As the U.S. dollar strengthens relative to the Canadian dollar, the value of crab exports to processors increases. As the U.S. dollar weakens relative to the Canadian dollar, the value of crab exports to processors decreases.
29. To balance the effect of currency exchange rates on the value of crab as between processors and harvesters, the parties typically include a “currency provision” as a condition of sale in the Snow Crab Schedule.
30. The currency provision is a mechanism to mediate the effect of variable currency exchange rates between harvesters and processors by making the minimum price of crab responsive to changes in currency markets.
31. Application of this currency provision results in an adjustment to the price of snow crab on a weekly basis throughout the season by referencing the average USD to CAD exchange rate from the previous week.
32. The currency provision typically works as follows:
 - a) at the beginning of the season, a baseline currency factor is established by averaging the USD to CAD exchange rate over an immediately preceding time period. This baseline currency factor serves as the reference point for iteratively evaluating the price of crab throughout the season;
 - b) at the beginning of each week throughout the season, the average USD to CAD exchange rate from the previous week is compared to the baseline currency factor.

Deviations in this average exchange rate from the currency factor by increments of a specified amount result in a change in the price by increments of a specified amount.

As a result:

- (i) as the USD strengthens relative to the CAD, the minimum price increases;
and
- (ii) as the USD weakens relative to the CAD, the minimum price decreases.

The Panel's April 1/April 6, 2022 Decision

- 33. For the 2022 fishing season, FFAW and ASP were unable to agree on the price of snow crab. The price was determined by final offer arbitration before the Panel in accordance with the process set out in the Act.
- 34. In late March 2022, the parties submitted their final offers to the Panel. In their respective submissions to the panel, each of ASP and FFAW proposed a minimum price for snow crab. Neither ASP's nor FFAW's offer included conditions of sale other than minimum price.
- 35. On April 1, 2022, the Panel selected ASP's final offer, setting the minimum price for snow crab for the 2022 season at \$7.60 per pound for crab greater than or equal to four inches (and \$7.30 for crab less than 4 inches). On April 6, 2022, the Panel provided a detailed decision. The Panel's April 1 and April 6 decisions did not reference the currency provision or other conditions of sale.

Agreement on Currency Provision for the 2022 Fishing Season

- 36. As in previous years, in 2022 ASP and FFAW determined the conditions of sale for snow crab, other than price, by agreement. These conditions became part of the Snow Crab Schedule.

37. The minimum prices decided by the Panel were incorporated into the 2022 Snow Crab Schedule and became binding on all processors that process snow crab.
38. On April 11, 2022, representatives of ASP and FFAW agreed to a baseline currency price of \$1.250054 for the currency provision. This was the average of the USD to CAD exchange rate from the week of March 27, 2022 to April 2, 2022.
39. The Snow Crab Schedule for 2022 was not executed, but the parties agreed to apply the currency provision as follows:
 - a) on each Monday of the crab fishing season, the parties would calculate the average USD to CAD exchange rate over the last week, being the preceding Sunday to Saturday period;
 - b) the parties would then compare the calculated average exchange rate from the previous week against the baseline currency price of \$1.250054 to determine whether any change in the minimum price was warranted;
 - c) deviations in the average exchange from the previous week from the baseline currency price by increments of \$0.025 (i.e. 2.5 cents) would result in a change in the price of crab in increments of \$0.07 (i.e. 7 cents) for the following week;
 - d) the direction of the change in the average exchange rate, compared to the baseline, would dictate the direction of the change in prices:
 - (i) If the average exchange rate increased by 2.5 cents, then the price of crab would increase by 7 cents per pound in the following week; and
 - (ii) If the average exchange rate decreased by 2.5 cents, then the price of crab would decrease by 7 cents per pound in the following week.

40. There is no dispute about the first three weeks of the 2022 crab fishing season (April 10-16, April 17-23 and April 24-30). For these first three weeks, the currency did not deviate more than 2.5 cents from the currency factor. Therefore, the minimum price of crab remained steady at \$7.60 per pound for crab greater than 4 inches.

The Panel's May 16, 2022 Reconsideration Decision (the "Reconsideration Decision")

41. On May 12, 2022, as a result of changing market conditions and the strengthening U.S. dollar, ASP sought reconsideration of the minimum price. The Panel agreed to reconsider its April 1/April 6 initial price decision.
42. On May 14, 2022 the parties submitted their final offers and written submissions to the Panel.
43. Based on a new exchange rate of 1.29, ASP proposed a minimum price of \$6.15/lb for crab greater than or equal to four inches and \$5.85/lb for crab less than 4 inches.
44. Based on an exchange rate of 1.25 to 1.30, the FFAW proposed a minimum price of \$6.55/lb for crab greater than or equal to four inches and \$6.25/lb for crab less than 4 inches.
45. On May 16, 2022, the Panel accepted ASP's final offer of \$6.15/lb for crab greater than or equal to four inches. This new minimum price took effect at 4:00 PM on May 16, 2022.

Positions of the Parties on the Merits

46. While the merits of the Grievances are not the subject of this Preliminary Award, I will briefly outline the parties' respective positions.
47. The crab fishery was open from April 11, 2022 to August 7, 2022.

48. FFAW's collective allegation in the written Grievances is that beginning May 16, 2022, at least four member producers of ASP failed to pay the agreed upon price adjustments as set out in Appendix A of the Snow Crab Schedule, which price was determined by the comparing the baseline currency exchange rate to the exchange rate changes (more than 2.5 cents).
49. FFAW claims that ASP processors paid the minimum price for the 2022 season (\$6.15 from May 16 forward) with no adjustments for currency rate changes. As a result, FFAW alleges that processors did not pay the negotiated price for snow crab and/or ASP implemented deductions that were not in accordance with the MCA.
50. FFAW takes the position that the Panel's May 16, 2022 Reconsideration Decision only set the minimum price of crab for the remainder of the 2022 season (i.e. May 16 onward). FFAW alleges the Panel's Reconsideration Decision did not establish a new baseline currency exchange rate. As such, FFAW submits the applicable baseline currency exchange rate during the 2022 season remained \$1.250054, which was the rate agreed upon by the parties on April 11, 2022.
51. ASP's position on the merits is that the May 16, 2022 Reconsideration Decision changed the baseline currency exchange rate from \$1.25 to \$1.29 starting May 16, 2022. As part of the reconsideration process, ASP submits the Panel only had jurisdiction to select a party's offer in its entirety. The Panel selected ASP's offer in its entirety, which included a new baseline currency factor of \$1.29. ASP submits that beginning May 16, 2022, the weekly minimum price had to be calculated based on deviations of \$ 0.025 from the new baseline currency factor of \$1.29. The Panel's Reconsideration Decision, setting the price at \$6.15 per pound, was based on this new baseline currency exchange rate of \$1.29.
52. As a result, the merits of the Grievances deal with a dispute about the correct price of crab for the remainder of the 2022 crab fishing season, beginning in week 6 (beginning May 16, 2022) through to the end of week 18 (ending August 7, 2022).

53. While it is not apparent on the face of the written Grievances, during the hearing of ASP's preliminary objection, it became apparent that FFAW is also disputing the price paid by four processors for week 4 (May 1 – 7) and week 5 (May 8 – 15) of the 2022 crab fishing season.
54. First, with respect to *weeks 4 – 5 (May 1 – May 15)*: the parties agree the currency deviated more than 2.5 cents above the baseline currency of \$1.25. Therefore, the price increased 7 cents to \$7.67/lb for crab greater than 4 inches. ASP instructed its members to pay \$7.67/lb. FFAW agrees that \$7.67 is the correct price, but FFAW claims that some processors only paid \$7.60 per pound. ASP disagrees with FFAW's claim.
55. *Weeks 6-18 (May 16 – Aug 7)*: due to differences in the parties' respective positions regarding the applicable baseline exchange rate (\$1.25 for FFAW and \$1.29 for ASP), the parties disagree that the currency deviated more than 2.5 cents. As a result, there is a dispute about the price paid in weeks 6 – 18.

Employer's Preliminary Objection

56. ASP's preliminary objection is that the Grievances are not arbitrable because:
- 1) They were filed outside the mandatory 30-day time limit in article 10:01 of the MCA; and/or
 - 2) They were not referred to arbitration within the mandatory 10-day time limit in article 10.02 of the MCA; and/or
 - 3) FFAW did not provide ASP or the individual processors with a notice of intention to arbitrate as required by article 11.02 of the MCA; and/or
 - 4) FFAW failed to comply with the process for appointing an arbitrator as required by articles 11.03 and 11.04.

57. In paragraph 51 of the ASOF, in reference to articles 10.01 and 10.02, it indicates that pursuant to the MCA, the grieving party has:
- a) 30 days to bring a grievance;
 - b) 30 days from the filing date to attempt to resolve the grievance; and
 - c) 10 days from the end of the attempted resolution period to refer the matter to arbitration.
58. For reasons that will be explained later in this Preliminary Award, my view is that this summary of articles 10.01 and 10.02 in paragraph 51 of the ASOF is not entirely accurate.
59. In paragraph 54 of the ASOF, the parties indicate that article 11.03 requires them to try and agree on the appointment of an arbitrator within 10 days of the notice of intention to arbitrate. I agree with this statement.
60. In paragraph 54 of the ASOF, the parties indicate that article 11.04 requires the grieving party to request the appointment of an arbitrator from the Minister within a further 10 days. This summary of article 11.04 is not entirely accurate. It is not accurate to suggest that the 10-day timeline in article 11.04 is mandatory (as opposed to directory), nor is it accurate to say that the request for the appointment of an arbitrator must be made by the grieving party.

Chronology of Events

61. To assess ASP's preliminary objection, it is necessary to start by compiling a chronology of events that began in 2022 and continued into 2023 and culminated with the hearing in June 2024 leading to this Preliminary Award.

62. Dwan Street was on leave from April 3, 2022 to mid-June 2022. While she was on leave, Miranda McGrath, another FFAW employee, took over her files. Ms. Street assumed responsibility for these files on her return in mid June.
63. Around May 15, 2022 – while Ms. Street was on leave – FFAW learned there were crab harvesters who had issues with the price they were receiving for crab. Miranda McGrath prepared a draft letter to ASP.
64. When Ms. Street returned to work in mid-June, she spoke with then FFAW President, Keith Sullivan, who informed her FFAW had received a representative sample of purchase slips showing that four processing companies were not paying the minimum price according to the applicable currency provisions. Ms. Street was instructed by Mr. Sullivan to send a letter to ASP, which she did. In this letter, FFAW alleged that certain unspecified ASP members underpaid certain unspecified harvesters during the 6th, 7th and 8th weeks of the 2022 crab fishing season (i.e. the weeks of May 16, May 22, and May 29). The parties agree this letter was received by ASP on June 22, 2022. It was sent by Miranda McGrath and Dwan Street to Derek Butler. I will refer to it as the “June 22, 2022 letter”.
65. In the June 22, 2022 letter, FFAW asserted the minimum price for weeks 6, 7 and 8 should have been \$6.22 per pound rather than \$6.15 per pound. FFAW alleged this underpayment in weeks 6, 7 and 8 arose from a misapplication of the Currency Provision by processors.
66. In the June 22, 2022 letter, FFAW stated it was seeking full redress for harvesters who landed crab between Monday, May 16, 2022 and Saturday, June 4, 2022 (i.e. weeks 6, 7 and 8), indicating it would initiate a formal grievance by July 1st:

... Embracing the spirit of our agreement regarding promptness, we shall initiate the grievance/arbitration procedure by way of a formal grievance by Friday July 1st.

67. The June 22, 2022 letter was the first time Renae Butler heard about an issue with the currency provision. Renae Butler acknowledged knowing as of June 22, 2022, FFAW indicated it would proceed to arbitration if the currency issue was not resolved.
68. Neither ASP's witness (Renae Butler) nor FFAW's witness (Dwan Street) knew if FFAW had attempted to discuss this issue with Derek Butler (then ASP's Executive Director) prior to sending the June 22, 2022 letter. Derek Butler did not testify at the hearing.
69. Ms. Street testified "...we had a good relationship with Derek [Butler], so we thought [after receiving the June 22, 2022 letter] that he'd go back to his members and see what the issue was".
70. Ms. Street testified that at the time of the June 22, 2022 letter, "we [FFAW] just wanted to settle this for our members, as quickly as possible". She further testified that "I felt this was the easiest one to resolve of the grievances we had ongoing at the time".
71. ASP did not respond to the FFAW's June 22, 2022 letter in writing.
72. On June 29, 2022 – having received no response to its June 22, 2022 letter – FFAW filed grievance #03752 – the Original Grievance – naming ASP as the Company Party.
73. Consistent with the content of the June 22, 2022 letter, the Original Grievance alleges that ASP "fail(ed) to pay harvesters \$6.22 as per the currency provision agreed upon in the snow crab schedule – for crab landed between 4:01pm May 16/22 to 11:59pm Saturday June 4, 2022".
74. On cross examination, Ms. Street was asked again why she wrote ASP and why the Original Grievance was filed against ASP (as opposed to against individual processor companies). She responded that while it is typical to file grievances on behalf of individual harvesters against individual companies, the "currency grievances" were unique and unusual because they involved so many harvesters and companies. She testified there are perhaps

thousands of harvesters who will be impacted by the currency grievances and that the monetary value of the currency grievances is large.

75. Ms. Street testified that 2022 was a “turbulent time”. She testified there was a lot of transition as well as some unhappiness with “the system”, prompting Government NL to announce an independent review of the price setting system. She testified 2022 was an unusual year with several large policy grievances involving ASP, including the Original Grievance, another grievance about the size of crab, and another grievance about sea cucumbers. In addition, in late 2022 Derek Butler resigned as Executive Director of ASP and Keith Sullivan resigned as President of FFAW.

Service Issue

76. At the commencement of the hearing, there was confusion about whether the Original Grievance had been served on ASP.
77. In her affidavit, Renae Butler initially denied that the Original Grievance was served on ASP. She referred to unsuccessful efforts on her part to locate in ASP’s records any confirmation that ASP had received the Original Grievance.
78. Ms. Butler’s affidavit outlines her search and review efforts, including looking through her emails for “all material times”. Despite her efforts, she found no record of receiving the Original Grievance from FFAW or from any other individual with ASP. Ms. Butler’s affidavit also references searching Derek Butler’s e-mail inbox for “all material times” but being unable to find any record of Mr. Butler receiving the Original Grievance.
79. At the hearing, however, Ms. Butler revised her evidence with respect to service of the Original Grievance. She clarified that the portion of her affidavit indicating ASP did not receive the Original Grievance is incorrect. She acknowledged that Rachel Waye (who at

that time was the Executive Assistant to FFAW President, Keith Sullivan) did in fact email the Original Grievance to Derek Butler on June 29, 2022.

80. Renae Butler testified Derek Butler did not inform her that he had received the June 29, 2022 email with the Original Grievance attached. When asked on cross examination if it was normal for Derek Butler not to inform her when he received a grievance, Ms. Butler replied that this was the first grievance she was involved with while employed with ASP. Ms. Butler then admitted she is not the best person to say whether FFAW has filed a grievance or not.
81. Ms. Street testified it is standard practice for FFAW to send grievances out right away. She testified Rachel Waye would “always send a grievance to the company” and that “we’d be copied”. Presumably, with respect to “being copied”, she was referring to the FFAW staff representative carrying the file. Ms. Street testified that if a grievance was not sent out by Ms. Waye “we’d [staff representative] be told”. When asked on direct examination if there was any reason Ms. Waye would not send out a grievance, Ms. Street replied “no”.
82. There is no evidence Rachel Waye received a response from ASP to her June 29, 2022 e-mail to Derek Butler with the Original Grievance attached. Neither Rachel Waye nor Derek Butler testified at the hearing.
83. On July 20, 2022 – about three weeks after Rachel Waye’s June 29, 2022 email to Derek Butler – Ms. Waye emailed Dwan Street and others at FFAW as follows:

Hi folks,

To my knowledge we have had no resolution to date on the attached grievance. After 30 days, July 29th, we can officially apply for a conciliator (correct me if I'm wrong). When we prepare this letter, we normally build in our efforts to resolve the issue. If you would like to forward anything relative, including dates, I will bring it together.

84. On cross examination, Ms. Street testified nobody “corrected” Ms. Waye. Ms. Street answered affirmatively when asked if the process outlined by Ms. Waye was not actually the process under the MCA. It was put to Ms. Street that the reason FFAW requested a conciliator was because it had not followed the process under the MCA. Ms. Street denied this suggestion, stating FFAW went to the Minister because it wanted the Minister to appoint an arbitrator.
85. Ms. Street testified that writing to the Minister to seek appointment of an arbitrator was a common practice. When asked if this common practice was known to ASP, Ms. Street replied yes, but ASP objected to the question, citing the rule in *Brown and Dunn*. The rule, stated generally, is that any counsel intending to impeach a witness on a particular aspect of a case, must give the witness the chance to address the contradictory evidence in cross examination while he or she is in the witness-box. ASP counsel objected to this question to Ms. Street on the basis that ASP’s knowledge of the grievance/arbitration process was not put to Renae Butler during cross examination. My review of the evidence of Ms. Butler, however, leads me to conclude the question posed by Ms. Ding (counsel for FFAW) to Ms. Street did not offend the rule in *Brown and Dunn* because it was not a question aimed at impeaching the testimony of Ms. Butler. Ms. Butler did not give evidence that was contradictory to the evidence sought from Ms. Street. In any event, the aim of a hearing is to bring out the truth and relevant evidence. ASP counsel could have requested to recall Ms. Butler or requested to call a rebuttal witness if it felt it was necessary. This request was not made.
86. Ms. Street testified that by the end of July, because FFAW had made multiple attempts to resolve the issue raised in the Original Grievance, but had received no response from ASP, it decided to write to the Minister for the appointment of an arbitrator.
87. On July 29, 2022, FFAW sent a letter to Minister Davis, requesting the appointment of an arbitrator (the “July 29, 2022 letter”). Whether this July 29, 2022 letter was delivered to ASP by FFAW was a disputed point during the preliminary hearing.

Service of the July 29, 2022 Letter to the Minister on ASP

88. Ms. Street testified that Rachel Waye would have sent a copy of FFAW's July 29, 2022 letter to ASP. Renae Butler's evidence was that to the best of her knowledge, information and belief, ASP did not receive a copy of this letter until mid-2023.
89. Ms. Butler's affidavit indicates that despite taking the following steps, she was unable to locate a copy of FFAW's July 29, 2022 letter to Minister Davis in ASP's records:
- a) she searched and reviewed Derek Butler's e-mail for all material times;
 - b) she specifically searched and reviewed e-mail correspondence between Brian Kenny and Derek Butler;
 - c) she searched and reviewed her own emails for all material times;
 - d) she searched and reviewed the documents saved to Derek Butler's computer; and
 - e) she searched and reviewed the documents saved to her computer.
90. In addition, ASP submits that FFAW was unable to produce any documentary evidence to show that a copy of FFAW's July 29, 2022 letter was sent to ASP in 2022. Accordingly, ASP submits it did not receive the July 29, 2022 letter in 2022.
91. In reply, FFAW submits that just because Renae Butler's search efforts did not turn up any record of ASP receiving a copy of the July 29, 2022 letter (in 2022), this does not mean that Ms. Waye did not send it to ASP. FFAW points to Ms. Butler's inability to locate Rachel's Waye's June 29, 2022 email in ASP's records – despite proof from the FFAW that it was indeed sent – to support its submission that a copy of the July 29, 2022 letter to Minister Davis was in fact sent to ASP.
92. FFAW also relied on Dwan Street's evidence about Rachel Waye's standard practices as sufficient proof that the July 29, 2022 letter was indeed delivered to ASP.

93. Ms. Street testified it was standard practice for Ms. Waye to send grievances electronically and then by registered mail. She further testified that if something was sent by registered mail, but was not delivered, “we’d be notified”. Ms. Street further testified there would have been no reason for Ms. Waye not to send the July 29, 2022 letter to ASP. Based on her experience working with Rachel Waye, Ms. Street felt it is more likely than not that Ms. Waye sent a copy of the July 29, 2022 letter to ASP.
94. On cross examination, Ms. Butler acknowledged the possibility ASP received a copy of FFAW’s July 29, 2022 letter to the Minister, but she maintained her search efforts did not turn it up and maintained her position that it was not received.
95. The burden of proving a document was delivered is on the party purporting to have delivered it – in this case FFAW. FFAW has failed to establish it delivered a copy of the July 29, 2022 letter to ASP. Unlike the June 29, 2022 email, FFAW was not able to produce any email showing the July 29, 2022 letter was sent. If it was sent by registered mail and/or email (and if Dwan Street or others at FFAW were copied), FFAW would presumably have been able to provide documentary evidence of delivery. FFAW’s argument that it did not have sufficient time to search for proof of delivery and/or that it did not have access to Rachel Waye’s emails prior to 2023 is not a satisfactory justification for its inability to produce documentation establishing delivery.
96. I accept the evidence of Renae Butler in paragraph 55 of her affidavit that ASP did not receive a copy of the FFAW’s July 29, 2022 letter to Minister Davis at any point in 2022. I also accept her evidence in paragraph 56 of her affidavit that she only became aware of the letter in July 2023 when she received a copy from ASP’s legal counsel.
97. That said, as will be explained below, even though ASP did not receive a copy of FFAW’s July 29, 2022 letter to the Minister, Derek Butler was nevertheless aware not later than

August 16, 2022 that FFAW had made a request to the Minister for the appointment of an arbitrator.

98. I now return to the chronology.
99. On August 11, 2022 (about two weeks after FFAW sent its July 29, 2002 letter to Minister Davis requesting an arbitrator), Brian Kenny (a Conciliator/Mediator with Government of Newfoundland and Labrador), contacted Dwan Street to advise he had been assigned to the file dealing with her request for the appointment of an arbitrator for the 2022 Snow Crab Schedule (the Original Grievance).
100. In his August 11, 2022 email, Mr. Kenny advised Ms. Street that while he could proceed to appoint an arbitrator, it would be customary to offer grievance mediation services as a first step. Dwan Street testified she opted for the mediation suggestion put forward by Mr. Kenny because she “just wanted it resolved and it seemed like an easy one to settle”.
101. The following fact is significant. On August 16, 2022, Brian Kenny emailed Derek Butler stating:

...I have been assigned to this file re: Dwan Street's request to appoint an Arbitrator re: 2022 Snow Carb [sic.] Schedule re: grievance 03752.

I can proceed to appoint an Arbitrator, but it is customary to offer grievance mediation services as a first step.

Dwan Street has advised willing to proceed with GM.

Please advise if you are also willing to pursue this option.

102. This email confirms that Derek Butler was aware not later than August 16, 2022 that FFAW had requested for an arbitrator to be appointed for the Original Grievance, but that FFAW was willing to proceed with mediation first. This is significantly material with respect to ASP's preliminary objection. Despite being advised in August 2022 of FFAW's request for

an arbitrator to be appointed and its willingness to participate in mediation, ASP never raised an objection with respect to an alleged failure to comply with article 10 or article 11 until immediately before the June 2024 hearing dates.

103. On August 23, 2022, Derek Butler replied to Brian Kenny to advise that he was awaiting legal advice and would report back. Derek Butler did not testify at the preliminary objection hearing.
104. On August 29, 2022, Ms. Street emailed Mr. Kenny to follow up on his August 11, 2022 email. She stated:

Just following up on this one and the second grievance as well. Has any progress been made on setting a time for mediation? Thank you!

105. While the reference to the “second grievance” was not explained in evidence, I am aware there were other grievances ongoing at around the same time, including one pertaining to sea cucumber. This may have been what Ms. Street was referring to. I only note this point because in Mr. Kenny’s September 1 reply to Ms. Street, he refers to “Quinn Sea” who are not one of the four processors named in the Individual Grievances.
106. On September 1, 2022, Mr. Kenny emailed Ms. Street to advise he had been on vacation the previous two weeks, that he had reached out to the parties and was still waiting to hear from them “*re: both files, ASP and Quinn Sea*”. Mr. Kenny indicated he would follow up with them both the following week if he did not hear from them before that.
107. On September 9, 2022 at 9:20 am, Mr. Kenny emailed Derek Butler requesting an update.
108. On September 9, 2022 at 9:25 am, Derek Butler replied to Mr. Kenny’s email indicating:

...I rang a few weeks [ago] when I got back from holidays to have a chat, but I think you were out of the office? I'm going in to [sic.] price arbitration

now shortly, and have meetings all day and FICBA review submission due at 4PM. Would Tuesday afternoon work for chat?

109. On September 9, 2022, at 9:29 am, Mr. Kenny emailed Ms. Street to advise he had again reached out to Derek Butler, that they had been playing phone tag, but that they had *"...arranged a call for early next week to discuss"*.
110. At Tab 'O' of Renae Butler's affidavit there is an email that seems misplaced in terms of a chronology. This email has a sent date of July 26, 2023. It was sent by Derek Butler to Brian Kenny, stating: *"Just a follow-up to this. will be driving this afternoon (perfect time to catch up on phone calls like this one!). Text me at 746-3923 anytime after 12 and I will give you a ring. Thanks Derek"*.
111. It appears this email is likely misdated because Derek Butler had resigned from ASP in November 2022. So why would he be emailing Brian Kenny in July 2023? Presumably he would not be. This email is on the same page as a series of emails that were exchanged between the same two individuals in September 2022. It seems more likely than not that this email was sent by Derek Butler to Brian Kenny sometime in the September-November 2022 time period (prior to Mr. Butler's departure). Unfortunately, the parties did not address this matter at the hearing, but for the reasons stated, it seems unlikely that this email was sent on July 26, 2023. Whenever it was sent, it is another example of Derek Butler continuing to communicate about the currency grievances and having an opportunity to raise a timelines objection, but not doing so.
112. As stated above, the Original Grievance (grievance #03752) is dated June 29, 2022. It was served June 29, 2022. It relates to the three-week period commencing May 16, 2022 and ending June 4, 2022.
113. FFAW Grievance #03728 is dated September 12, 2022 and states "all landing beyond those covered in 03752". FFAW refers to this grievance as the "Extended Grievance". Ms. Street

testified the Extended Grievance was filed because FFAW was hearing from harvesters that some processors were not paying the correct amount for crab.

114. In terms of service of the Extended Grievance, the evidence and argument from each party essentially mirrors the evidence and argument with respect to delivery of FFAW's July 29, 2022 letter to the Minister. ASP says the Extended Grievance was not served. FFAW says it was.
115. Ms. Butler testified ASP did not receive a copy of the Extended Grievance until July 17, 2023 and that she had no knowledge of the Extended Grievance until being told about it by ASP legal counsel in July 2023.
116. Ms. Butler testified she took the following steps to try and determine whether the Extended Grievance was sent to ASP in 2022: a) she searched and reviewed Derek Butler's emails for all material times; b) she searched and reviewed her own emails for all material times; c) she searched and reviewed the documents saved to Mr. Butler's computer; and she searched and reviewed the documents saved to her computer.
117. Despite these efforts Ms. Butler was unable to find any correspondence relating to the Extended Grievance.
118. FFAW maintains the Extended Grievance was served on ASP. Ms. Street pointed to Ms. Waye's standard practice of sending out grievances right away, first electronically and then by registered mail, as proof of service on ASP. She testified there would have been no reason for Ms. Waye not to have sent out the Extended Grievance because FFAW wanted a resolution. Ms. Street was unable, however, to produce any documentary evidence to prove service of the Extended Grievance on ASP by email or registered mail. In an attempt to explain FFAW's inability to produce registered mail slips, Ms. Street said Rachel Waye is the person who would have had those.

119. It was pointed out to Ms. Street on cross examination that she was copied on Ms. Waye's June 29, 2022 email to Derek Butler attaching the Original Grievance. It was then suggested to her that if the Extended Grievance really was served on ASP by email, she would also have been copied on that email. Ms. Street confirmed she checked her own email account for confirmation an email with the Extended Grievance had been sent to ASP, but she did not find anything. She reasoned that she must not have been copied on Ms. Waye's (alleged) email attaching the Extended Grievance. She also testified that she was unable to find the email in Ms. Waye's records despite asking FFAW's human resource manager to access Rachel Waye's emails (because Ms. Waye was no longer with the FFAW). Ms. Street testified, however, that the human resources manager could not access anything prior to 2023.
120. On cross examination, the possibility that the *Extended* Grievance was emailed to Derek Butler by Rachel Waye – despite Ms. Butler not finding any record of it – was again put to Ms. Butler, including the fact that her search for Rachel Waye's June 29, 2022 email containing the Original Grievance was not successful even though there is an email proving it was sent. Ms. Butler acknowledged the possibility, but confirmed her belief that ASP did not receive the Extended Grievance.
121. Overall, for the same reasons I decided FFAW's July 29, 2022 letter was not sent to ASP, I find that the Extended Grievance was not sent to ASP in 2022. If FFAW had served the Extended Grievance on ASP on or around September 12, 2022 – by email and/or registered mail – it would or should have been able to produce documentary evidence to establish service, but it did not. Ms. Street's explanations for being unable to produce such documentary evidence are insufficient.
122. Returning to the chronology of events, on September 13, 2022, Brian Kenny emailed Dwan Street as follows:

I am just off the phone with Derek Butler, ASP.

He informs that he cannot respond to your request.

He notes that, if the FFAW wishes to file a grievance against a particular company that has purchased snow crab (re: alleged violation, Snow Crab Schedule) then you have the right to do so but he cannot respond to a grievance referencing "ASP".

Please call to discuss

123. Ms. Street testified that Mr. Kenny indicated to her that he had spoken with Derek Butler on September 13 which is consistent with the content of Mr. Kenny's email.
124. If Derek Butler had communicated to Brian Kenny that ASP felt there was a timelines violation and that the grievance was not arbitrable, ASP could have called Mr. Butler as a witness to give such testimony, but it did not do so. Based on what I can extrapolate from the emails in evidence, it does not appear that Derek Butler raised any timelines or other procedural objections with Mr. Kenny. The only issue he appears to have raised is that FFAW had the right to file a grievance against an individual company, but that he (Derek Butler) could not respond to a grievance referencing ASP.
125. Derek Butler's communications with Brian Kenny, which resulted in Mr. Kenny emailing Ms. Street about filing individual grievances, constituted a "fresh step" in the grievance/arbitration process. While the discussions between Mr. Butler and Mr. Kenny are hearsay, the content of the emails between Brian Kenny and Dwan Street is the only evidence with respect to the discussions between Mr. Kenny and Mr. Butler (besides Ms. Street's evidence of her discussions with Mr. Kenny) and I am prepared to rely on it and draw certain conclusions from it. ASP could have called Mr. Butler as a witness to contradict or clarify or explain what Derek Butler discussed with Mr. Kenny if it felt necessary, but it did not.
126. Renae Butler testified that she was not aware Derek Butler had been talking with Brian Kenny and was not aware that FFAW had requested that an arbitrator be appointed.

127. On September 13, 2022, Ms. Street forwarded Mr. Kenny’s email to Keith Sullivan, then President of FFAW. An email exchange between Ms. Street and Mr. Sullivan ensued, beginning with Mr. Sullivan’s saying to Ms. Street:

How did ASP come into the conversation? Our grievances have to do with the companies sod [sic.] course. Why did Kenny call ASP?

128. Ms. Street replied to Mr. Sullivan stating that when she was asked to “take this one over the letter of intent to grieve was addressed to ASP”. Presumably Ms. Street was referring to the June 22, 2022 letter that had initially been drafted by Miranda McGrath while Ms. Street was on leave. Mr. Sullivan then asked, “what arbitration is this sorry?”, and Ms. Street replied “\$6.15/\$6.22”. Mr. Sullivan then instructed Ms. Street to seek advice from Greg Pretty.
129. On cross examination it was put to Ms. Street that based on this email exchange with Mr. Sullivan, there appears to have been confusion at FFAW. Ms. Street replied that it did not make sense to her why Keith Sullivan was questioning how ASP had come into the conversation because Mr. Sullivan was the one who had instructed her to write ASP.
130. On September 13, 2022 Ms. Street and Mr. Pretty exchanged a few emails attempting to schedule a time to meet, concluding with a September 14 email from Ms. Street indicating she had just spoken with Mr. Kenny and did not think that she and Mr. Pretty needed to meet because Mr. Kenny had suggested that she “file grievances against the individual processors who it showed in the settlement sheets did not pay enough”.
131. On September 14 – a few minutes after emailing Greg Pretty – Ms. Street emailed Brian Kenny to confirm that FFAW would be amending the Original Grievance to include individual companies/individual grievances “based on Derek’s [Butler] response”.

132. On or about September 21, 2022, FFAW filed grievances against each of the following four processors: Independent Fish Harvesters; Barry Group; Ocean Choice International; and Notre Dame Seafoods (collectively, the “Individual Grievances”).
133. At the hearing, Ms. Street testified she “filed” the Individual Grievances against the four individual processors based on “advice from the mediator [Kenny]”. When asked why she filed the Original Grievance against ASP (as opposed to against individual companies), Ms. Street testified that there was precedent for filing against “FANL” (ASP’s predecessor), but she was uncertain if FANL ever required FFAW to file grievances against individual companies as it was “quite some time ago”.
134. Each of the Individual Grievances is dated September 21, 2022 and alleges:

NATURE OF GRIEVANCE Violation of appendix A of 2022-23 snow crab Schedule Currency provisions – all affected members/ landings – May 16 to end of season

amendment of grievance 03752

REQUIRED ADJUSTMENT full redress, to be made whole

135. The Individual Grievances refer to circumstances occurring between May 16 and August 7, 2022, but it appears the parties are in agreement that the two-week period from June 5th, 2022, to June 18th, 2022 is not in dispute. During those two weeks, both parties applied the minimum price to be \$6.15 per pound (even though ASP alleges the correct price was \$6.08 and it instructed its members in error to pay \$6.15).
136. In terms of service of the Individual Grievances on ASP, Ms. Butler’s affidavit indicates that on or around September 21, 2022, ASP was advised by four of its members that they received grievances from FFAW. This indicates these four processors were served on or around September 21, 2022 and that ASP was aware of the Individual Grievances.

137. ASP's position is that the Individual Grievances were not served within the 30-day time limit in article 10:01 of the MCA because September 21, 2022 was more than 30 days after the crab fishing season ended on August 7, 2022.
138. ASP's position is that FFAW did not refer the Individual Grievances to arbitration within the 10-day time limit in article 10:02 of the MCA.
139. ASP's position is that it did not provide a written waiver of these time limits.
140. Returning to the chronology of events, in a document entitled "Currency provision grievance timeline", Ms. Street summarized events between June 2022 and June 2023, which summary she compiled from her personal notes (although her personal notes were not submitted into evidence).
141. In her summary, Ms. Street indicated Brian Kenny reached out to her on September 23, 2022 to "discuss status" and that on September 24, 2022 she and Mr. Kenny had a telephone discussion "to discuss moving forward with the individual grievances as well as a monetary value of each".
142. Ms. Street testified she told Mr. Kenny that the monetary value was hard to capture because FFAW only had a sample of settlement sheets, and it would need records from all processors in order to provide the monetary value. There was no evidence called about what sample sheets are or how, if, or when these sample sheets come into the possession of harvesters. I do not know how FFAW came into possession of the sample sheets it did have in its possession.
143. On October 21, 2022 – 30 days after serving the Individual Grievances – FFAW wrote again to Minister Bernard Davis to request an arbitration hearing and appointment of an arbitrator (the "October 21, 2022 letter"). In the subject line of this letter, FFAW referred to grievances "03729/03730/03731/03732". In the body of the letter, FFAW referred to

grievances filed on September 14, 2022 (which were actually filed September 21, 2022), and to “...(originals filed on June 29, 2022 and submitted to the Association of Seafood Producers)”.

144. There is no reference to the Extended Grievance in FFAW’s October 21, 2022 letter to the Minister even though the Extended Grievance is purportedly dated September 12, 2022. If FFAW had served the Extended Grievance in September 2022 as Ms. Street alleged, it is odd it was not referenced in FFAW’s October 21, 2022 letter. The fact it is not referred to in the October 21, 2022 letter indicates it likely a possibility it did not exist on October 21, 2022 and/or that it had not been served on ASP.
145. Ms. Street testified that FFAW sent its October 21, 2022 letter to Minister Davis because it felt its efforts to resolve the Grievances through Mr. Kenny had hit a stalemate. At the hearing, when asked by FFAW legal counsel, whether she was trying to “cross her i’s and dot her t’s” by sending another letter to the Minister (in October), Ms. Street replied yes.
146. Delivery of a copy of FFAW’s October 21, 2022 letter to the Minister to ASP was also at issue in the hearing. ASP denies receiving FFAW’s October 21, 2022 letter to Minister Davis. FFAW’s position is that it was served on ASP.
147. Renae Butler testified that to the best of her knowledge, information and belief, ASP did not receive a copy of the FFAW’s October 21, 2022 letter to Minister Davis until July 2023 when it was provided to her by ASP legal counsel. Ms. Butler testified that when searching for the October 21, 2022 letter she took essentially the same steps she took when searching for other documents in ASP’s records (i.e. searching the emails and the computer of her and Derek Butler for all material times, etc.).
148. Ms. Street again testified as to Ms. Waye’s standard practices. She testified the October 21, 2022 letter would have been served on ASP by Ms. Waye by email and registered mail, indicating there would have been no motivation on Ms. Waye’s part not to send it because

FFAW was trying to get a resolution. Again, however, Ms. Street was unable to produce any documents confirming delivery of the October 21, 2022 letter.

149. Ms. Street testified her understanding was that Brian Kenny had talked with Derek Butler about both letters to the Minister (requesting arbitration). Ms. Street testified Mr. Kenny did not indicate to her that Mr. Butler was unaware of the letters to the Minister.
150. Overall, for the same reasons I decided FFAW's July 29, 2022 letter and the Extended Grievance were not sent to ASP, I also find that FFAW's October 21, 2022 letter to the Minister was not sent to ASP.
151. Again, however, while ASP may not have received a copy of the October 21, 2022 letter, given the nature of the communications between ASP, FFAW and Brian Kenny throughout the fall of 2022 and into 2023, ASP was aware (through Derek Butler and/or Renae Butler) of FFAW's request that the currency issue be resolved by arbitration if it was not resolved through mediation.
152. Returning to the chronology of events, on November 2, 2022, Renae Butler and Derek Butler met with Dwan Street and Jake Rice of FFAW at Bannerman Brewery. The day before – November 1, 2022 – Derek Butler had publicly announced his exit from ASP. The testimony of Renae Butler and Dwan Steet was consistent on the following point – that most of the November 2, 2022 meeting was spent discussing Derek Butler's upcoming departure and his future plans, and that there was also some discussion about grievances relating to sea cucumber.
153. In Renae Butler's affidavit she indicated there was no discussion about the currency grievances during the November 2 meeting at Bannerman Brewery, except for a "very brief" discussion at the end. Ms. Butler testified and clarified that by "very brief", she meant that the only thing discussed was that Brian Kenny had been appointed as a mediator by the Labour Relations Board. Ms. Butler testified there was no further mention of the

Currency Grievances at this November 2 meeting. Her clarification illustrates, however, that she was aware of Mr. Kenny's appointment.

154. Ms. Street's evidence of the November 2 meeting is more or less consistent with Ms. Butler's. Ms. Street testified that at the November 2 meeting, Derek Butler said to her and Mr. Rice that he had received a call from Brian Kenny in an attempt to get ASP to participate in a mediation.
155. But Ms. Street also testified that prior to the November 2 meeting at Bannerman Brewery, Derek Butler had reached out to both her and Jake Gill indicating he wanted to discuss the "outstanding files that would likely not be resolved before he was finished with ASP".
156. Ms. Street's understanding was that the "outstanding files" Derek Butler was referring to included the currency grievances. In my view, given all the discussions leading up to this meeting, this was a reasonable understanding on the part of Ms. Street. Derek Butler's reference at the November 2 meeting to being contacted by Mr. Kenny would have confirmed Ms. Street's understanding.
157. Derek Butler resigned as ASP's Executive Director on November 30, 2022.
158. When Ms. Street was asked by FFAW's legal counsel whether her understanding was that "they [ASP] knew about your [FFAW] grievances and your position on the currency issue", whether her "impression was that they [ASP] wanted to resolve the currency issue", and whether "there seemed to be a willingness [on ASP's part] to resolve it", Ms. Street replied yes to all questions. When asked whether "they" [ASP] ever raised an issue about FFAW being out of time to file a grievance or whether there was discussion about the timelines, Ms. Street replied no to both questions. If Derek Butler and/or ASP had a different understanding, ASP could have called him as a witness, but it did not.

159. Renae Butler testified that ASP did not receive a notice of intention to arbitrate with respect to the Original Grievance, the Extended Grievance or Individual Grievances. She testified that she asked the four individual processors if they received a notice of intention to arbitrate from FFAW and all four replied they had not. Ms. Butler acknowledged, however that generally, if a mediator is appointed, it indicates a possibility of arbitration.
160. Ms. Street acknowledged that a formal notice of intention to arbitrate for the Grievances was not served on ASP. When asked why, she replied that FFAW was trying to give Derek Butler time to get instructions. She also testified that after Mr. Butler's departure on November 30, 2022, she tried to work with Renae Butler while ASP was transitioning to a new Executive Director.
161. From about November 30, 2022 until January 31, 2023, ASP was without an Executive Director. Jeff Loder was hired to replace Derek Butler. He started in the Executive Director role with ASP on January 31, 2023.
162. Returning to the chronology of events, on December 5, 2022, Ms. Street emailed Mr. Kenny as follows:

I had spoken with Derek who had requested we put a monetary value on the crab currency and sea cucumber deductions files. After internal discussion we all agree this is impossible to estimate as these are both policy grievances and not all harvesters who are affected are named in the evidence. We would require an arbitrator request the documentation in our do too [sic.] so (companies would have the financial records which show the amount of these deductions).

We are open to mediation on this issue I'm not sure who would be participating for ASP given Derek's departure. Thanks!

163. On December 5, 2022 Mr. Kenny replied to Ms. Street:

Derek Butler called me on Wednesday, November 30, 2022 - his last day with ASP - I guess he was tying off loose ends.

He informed me that ASP may, at some point down the road, be formally representing a group of processors in this matter, but ASP has not yet made the decision to become formally involved. He noted that, unofficially, the union was asked to “propose a remedy” and to forward this proposed remedy to the processors for consideration. His comments appear to be consistent with your statement below (i.e. Derek... requested we put a monetary value on the crab currency).

Your original request for the appointment of an arbitrator, sent to Minister Davis earlier this year, references ASP as the other party. But as we discussed back in September, 2022, Derek Butler noted ASP is not formally involved. As we've discussed earlier, if the FFAW wishes to request the appointment of an arbitrator, listing the companies in question (re: alleged violation, snow crab schedule), then I can contact the company(s) to determine how they wish to proceed.

Thank you for viewing mediation as an alternative. If you identify the companies in question, I can contact a representative from each company to suggest this alternative.

Please advise how you wish to proceed.

164. Ms. Street testified that her understanding after receiving this December 5 email from Mr. Kenny was that ASP had followed up with its members and that “we would be moving forward with that group of processors”.
165. When FFAW’s legal counsel asked Ms. Street during her direct evidence if her understanding from Mr. Kenny’s December 5 email was that there was an effort on Derek Butler’s part to try to settle the issue and that Mr. Kenny had discussed both letters to the Minister with Derek Butler, she replied yes to both questions. When asked if the FFAW was still at that point open to negotiation on the currency grievance matter, Ms. Street replied yes.
166. ASP objected to Ms. Street’s evidence about the December 5, 2022 emails, particularly with respect to discussions between Brian Kenny and Derek Butler as well as what Derek Butler’s understanding was, alleging it to be double hearsay. I agree the evidence about what was

discussed between Brian Kenny and Derek Butler is hearsay, possibly double hearsay. Hearsay evidence is not, however, necessarily inadmissible. I am allowed to receive and rely on hearsay evidence. Granted, hearsay is generally not as reliable as evidence of direct knowledge, but it can still be admitted and given less weight than direct evidence.

167. In terms of Ms. Street's evidence about the December 5 emails, including the discussions between Mr. Kenny and Mr. Butler and Mr. Butler's understanding at the time, while I agree her evidence on these points is hearsay, it is also consistent with her direct knowledge testimony in terms of what was happening at that time with the mediation process and her communications with Brian Kenny. ASP could have called Derek Butler as a witness to contradict any of this, but it did not. ASP did not put before me any apparent contradiction, inconsistency or other reason to question the reliability of Ms. Street's evidence about the December 5 emails or Derek Butler's understanding at the time. Even though some of her evidence is hearsay and is deserving of less weight, I am not inclined to reject it.
168. Combined with Ms. Street's evidence as to her understanding of what Derek Butler was aware of in the September to November 2022 time period, I am comfortable reaching a conclusion that Derek Butler was aware of the Original Grievance and the Individual Grievances, he was aware that FFAW had requested arbitration, and he was aware that Brian Kenny was leading a mediation process between the parties to try to resolve the currency provision dispute to avoid the need for an arbitrator to be appointed.
169. Later, on December 5, 2022, Ms. Street replied to Mr. Kenny as follows:

Thanks Brian,

The difficulty here (and why we had originally grieved ASP) is that we have evidence from a number of companies but are unsure of others, hence the information would need to be requested to even know the total companies who have violated the agreement.

This is also the case with the sea cucumber, though we feel those we have evidence for might be all in that species [low number of buyers].

Any advice on how to best proceed?

170. On December 6, 2022 Mr. Kenny replied to Ms. Street as follows:

The only tools I have to offer are the appointment of an arbitrator, if you identify the companies in question, and you wish to bring this matter to arbitration. Alternatively, in lieu of arbitration, the option of mediation can be explored with each company, to see if they're willing to engage in this process.

If this matter (re: currency provisions re: snow crab schedule) is an issue that keeps rearing its head annually, hopefully the parties will want to “sit down” and seek some resolution.

171. On December 6, 2022, Ms. Street replied to Mr. Kenny as follows:

Thanks Brian, this does not come up annually as processors have abided by the agreement in prior years.

Let me have a chat with management and I will get back to you ASAP.

172. Regarding the comment that “this does not come up annually”, Ms. Street testified there had been no issues between the parties with respect to the currency provision in prior years, so she assumed that it (the failure to pay the alleged correct price to harvesters in 2022) resulted from a “lack of oversight” or a “clerical error”, that the parties would resolve it, and that she did not think it would be a big issue.

173. On December 21, 2022, Mr. Kenny emailed Ms. Street as follows:

Just keeping this file in view. Please get back to me when ready.

174. On December 21, 2022, Ms. Street replied to Mr. Kenny as follows:

I have had some discussions with Renae at ASP. She has gone back to her members. I will follow up with her for an update.

175. On December 21, 2022, Ms. Street emailed Ms. Butler as follows:

Just following up on our last convo re: currency provision and cucumber grievances. Just wondering if you've had a chance to chat with your guys?

Thanks!

176. On December 21, 2022, Ms. Butler replied to Ms. Street as follows:

I have floated it with them but I'll follow up. Thanks for checking in. Hopefully we can move forward with this early in January...

177. On January 6, 2023, Ms. Street emailed Ms. Butler as follows:

Happy new year! Just following up on the currency and cucumber grievances. Any updates? Thanks!

178. On January 6, 2023, Ms. Butler replied to Ms. Street as follows:

Happy new year!

It looks like our sea cucumber members want to work together to try to settle these. What are next steps for this process? Should we (me and you) have a conversation on views for each side first? Or do we (the larger group) just go into mediation? Or is mediation held just between myself and you, representing the larger group?

Thanks,

Have a great weekend.

179. On January 6, 2023, Ms. Street replied to Ms. Butler as follows:

Thanks Renae, I think a conversation between you and I would be just fine to start off rather than having to get a mediator involved. If that works for you we can set up a time period let me know what works for you.

Appreciate your help!

180. On January 9, 2023, there was a further email exchange between Ms. Butler and Ms. Street about meeting again.

181. On January 9, 2023, Mr. Kenny emailed Ms. Street as follows:

Just keeping this file in view. Please get back to me when ready.

182. On January 9, 2023, Ms. Street replied to Mr. Kenny as follows:

Renae and I are meeting on Friday morning to discuss. I will keep you in the loop as we move forward.

183. On January 11, 2023, Ms. Butler emailed Ms. Street as follows:

Meet at Bannerman Brewing for 9 on Friday [January 13]?

184. No reply email from Ms. Street to Ms. Butler's January 11, 2023 email was submitted into evidence. Presumably Ms. Street did not reply.

185. It appears the meeting scheduled for Friday, January 13 at Bannerman Brewery did not happen, but Ms. Street testified that on Friday, January 13, 2023, she and Renae Butler had a Zoom call during which they discussed two outstanding grievances with respect to sea cucumber "as well as the currency one too... briefly".

186. Ms. Street testified that during the January 13 Zoom call Ms. Butler told her that Jeff Loder had been hired, that she would “bring him up to speed”, and “that she would have to circle back with her members”. Ms. Street testified Ms. Butler did not mention any timelines with respect to arbitration during this call.

187. On January 23, 2023, Ms. Street emailed Ms. Butler as follows:

I hope the storm wasn't too bad for you!

Just wondering if you've had a chance to get your cucumber guys together? I also realized we didn't chat about the currency provision grievance.

Thanks!

188. At the hearing, Ms. Street testified she was discussing these grievances with Renae Butler because “me and Renee were trying to keep things moving on the currency grievance and the cucumber grievance while ASP was without an Executive Director”.

189. Jeff Loder started as ASP’s new Executive Director on January 31, 2023.

190. Ms. Butler acknowledged that in January 2023 she was aware that FFAW still wanted an answer on the currency grievances.

191. There does not appear to have been any other email communications between Ms. Street and Mr. Kenny or between Ms. Street and Ms. Butler until February 23, 2023.

192. On February 23, 2023, referring to Ms. Street’s January 9 email, Mr. Kenny emailed Ms. Street as follows:

Hi Dwan. See below. I assume this matter has been resolved?

I'll be closing the file.

193. Ms. Street replied to Mr. Kenny on February 23, 2023 as follows:

It has not. I have been trying to connect with Renae this week but she has been tied up. ASP just hired their new executive director so she is bringing him up to speed.

194. On February 23, 2023 – about 45 minutes after she replied to Mr. Kenny’s email – Ms. Street emailed Renae Butler as follows:

Just wondering when you might have some time to chat cucumber and currency?

195. Ms. Street testified her understanding as of February 23, 2023, was that resolution talks with ASP were still ongoing with respect to the currency grievances, but that Ms. Butler still had not spoken with Mr. Loder.

196. Ms. Street testified that the January to March 2023 time period would have been the prime negotiating period for the upcoming fishing season.

197. Ms. Street testified that on March 14, 2023, she and Ms. Butler had another Zoom meeting, during which they discussed “more of the same”, with Ms. Street wanting an update on “both grievances”. She testified that during the call, she and Ms. Butler acknowledged they would have to “circle back on the grievances soon”. The matter of timelines was not raised during this Zoom meeting.

198. Renae Butler’s description of the March 14, 2023 Zoom call was different than Ms. Street’s. She acknowledged that she and Ms. Street had a Zoom call that day, but said they only discussed the sea cucumber grievances (but not the currency grievances).

199. On April 10, 2023, Ms. Street emailed Ms. Butler as follows:

I'm am [sic.] FINALLY getting the spreadsheet completed for cucumber. I am just wondering the status of the currency provision grievance from last year's crab landings as well?

200. On April 19, 2023, Ms. Butler and Ms. Street had the following email exchange:

Ms. Butler: Any update on the cucumber data? I know things have been hectic on your end. I'll look into the currency piece.

Ms. Street: Good timing – I just got everything back after sending it over to Jake for review. I'll be forwarding it over this afternoon once I finish up a few calls.

Ms. Butler: Sounds good! thanks

201. On May 25, 2023, Ms. Street emailed Ms. Butler as follows:

I know everything is chaos right now with crab but just wanted to check in on cucumber and the currency provision grievances to see if there are any updates? Thanks!

202. On May 30, 2023, Ms. Street emailed Ms. Butler in follow-up to her May 25, 2023 email as follows:

Just circling back on this.

203. It does not appear that Ms. Butler replied to Ms. Street's May 25 or May 30 emails.

204. On June 1, 2023, Ms. Street emailed Ms. Butler and the following email exchange occurred:

*Ms. Street: I know things are super busy but just wondering about an update for the cucumber and currency grievances? Given the length of time that has passed we would like to get these dealt with and will soon have to move to arbitration if no resolution is reached.
Thanks!*

Ms. Butler: Thanks for your e-mail. I will try to get back to you tomorrow on this.

Ms. Street: Thanks so much!

205. Ms. Street testified that she and Ms. Butler were trying to meet around June 1st or 2nd, 2023, but it got postponed. On June 2nd, they agreed to meet on June 8th or 9th, but later Ms. Butler told her that Mr. Loder was not available those dates. Ms. Street's notes indicate that in a text message, Ms. Butler informed her that Mr. Loder had been briefed on the issues but would not be available to meet until the following week, closer to June 16th.
206. Ms. Street testified that when she informed FFAW management of these developments, they indicated to her this all seemed like a stall tactic on the part of ASP and for her to move the matter towards arbitration.
207. Ms. Street's notes indicate that on June 16th she emailed Brian Kenny to inform him that discussions with ASP had hit an impasse and that FFAW would like to proceed to arbitration (though there was no June 16 email entered into evidence).
208. There was no evidence of Mr. Kenny replying to Ms. Street and/or if Mr. Kenny took any action in response to a June 16 email from Ms. Street.
209. A few months later, on November 22, 2023, I received an email from Kyle Rees (O'Dea Earle), legal counsel for FFAW. John Samms (Stewart McKelvey), legal counsel for ASP, was copied on the email. In the letter, Mr. Rees inquired if I was able to accept an appointment as arbitrator to hear the Grievances. Mr. Rees advised that the parties estimated a "two-day hearing should be sufficient for the merits" and asked about my availability in June 2024 for the hearing as well as a "pre-hearing conference to be held as needed".
210. I replied to Mr. Rees on November 23, 2023 (copying Mr. Samms) accepting the appointment, proposing June 4-5, 2024 for a hearing and advising that once hearing dates were confirmed, we could schedule a pre-hearing conference call as per Mr. Rees' letter.

211. In late November and early December of 2023, I exchanged further emails with legal counsel for the parties regarding scheduling an arbitration hearing.
212. On December 5, 2023, I confirmed with legal counsel for the parties via email that the dates of June 19-20, 2024 would be scheduled for the hearing, which I understood would be a hearing on the merits (though I did not know what the merits were at that point). I also proposed we have a call to discuss procedural matters. To the best of my recollection and my notes, that call did not happen.
213. On January 18, 2024, a Notice of Hearing was emailed to legal counsel for the parties by my office.
214. There was no further correspondence between me and legal counsel for the parties until June 18, 2024 (the day before the scheduled hearing dates) when I received an email from John Samms (legal counsel for ASP) raising, *inter alia*, procedural concerns on behalf of ASP with respect to ASP's lack of knowledge of the case it had to meet.
215. In his June 18, 2024 email, Mr. Samms also advised that:

ASP will be arguing that:

(1) the parties agreed that "it is of the utmost importance to adjust grievances and disputes... as quickly as possible" and the grievances are not arbitrable because the "circumstances of the grievance occurred or originated more than 30 days prior to the written grievance being served on the other party" pursuant to Article 10:01 of the Collective Agreement (emphasis added, see Exhibit M in the provided affidavit); and,

(2), the grievances were not referred to an arbitrator within the 10 day timeframe under Article 10:02 of the Collective Agreement.

216. On June 18, 2024, I became aware that Adrienne Ding (O'Dea Earle) had replaced Kyle Rees as legal counsel on the file for FFAW. A number of emails were exchanged between Ms.

Ding, Mr. Samms and myself on the evening of June 18 that are not material to the preliminary objection of ASP.

217. The evidence before me indicates that at no point prior to June 18, 2024 did anyone with ASP (including Derek Butler or Renae Butler), or on behalf of ASP, advise FFAW of ASP's preliminary objections that the Grievances were not served in compliance with article 10.01 and were not referred to arbitration in compliance with article 10.02 or that a notice of intention to arbitrate was not delivered in accordance with article 11.02 or that ASP was taking issue with the process of the selection of an arbitrator in accordance with articles 11.03 or 11.04.
218. This concludes the chronology of events for purposes of this Preliminary Award.
219. Overall, with respect to the May/June 2022 to June 2023 time period, Ms. Street testified that while she was never informed of ASP's formal position with respect to the Currency Grievances, she genuinely believed that they could be resolved. She testified that until June 2023 she believed that ASP had been seeking instructions from its members. Ms. Street's impression was that Derek Butler was aware of the Original Grievance and the Extended Grievance (although she could not produce any email or registered mail documentation to prove service of the Extended Grievance). When asked whether at any point Mr. Kenny indicated to her that Derek Butler was not aware of the currency issue, Ms. Street replied no.
220. Ms. Street testified that based on all her meetings and discussions with Renae Butler, Derek Butler and Brian Kenny, she never got the sense that ASP did not understand FFAW's position, that ASP felt FFAW would not proceed to arbitration if the matter did not resolve, or that ASP would attempt to hold FFAW to the timelines with respect to getting the currency grievances to arbitration.

221. Ms. Street testified that up to June 2023, it seemed like both parties were engaged and wanted to reach a resolution, but that after Derek Butler's resignation she knew Renae Butler was not in a position to provide a formal response without an Executive Director in place at ASP. As a result, she tried to give "grace" to ASP because both organizations were in transition. Ms. Street testified that reflecting back now, she does not think ASP ever made true efforts to resolve the currency grievances.
222. Ms. Street agreed with the statement put to her on cross examination that "action did not pick up" with respect to the currency grievances until Mr. Kenny became involved in or around the fall of 2022.
223. Ms. Street acknowledged the Original Grievance relates to the Panel's Reconsideration Decision on May 16, 2022. When it was put to her on cross examination that determining the minimum price of crab based on the currency provision was a weekly decision, she answered yes. She acknowledged the Original Grievance is against ASP – not against individual processors – and acknowledged it relates to the issue of \$6.15 versus \$6.22.
224. Ms. Street acknowledged there was nothing in writing from ASP confirming a waiver of any timelines and there were no discussions between the parties about timelines. She qualified these admissions by stating there was no need for written waiver or discussions because of the past practice and working relationship between the parties.
225. Ms. Street acknowledged the currency provision grievances are unique, but she maintained that the parties' practice was that "...if a crisis arose during negotiations or during the high fishing season, we gave each other leeway to get to the table to try to discuss it".
226. When asked how often the timelines in articles 10 and 11 are relied on by the parties, Ms. Street replied: "It depends. If discussions are ongoing, the timelines are not relied on. Generally, we do manage to avoid arbitration – there is one example of another grievance where discussions have been ongoing for two years, and the grievance is only now going

to arbitration this September”. Ms. Street testified that a preliminary objection about timelines for the September [2024] arbitration has not been raised by ASP and that she has not had a preliminary objection raised in grievances she has been involved with.

227. Ms. Street testified that by taking a strict approach with respect to the timelines with the currency grievances, ASP is acting inconsistently in terms of how it has acted in the past. She indicated “we've always given each other grace in the past...we've always recognized the peak fishing season and recognized that processors cannot do arbitrations during this time”. When asked if waiver of timelines and flexibility are critically important to the relationship between harvesters and processors, Ms. Street replied yes. When asked if going forward she had any concern with respect to strict enforcement of the timelines on the relationship between the parties and the livelihood of harvesters, she replied yes.
228. Ms. Street acknowledged that except for FFAW’s June 22, 2022 letter, there was no written notice of an intention to arbitrate (as per article 11:02). She acknowledged an arbitrator was not appointed within 10 days after delivery of a notice of intention to arbitrate (as per article 11:03). She agreed the appointment of the arbitrator did not happen until 2023. When asked on cross examination if FFAW essentially skipped ahead to article 11:04 (applying to the Minister for the appointment of an arbitrator), she agreed saying it did so because it had gotten no response from ASP on the currency grievance issue.
229. When asked during direct examination whether the practice of filing a formal notice of intention to arbitrate is a new practice, Ms. Street replied yes and indicated that the parties have always tried to resolve grievances before arbitration. She then made specific reference to the FFAW’s June 22, 2022 letter, which indicated the FFAW would proceed to arbitration if the parties could not resolve the issue.
230. In general, Ms. Butler testified that while there were communications (emails and discussions) relating to the Currency Grievances between her and Dwan Street that continued after November 2022 up until June 2023, in her view these communications

pertained mostly to the sea cucumber grievances as opposed to the currency grievances. As well, Ms. Butler testified that – with the exception of the November 2, 2022 meeting at Bannerman Brewery during which the Currency Grievances were mentioned “very briefly” – there were no discussions between her and Dwan Street regarding the currency grievances, except by email.

231. Ms. Butler’s evidence is that she never advised Ms. Street, by email or otherwise, that ASP waived its right to argue that the Currency Grievances were non-compliant with the grievance and arbitration procedures in the MCA and therefore not arbitrable.
232. On cross examination, Renae Butler acknowledged being aware – based on FFAW’s June 22, 2022 letter – that FFAW would be proceeding to arbitration if the Original Grievance was not resolved.
233. Ms. Butler testified the June 22, 2022 letter (containing the reference to arbitration) was forwarded to Derek Butler, but she does not know if he responded to it or not.

ASP Submission

234. The issue is whether FFAW complied with articles 10.01, 10.02 and 11.02 with respect to serving the Grievances, referring them to arbitration, providing a notice of intention to arbitrate and appointing an arbitrator. If not, the Grievances are not arbitrable.
235. The 30-day time limit in article 10.01 for serving a grievances is mandatory, not directory. Except for the week of May 29 – June 4, 2022, none of the Grievances were served within this 30-day period. They are therefore not arbitrable.
236. With respect to the Original Grievance, it relates to the three-week period beginning May 16, 2022 and ending June 4, 2022. The Original Grievance was not served until June 29, 2022, which was more than 30 days after the week commencing May 16, 2022 and the week commencing May 22, 2022. Therefore, with respect to these two weeks, the Original

Grievance is not arbitrable. The Original Grievance was, however, served within 30 days of the week beginning May 29, 2022 (and ending June 4, 2022).

237. While the Original Grievance might have been arbitrable with respect to that one-week period beginning May 29, 2022 and ending June 4, 2022, the entire Original Grievance was not referred to arbitration within the mandatory 10-day timeline in article 10.02. Therefore, no aspect of the Original Grievance is arbitrable.
238. The Extended Grievance is dated September 12, 2022. Ms. Street confirmed it pertains to the period beginning June 5, 2022 and ending August 7, 2022 (the end of the 2022 crab fishing season).
239. The Extended Grievance is not arbitrable for the same reasons as the Original Grievance. Even if the Extended Grievance had been served on September 12, 2022, as FFAW alleges, that was still outside the 30-day timeline in article 10.01 which commenced August 7, 2022. Not only could FFAW not produce any evidence that the Extended Grievance was served within 30 days of August 7, FFAW was unable to produce any evidence it was served on ASP at any point in 2022. The best FFAW can say was that the Extended Grievance might have been served. If the Extended Grievance had really been served, FFAW could have subpoenaed Rachel Waye to provide evidence with respect to service, but it did not do so.
240. Moreover, there is no such thing as an extension grievance. In terms of any suggestion that there was a “continuing grievance”, Ms. Street confirmed that each week of the fishing season is a separate and discrete week. Each week presented a discreet decision point. This means a separate grievance must be filed with respect to each week. This was not done.
241. The Extended Grievance is not a “continuing grievance” within the meaning of the arbitral authorities. Describing it as an extension grievance was an attempt by FFAW to skirt the timelines in the MCA by attempting to tie it to the Original Grievance.

242. With respect to the Individual Grievances, they differ in nature from the Original Grievance, but ASP did not learn of this until just before the hearing into ASP's preliminary objection. Ms. Street confirmed that the Original Grievance relates to the period commencing May 16, 2022, and that the dispute is about the applicable minimum price being \$6.15 or \$6.22 per pound arising from a dispute about whether the applicable baseline currency factor is \$1.29 or \$1.25.
243. The Individual Grievances apparently relate to an allegation that for the weeks of May 1 and May 8, 2022, four rogue processors paid harvesters a lower price (\$7.60) than the price FFAW directed them to pay (\$7.67). Ms. Street testified to being aware of these allegations on May 15, 2022, perhaps earlier. But the nature of this allegation only came to light just before the hearing. Until then, ASP's understanding had been that the Individual Grievances also related to the same currency-provision issue as the Original Grievance and that they related to the period from May 16, 2022 onward.
244. If ASP had been advised as to the nature of the Individual Grievances (i.e. four rogue processors) in a timely manner, it could have addressed the allegations at the time. While ASP need not prove prejudice, FFAW's delay in disclosing the nature of the Individual Grievances creates prejudice in this case. Whether on purpose or not, by failing to clarify the nature of the Individual Grievances sooner, FFAW allowed damages to rack up. The nature of the Individual Grievances came as a total surprise to ASP just in advance of the hearing.
245. At the earliest, the Individual Grievances were filed September 21, 2022, yet they relate to the weeks of May 1 and May 8 (i.e. weeks 4 and 5) of the fishing season. The Individual Grievances were therefore filed well outside the 30-day timeline in article 10.01.
246. In addition to FFAW's failure to comply with article 10.01 in relation to all six Grievances, article 10.02 indicates that if a matter has not been settled to the satisfaction of the Union within thirty (30) days of its initiation as a grievance it must be referred to arbitration within

a further 10 days. This time limit is mandatory, not directory. None of the Grievances were referred to arbitration within that 10-day period.

247. In addition to the failure to comply with the timelines in articles 10.01 and 10.02, a notice of arbitration was not prepared in accordance with article 11.02 with respect to any of the Grievances. This also renders all the Grievances not arbitrable.
248. Emails between Keith Sullivan, Rachel Waye and Dwan Street illustrate there was confusion within FFAW with respect to how to properly advance these Currency Grievances.
249. Article 10.01 begins by stating it is of the “...utmost importance to adjust grievances and disputes as herein defined as quickly as possible”. Interestingly, FFAW’s June 22, 2022 letter quotes this language from article 10.01. Therefore, FFAW’s suggestion that the parties had a lax approach to timelines rings hollow.
250. Ms. Street acknowledged that the Currency Grievances are unusual and unique. While it is true most disputes between employers and unions settle, her testimony falls short of establishing there was a past practice of ignoring or waiving timelines with respect to the types of grievances now being arbitrated.
251. The language in article 10.04 stating that “...no grievance shall be denied through error in form or technical irregularity” does not save FFAW’s delinquency with respect to the timelines. This exact language was before Justice Orsborn in *Barry’s Ltd. v. Fishermen, Food and Allied Workers’ Union*, 122 Nfld. & PEIR 45 (“*Barry’s & FFAW*”). This language did not change Justice Orsborn’s analysis with respect to enforcing timelines that he found to be mandatory.
252. The language at issue in the collective agreement in the *Barry’s & FFAW* case is similar to the language now at issue between ASP and FFAW. The timelines in articles 10 and 11 of the MCA are mandatory. These articles help ensure that issues between the parties are

dealt with in a timely manner while evidence is fresh. Timely dealings keep the parties focused. Timely dealings avoid political calculus becoming the reason for pursuing grievances. In this regard, ASP points out that FFAW only got serious about the grievances during the crab tie up in 2022. Parties should not be allowed to accumulate grievances, which is what FFAW did here.

253. ASP also relies on chapter 2:64 of David M Beatty, Donald J Brown & Adam Beatty, *Canadian Labour Arbitration, 5th ed*, (Toronto: Thomson Reuters Canada, 2006, loose-leaf).

FFAW Submission

254. FFAW's June 22, 2022 letter, the filing of the Original Grievance on June 29, 2022, and the discussions between the parties throughout 2022 and 2023 illustrate that FFAW met the applicable timelines in the MCA. The letter of June 22, 2022 and the two letters to the Minister requesting arbitration constitute sufficient notice of referral to arbitration within the meaning of the MCA.
255. FFAW rejects ASP's suggestion that the Extended Grievance was an attempt to skirt the timeline in article 10.01. The first sentence in article 10.01 reads, "The parties...are agreed that it is of the utmost importance to adjust grievances and disputes as herein defined as quickly as possible". This language, in particular the words "adjust grievances", means that there is authority to change how a grievance or dispute is resolved.
256. ASP's position that it did not receive the Extended Grievance or the two letters to the Minister is based on Renae Butler's inability to locate these documents within ASP's records. This inability does not conclusively establish they were not served on ASP. FFAW's production of the June 29, 2022 email from Rachel Waye to Derek Butler – despite Renae Butler's inability to find this email in ASP's records – cannot be ignored. FFAW's production of this email contradicts ASP's assertions that the other documents were not served.

257. Admittedly, neither party's records show whether certain documents were delivered, but considering the contradiction in Ms. Butler's evidence arising from her inability to find the June 29, 2022 email, the most reliable evidence with respect to service of documents is that of Dwan Street. Ms. Street testified that Rachel's Waye's standard practice was to serve grievance documents, first by email, followed by registered mail.
258. As well, Dwan Street confirmed there would have been no reason for Ms. Waye not to have sent the grievances and letters. FFAW wanted to resolve the Grievances informally. The evidence illustrates FFAW was patient and diligent in its efforts to resolve the Grievances. Sending these grievances and letters to the Minister to ASP would have facilitated discussion and possible resolution. For all these reasons, it is far fetched for ASP to suggest that Rachel Waye, on multiple occasions, simply failed to send the grievances and letters to ASP. On balance, it is more likely than not that these other documents – the Extended Grievance, the Individual Grievances and the two letters to the Minister – were served on ASP.
259. It is possible FFAW has records to substantiate proof of service but given how late FFAW became aware of ASP's position with respect to service, FFAW's ability to search its own records was limited.
260. ASP's conduct constitutes waiver of any applicable time limits. There is no record of ASP raising any issue with respect to time limits until just before the hearing. ASP had ample opportunity to raise a timeline objection during the many emails, telephone calls, zoom calls with Dwan Street and/or with Brian Kenny (the conciliator). It could have raised the issue of timelines following the Original Grievance, when the letters were sent to the Minister, during the meeting at Bannerman Brewery, when Brian Kenny was appointed as a mediator, or at any point in between, but it did not do so.
261. Waiver need not be in writing. Waiver can be established by conduct. ASP is a sophisticated organization. It cannot argue it was unaware of its right to raise the timelines objections

sooner. ASP was served with the Original Grievance on June 29, 2022, yet it continued to correspond with FFAW about the grievances for a year. It makes no sense for ASP to have continued to try to resolve the grievances if it truly felt the grievances were not arbitrable because the timelines had not been met. Overall, the evidence sufficiently establishes that ASP abandoned any right to enforce the timelines in articles 10 and 11.

262. A party seeking to enforce timelines in a collective agreement must come with “clean hands”. The evidence shows that ASP failed to act in a cooperative and responsible manner. The evidence shows that Mr. Kenny sometimes had difficulty reaching Derek Butler and sometimes received no response at all from Mr. Butler. The record shows ASP's failure to provide a response to the Grievances to FFAW. The successful operation of dispute resolution mechanisms in collective agreements is premised on both parties genuinely putting forward best efforts to resolve disputes. By failing to adequately respond and by not meaningfully engaging in the dispute resolution process, ASP frustrated the contemplated operation of articles 10 and 11. As a result, ASP should not be able to rely on a strict application of the timeline provisions. If ASP was genuinely interested in resolving the Grievances it could have replied to any number of messages and communications from FFAW.
263. A number of documents in evidence illustrate that Derek Butler was engaged in the mediation efforts with Brian Kenny. These records illustrate that even if certain documents were not served on ASP, ASP was nevertheless engaged in the process and had ample opportunity to find out what it had not received.
264. In the alternative, even if the time limits in articles 10 and 11 were not waived by ASP, the time limits are directory, not mandatory.
265. The historical evidence establishes that timelines have not been enforced between these parties. The historical evidence also shows that processors have always abided by the currency provision and would pay if a discrepancy was discovered. The currency grievances

seemed to be the most calculable and fixable of the grievances between the parties in 2022. Because conversations about resolving them were still happening throughout the latter half of 2022 and first half of 2023, it was reasonable and practicable for FFAW not to take the aggressive stance of referring them to arbitration without first trying to resolve them. The evidence shows that resolution through mediation was still possible even after the 2022 season was over.

266. Due to the nature of the fishing industry, there are good and practical reasons for flexibility with respect to timelines. Resolving grievances prior to arbitration takes time and space, even if the parties give their best efforts to resolve this dispute. Therefore, for grievances that arise during a busy fishing season, discussions must take place outside the prescribed windows in the MCA. In the present case, even with the involvement of Brian Kenny as a conciliator, the discussions between ASP and FFAW spanned the course of one year.
267. Context is also important with respect to the six grievances. The evidence shows that the 2022 crab fishing season was chaotic, volatile and unusual. In early May 2022, because crab sales were slow, ASP sought reconsideration of the Panel's April 1 decision. Government NL had instituted an independent review of the price setting system. ASP and FFAW had several large-scale disputes, including the currency grievances – which are the subject matter of the current dispute – as well as the sea cucumber grievances.
268. FFAW submits that allowing the grievances to proceed on the merits will not result in any prejudice to ASP. ASP submitted no evidence of prejudice. Conversely, there will be disproportionate and significant prejudice to thousands of harvesters if the grievances are not heard on the merits. FFAW feels its case on the merits is strong. ASP should not be able to dispose of it through procedural technicalities.
269. FFAW requests dismissal of ASP's preliminary objection. FFAW requests that dates be scheduled for a hearing on the merits of the grievances.

270. The Union relies on the following authorities: *Toromont Cat & IUOE Local 904*, February 11, 2021 (Arbitrator Peddigrew); *IBEW Local 1620 and Newfoundland Power Inc.*, 2023 C.L.A.S. 517 (Arbitrator Conway); Brown & Beatty, *Canadian Labour Arbitration*, 5th Edition, paragraph 2:63; *Natrel (Ontario) Inc. v. Teamsters, Local 647* (1999), 57 C.L.A.S. 316, 83 L.A.C. (4th) 55 (Arbitrator Newman); and *Nova Scotia and NSGEU* (2007), 88 C.L.A.S. 371 (Arbitrator Ashley).

ASP Rebuttal Argument

271. In terms of FFAW's argument about past practice, the arbitrator must very carefully review what the evidence says. The past practice evidence relates to the parties' efforts to resolve disputes. The past practice evidence does not relate to a history of waiving timelines.

272. The threshold to establish waiver is very high and has not been met in this case. The parties did not really figure out what these grievances were all about until the week of the hearing of the preliminary objection.

273. In the alternative, the waiver argument can only apply to article 10.02 with respect to the referral to arbitration. The article 10.01 requirement to serve a grievance within 30 days was never waived. The Extended Grievance and the Individual Grievances were brought way too late.

274. FFAW's past practice argument is really an estoppel argument. ASP acknowledges it has the onus to show the timelines were not complied with, which it has done. But once it has done so, the onus to establish estoppel rests with FFAW. In ordinary circumstances, there would be a lot more evidence of past practice than that put forward by FFAW in order to establish estoppel. FFAW provided two examples only and they do not assist FFAW's case. In one of its examples, a formal notice of arbitration was given. The other example is about a hearing scheduled for this September. No other evidence about these examples was led.

275. FFAW's limited evidence of past practice is insufficient to ground estoppel. Estoppel requires a clear and unequivocal representation and detrimental reliance. In other words, FFAW has to show it was induced to walk out onto a branch, and that ASP then sawed off the branch. There is no evidence of this.
276. Regarding FFAW's clean hands argument, ASP did nothing wrong. There is no evidence ASP deliberately "ragged the puck". ASP agrees the evidence shows that 2022 was a chaotic year. There was a lot going on. The executive directors at both ASP and FFAW resigned. There were illegal strikes and disputes between the parties. There were a number of unique and unusual grievances. But the evidence also shows FFAW did not know what to do with those grievances. Instead of arguing ASP has not come to the hearing with clean hands, FFAW should have followed the procedures in articles 10 and 11.
277. In response to FFAW's argument about its inability to fully search for certain documents within its records because it only recently found out about ASP's position with respect to timelines, any notion that this prevented FFAW from gathering relevant evidence is purely of FFAW's own doing. If there was evidence FFAW felt was relevant that it did not have sufficient time to obtain, it could have requested a delay to the start of the hearing.
278. With respect to FFAW's arguments about the word "adjusting" in article 10.01, ASP disagrees the word "adjusting" implies an ability to change an applicable timeline. Rather, "adjusting" refers to dealing with a grievance.

Law & Analysis

279. ASP preliminary objection is that the Grievances are not arbitrable because:
- (i) the time limits in articles 10 and 11 are mandatory;
 - (ii) except for the week of May 29 to June 4, 2022, the Original Grievance was not served within the 30-day timeline in article 10.01;

- (iii) with respect to the Extended Grievance and the Individual Grievances, FFAW did not serve them within the 30-day timeline in article 10.01;
- (iv) with respect to the Original Grievance (including the week of May 29 – June 4, 2022), the Extended Grievance and the Individual Grievances, FFAW did not refer them to arbitration within the 10-day timeline in article 10.02;
- (v) with respect to the Original Grievance, the Extended Grievance and the Individual Grievances, FFAW did not deliver a notice of arbitration to ASP in accordance with article 11.02; and
- (vi) in respect of the appointment of an arbitrator, FFAW did not comply with articles 11.03 and 11.04.

280. FFAW submits that ASP's preliminary objection with respect to articles 10 and 11 should be dismissed because the timelines in articles 10 and 11 are directory, not mandatory, and even if the time limits are mandatory, FFAW complied with the time limits, and/or the past practice evidence illustrates a history of the parties not enforcing the time limit, and/or ASP waived its right to insist on strict compliance with the timelines in articles 10 and 11.

281. The submissions of the parties can be distilled and summarized as follows: are the timelines in articles 10 and 11 mandatory or directory; did FFAW fail to comply with the time limits and/or other procedural requirements in article 10 and/or article 11; if FFAW failed to comply with the time limits and/or other procedural requirements in article 10 and/or article 11, what are the implications; did ASP waive its right to insist on strict compliance with the time limits and/or other procedural requirements in article 10 and article 11; and is there an established past practice of not adhering to the timelines and/or other procedural requirements in articles 10 and 11.

Are the timelines and other procedural requirements in articles 10 and 11 mandatory or directory?

282. In support of its position that the timelines in articles 10 and 11 are mandatory, as opposed to directory, ASP relies on *Barry's & FFAW, supra*.

283. *Barry's & FFAW* is a judicial review of an arbitration decision. In paragraph 10 of *Barry's & FFAW, supra*, Justice Orsborn summarizes the following legal principles as applicable when determining whether time limits in a collective agreement are mandatory or directory, and thus whether compliance with those time limits is a prerequisite to arbitrability:

1. *The inclusion in the collective agreement of a specific provision dealing with the manner in which time may be extended will suggest that time limits are mandatory, unless extended in accordance with the agreement.*
2. *The inclusion in the collective agreement of a specific provision dealing with the consequences' of noncompliance with the time limits will suggest that compliance is mandatory, but the failure to provide a penalty will not, itself, render the time limits directory.*
3. *The use of the imperative "shall" does not of itself render the time limits mandatory.*
4. *The time limit provision should be interpreted so as to give effect to the intentions of the parties as reflected in an interpretation of the grievance procedure provisions as a whole.*

284. In *Barry's & FFAW*, the arbitrator had concluded the timelines in the grievance procedure were directory, not mandatory, which conclusion Justice Orsborn found to be patently unreasonable, which resulted in him setting aside the arbitrator's decision.

285. In reaching this conclusion Justice Orsborn noted that: the collective agreement before him contained no specific penalty for non-compliance with the grievance procedure time limits; the imperative "shall" and the permissive "may" were used throughout Article 6; the word

“shall” was used when referring to the requirement of the employer to respond at any particular stage; and the word “may” was used to refer to the employer’s or the union’s decision to proceed further after various responses from the employer.

286. Justice Orsborn then referred to step 4 of article 6.02, which set out how a grievance was to be referred to arbitration:

Step 4: Failing resolution of the grievance, and issue involving the interpretation or alleged violation of the agreement, the grievance may be referred to arbitration in accordance with Article 7 within forty-eight (48) hours from the time that the manager’s decision is rendered or from the time when such decision is due.

287. Justice Orsborn then referred to Article 6.05 which made specific reference to the extension of time limits. Article 6.05 stated, “Hourly time limits fixed by this article... can be extended only by mutual agreement between the company and the union subject to the right of either party to provide reasonable grounds for its delay which shall be an arbitrable issue failing agreement.”
288. Justice Orsborn noted there was no evidence before the arbitrator of any agreement between the company and the union, nor was there any argument or evidence adduced so as to bring into play the “reasonable” grounds exception in article 6.05.
289. Justice Orsborn noted the arbitrator’s focus on the word “may” in step 4 of article 6.02 and on the absence of a penalty clause in article 6. He then pointed to the arbitrator’s conclusion that because the employer failed to respond at step 2 of the grievance procedure (step 2 required the employer to render a decision within 24 hours of receiving the written grievance), the employer was in default and could not rely on its own default to render the grievance inarbitrable.
290. Justice Orsborn then concluded that the arbitrator erred by introducing the element of the employer’s default, by failing to consider article 6.05 of the applicable collective agreement

(which dealt with the issue of the extension of time limits), and by failing to make any reference to article 7.06 (which dealt with the extension of time limits for the selection of the arbitrator and the convening of the arbitration). Justice Orsborn concluded:

[19] Where the grievance and arbitration articles of the collective agreement contained not one, but two specific clauses dealing with the manner in which time limits may be extended, the arbitrator commits reversible error if he interprets the time limits as either mandatory or directory without consideration of these articles. The agreement cannot be rationally interpreted by the arbitrator without taking into account the assistance provided by both Article 6.05 and 7.06. The arbitrator's decision must therefore be set aside.

291. While the collective agreement language before Justice Orsborn has similarities with the language in articles 10 and 11 of the MCA before me, there are also significant differences. Each collective agreement must of course be interpreted according to its own language, with the applicable legal principles and authorities providing guidance.
292. As well, although Justice Orsborn identified the factors an arbitrator should consider when determining whether a timeline is mandatory or directory, I read his decision in *Barry's & FFAW* more as authority for explaining how an arbitrator commits a reviewable error (based on the then-applicable standard of patent unreasonableness) when assessing whether timelines are mandatory or directory. Ultimately, while Justice Orsborn determined the arbitrator acted in a patently unreasonable manner in reaching a conclusion that the timelines were directory, he did not determine whether those timelines were mandatory or directory.
293. Nevertheless, the legal principles identified by Justice Orsborn in paragraph 10 of *Barry's & FFAW*, as well as his analysis of the arbitrator's decision, provide useful guidance. The legal principles he identified in paragraph 10 – or a variation of them – are found throughout the arbitral authorities.

294. Paragraph 2:3128 of Brown and Beatty, Canadian Labour Arbitration, 4th edition (“Brown & Beatty”) states as follows:

Other than where the breach is a continuing one, the most critical issue that may arise with respect to such provisions is whether compliance with the time-limits is mandatory so as to render a grievance inarbitrable. . . . However, where the word “shall” is used, the matter is less certain. One line of authority has held that “shall” is imperative or mandatory and that non-compliance with such a provision is a bar to arbitration, particularly in connection with statutory expedited arbitration provisions. The more prevalent view now, however, is that notwithstanding the imperative character of the word “shall”, whether it is mandatory or directory ultimately will turn on the construction of each agreement. For example, where the agreement does not contain an express provision providing for a penalty or does not address the consequence of non-compliance, the provision will more likely be construed as directory only. Where the collective agreement refers to disciplinary action procedures as “guidelines”, this characterization has been held to be consistent with a conclusion that specified time periods are directory only. However, where the collective agreement provides that “no matter may be submitted to arbitration which has not been properly carried through all previous steps of the grievance procedure”, or “if a grievance is not submitted or advanced from one step to another within the time limits . . . the grievance shall be deemed to be abandoned and all rights of recourse to the grievance procedure shall be at an end”, failure to comply with its terms will likely be held to be a bar to arbitration.

295. I will now apply the principles identified above to each of articles 10 and 11 of the MCA in order to determine whether the time limits therein are mandatory or directory.

Service of the Grievances

296. At the end of article 10.01 it states, “No complaint shall be considered a grievance if the circumstances occurred or originated more than thirty (30) days prior to the written grievance being served on the other party”. This sentence contains a clear consequence for failure to serve a grievance within 30 days. I would describe this language as a penalty provision insofar as it prescribes a penalty for failure to adhere to the 30-day timeline.

297. The absence or presence of a penalty provision in relation to a missed timeline, in and of itself, is not determinative, as to whether a timeline is mandatory or directory, but it is a relevant factor.
298. Article 10.04 states that the “Time limits specified may be changed by agreement in writing between the parties”. The presence of a clause like article 10.04, combined with the use of the word “shall” in relation to a deadline for filing a grievance (i.e. or serving a grievance as per article 10.01), usually results in a finding that the time limit in question is mandatory (see *Newfoundland and Labrador Association of Public and Private Employees v Newfoundland and Labrador Government*, 2016 CanLII 29021 (NL LA) (Arbitrator Oakley)).
299. In my view, the penalty provision language in article 10.01, when combined with the absence of penalty provision language in the remainder of article 10, as well as the article 10.04 requirement for written agreement to change the time limits, leads to a conclusion that the 30-day time limit in article 10.01 is mandatory. The parties intended to prevent a complaint from being considered a grievance if the *circumstances occurred or originated* more than 30 days prior to the written grievance being served on the other party.
300. My conclusion that the 30-day time limit in article 10.01 is mandatory does not, however, resolve ASP’s preliminary objection in its favour. Later in this Preliminary Award I will explain my finding that ASP waived its right to insist on strict compliance with this mandatory 30-day time limit in article 10.01.
301. Before explaining my finding with respect to FFAW’s waiver argument, I will first address ASP’s submission that the other time limits in article 10 are also mandatory. I reject ASP’s submission in this regard for the reasons outlined below. Next, I will address the principle of discoverability as it applies to the 30-day time limit in article 10.01. Next, I will address ASP’s preliminary objection with respect to time limits and procedures in article 11

(Arbitration). Then I will address FFAW’s waiver argument with respect to both article 10 (Grievance Procedure) and article 11 (Arbitration Procedure).

302. Both parties referred to the first sentence in article 10.01, which states, “*The parties to this agreement are agreed that it is of the utmost importance to adjust grievances and disputes as herein defined as quickly as possible.*” ASP submits this sentence means all other timelines in article 10 are mandatory. I disagree. I accept, however, that this first sentence suggests a mutual intention that grievances and disputes be adjusted (i.e. dealt with) as quickly as possible. The phrase “as quickly as possible” is, however, not defined. It is subjective and open to interpretation depending on the circumstances.
303. At this point, I draw attention to aspects of article 10 that create ambiguity and confusion. The parties did address this ambiguity/confusion at the hearing by calling, for instance, past practice evidence or evidence of negotiating history. I have done my best to reconcile the ambiguity/confusion, applying the principles referred to by Arbitrator Browne in *Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Nurses’ Union*, 2013 CanLII 98014:

And at 4:2110 Brown and Beatty state:

In searching for the parties’ intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense.

Arbitrator Oakley, in a recent decision, summarized these principles of interpretation in terms to which I subscribe:

The Arbitrator has considered the principles of collective agreement interpretation that apply in this case. The principles of interpretation are discussed in Brown & Beatty, Canadian Labour Arbitration, 4th edition, and include, that the object of construction is to determine the intention of the parties from the express

provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

304. The second sentence in article 10.01 states that should a party “...*allege a breach of this Agreement, the matter or matters in which in which it is alleged that the Agreement has been violated shall be indicated promptly to the other party in writing*”.
305. Interestingly, this second sentence refers to an alleged breach and violation of the MCA, but it does not refer to “grievances” or “disputes”, which are words used in the first sentence or article 10.01. Whether this different wording as between the first and second sentences was intentional on the part of the drafters or not, I do not know. The parties did not address the matter at the hearing. In the absence of submissions from the parties, I am reluctant to delve into the significance of the difference, if any. As well, I do not consider the difference to be material for my determinations with respect to article 10. Finally, given my finding on FFAW’s waiver argument, it is not necessary for me to further address this difference in wording in the first and second sentences of article 10.01 any further.
306. The second sentence of article 10.01 also indicates that an alleged “breach” and the “matter or matters in which it is alleged that the Agreement has been violated” shall be “promptly” indicated to the other party in writing. Like the phrase “as soon as possible” in the first sentence of article 10.01, the word “promptly” generally means quickly, at once, or without delay, but it too is subjective and open to interpretation in any given circumstance. “As quickly as possible” or “promptly” could mean a day or two in one situation, or several weeks in another situation.

307. The word “adjust” in the first sentence of article 10.01 suggests the parties intended the phrase “as quickly as possible” to apply to the entire grievance procedure and not just to the initial filing or service of grievances.
308. Overall, I read the first and second sentences of article 10.01 as illustrating a mutual intention that disputes, alleged breaches, violations, and/or grievances be dealt with “as quickly as possible” and “promptly”, while allowing for some flexibility (except with respect to the mandatory 30-day timeline for serving a grievance).
309. A desire for flexibility aligns with the testimony of Dwan Street. She testified the parties always gave “each other grace in the past” and recognized “the peak fishing season and that processors cannot do arbitrations during this time”. ASP did not call evidence to contradict Ms. Street’s evidence on these points. Her evidence makes sense given the short, but intense, fishing season. Given my understanding of the typical requirements on parties when preparing for arbitration and the demands on processors and harvesters during a fishing season, it makes sense that the parties might not prioritize processing grievances to arbitration during an intense 12-14 week crab fishing season.
310. Despite an apparent intention for promptness/speed in article 10, the absence of a timeline in article 10 applicable to the responding party is interesting. Most collective agreement grievance procedures establish a timeline – whether mandatory or directory – within which a responding party (usually the employer) is required to respond to a grievance. Article 10.01 does not, however, contain a timeframe within which a responding party is to respond to what it receives from “the other party in writing” about an alleged breach or violation of the MCA, nor does it establish a deadline by which a responding party must respond after a complaint becomes a grievance after being served.
311. It could be argued that a responding party is expected to respond within 30 days because article 10.02 indicates that the grieving party “may” refer the grievance to arbitration within a further 10 days if “the matter has not been settled to the satisfaction of the

Processor, individual fisher or the Union within thirty (30) days of its initiation as a grievance...”. But even if article 10.02 contains an inherent 30-day time limit for a responding party to reply, the elements pointing towards that 30-day period being mandatory are absent. For example, the word “shall” is not used and there is no penalty provision language (i.e. a deemed acceptance of the grievance).

312. However, even if there is no deadline for a responding party to reply, the first sentence of article 10.01 means that a responding party is expected to respond “as quickly as possible”. This expectation applies whether it is something in “writing” or an actual grievance. Despite this obligation, there is no evidence ASP replied at all to FFAW’s June 22, 2022 letter or to the Original Grievance. And there is no evidence that ASP or any of the four Individual Processors replied to the Individual Grievances to communicate the position of ASP and/or the Individual Processors.
313. The process and timelines in article 10 are ambiguous/confusing for another reason. Even though the parties did not focus on article 10.03 in evidence or argument, I feel it necessary to comment on article 10.03 in this Preliminary Award.
314. Article 10.01 refers specifically to “Processor(s), the Union, or a fisher, a member of the bargaining unit” in terms of alleging a breach or violation of the agreement. The language in article 10.03 is similar, but different, in that it refers specifically to a “dispute or difference” arising “between a Processor and the Union, or between a Processor and another Processor...as to the interpretation or application of this Agreement” or “an allegation that there has been a violation of this Agreement...”. Article 10.03 does not refer to “fisher” or “a member of the bargaining unit”.
315. The parties did not call evidence or present argument regarding whether article 10.03 applies to different parties or different types of disputes or different circumstances than article 10.01. In the context of the Grievances before me, each one could be captured by article 10.01 or article 10.03. The circumstances resulting in each of the Grievances could

be described as a “grievance” or a “dispute” or an alleged “breach” within the meaning of article 10.01, or as a “dispute” or “difference” or “alleged violation” between Processors and the FFAW within the meaning of article 10.03.

316. Under article 10.03, “the matter [in dispute] shall be taken up by notices in writing to...” the other party. Then, if satisfactory settlement is not reached within 10 days, the matter may be referred to arbitration within a further 10 days “by either the Union of the affected Processor”. Article 10.03 does not contain a penalty provision like article 10.01, but perhaps the “as soon as possible” and “promptly” language from article 10.01 was still intended to apply with respect to article 10.03? I believe that was the intention.
317. If article 10.03 was meant to capture a different type of dispute or difference than was meant to be captured by article 10.01 – one that is not subject to a mandatory 30-day timeline in article 10.01 – that difference is not obvious or clear on the face of the language in article 10.03. And again, the parties did not raise or otherwise address this issue at the hearing and for that reason I am reluctant to address it further.
318. Article 10.03 does seem to allow for a quicker referral to arbitration than article 10.02, and it seems to contemplate the ability to raise an alleged violation by a notice in writing not subject to a time limit. But in my view there is nothing in article 10.03 that is clear enough to provide FFAW with relief from the mandatory 30-day time limit for serving a grievance as set out in article 10.01
319. Absent evidence and/or submissions of a mutual understanding as to the interplay between articles 10.01 and 10.03, I am not prepared to alter my conclusion that the last sentence in article 10.01 creates a mandatory 30-day timeline with respect to the service of a grievance.
320. In terms of that mandatory 30-day time limit in article 10.01, a question that struck me when writing this Preliminary Award – but that was not raised at the hearing – was the

matter of when the calendar started to run for this 30-day period in respect of each of the Grievances.

321. The phrase in article “*No complaint shall be considered a grievance if the circumstances occurred or originated...*” requires one to determine the starting point for the 30-day timeline in article 10.01. This means I need to identify the circumstances leading to the “complaint” that resulted in each Grievance, and I also need to identify when those circumstances occurred or originated.
322. Even though the “discoverability principle” was not raised by FFAW, it is an issue requiring at least a mention in this case, given the language in article 10.01. The discoverability principle dictates that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence (*Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, at p. 224).
323. It would be open to the parties to negotiate language that overrides the discoverability principle, but in my view clearer language would be required to conclude that the 30-day time limit in article 10.01 was intended to begin even if the harvesters and/or FFAW were unaware and could not have become aware through the exercise of reasonable diligence, of the facts giving rise to the Grievances – i.e. that processors failed to pay in accordance with the currency provisions.
324. Similar collective agreement language to that found in article 10.01 was before Arbitrator Ponak in *Nutrien Inc. (Allan Division) v. United Steelworkers, Local 7689*, 2020 CanLII 50727 (SKLA) (Ponak) (“*Nutrien*”). In that case, the employer argued the grievance was not arbitrable because it had been filed outside the 15-day time period in the collective agreement. Similar to the matter before me, Arbitrator Ponak was called upon to interpret a collective agreement article that differed from the language found in most agreements

in terms of the focus on the “occurrence” of the event as opposed to the union’s “awareness” of the event. He found:

I agree with the Employer that the wording in this collective agreement, focusing on the “occurrence” of the grievance is unusual and differs from the more commonly found CBA language that expressly ties grievance clocks to knowledge of the alleged breach. However, the use of different wording does not necessarily mean that it was the clear intention of the parties to begin the 15 day countdown even if employees and the union...knew nothing and could not have known anything about the alleged breach. Such a draconian approach to time limits would require strong and explicit language, beyond the use of a single word “occurrence”, to make it plain that the knowledge of the breach was irrelevant. Had the contract stated that the 15 days began “on the date of the occurrence, even if the parties were unaware of and could not have been aware of the occurrence”, then the Employer’s interpretation would be unassailable.

But those are not the words used in the contract. I am satisfied that “occurrence of the grievance” implicitly includes the principle of discoverability. The 15 day clock begins when the Union or employees become aware of or reasonably should have become aware of the action or incident that gives rise to the alleged breach. This interpretation makes sense in a labour relations context and is consistent with fundamental principles of fairness. To adopt an interpretation that renders non-arbitrable breaches about which no one was aware or could have been aware would require absolutely clear language that says just that. This contract does not contain such express language. Therefore, the question in the current case is – when did the Union or Grievor become aware of the possible breach or when were they in a position to gain such knowledge?

325. Such an interpretation makes sense in a labour relations context, provides for a more common-sense result, and is consistent with the fundamental principles of fairness.
326. Consistent with the reasoning in *Nutrien*, I find that the principle of discoverability is implicitly included in the words “...if the circumstances occurred or originated more than thirty (30) days prior to the written grievance being served...” in article 10.01. How could

harvesters/FFAW be expected to grieve if, despite exercising reasonable diligence, they were unaware of the facts giving rise to an alleged breach?

327. Therefore, I find that the 30-day time limit in article 10.01 – although mandatory – did not begin to run until the harvesters and/or FFAW became aware, or ought to have become aware through the exercise of reasonable diligence, of the allegations giving rise to the Grievances. When did this happen?
328. With respect to the Original Grievance and the Extended Grievance, ASP's preliminary objection that the time limit was missed is premised on: i) a submission that each week of the 2022 fishing season was a separate and distinct week requiring a separate grievance separately; and ii) an assumption that the harvesters in question and/or FFAW became aware of the (alleged) failure to pay the correct price in accordance with the currency provisions on the 7th day of the week for which a processor failed to pay that correct price.
329. I will address the submission about each week of the 2022 season being a separate and distinct week later in this Preliminary Award.
330. Regarding the assumption about the awareness of harvesters/FFAW, this assumption was not really challenged by FFAW. The awareness/discoverability issue is addressed in paragraph 55 of the Agreed Statement Facts wherein there appears to be an implicit assumption that the awareness of harvesters/FFAW occurred on the 7th day of each week of fishing season.
331. The only FFAW evidence about discoverability/awareness was Dwan Street's testimony that around May 15, 2022 – while she was on leave – FFAW learned there were crab harvesters who had issues with the price they were receiving for crab. Miranda McGrath prepared a draft letter to ASP. When Ms. Street returned to work in mid-June, she spoke with Keith Sullivan who informed her FFAW had received a representative sample of purchase slips showing that four processing companies were not paying the minimum price

according to the applicable currency provisions. Ms. Street was instructed by Mr. Sullivan to send a letter to ASP, which she did. The letter is dated June 22, 2022. This letter led to the Original Grievance, which was served June 29, 2022. Based on this evidence, ASP says Ms. Street was aware of the circumstances giving rise to the Original Grievance as of May 15, 2022. I do not agree.

332. How could Ms. Street or FFAW have been aware – on May 15 – of events that did not transpire until the May 16 – June 4 time period? It seems that what Ms. Street and the FFAW became aware of on May 15 pertained to a complaint about four rogue processors who FFAW now alleges paid a lesser price than FFAW directed them to pay for the weeks of May 1 and May 8, 2022. At or just before the hearing, this allegation about four rogue processors and the weeks of May 1 and May 8 was brought to ASP’s attention for the first time.
333. In any event, by mid-May 2022, FFAW and at least some harvesters would have been aware that some processors were not paying the correct price. This would or should have placed the matter of price on their radar. Then at some point, not later than mid-June 2022, FFAW was aware there was a concern that at least four processors were not paying according to the currency provision. Again, this would or should have placed the currency provision issue on FFAW’s radar for the remainder of the 2022 fishing season.
334. If FFAW/harvesters were not aware of the grounds giving rise to the Grievances until a point in time that brought them within the 30-day time limit in article 10.01, they could have called evidence and/or made submissions on this point, but they did not.
335. In fact, FFAW did not even mention any issues with respect to lack of awareness/discoverability in terms of the commencement of the 30-day time limit with respect to any of the Grievances. Therefore, based on the unchallenged assumption that harvesters/FFAW were aware, or ought to have been aware, of the alleged improper application of the currency provision on the 7th day of each week during the 2022 fishing

season, all the Grievances (except for the week of May 29-June 4 with respect to the Original Grievance) were filed outside the 30-day timeline in article 10.01. The discoverability principle does not save FFAW from the failure to comply with the mandatory 30-day time limit in article 10.01.

336. In terms of the date of service of the *Extended Grievance*, I have considered and weighed the evidence of Renae Butler’s search efforts, the evidence of Dwan Street with respect to Rachel Waye’s standard practices, FFAW’s arguments regarding the contradiction arising from Renae Butler’s inability to find the June 29, 2022 email from Rachel Waye to Derek Butler, and FFAW’s inability to produce any documentation proving service of the Extended Grievance on ASP. On balance, I cannot conclude the Extended Grievance was served on ASP on or about September 12, 2022. And even if I accepted FFAW’s submission that it was served on ASP on or just after September 12, 2022, which I do not – that would still have been outside the 30-day time limit in article 10.01.
337. With respect to the *Individual Grievances*, while some confusion arose at the hearing as to the nature of these grievances, to the extent ASP submits that Ms. Street’s testimony confirms the nature of the Individual Grievances is limited to an allegation that four individual processors paid less than the price FFAW directed them to pay for the weeks of May 1 and May 8 (i.e. \$7.60 versus \$7.67), I disagree. While FFAW seemed to be attempting to add the weeks of May 1 and May 8 to the scope of the Individual Grievances, I do not interpret Ms. Street’s evidence as an abandonment of FFAW’s allegation that the four named processors failed to comply with the currency provision from May 16 until the end of the season.
338. My interpretation of the nature of the Individual Grievances is consistent with the communications from the September 2022 time period – mainly between Dwan Street and Brian Kenny – which illustrate that the Individual Grievances were filed against the four individual processors because Derek Butler told Brian Kenny that ASP could not respond to

the currency grievance (which I have identified as the Original Grievance herein). This information was passed along to Ms. Street by Mr. Kenny.

339. In any event, even though the scope of the Individual Grievances encompasses the currency provision issue from May 16 onwards, they were not served on the four processors until September 21, 2022 – outside the mandatory 30-day time limit in article 10.01.
340. To the extent the scope of the Individual Grievances also encompasses an allegation relating to the weeks of May 1 and May 8 – which information was known by FFAW not later than May 15, the Individual Grievances were served (on September 21, 2022) outside the mandatory 30-day time limit in article 10.01.

What are the implications of FFAW’s failure to comply with the mandatory 30-day time limit in article 10.01?

341. In the absence of an agreed extension of a mandatory time limit, a waiver of a time limit, or some other equitable reason not to apply a time limit (i.e. an established past practice or estoppel), a failure to comply with a mandatory time limit will render a grievance inarbitrable and the grievance will be denied (see *Resource Development Trades Council of Newfoundland and Labrador v. Hebron Project Employers’ Association Inc.*, 2017 CanLII 44707 (Oakley) (“*RDTCNL & HPEA*”).
342. Therefore – absent a reason to grant relief to FFAW – the Original Grievance (except for the week of May 29 – June 4, 2022), the Extended Grievance, and the Individual Grievances are all inarbitrable because of FFAW’s failure to comply with the mandatory 30-day timeline in article 10.01. Should relief be granted to FFAW?
343. The most commonly relied upon equitable grounds for relief from violation of a mandatory time limit are: i) waiver; and ii) estoppel. The concept of “continuing breach” can sometimes provide relief when it is alleged a time limit has been violated.

344. I will address these equitable principles in the context of the Grievances before me. First, however, I will assess ASP's submissions with respect to FFAW's alleged violation of the 10-day time limit in article 10.02 and the timelines and other procedural requirements of article 11 (Arbitration).

Referral to Arbitration and Arbitration Procedure

345. Even if FFAW had complied with the mandatory 30-day time limit in article 10.01, ASP submits FFAW also violated the 10-day time limit in article 10.02 with respect to the referral of the Grievances to arbitration. ASP also submits FFAW did not deliver to ASP a notice of intention to arbitrate in accordance with the requirements of article 11.02. Finally, ASP submits FFAW did not comply with articles 11.03 and 11.04 in respect of the appointment of an arbitrator.

346. With respect to the 10-day time limit for referral to arbitration in article 10.02, ASP submits it is mandatory. I disagree.

347. Both article 10.02 and 10.03 fall under the heading "Grievance Procedure", though both deal with the process of referral to arbitration. Article 10.02 states a grievance *may* be referred to arbitration within 10 days if a matter has not been settled within 30 days of its initiation as a grievance. Article 10.03 states that if there has not been a satisfactory settlement of the dispute reached within 10 days (presumably within 10 days of the matter "being taken up by notices in writing" to a Processor, Union and/or affected person) the matter *may* be referred to arbitration within a further 10 days.

348. Neither party focused on article 10.03, but for similar reasons discussed earlier in this Preliminary Award, I cannot ignore it and I will refer to it in my analysis of article 10.02.

349. Even though article 10.04 indicates the “time limits specified” may be changed by agreement in writing between the parties, I am not inclined to find that the timelines in articles 10.02 and 10.03 are mandatory. My finding in this regard is supported by the “...as quickly as possible” language in article 10.01 and the absence of any deadline for a respondent to reply once a grievance has been served (article 10.01) or once a matter has been taken up in writing (article 10.03). While the “as quickly as possible” language suggests promptness and a lack of delay, it also has an element of flexibility built into it, unless otherwise clearly stated (i.e. the 30-day mandatory time limit in article 10.01). In addition, the permissive word “may” is used throughout article 10.02 and 10.03. I also note the absence of a penalty provision in either article 10.02 or 10.03 for failure to refer a grievance (or a matter) to arbitration within the 10-day timeline. Overall, I conclude that the 10-day time limit with respect to a referral to arbitration (in article 10.02 and article 10.03) is directory.
350. Even when a collective agreement timeline is merely directory, a grievance may still be dismissed because of delay. This is discussed at paragraph 2:3210 of *Brown & Beatty, supra*:

2:3210 Delay

In labour-management relationships, it is usually desirable that grievances be brought within a reasonable time. Thus, even where the collective agreement does not provide for any time-limits for the filing and processing of grievances, or its time-limits are merely directory, a grievance may nevertheless be dismissed or declared to be inarbitrable because of delay. However, barring a grievance from arbitration on the merits for excessive delay is not a matter which goes to the jurisdiction of the arbitrator. Rather, declining to deal with a dispute on the basis of undue delay is akin to the equitable doctrine of laches as applied in the civil courts, in that a balance is sought between expedition and finality on the one hand and the fair resolution of the merits of disputes on the other. Accordingly, the decision in each case is a matter for the arbitrator to make in his or her discretion after considering any explanation for the delay and its effect in terms of prejudice to the other party.

351. I do not find there was delay on the part of FFAW in the processing of the Grievances to arbitration sufficient to render them not arbitrable. In *Royal Conservatory of Music v. Ontario Secondary School Teachers' Federation Representing the Royal Conservatory of Music Faculty*, 2021 CanLII 6917 ("*Royal Conservatory*") the board outlined principles for determining whether to allow a hearing on the merits when there is an allegation of undue delay: the nature of the grievance; whether the delay occurred in initially lodging the grievance or at some later stage; whether the grievor or the union or some third party was responsible for the delay; the reasons for the delay; the length of the delay; and whether the Employer could reasonably have assumed that the grievance had been abandoned.
352. Applying these factors, I first note that ASP did not even allege undue delay. Instead, it relied entirely on an argument that all the time limits are mandatory, which argument I reject except with respect to the 30-day time limit in article 10.01. Even if ASP had alleged undue delay, I would have rejected the allegation applying the principles set out in *Royal Conservatory, supra*. First, the Grievances carry significant income implications for the harvesters. As will be evident from the discussion with respect to waiver later in this Preliminary Award, it is obvious that ASP contributed to the delay. As well, the length of the delay was not inordinate and given FFAW's regular communications, ASP could not have reasonably assumed the Grievances were abandoned. For all these reasons, I would not be prepared to find that FFAW's delay in processing the Grievances to arbitration was undue.
353. Besides the time limit violation argument with respect to article 11, ASP also argues FFAW failed to comply with other formal requirements of article 11. For instance, article 11.02 states that if a party desires to submit the matter to arbitration, it "shall" deliver to the other party a "notice of intention to arbitrate". In terms of the content of this "notice of intention to arbitrate", article 11.02 indicates:
- i) that the notice "shall" state the matter at issue;

- ii) that the notice “shall” state in what respect the agreement has been violated or misinterpreted; and
 - iii) that the notice “shall” also stipulate the nature of the relief or the remedy sought.
354. ASP says a notice of intention to arbitrate was never delivered to it. FFAW disagrees and submits a notice of intention to arbitrate was delivered to ASP on June 22, 2022.
355. FFAW’s June 22, 2022 letter to ASP seems to satisfy the content requirements of article 11.02 with respect to the Original Grievance. It sets out clearly the matter at issue, in what respect the MCA has been violated or misinterpreted, and the nature of the relief or remedy sought. It was delivered to ASP. But can the June 22, 2022 letter constitute a notice of intention to arbitrate if the Original Grievance was not served until June 29, 2022? If not, is this fatal to FFAW’s case? The use of the word “shall” in article 11.02 indicates that delivery of a notice of intention to arbitrate is required.
356. Article 11.02 does not, however, contain an explicit deadline by which a notice of intention to arbitrate is required to be delivered or served on the other party, although the applicable time limit seems to be the *directory* 10-day time period in article 10.02, which does not start to run until 30 days after the grievance is filed. Arguably, however, the timeline for delivery of the notice of intention to arbitrate is the 10-day timeline in article 10.03.
357. With respect to both article 10.02 and 10.03, the 10-day timeline is directory. As well, ASP never did reply in writing to FFAW with respect to either the June 22, 2022 letter or to any of the Grievances, and it never objected to the mediation process once Brian Kenny became involved. From FFAW’s perspective, with the assistance of Brian Kenny, the parties were trying to mediate a resolution. All this likely contributed to FFAW not sending to ASP a formal document entitled “Notice of Intention to Arbitrate”. On this point, FFAW’s “clean hands” argument comes into play. It seems disingenuous for ASP to argue that FFAW failed to comply with certain formal requirements in article 11 when it failed to respond to any

of FFAW's communications despite the mutual intention that grievances and disputes be "adjusted" "as quickly as possible".

358. For the reasons outlined later in this Preliminary Award, I also find that ASP waived its right to insist on strict compliance with the requirements of article 11.02.
359. Article 11.03 indicates that within 10 days after the date of delivery of the article 11.02 notice of intention to arbitrate, the parties "shall endeavour to agree on the appointment of the arbitrator". ASP submits this was the sole responsibility of FFAW. I disagree. Article 11.03 clearly places the responsibility for appointing an arbitrator on both parties. The evidence shows that as early as August 16, 2022, Derek Butler was aware that a provincial mediator had been appointed, which is a precursor to arbitration. Until June 2023, there is no evidence that either ASP or FFAW reached a point where abandoning mediation to move to arbitration was contemplated.
360. I also note article 11.06 which indicates the "time limits specified" [in article 11] may be extended by mutual consent. For the same reasons discussed later in this Award with respect to FFAW's waiver argument, I find there was "mutual consent" to extend the time limits with respect to the appointment of an arbitrator. Unlike article 10.04, there is no requirement in article 11.06 that such consent be in writing. As well, even in the absence of mutual consent, article 11.06 provides me, as arbitrator, authority to extend the time limits in article 11. To the extent necessary, for the same reasons outlined later in this Preliminary Award with respect to waiver, I am exercising that authority.
361. Both parties devoted considerable time and effort at the preliminary hearing with respect to the issue of whether FFAW's requests to the Minister for the appointment of an arbitrator were delivered to ASP. For the reasons already stated (i.e. Ms. Street's evidence about Rachel Waye's standard practices and the contradiction arising from Ms. Butler's failure to find the June 29, 2022 email as being insufficient to prove delivery in the absence of documentary proof of service from FFAW) I do not believe the two letters to the Minister

were delivered to ASP. There is, however, no explicit requirement in article 11.04 that the party requesting the appointment of the arbitrator deliver or serve a copy of that request to the Minister on the other party. In any event, Derek Butler was aware of the July 29, 2022 request no later than August 16, 2022. He could have requested a copy of the request if he had not received one.

362. ASP alluded to FFAW's requests to the Minister for appointment of an arbitrator as being filed at an improper time in the context of article 11. I do not agree they were. The first request to the Minister (July 29, 2022) appears to have been sent to the Minister within 30 days of the June 29, 2022 Original Grievance and the second (October 22, 2022) appears to have been sent 30 days after the September 21, 2022 Individual Grievances were served.
363. But even if the letters to the Minister were sent outside the article 11 timelines, was that fatal to FFAW's case? Article 11.04 states that one of the parties "may" request that the "Minister of Labour" appoint an arbitrator if the parties fail to agree to appoint an arbitrator within 10 days. The commencement point for that 10-day period is the date of delivery of the notice of intention to arbitrate in article 11.02. Not only is that time limit directory, I note again my authority through article 11.06 to extend the time limits in article 11. Finally, for the reasons discussed later in this Preliminary Award dealing with FFAW's waiver argument, I find ASP waived any alleged failure to comply with article 11.04.
364. At several points above, I have referred to my determination that ASP waived its ability to rely on strict compliance with the time limits and procedures in article 10 and article 11. I will now outline my reasoning this determination with respect to FFAW's "waiver" argument.

Waiver

365. As mentioned on numerous occasions above, the outcome of ASP's preliminary objection has been determined based on the principle of waiver. For the reasons that follow, I find

that ASP waived its right to insist on strict compliance with the time limits and other procedures in articles 10 and 11 with respect to the Original Grievance, the Extended Grievance and the Individual Grievances.

366. The subject of waiver of procedural irregularities is referenced in Brown & Beatty, *Canadian Labour Arbitration*, Fourth Edition, at para 2:3130, as follows:

The concept of “waiver” connotes a party not insisting on some right or giving up some advantage. However, to be operative, waiver will generally require both knowledge of and an intention to forego such a right.

In its application, waiver is a doctrine that parallels the one utilized by the civil courts known as “taking a fresh step” and holds that by failing to make a timely objection and “by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect”. That is, by not objecting to a failure to act within mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance and any objection to arbitrability will not be sustained.

367. In *Ontario Public Service Employees Union (Sagiuliano) v Ontario (Community Safety and Correctional Services)*, 2014 CanLII 20596 (ON GSB) the grievance settlement board referred to an excerpt from *Collective Arbitration in Canada (Palmer)* regarding waiver:

[53] Excerpts from Collective Arbitration in Canada (Palmer) have also been set out in previous Board decisions. It states:

Like estoppel, “waiver” is a legal barrier to the exercise of the rights in a particular case, erected by the conduct or words of the parties”. Conduct which has been held to amount to a waiver includes: allowing a grievance to go through the grievance procedure; failure to object at the first opportunity in the grievance procedure; ... and an attempt to settle the grievance. Waiver can also be by verbal agreement. The right to object at a later stage can be retained by a statement to that effect at the first opportunity or by a timely objection, even though it was not raised until the hearing.

Generally, waiver arises therefore where it is clearly indicated that one of the parties does not intend to invoke the procedural provisions of the collective agreement.

368. The onus to establish waiver rests with the party asserting it – in this case FFAW. There is no onus on ASP to disprove waiver (see *Muskrat Falls Employers’ Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*, 2018 NLSC 182 (CanLII)).
369. Waiver of a timeline can be given: (i) to provide prospective assurance that a yet-to-be-expired timeline will not be enforced while negotiations are ongoing; or (ii) to retroactively cure an already-expired timeline (see for example, the line of cases where waiver arises from the employer taking a “fresh step” after the expiry of a timeline).
370. There is no evidence FFAW requested advanced relief from a yet-to-be expired timeline, nor is there any evidence ASP provided written consent to waive timelines on a go-forward basis. Therefore, it is the latter category of waiver at issue in the matter before me – i.e. a retroactive cure of an already-expired timeline.
371. FFAW’s waiver argument requires me to find that ASP retroactively waived its right to insist on compliance with various time limit and other procedural requirements in articles 10 and 11 based on its conduct throughout 2022 and 2023. It did not do so by providing written notice but that is not how waiver typically occurs when it is deemed to have been retroactively given. Rather, a finding of retroactive waiver is typically found based on conduct.
372. In the matter before me, ASP did not raise a preliminary objection about an alleged violation of the timelines or other procedural steps in article 10 or article 11 until June 18, 2024 – the day before the hearing on the merits was scheduled to commence. A preliminary objection with respect to the Original Grievance could have been raised by ASP at any point following the June 29, 2022 Original Grievance. The evidence reveals there

- were many opportunities throughout 2022 and 2023 for Derek Butler and/or Renae Butler to have raised an objection with Dwan Street or Brian Kenny, but that did not happen.
373. In fact, neither ASP nor the Individual Processors ever provided a reply to any of the Grievances. I acknowledge that ASP does not appear to have been provided with a copy of the Extended Grievance until ASP's legal counsel provided it to Ms. Butler in mid-2023, but ASP and the four processors knew, or ought reasonably to have known, as of September 2022 that FFAW's allegations regarding the currency provision spanned a period beginning May 16, 2022 and ending August 7, 2022 – the last day of the fishing season.
374. Throughout the June 2022 to June 2023 time period, FFAW was clearly trying to settle the Grievances. Otherwise, why would they have requested arbitration and agreed to mediation – facts that were known to Derek Butler not later than August 16, 2022. While neither ASP nor the processors made any settlement proposals (not according to the evidence before me), it is noteworthy that ASP never took the position with FFAW or Mr. Kenny that settlement efforts and mediation were pointless, nor did ASP or the processors ever indicate to FFAW that they were denying the Grievances.
375. Based on ASP's communications to FFAW – including what was absent in those communications – and based on Dwan Street's many communications directly with ASP and with ASP through mediator Brian Kenny, Ms. Street would have had no reason to think that ASP and/or the individual processors were going to raise an objection on the grounds of missed timelines or some other procedural failure.
376. The action/inaction of ASP and the Individual Processors throughout 2022 and 2023 – including the many email communications between Ms. Street and Ms. Butler in late 2022 and early 2023 – led FFAW to a reasonably held belief that an objection was not going to be raised.

377. In or around early December, Derek Butler asked Dwan Street to put a monetary value on the Grievances. This indicates an intention to at least consider settlement and/or take the information to the Individual Processors for consideration.
378. In at least seven emails to Ms. Butler sent between December 2022 and June 2023, Ms. Street specifically referred to the “currency” grievance(s). As late as April 19, 2023, Ms. Butler also referred to the currency grievances in a reply email to Ms. Street. As late as June 1, 2023, Ms. Street indicated in an email to Ms. Butler that if the currency grievance were not dealt with, FFAW would “soon have to move to arbitration...”.
379. At no point did Ms. Butler’s replies suggest ASP had come to a conclusion that the Grievances were not arbitrable because of an article 10 or article 11 violation. Ms. Butler’s emails, viewed objectively, suggest that ASP was treating the currency grievances as an ongoing matter for which the parties were seeking resolution. This was clearly Ms. Street’s understanding. If Derek Butler and/or Renae Butler had a different understanding, either of them could easily have communicated that to Ms. Street.
380. Not only did ASP fail to make any timelines or procedure objection until just before the hearing, but it also took fresh steps to advance the Grievances.
381. The first fresh step occurred when Derek Butler communicated to Brian Kenny in September 2022 about FFAW having to name individual processors, not ASP, which information Mr. Kenny passed on to Ms. Street. This communication from Mr. Butler is what ultimately led to FFAW filing the four Individual Grievances.
382. The November 2023 appointment of me as arbitrator and the communications that followed, including the scheduling of dates for a hearing – without raising any objections with respect to procedure – constituted more “fresh steps” by ASP in the process.

383. I acknowledge the appointment of an arbitrator and the scheduling of a hearing may not constitute fresh steps in all cases, but in the matter before me they did. The communications between myself and legal counsel for the parties provided ample opportunity for the preliminary objection to be raised well in advance of June 2024. In the November 22, 2023 letter from O’Dea Earle (legal counsel for FFAW), copied to Stewart McKelvey (legal counsel for ASP), FFAW inquired if I was able to accept an appointment as arbitrator to hear the Grievances. FFAW advised the parties estimated a “two-day hearing should be sufficient **for the merits**” [**emphasis added**] and asked about my availability in June 2024 for the hearing as well as a “pre-hearing conference to be held as needed”. ASP scheduled hearing dates without requesting a pre-hearing conference and without raising any objection as to arbitrability. While the potential time limit and procedural violations may not have been communicated to ASP’s legal counsel by this point, ASP itself would have been aware.
384. In support of the above findings on waiver, I rely on *Canada Post Corporation v. Canadian Union of Postal Workers*, 2012 CanLII 51086 (CA LA), *Ontario Public Service Employees Union (Moody) v Ontario (Children and Youth Services)*, 2012 CanLII 35048 (ON GSB).
385. The facts before me differ from cases such as *RDTC & HPEA, supra*, where the employer gave notice in writing to the union that it was objecting to the grievances on the grounds of violation of the time limits in the article dealing with the grievance and arbitration procedure. In *RDTC & HPEA, supra*, there was no evidence that the union took any step to respond to the grievances between October 15, 2015 – the date they were filed – and October 26, 2015 – the date notice was given by the employer as to the time limit objection. The arbitrator found that the time limit objection was raised by the employer in a prompt manner and that there was no evidence that the employer had any intent to forego its strict rights under the Collective Agreement with respect to the mandatory time limits in the grievance procedure. These findings differentiate *RDTC & HPEA* from the matter before me.

386. It could be argued that the Extended Grievance should be treated differently than the Original Grievance in terms of the waiver issue because a copy of the Extended Grievance was not given to ASP until July 2023.
387. The issue alleged in the Extended Grievance is, however, the same issue as the issue alleged in the Original Grievance, albeit with respect to different weeks during the 2022 fishing season. It relates to an alleged failure on the part of processors to pay the price of crab in accordance with the applicable currency provisions.
388. The disagreement with respect to the currency provision was a recurring one that occurred each week of the 2022 fishing season starting May 16, 2022 (the effective date of the Panel's Reconsideration Decision).
389. An oft-cited passage on the matter of continuing versus non-continuing grievances is *Port Colborne General Hospital and ONA (1986)*, 1986 CanLii 6715 (ONLA), where Arbitrator Burkett said:

...the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action. Allegations concerning unjust imposition of discipline, the improper awarding of a promotion or the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, an ongoing failure to pay the wage rate or any benefit under the collective agreement or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement. In these cases that party against whom the grievance is filed takes a series of fresh steps each one giving rise to a separate breach. In this latter type of case the time-limits for filing a grievance, altogether apart from any question as to when damages commence to run, must be found to be triggered by the breach closest in time to the filing of the grievance.

390. In *Pembroke Regional Hospital v Ontario Nurses' Association*, 2017 CanLII 63634 (ONLA) ("*Pembroke Regional Hospital*") the grievance related to denial of long-term disability benefits over several years, which the arbitrator held constituted continuing breaches. The arbitrator held that in a continuous breach situation like the one before her, a grievor and a union should not have to file a new grievance each time the benefits are denied, with the possibility of a timeliness objection if they fail to do.
391. ASP knew as of June 22, 2022 and June 29, 2022 that FFAW had an issue with the application of the currency provision. Even though the Original Grievance did not specifically mention the periods after June 4, 2022, ASP knew that the currency issue had not been resolved by June 4. And if ASP felt that there had been no violation, why did it not communicate this to FFAW?
392. The Original Grievance and the Extended Grievance are the same grievances, except with respect to the time periods to which they relate. They allege the same mistake or wrongdoing on the part of the processors/ASP. The nature of the allegation did not change. It cannot be said that ASP was unaware of this allegation or that the nature of the alleged mistake/wrongdoing changed each week.
393. If the matter in dispute is the same each week, and if that matter in dispute has been brought to the attention of the employer through a grievance, and if the actions of the employer resulting in the grievance continue unchanged – all of which occurred in the matter before me – then I agree with the approach by the arbitrator in *Pembroke Regional Hospital, supra*. The matter before me is a case of a continuous breach situation like the one in *Pembroke Regional Hospital, supra*. FFAW should not have had to file a new grievance each time ASP (allegedly) applied the wrong currency factor during the 2022 fishing season, with the possibility of a timeliness objection if it failed to do so.
394. Even if I am wrong with respect to this analysis of the Extending Grievance as a continuing breach and my application of the approach taken by the arbitrator in the *Pembroke*

Regional Hospital case, I still find that ASP's actions in November 2023 – five months after it received a copy of the Extended Grievance – constitute fresh steps with respect to the Extended Grievance such that it waived its right to raise a preliminary objection with respect to article 10 and/or article 11.

395. An additional observation that underscores my finding on the issue of waiver, and that I feel is important to point out, comes from ASP's strenuous submission that the timelines in article 10 and article 11 are mandatory. If ASP truly understood these timelines to be mandatory, then why did it remain silent for two years with respect to the time limit and procedural violations?
396. In summary, ASP waived its right to insist on strict compliance with the timelines and other procedural formalities in articles 10 and 11. Subject to my comment with respect to the Individual Grievances in the following paragraph, each of the Grievances is therefore arbitrable.
397. With respect to FFAW's allegation that the Individual Grievances encompass an allegation that four rogue processors paid only \$7.60 per pound (rather than the \$7.67 per pound that FFAW directed them to pay) for the weeks of May 1 and May 8, 2022, that aspect of the Individual Grievances is not arbitrable. The first time this May 1 / May 8 allegation seems to have been raised was at or just before the hearing. In none of the communications between May/June 2022 and June 2023 was this allegation brought to ASP's attention. I do not find any waiver on the part of ASP with respect to this particular allegation. To the extent that the Individual Grievances encompass an allegation that the incorrect price was paid for the weeks of May 1 and May 8 (i.e. \$7.60 rather than \$7.67), that matter was not grieved within the 30-day time limit in article 10.01. Even though it was known to FFAW in mid-May 2022, it was only raised at or just before the hearing dates in June 2024. That failure to comply with the 30-day time limit was not waived by ASP.

The past practice evidence illustrates the parties have a history of not enforcing timelines in articles 10 and 11 with respect to the filing of grievances, and the referring of grievances to arbitration

398. Given my finding with respect to FFAW's waiver argument, it is not necessary for me to address its past practice argument. Nevertheless, I will address it briefly.
399. Contrary to FFAW's assertion with respect to past practice, the evidence is insufficient to establish a past practice or history of the parties not enforcing timelines with respect to the filing of grievances and/or referring them to arbitration. The evidence before me with respect to past practice was minimal and not specific. I contrast this with the past practice evidence before Arbitrator Conway (as he was then) in *IBEW, Local 1620 and Newfoundland Power Inc.*, 2023 C.L.A.S. 517. In that case detailed evidence of an established past practice was put into evidence, including the number of times the timelines were not adhered to and the number of days and months by which a time limit was missed. A comparable level detail was not placed before me in this matter.

Decision

400. ASP's Preliminary Objection is denied with respect to all the Grievances, except with respect to the issue of the price paid for weeks of May 1 and May 8, 2022 (i.e. \$7.60 versus \$7.67). On dates to be established, the Grievances will proceed on the merits with respect to the period beginning May 16, 2022 and ending to August 7, 2022.

Dated this 10th day of September, 2024.

Respectfully submitted as the decision of the Arbitrator.

Christopher Peddigrew, K.C.

Fishing Industry Collective Bargaining Act, RSNL 1990, c F-18

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RSNL1990 CHAPTER F-18

**FISHING INDUSTRY COLLECTIVE
BARGAINING ACT**

Amended:

1993 c53 s10; 1998 c11; 2000 c4; 2001 c42 s16; 2002 c20; 2004 c26; 2006 c1; 2006 c50; 2010 c38; 2012 c30 s21; 2013 c16 s25; 2014 c19 s11; 2019 c3; 2022 c31

CHAPTER F-18

AN ACT RESPECTING COLLECTIVE BARGAINING BETWEEN CERTAIN FISHERS OR ASSOCIATIONS OF FISHERS AND CERTAIN PERSONS OR ASSOCIATIONS OF PERSONS ENGAGED IN THE PROCESSING OF FISH IN THE PROVINCE

Short title

1. This Act may be cited as the *Fishing Industry Collective Bargaining Act*.

1971 No53 s1

Definitions

2. (1) In this Act
 - (a) "association" means a local or provincial organization or association of fishers, or a local or provincial branch of a national or international organization or association of fishers within the province or a council of associations that has as one of its purposes the regulation in the province of relations between processors and fishers through collective bargaining, whether or not that organization or association also contains other persons who are employees as defined by the *Labour Relations Act*, but does not include an organization or association of fishers or a council of associations that is dominated or influenced by a processor;
 - (b) "bargaining agent" means an association or a council of associations that acts on behalf of fishers
 - (i) in collective bargaining, or
 - (ii) as a party to a collective agreement with a processor;
 - (c) "board" means the Labour Relations Board established under the *Labour Relations Act*;
 - (d) "certified bargaining agent" means a bargaining agent that has been certified under this Act and the certification of which has not been revoked;
 - (e) "collective agreement" means an agreement in writing between a processor or a processors' organization acting on behalf of a processor and a bargaining agent for fishers acting on behalf of the fishers containing terms or conditions of the relationship of the processor to the fishers, including provisions with reference to rates of pay for fish supplied to a processor by the fishers concerned, and includes a decision made by an arbitrator;
 - (f) "collective bargaining" means negotiating with a view to the conclusion of a collective agreement or the renewal or revision of a collective agreement and "bargaining collectively" and "bargain collectively" have corresponding meanings;
 - (g) [Rep. by 2006 c1 s1]

- (h) "conciliation officer" means a person whose duties include the conciliation of disputes and who is under the control and direction of the minister;
- (i) "council of association" means 2 or more local or provincial organizations or associations of fishers, or local or provincial branches of national or international organizations or associations of fishers within the province that have been certified as a bargaining agent for fishers supplying fish to a processor or to processors in a processors' organization or that have signed an agreement in writing or signed a collective agreement with a processor or processors' organization;
- (j) "dispute" or "industrial dispute" means a dispute or difference or apprehended dispute or difference between a processor and one or more of the fishers supplying fish to the processor or a bargaining agent acting on behalf of those fishers, as to matters or things affecting or relating to terms or conditions of the relationship or intended relationship of the processor to those fishers with respect to the supplying of fish by those fishers to the processor or as to the privileges, rights or duties of the parties to that relationship;
- (k) "fish" does not include cured fish as defined by the *Salt Fish Marketing Act* or the by-products of fish curing;
- (l) "fisher" means a self-employed commercial fisher including a person receiving a share of the voyage or a person agreeing to accept in payment for the person's services a share of the profits of a fishing venture, with or without other remuneration engaged in fishing for gain, other than for sport, in tidal waters including fishing for anadromous fish while in those waters and includes all other commercial fishers not falling within the definition of employee in the *Labour Relations Act*;
- (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 the first-mentioned or last-mentioned processor;
- (m.01) "majority percentage of a fish species" means the majority percentage of a fish species as measured by the round weight equivalent based upon the previous calendar year's production as determined on the basis of records submitted by processors to the Department of Fisheries and Aquaculture under the requirements of the *Fish Inspection Act* and the regulations made under that Act and the *Fisheries Act* in the context of obtaining licence renewal and reporting production for the calendar year previous to the application;
- (m.1) [Rep. by [2004 c26 s1](#)]
- (n) "minister" means the minister appointed under the *Executive Council Act* to administer this Act;
- (n.1) "panel" means the Standing Fish Price-Setting Panel established under [section 19.1](#);
- (o) [Rep. by [2001 c42 s16](#)]
- (p) [Rep. by [2000 c4 s2](#)]
- (q) [Rep. by [2006 c1 s1](#)]
- (r) "processor" means a person licensed under the *Fish Inspection Act* to process or buy fish; and
- (s) "processors' organization" means an organization of processors formed for purposes including the regulation of relations between processors and fishers.

(2) A person shall not cease to be a fisher within the meaning of this Act by reason only of that fisher ceasing fishing operations as the result of a lockout or because that fisher has temporarily suspended those operations for any reason.

(3) For the purposes of this Act a "unit" means a group of fishers and "appropriate for collective bargaining", with reference to a unit, means a unit that is appropriate for those purposes, whether or not the fishers in the unit are supplying fish to one or more processors.

(4) For the purposes of subsection (3), a unit of fishers appropriate for collective bargaining may be, but is not required to be, determined by reference to all fishers in a specified geographical area, notwithstanding the number of processors in that specified geographical area.

(5) In this Act, except in paragraphs 2(1)(a) and (i) and section 24, a reference to the province does not include the Labrador Inuit Settlement Area as shown in Schedule 1-A of the Schedule to the *Labrador Inuit Land Claims Agreement Act* .

1971 No53 s2; 1973 No34 Sch B; 1977 c29 s3; 1977 c64 s150; 1984 c40 Sch B; 1989 c25 Sch B;
2000 c4 ss1&2; 2001 c42 s16; 2004 c26 s1; 2006 c1 s1; 2006 c50 s1; 2022 c31 s1

Application of certain provisions

2.1 Sections 13.1 to 13.9, 19.1 to 19.14 and 35.1 to 35.5 apply only where fishers are represented by a certified bargaining agent.

2006 c1 s2

Labour Relations Act

3. Sections 93, 94 and 134 of the *Labour Relations Act* shall, with the necessary changes, apply to all matters within the scope of this Act, with

- (a) the words "trade union" replaced by the word "association";
- (b) the word "employer" replaced by the word "processor"; and
- (c) the word "employee" replaced by the word "fisher".

1973 No107 s4; 2000 c4 s1

Conflict

4. Where there is a conflict between this Act and the *Salt Fish Marketing Act* that Act shall prevail.

1971 No53 s4

Rights of fishers and processors

5. (1) Every fisher has a right to be a member of an association and to participate in the activities of the association.

(2) Every processor has the right to be a member of a processors' organization and to participate in the activities of that organization.

1973 No53 s5; 2000 c4 s1

Unfair practices

6. (1) A processor or processors' organization, and a person acting on behalf of a processor or processors' organization, shall not participate in or interfere with the selection, formation or administration of an association, or contribute financial or other support to it.

(2) A processor and a person acting on behalf of a processor shall not

(a) refuse to purchase fish from, or to continue to purchase fish from, a person, or otherwise discriminate against a person in regard to that purchase or a term or condition of that purchase because the person is a member of an association; or

(b) impose conditions in a contract seeking to restrain a fisher from exercising the fisher's rights under this Act.

(3) A processor and a person acting on behalf of a processor shall not seek by intimidation, by threat of refusing to purchase fish from a fisher, or by other kinds of threats or by other means to compel a fisher to refrain from becoming or to cease to be a member or officer or representative of an association and a person shall not seek by intimidation or coercion to compel a fisher to become or refrain from becoming or to cease to be a member of an association.

(4) A processor and a person acting on behalf of a processor shall not in the course of a dispute with fishers on matters within the scope of this Act threaten to shut down or move a plant or a part of a plant.

(5) Except as expressly provided, nothing in this Act shall be interpreted to affect the right of a processor to refuse to purchase fish from a fisher for proper and sufficient cause.

(6) A fisher or a person acting on behalf of an association shall not use coercion or intimidation with a view to encouraging or discouraging membership in or activity in or for an association but nothing in this Act precludes a person acting on behalf of an association from attempting to persuade a processor to make an agreement with that association to require as a condition of purchasing fish from a fisher membership or maintenance of membership by that fisher in the association where the association has been designated or selected by a majority of fishers in the unit as their representative for the purpose of bargaining collectively.

1971 No53 s6; 2000 c4 s1; 2022 c31 s2

Assignment

7. (1) A processor shall honour a written assignment to an association, certified as bargaining agent, of money forming a part of payment for the purchase of fish.

(2) An assignment under subsection (1) shall be substantially in the following form:-

To (name of processor)

I request you to deduct from money in your hands to my credit and pay to (name of association) fees in the amounts following:

(1) Initiation fee in the amount of \$.

(2) Dues of \$ per.

(3) Unless the assignment is revoked in writing delivered to the processor, the processor shall remit the dues deducted to the association named in the assignment at least once each month, together with a written statement of the names of the fishers for whom the deductions were made and the amount of each deduction.

(4) Where the assignment is revoked, the processor shall give notice of the revocation to the assignee.

(5) Notwithstanding anything contained in subsections (1), (2) and (3), there shall be no financial responsibility on the part of a processor for fees or dues of a fisher unless there is sufficient unpaid money to the credit of that fisher in the processor's hands.

1971 No53 s7; 2000 c4 s1

Application for certification

8. (1) An association claiming to have as members in good standing a majority of fishers supplying fish to one or more processors in a unit that is appropriate for collective bargaining may, subject to the rules of the board and in accordance with this section, make an application to the board to be certified as bargaining agent for fishers in the unit.

(2) Where a collective agreement is not in force and a bargaining agent has not been certified under this Act for the unit, the application may be made at any time.

(3) Where a collective agreement is not in force but a bargaining agent has been certified under this Act for the unit, the application may be made after the expiry of 12 months from the date of certification of the bargaining agent but not before, except with the consent of the board.

(3.1) Where a collective agreement is in force, the application may be made at any time after the expiry of 10 months of the term of the collective agreement but not before, except with the consent of the board.

(4) Two or more associations claiming to have as members in good standing of the associations a majority of fishers in a unit that is appropriate for collective bargaining may join in an application under this section and the provisions of this Act relating to an application by one association and all matters or things arising from that application shall apply with respect to the application and the associations as if it were an application by one association.

2000 c4 s4; 2004 c26 s3

Membership in association

9. (1) The parties to a collective agreement may insert in the collective agreement a provision requiring, as a condition of a processor purchasing fish from a fisher, membership of that fisher in a specified association, or granting a preference, with respect to the purchase of fish, to members of a specified association.

(2) Notwithstanding the other provisions of this or another Act, where a person

(a) is not a member of an association which is a party to a collective agreement but is otherwise qualified as a fisher in respect of a processor who is a party to the collective agreement; and

(b) applies for membership in the association referred to in paragraph (a),

the processor may purchase fish from that person notwithstanding a provision of a collective agreement where the association refuses to accept that person into membership.

(3) Nothing contained in subsection (2) excuses a fisher from complying with the constitution, rules and by-laws of an association of which the fisher becomes a member.

(4) Notwithstanding a provision in another Act, a provision in the constitution, rules or by-laws of an association which is designed or operates to exclude from membership in the association a person referred to in subsection (2) is invalid.

1971 No53 s9; 2000 c4 s1; 2022 c31 s3

Certification of bargaining agent

10. (1) Where an association makes application for certification under this Act as bargaining agent of fishers in a unit, the board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining and the board may, before certification include additional fishers in, or exclude fishers from, the unit, and shall take those steps that it considers appropriate to determine the wishes of the fishers in the unit as to the selection of a bargaining agent to act on their behalf, and for the purpose of determining those wishes the board may disregard the wishes of fishers who in its opinion are engaged in other full-time employment.

(2) Where, as a result of an application for certification under this Act by an Association, the board has determined that a unit of fishers is appropriate for collective bargaining

(a) where the board is satisfied that the majority of the fishers in the unit are members in good standing of the association; or

(b) where, as a result of a vote of the fishers, excluding those whose wishes are disregarded under subsection (1) in the unit, the board is satisfied that a majority of them have voted and that a majority of those fishers who have so voted have selected the association to be a bargaining agent on their behalf,

the board may certify the association as the bargaining agent of the fishers in the unit, including those fishers whose wishes have been so disregarded.

(3) Where an application for certification under this Act is made by an association claiming to have as members in good standing a majority in a unit that is appropriate for collective bargaining, which includes fishers supplying fish to 2 or more processors, the board may certify the association as the bargaining agent of the fishers in the unit.

(4) The board may, for the purposes of determining whether the majority of the fishers in a unit are members in good standing of an association or whether a majority of them have selected an association to be their bargaining agent, make an examination of records or other inquiries that it considers necessary, including the holding of hearings or the taking of votes that it considers necessary, and the board may prescribe the nature of the evidence to be furnished to the board.

(5) An association, the administration, management or policy of which is, in the opinion of the board,

- (a) influenced by a processor so that its fitness to represent fishers for the purposes of collective bargaining is impaired; or
- (b) dominated by a processor

shall not be certified as a bargaining agent of fishers, nor shall an agreement entered into between that association and that processor be considered to be a collective agreement for the purposes of this Act.

(6) When a processor has received notice in writing from the board that an association has made application for certification under this Act as a bargaining agent of fishers supplying the processor with fish, the processor shall not, afterward,

- (a) without the consent of the board; or
- (b) unless a collective agreement has been made which is binding on fishers in the unit in respect of which the application is made,

alter rates of pay for fish or another term or condition of the purchase of fish then in force in respect to those fishers, until the application has been granted, refused or withdrawn.

1971 No53 s10; 2000 c4 s1

Hearing

11. In relation to an application for certification, the board may hold a hearing where it considers it necessary to do so and may dispose of an application without a hearing notwithstanding that a request to hold a hearing has been filed with it.

1988 c49 s1

Effect of certification

12. Where an association is certified under this Act as the bargaining agent of the fishers in a unit,

- (a) the association shall immediately replace another bargaining agent of fishers in the unit and shall have exclusive authority to bargain collectively on behalf of fishers in the unit and to bind them by a collective agreement until the certification of the association in respect of fishers in the unit is revoked;
- (b) where another association had previously been certified as bargaining agent in respect of fishers in the unit, the certification of that association is revoked in respect of those fishers;
- (c) where, at the time of certification, a collective agreement binding on or entered into on behalf of fishers in the unit is in force, then the association shall be substituted as a party to the agreement in place of the bargaining agent that is a party to the agreement on behalf of fishers in the unit, and may, notwithstanding anything contained in the agreement, upon 2 months' notice to the processor concerned terminates the agreement as it applies to those fishers; and
- (d) the certification shall apply to all processors purchasing fish within the specified geographical area applicable to the unit, where that unit is determined by reference to a specified geographical area.

1971 No53 s11; 2000 c4 s1

Revocation of certification

13. (1) Where, following investigation, and after a hearing where one is considered necessary by the board, it is determined by the board that a bargaining agent no longer represents a majority of fishers in the unit for which it was certified or for which it acts as bargaining agent the board of its own motion or upon application may

- (a) revoke the certification of the bargaining agent, where it was certified; or
- (b) where the bargaining agent was not certified, by a declaration in writing terminate the bargaining rights of the bargaining agent,

and, where the certification is revoked or the bargaining rights terminated, notwithstanding anything contained in this Act, a processor shall not be required to bargain collectively with the bargaining agent, but nothing in this subsection shall prevent the bargaining agent from making an application under [section 8](#).

(2) The board shall not be required to accept or deal with an application to revoke the certification of a bargaining agent under subsection (1) within the period of 6 months immediately following

- (a) the date of the certification of that bargaining agent;
- (b) the date when a previous application to revoke the certification of that bargaining agent was refused, where a previous application was made; or
- (c) the date when that bargaining agent by notice required an operator to commence collective bargaining, where a notice was given,

but the board may, where it thinks fit, accept and deal with an application of that kind.

(3) Where a certification has been revoked or the bargaining rights of a bargaining agent have been terminated under subsection (1), an agreement entered into on or before and in force at the date of the revocation or termination between the bargaining agent and a processor is not and shall not be considered to be, from that date, a collective agreement for the purposes of this Act.

1971 No53 s12; 1988 c49 s2; 1998 c11 s1; 2000 c4 ss1&5; 2004 c26 s4

Accreditation as bargaining agent

13.1 (1) Subject to the rules of the board, a processors' organization whose members produce the majority percentage of a fish species may apply to the board to be accredited as the sole collective bargaining agent for all processors in the province of that species.

(2) Where as a result of an application under subsection (1) the board issues an accreditation order to a processors' organization with respect to a species of fish, a previously issued accreditation order with respect to that species is revoked.

2006 c1 s3

Membership in accredited processors' organization

13.2 An accredited processors' organization

- (a) shall offer membership to processors who process the fish species for which the organization is accredited on terms that are no less favourable than the terms offered to existing members; and
- (b) shall not deny membership to a processor for whom it is the bargaining agent for a reason other than refusal or failure to pay the periodic dues, assessments and initiation fees ordinarily required to be paid by all members of the processors' organization as a condition of acquiring or retaining membership in the organization.

2006 c1 s3

Expedited accreditation process

13.3 (1) Where an application is made to the board under [section 13.1](#), the board shall, within 5 business days of the making of that application, notify all processors who process the fish species for which the applicant has applied for accreditation who are required to submit records to the Department of Fisheries and Aquaculture under the *Fish Inspection Act* and the regulations under that Act and the *Fisheries Act* in the context of obtaining licence renewal and reporting production of the receipt of that application for accreditation.

(2) A processor who has received notice under subsection (1) may, within 10 business days of receiving that notice, make representations to the board with respect to whether the applicant produces the majority percentage of a fish species, and subject to the merits of those representations, the board may, in its discretion, hold a hearing with respect to that application for accreditation.

(3) Where an application is made under [section 13.1](#) and the board has fulfilled the requirements of subsections (1) and (2) of this section, and is satisfied that the processors' organization produces the majority percentage of a fish species, the board shall accredit the applicant.

2000 c4 s6; 2006 c1 s4

Prerequisites of accreditation

13.4 (1) Before the board accredits a processors' organization, the board shall satisfy itself that

- (a) the processors' organization is a properly constituted organization controlled by its members; and
- (b) each of its members has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent.

(2) Where the board is of the opinion that appropriate authority has not been vested in the processors' organization, the board may dismiss or postpone disposition of the application to enable processors who are member of the processors' organization to vest in the organization whatever additional or other authority the board considers necessary.

2000 c4 s6

Results of accreditation

13.5 Upon accreditation, all rights, duties and obligations under this Act of processors for whom the accredited processors' organization is or becomes the bargaining agent apply to the accredited processors' organization and its members, and a collective agreement between a processor and a certified bargaining agent for fishers that is in force at the date of accreditation of a processors' organization does not bar a certified bargaining agent for fishers from giving

notice to the accredited processors' organization to start collective bargaining nor does it bar the accredited processors' organization from giving notice to a collective bargaining agent for fishers to start bargaining.

2000 c4 s6

Binding effect

13.6 (1) Where a collective agreement is negotiated between an accredited processors' organization and a certified bargaining agent and a processor in the province is not a member of that accredited processors' organization, that processor is bound by and shall comply with the terms of that collective agreement notwithstanding the fact that the processor is not a member of that accredited processors' organization.

(2) Where a processor referred to in subsection (1) or a member of an accredited processors' organization fails to comply with a provision of a collective agreement referred to in that subsection, the accredited processors' organization may apply to the board for a determination on the matter and the board may make that determination.

2000 c4 s6; 2006 c50 s2; 2022 c31 s4

Revocation

13.7 (1) An accredited processors' organization or one or more members of an accredited processors' organization may apply to the board for a declaration that the accreditation of that organization is revoked.

(2) Where an application is made under subsection (1) by an accredited processors' organization, the board shall declare the accreditation of that processors' organization revoked.

(3) Where an application is made under subsection (1) by one or more members of an accredited processor's organization, the board shall ascertain the processors in the accredited processors' organization who, within a 2 month period immediately preceding the date of the making of the application, have voluntarily indicated in writing that they no longer wish to be represented by that organization and where the board is satisfied that

(a) processors processing the majority percentage of a fish species have voluntarily indicated in writing that they no longer wish to be represented by the accredited processors' organization; and

(b) it can be shown that the accredited processors' organization no longer fulfils the requirements of [section 13.1](#) as determined on the basis of records submitted by processors to the Department of Fisheries and Aquaculture under the requirements of the *Fish Inspection Act* and the regulations made under that Act and the *Fisheries Act* in the context of obtaining licence renewal and reporting production from the previous calendar year,

the board shall declare the accreditation of the processors' organization revoked.

2004 c26 s5; 2006 c1 s5

Result of revocation

13.8 Upon the board making a declaration under subsection 13.7(2) or (3), all rights, duties and obligations of the processors' organization under this Act and under an unexpired collective agreement revert to the individual processors to whom the collective agreement or the bargaining agent's certification order applies.

2000 c4 s6

Certain agreements void

13.9 A certified bargaining agent for fishers which has bargaining rights for fishers who sell fish to processors represented by an accredited processors' organization and a processor or person acting on behalf of the processor, shall not, as long as the accredited processors' organization continues to be entitled to represent the processors in an accredited processors' organization, enter into an agreement or understanding, oral or written, that provides for the selling of fish contrary to the terms of a collective agreement, and, where that agreement or understanding is entered into, it is illegal.

2000 c4 s6

Notice to begin bargaining

14. Where the board has under this Act certified an association as a bargaining agent of fishers in a unit and no collective agreement with the processor concerned binding on, or entered into on behalf of, fishers in a unit, is in force,

- (a) the bargaining agent may, on behalf of the fishers in the unit, by notice, require the processor concerned to commence collective bargaining; or
- (b) the processor or a processors' organization representing the processor may, by notice, require the bargaining agent to commence collective bargaining

with a view to the conclusion of a collective agreement.

1971 No53 s13; 2000 c4 s1

Notice to renew agreement

15. (1) Not more than 60 days and not less than 30 days immediately before the date of expiration or of the termination of a collective agreement a party to the collective agreement may by notice in writing require the other party to the agreement to commence collective bargaining with a view to the renewal or revision of the agreement or the conclusion of a new collective agreement.

(2) Where a collective agreement provides for a period of notice to commence collective bargaining which is different from the period provided for in subsection (1), that provision in the collective agreement has effect in respect of a notice requiring the commencement of collective bargaining.

1971 No53 s14

Notice to panel

15.1 Where a notice is given under [section 14](#) or [15](#), a copy of the notice shall at the same time be given to the panel.

2006 c1 s6

Time limit to begin bargaining

16. Where notice to commence collective bargaining has been given under [section 14](#),

- (a) the certified bargaining agent and the processor, or a processors' organization representing the processor shall, without delay, but within 20 clear days after the notice was given or the further time that the parties

may agree upon, meet and commence or authorize representatives on their behalf to meet and commence to bargain collectively with one another and shall make every reasonable effort to conclude a collective agreement; and

(b) the processor shall not, without consent by or on behalf of the fishers affected, alter rates of pay for fish or alter other terms or conditions respecting the purchase of fish then in force in respect to fishers in the unit for which the bargaining agent is certified until

(i) a collective agreement has been concluded that is binding on all the processors who process the species of fish to which the agreement relates, or

(ii) the matters in dispute between the processor and the certified bargaining agent have been decided on by the panel and an agreement imposed that is binding on all the processors who process the species of fish to which the agreement relates,

whichever is earlier.

2006 c1 s7

Parties not to delay bargaining

17. Where a party to a collective agreement has given notice under [section 15](#) to the other party to the agreement,

(a) the parties shall, without delay, but in any case within 20 clear days after the notice was given, or the further time that the parties may agree upon, meet and commence or authorize representatives on their behalf to meet and commence to bargain collectively and make every reasonable effort to conclude a renewal or revision of the agreement or a new collective agreement; and

(b) where a renewal or revision of the agreement or a new collective agreement has not been concluded before expiry of the term of, or termination of, the agreement, the processor shall not, without the consent of or on behalf of the fishers affected, alter rates of pay for fish or alter other terms or conditions respecting the purchase of fish in effect immediately prior to that expiry or termination provided for in the agreement, until

(i) a renewal or revision of the agreement or a new collective agreement has been concluded that is binding on all the processors who process the species of fish to which the agreement relates, or

(ii) the matters in dispute between the processor and the bargaining agent have been decided on by the panel and an agreement imposed that is binding on all the processors who process the species of fish to which the agreement relates,

whichever is earlier.

2006 c1 s7

Bargaining committee

18. (1) During collective bargaining an association shall be represented by a bargaining committee consisting of fishers supplying fish to the processor who are in the association, and that committee

(a) shall in the case of collective bargaining between

- (i) an association and a processors' organization, consist of fishers supplying fish to one or more members of that organization who are in the association,
 - (ii) an association and a group of processors bargaining jointly or through representatives of those processors, consist of fishers supplying fish to one or more of the processors in the group who are in the association, or
 - (iii) a group of associations and a processor, a processors' organization, or a group of processors bargaining jointly, consist of fishers supplying fish to the processor, or to one or more members of the organization or to one or more of the processors in the group of processors who are in the association; and
- (b) may include one or more officers or other representatives of the association.
- (2) Notwithstanding subsection (1), where a bargaining unit
- (a) consists of not more than 15 fishers, the bargaining committee shall include at least one fisher from that unit; or
 - (b) consists of more than 15 fishers, the bargaining committee shall include at least 2 fishers from that unit.

1971 No53 s17; 2000 c4 ss1&7

Representation of processors

19. During collective bargaining a processor shall be personally present or be represented by a person authorized by the processor to bargain collectively with fishers supplying fish to the processor and where one of the parties to the collective bargaining is a processors' organization which comprises 3 or more processors the organization shall be represented by at least 3 of the processors, or representatives of those processors, in respect of whom fishers are concerned in the collective bargaining and those processors or their representatives shall have authority to bargain collectively on behalf of the organization.

1971 No53 s18; 2000 c4 ss1&8

Minister to set date

19.01 (1) The minister responsible for fisheries and aquaculture shall set the date by which the price and conditions of sale for a fish species shall be set in a year.

(2) Notwithstanding subsection (1), the minister may, upon the joint request of the parties to collective bargaining, vary the date set under that subsection.

2010 c38 s1

Appointment of panel

19.1 (1) The Standing Fish Price-Setting Panel is continued and shall consist of 3 members appointed as follows:

- (a) a chairperson appointed by the Lieutenant-Governor in Council on the recommendation of the minister in accordance with subsection (2);

- (b) one member representing the certified bargaining agent appointed by the Lieutenant-Governor in Council on the recommendation of the certified bargaining agent; and
- (c) one member representing the processors' organization appointed by the Lieutenant-Governor in Council on the recommendation of the processors' organization.

(2) For the purposes of paragraph (1)(a), the minister shall provide a list of qualified candidates for chairperson to both the certified bargaining agent and the processors' organization who shall rank the candidates in accordance with a process established by the minister and submit the rankings to the minister.

(3) A member of the panel shall serve for a period of up to 3 years and is eligible to be reappointed.

(4) Alternate members of the panel shall be appointed as follows:

(a) 2 alternate chairpersons appointed by the Lieutenant-Governor in Council on the recommendation of the minister in accordance with subsection (2), each of whom may act in place of the chairperson when the chairperson is not available;

(b) one alternate member representing the certified bargaining agent appointed by the Lieutenant-Governor in Council on the recommendation of the certified bargaining agent who shall act in place of the member appointed under paragraph (1)(b) when that member is not available; and

(c) one alternate member representing the processors' organization appointed by the Lieutenant-Governor in Council on the recommendation of the processors' organization who shall act in place of the member appointed under paragraph (1)(c) when that member is not available.

(5) The alternate members appointed under subsection (4) shall

(a) serve for a period of up to 3 years and are eligible to be reappointed; and

(b) be considered to be members of the panel only while serving on the panel.

(6) The members of the panel shall be paid remuneration and expenses related to the carrying out of their duties at a rate set by the Lieutenant-Governor in Council.

(7) The remuneration and expenses referred to in subsection (6) shall be paid as follows:

(a) the remuneration and expenses of the chairperson and the alternate chairpersons shall be paid from money appropriated by the legislature for that purpose;

(b) the remuneration and expenses of a member appointed under paragraph (1)(b), (4)(b) and (9)(b) shall be paid by the certified bargaining agent; and

(c) the remuneration and expenses of a member appointed under paragraph (1)(c), (4)(c) and (9)(c) shall be paid by the processors' organization.

(8) Where a member of the panel resigns or due to absence, incapacity or other cause, is unable to carry out the duties as a member, a person shall be appointed in the member's place in accordance with subsection (9) who shall serve for the remainder of the term of the member being replaced.

(9) For the purposes of subsection (8), where the member is

- (a) the chairperson, the Lieutenant-Governor in Council shall appoint a person in the member's place in accordance with subsection (2);
- (b) the member representing the certified bargaining agent, the Lieutenant-Governor in Council on the recommendation of the certified bargaining agent shall appoint a person in the member's place; and
- (c) the member representing the processors' organization, the Lieutenant-Governor in Council on the recommendation of the processors' organization shall appoint a person in the member's place.

(10) Where the term of a member or alternate member expires, the member or alternate member continues to be a member or alternate member until reappointed or replaced.

(11) In this section,

- (a) "certified bargaining agent" means the certified bargaining agent prescribed in the regulations; and
- (b) "processors' organization" means the processors' organization prescribed in the regulations.

(12) The minister may make regulations

- (a) prescribing the certified bargaining agent for the purposes of paragraph (11)(a); and
- (b) prescribing the processors' organization for the purposes of paragraph (11)(b).

2006 c1 s8; 2019 c3 s1; 2022 c31 s5

Duties of the panel

19.2 The duties of the panel are

- (a) to facilitate access by parties to collective bargaining to market information relating to the sale of fish;
- (b) to establish criteria that are not inconsistent with this Act relating to collective bargaining under this Act;
- (c) to provide assistance to parties engaged in collective bargaining under this Act;
- (d) to set prices and conditions of sale for a fish species where parties have engaged in collective bargaining and have been unable to agree or where parties have refused to engage in collective bargaining;
- (e) to review and report on matters related to the price and conditions of sale of a fish species that may be referred to it by the minister responsible for fisheries and aquaculture; and
- (f) to make recommendations on matters falling within its mandate to the minister responsible for fisheries and aquaculture and the minister responsible for fisheries in the Government of Canada.

2006 c1 s8

Matters beyond panel's authority

19.3 The panel shall not have authority with respect to

- (a) raw material shares; or

(b) production limits.

2006 c1 s8

Procedure of the panel

19.4 The panel may establish rules and procedures for the purpose of carrying out its duties under this Act.

2006 c1 s8

Powers of the panel

19.5 The panel has all the powers that are or may be conferred on a commissioner under the *Public Inquiries Act* .

2006 c1 s8

Decision of the panel

19.6 A decision of a majority of the members of the panel is a decision of the panel.

2006 c1 s8

Costs

19.7 Each party to a proceeding before the panel shall assume its own costs.

2006 c1 s8

Time limit for agreement

19.8 (1) The panel shall annually set a date by which a bargaining agent and a processor or processors organization shall conclude a collective agreement in relation to a fish species that is binding on all processors in the province that process that fish species.

(2) Where parties to collective bargaining in relation to a fish species conclude a collective agreement in relation to that fish species that is binding on all processors in the province who process that fish species prior to the date set for it by the panel under subsection (1), the parties shall so inform the panel.

(3) Where the panel does not set a date under subsection (1) for a fish species, a certified bargaining agent or a processor or processors' organization referred to in [section 14](#) or a party to a collective agreement referred to in [section 15](#) may apply to the panel for a date to be set.

(4) A party to collective bargaining with respect to a fish species may refer a matter other than price to the panel prior to the date set under subsection (1) and the panel may consider and give a decision with respect to the matter.

(5) A party referring a matter to the panel under subsection (4) shall, at the same time, give notice to the other party of that referral.

(6) The panel may refuse to consider a matter referred to it.

2006 c1 s8; 2006 c50 s3

Panel to establish agreement

19.9 (1) Where a bargaining agent and a processor or processors' organization have failed to conclude a collective agreement in relation to a fish species that is binding on all processors in the province that process that fish species by the date set for it by the panel under subsection 19.8(1), all the matters in dispute between them relating to price and conditions of sale for a fish species shall be considered to have been referred to the panel for decision.

(2) The panel shall hold a hearing in relation to the matters considered to have been referred to it under subsection (1) at which the bargaining agent and processor or processors' organization may make submissions.

(2.1) Notwithstanding subsection (2), a party who has engaged in collective bargaining may not make a submission under that subsection unless that party has submitted an offer respecting price and conditions of sale to the other party not less than 48 hours before the scheduled commencement of the hearing referred to in subsection (2).

(3) Immediately after the conclusion of the hearing referred to in subsection (2), but in any event not later than 3 days before the date set by the minister responsible for fisheries and aquaculture under [section 19.01](#), the panel shall decide on the matters in dispute between the parties relating to price and conditions of sale for the fish species and the decision of the panel is final and binding on the parties and on all other processors in the province that process that species of fish to which the panel's decision relates and constitutes a collective agreement or part of a collective agreement between them.

[2006 c1 s8](#); [2006 c50 s4](#); [2010 c38 s2](#)

Where no collective bargaining occurs

19.10 Where a date has been set by the panel under subsection 19.8(1) and parties do not engage in collective bargaining with a view to concluding a collective agreement relating to price and conditions of sale for a fish species, the panel, following the holding of a hearing at which the bargaining agent and a processor or processors' organization may make submissions, shall set a price and conditions of sale for the fish species that are binding on the parties and on all other processors in the province that process that fish species and that decision constitutes a collective agreement or part of a collective agreement between them.

[2006 c1 s8](#); [2006 c50 s5](#)

Settlement of dispute by panel

19.11 (1) Notwithstanding subsection 19.9(3), where the parties to collective bargaining are a certified bargaining agent and an accredited processors' organization or a processors' organization that represents processors in the province that process the majority percentage of a fish species and those parties appear before the panel under subsection 19.9(2), the panel shall hear and consider their positions on price and conditions of sale and shall, in accordance with the regulations, make a decision with respect to the matters in dispute between the parties relating to price and conditions of sale.

(2) The panel shall notify the parties of its decision not later than 3 days before the date set by the minister responsible for fisheries and aquaculture under [section 19.01](#) and the decision of the panel is final and binding on the parties and on all other processors in the province that process that species of fish to which the panel's decision relates and constitutes a collective agreement or part of a collective agreement between them.

(3) The minister may make regulations

- (a) establishing the method that the panel shall apply in making a decision under subsection (1) or delegating to the panel the authority to establish its own method; and
- (b) generally respecting the powers and duties of the panel in making a decision under this section.

2006 c50 s6; 2010 c38 s3

Chairperson hearing

19.12 (1) Notwithstanding [sections 19.9](#), [19.10](#) and [19.11](#), at the request of both parties, the chairperson may, without the members of the panel referred to in paragraphs 19.1(1)(b) and (c), hear and consider the parties' positions on price and conditions of sale and make a decision with respect to the matters in dispute between the parties relating to price and conditions of sale.

2006 c1 s8; 2022 c31 s6

No cessation or lockout

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.

2006 c1 s8; 2022 c31 s6

Facilitator not compellable

19.14 Except with the consent of the minister, and notwithstanding a law to the contrary, a person appointed by the panel as a facilitator shall not be required to give evidence before a court, board or other body or provide information that the person has received in the course of carrying out the person's duties.

2010 c38 s4; 2019 c3 s2; 2022 c31 s6

Panel may reconsider decision

19.15 (1) A certified bargaining agent, an accredited processors' organization or a processors' organization that represents processors that produce the majority percentage of a fish species may apply to the panel to reconsider a decision respecting price and conditions of sale.

(2) Notwithstanding subsection (1), a processor that does not produce the majority percentage of a fish species or a processors' organization that represents processors that do not produce the majority percentage of a fish species may apply to the panel to reconsider a decision respecting price and conditions of sale where either or both of the following apply:

- (a) the processor or processors' organization has engaged in collective bargaining with the certified bargaining agent; or
- (b) the processor or processors' organization has appeared before the panel at the original hearing under subsection 19.9(2).

(3) On an application under subsection (1) or (2), the panel may reconsider its decision and may confirm or vary the decision taking into consideration the criteria it may establish and in accordance with the regulations.

(4) Notwithstanding subsection (3), the panel shall only reconsider its decision where the criteria for reconsideration prescribed in the regulations have been met.

(5) The minister may make regulations

(a) respecting the criteria which the panel shall consider in determining whether to accept a reconsideration request;

(b) respecting the method that the panel shall apply in making a decision under subsection (3);

(c) restricting the number of applications under subsection (1) or (2) that a party may make respecting a fish species in a year; and

(d) generally, respecting the powers and duties of the panel in reconsidering a decision under this section.

2010 c38 s5; 2022 c31 s6

Sections apply

19.16. Where there is a conflict between the other provisions of this Act and [sections 19.01 to 19.15](#), sections 19.01 to 19.15 apply.

2022 c31 s6

Review

19.17 The minister shall, every 5 years, conduct a review of [sections 19.1 to 19.16](#).

2022 c31 s6

Conciliation officers

20. [Section 98](#) of the *Labour Relations Act* with respect to conciliation officers applies to all matters within the scope of this Act.

2006 c1 s9; 2014 c19 s11

Collective agreement binding

21. A collective agreement is binding upon

(a) the bargaining agent and the fishers in the unit of fishers which the bargaining agent represents; and

(b) the processor who has entered into the agreement or on whose behalf the agreement has been entered into.

1971 No53 s20; 2000 c4 s1

Agreement or decision binding

21.1 (1) Where, in the absence of an accredited processors' organization

- (a) a certified bargaining agent negotiates a collective agreement for a fish species on price and conditions of sale; and
- (b) that collective agreement is binding upon the processors who process the majority percentage of the fish species

the terms of that collective agreement is binding upon all processors in the province who process that fish species.

(2) Where a processor referred to in subsection (1) fails to comply with a provision of a collective agreement referred to in that subsection, the processors' organization affected by the failure to comply may apply to the board for a determination on the matter and the board may make that determination.

2006 c1 s10

Labour Relations Act

22. Section 86 of the *Labour Relations Act* with the words "without stoppage of work" in subsection (1) being replaced by the words "without cessation of normal business dealings between the fishers and processor or processors concerned" apply to all matters within the scope of this Act.

1977 c64 s150; 2000 c4 s1

Single arbitrator

22.1 (1) Where a party to a collective agreement requests, the minister shall appoint a single arbitrator instead of an arbitration board, and where a single arbitrator is appointed under this section, the arbitrator has the powers and duties conferred and imposed on an arbitration board under the *Labour Relations Act* .

(2) An arbitrator's decision shall be given within 48 hours of the arbitrator's appointment unless the parties to the collective agreement agree to a different time.

2006 c1 s11; 2022 c31 s7

Enforcement of arbitration award

22.2 Where an association, fisher, processor or processors' organization or other person has failed to comply with the terms of the decision of an arbitration board or of a single arbitrator made under a collective agreement or this Act a person affected by the decision may after 48 hours of the date on which the decision was made, or the date provided in it for compliance, whichever is earlier, file with the Trial Division a copy of the decision, exclusive of the reasons for it, and the decision shall be entered in the same way as a judgment of or order of that court and is enforceable as such.

2013 c16 s25

Duration of agreement

23. (1) Notwithstanding a provision contained in it, a collective agreement shall, if for a term of less than a year, be considered to be for a term of one year from the date upon which it comes into operation, or if for an indeterminate

term shall be considered to be for a term of at least one year from that date and shall not, except as provided by [section 12](#) or with the consent of the board, be terminated by the parties to it within a period of one year from that date.

(2) The parties to a collective agreement may by consent in writing while the agreement is in force vary, cancel or substitute other provisions for a provision in the agreement other than the provision relating to the term of the agreement.

[1971 No53 s22; 2000 c4 s9](#)

Costs of collective bargaining

23.1 A processors' organization whose members produce the majority percentage of a fish species, or an accredited processor's organization, that engages in collective bargaining is entitled to recover its costs that are directly attributable to the collective bargaining proportionately from all the processors to which the collective agreement resulting from the collective bargaining applies.

[2006 c1 s12](#)

Extra-provincial company

- 24.** Where a processor is an extra-provincial company whose board of directors does not meet in the province,
- (a) the company shall appoint a person resident in the province with authority to bargain collectively and to conclude a collective agreement and to sign the agreement on behalf of the company;
 - (b) the collective agreement signed by that person shall be binding on the company; and
 - (c) the company is guilty of an offence where it fails to appoint a person in compliance with paragraph (a).

[1971 No53 s23; 2000 c4 s1](#)

Terms of business

25. (1) Where the ownership of a business is transferred and a bargaining agent has been certified in respect of the fishers supplying fish to that business before the transfer, the certification of the bargaining agent is, subject to this Act, binding on the person to whom ownership of the business is transferred.

(2) Where, the ownership of a business is transferred, a collective agreement entered into by a bargaining agent and the person who transferred the ownership of the business is, subject to this Act, binding on the person to whom ownership of the business is transferred.

[1971 No 53 s24](#)

Rep. by [2006 c1 s13](#)

26. [Rep. by [2006 c1 s13](#)]

[2006 c1 s13](#)

Rep. by 2006 c1 s13

27. [Rep. by 2006 c1 s13]

2006 c1 s13

Rep. by 2006 c1 s13

28. [Rep. by 2006 c1 s13]

2006 c1 s13

Association constrained

29. An association that is not entitled to bargain collectively under this Act on behalf of a unit of fishers shall not declare or authorize a cessation of business dealings in respect to fishers in that unit.

2006 c1 s14

Fisher not liable for loss

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 section exempts a fisher or bargaining agent from liability for a tortious act.

1971 No53 s29; 2000 c4 s1; 2022 c31 s8

Suspension of operations not affected

31. Nothing in this Act shall be interpreted to prohibit the suspension or discontinuance of operations in a processor's establishment, in whole or in part, not constituting a lockout or a cessation of business dealings.

2006 c1 s15

Personal grievance

32. Notwithstanding anything contained in this Act, a fisher may present the fisher's personal grievance to a processor at any time.

1971 No53 s31; 2000 c4 s1; 2022 c31 s9

Enforcement of board's order

32.1 (1) Where a person, fisher, processor, processors' organization or an association has failed to comply with an order or decision of the board, a person, fisher, processor, processors' organization or an association affected may, after 48 hours of the date which the order or decision was made, or the date provided in it for compliance, whichever is earlier, file a copy of the order or decision, exclusive of the reasons, with the Trial Division.

(2) Once an order or decision of the board is filed with the Trial Division under subsection (1), that order or decision is enforceable as a judgement or order of that court.

(3) Notwithstanding subsection (1), where a directive made by the board under [section 18.1](#) of the *Labour Relations Act* is not complied with, a person, association, processor or processors' organization, and their officers, officials or agents affected by that directive may file a copy of the directive, exclusive of reasons, with the Trial Division and, once filed, that directive is enforceable as a judgment or order of that court.

[2013 c16 s25](#)

Labour Relations Act

33. Section 99 of the *Labour Relations Act* applies to all matters within the scope of this Act to the extent of the reference to a conciliation officer.

[2006 c1 s17](#); [2014 c19 s11](#)

Rep. by [2006 c1 s17](#)

34. [Rep. by [2006 c1 s17](#)]

[2006 c1 s17](#)

Rep. by [2006 c1 s17](#)

35. [Rep. by [2006 c1 s17](#)]

[2006 c1 s17](#)

Definitions

35.1 In [sections 35.2](#) to [35.5](#), "party" and "parties", notwithstanding paragraph 2(1)(q), means an association of fishers or a certified bargaining agent for fishers, and a processors' organization, or an accredited processors' organization who may or may not be bound by a collective agreement.

[2004 c26 s7](#)

Minister may establish auction system

35.2 The Minister of Fisheries and Aquaculture may establish an auction system for the sale of fish.

[2004 c26 s7](#)

Auction

35.3 (1) Where an auction system for the sale of fish is established by the Minister of Fisheries and Aquaculture and that minister requires the sale of a fish species by auction or the parties agree to the sale of a fish species by auction, the sale price achieved by the auction process for the fish shall be considered to be the price agreed upon for that fish by the fisher who sells the fish and the buyer of that fish by collective agreement.

(2) A fish species offered for auction under subsection (1) may be offered for a price other than a price agreed upon by collective agreement.

(3) Where a fish species is auctioned in accordance with this section, the auctioneer shall deduct from the money received for the sale of that fish an amount equivalent to the dues owing to the appropriate certified bargaining

agent and shall remit that amount of money to that agent.

2004 c26 s7

Strikes and lockouts prohibited

35.4 Notwithstanding [sections 26, 27 and 28](#) or another section of this Act, where the minister requires the sale of a fish species by auction, there shall be no strike, lockout or cessation of business dealings between fishers and processors with respect to the fish species that is the subject of the auction while the auction system is in effect.

2004 c26 s7

Conflicting provisions

35.5 Where there is a conflict between a provision of [sections 35.1 to 35.4](#) and other provisions of this Act, the provision contained in sections 35.1 to 35.4 apply.

2004 c26 s7

Sunset clause

35.6 Sections 35.1 to 35.5 shall cease to have effect on June 1, 2006 .

2004 c26 s7

Rep. by [2004 c26 s7](#)

35.7 [Rep. by [2004 c26 s7](#)]

2004 c26 s7

Rep. by [2004 c26 s7](#)

35.8 [Rep. by [2004 c26 s7](#)]

2004 c26 s7

Rep. by [2004 c26 s7](#)

35.9 [Rep. by [2004 c26 s7](#)]

2004 c26 s7

Rep. by [2004 c26 s7](#)

35.10 [Rep. by [2004 c26 s7](#)]

2004 c26 s7

Rep. by [2004 c26 s7](#)

35.11 [Rep. by [2004 c26 s7](#)]

Rep. by 2004 c26 s7

35.12 [Rep. by 2004 c26 s7]

Rep. by 2004 c26 s7

35.13 [Rep. by 2004 c26 s7]

Offence

36. A processor and every person acting on behalf of a processor who alters a rate of pay for fish or another term or condition of the purchase of fish contrary to [section 16](#) or [section 17](#) is guilty of an offence and liable upon summary conviction to a fine not exceeding

- (a) \$5 in respect of each fisher whose rate of pay or in respect of whom that term or condition was so altered;
or
- (b) \$250,

whichever is the lesser, for each day during which that alteration continues contrary to this Act, and, for the purposes of this section, "day", where a full day is not involved, includes part of a day.

Offence

37. (1) A processor, person, association, or processors' organization violating [section 6](#) is guilty of an offence and liable upon summary conviction,

- (a) where an individual, to a fine not exceeding \$100; or
- (b) where a corporation, association, or processors' organization, to a fine not exceeding \$1,000.

(2) Where a processor is convicted for violation of paragraph 6(2)(a), the convicting Provincial Court judge, in addition to the penalty authorized by this Act, may order the processor to pay compensation to the fisher not exceeding the sum that in the opinion of the Provincial Court judge is equivalent to the profit that would have accrued to the fisher up to the date of conviction but for the violation, notwithstanding that the sum may be in excess of \$200.

- (3) A
 - (a) processor who refuses or neglects to comply with an order made under this section; and
 - (b) processor, person, association or processors' organization refusing or neglecting to comply with a lawful order of the board

is guilty of an offence and liable upon summary conviction to a fine not exceeding \$50 for each day during which that refusal or failure continues.

(4) For the purposes of subsection (3), "day", where a full day is not involved, includes part of a day.

[1971 No53 s36](#); [2000 c4 s1](#)

Illegal lockout

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.

(2) A person acting on behalf of 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 \$10,000.

(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.

(4) An officer or representative of an association who contrary to this Act authorizes or participates in the taking of a vote of fishers as to cessation of business dealings between fishers and a processor or declares or authorizes such a cessation contrary to this Act is guilty of an offence and liable upon summary conviction to a fine not exceeding \$10,000.

(5) For the purposes of this section, "day", where a full day is not involved, includes part of a day.

[1971 No53 s37](#); [2000 c4 s1](#); [2006 c1 s18](#)

General penalty

39. A processor, person, association, or processors' organization doing anything prohibited by this Act or refusing or neglecting to do anything required by this Act to be done by that processor, person, association or organization is guilty of an offence and, except where some other penalty is by this Act provided for the act, refusal or neglect, is liable upon summary conviction,

(a) where an individual, to a fine not exceeding \$100; or

(b) where a corporation, association or processors' organization to a fine not exceeding \$500.

[1971 No53 s38](#); [2000 c4 s1](#)

Rep. by [2006 c1 s19](#)

40. [Rep. by [2006 c1 s19](#)]

[2006 c1 s19](#)

Reference to board

41. (1) Where a party to collective bargaining believes that another party to the collective bargaining has failed to comply with [paragraph 16\(a\)](#) or with [paragraph 17\(a\)](#), that party may apply to the board for a determination of the matter.

(2) Where an application is made to the board under subsection (1), the board shall inquire into the matter and may dismiss the application or may make an order requiring a party to the collective bargaining to do those things that in the opinion of the board are necessary to secure compliance with [paragraph 16\(a\)](#) or [paragraph 17\(a\)](#).

(3) Every processor, processors' organization, association or other person in respect of whom an order is made under this section shall comply with the order.

1971 No53 s40; 2000 c4 s1; 2006 c1 s20

Application of [Labour Relations Act](#)

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".

(2) In [section 122](#) of the [Labour Relations Act](#), the following references to provisions of that Act shall be read as the following references to provisions of this Act:

- (a) subsection 23(1) - subsection 6(1);
- (b) paragraph 24(1)(a) - paragraph 6(2)(a);
- (c) paragraph 24(1)(b) - paragraph 6(2)(b);
- (d) subsection 25(1) - subsection 6(3);
- (e) [section 26](#) - [subsection 6\(4\)](#);
- (f) subsection 28(1) - subsection 6(6);
- (g) [section 45](#) - [subsection 10\(6\)](#);
- (h) section 74 - section 16; and
- (i) section 75 - section 17.

2006 c1 s21; 2012 c30 s21

Prosecution

42. (1) A prosecution for an offence under this Act may be brought against a processors' organization or an association and in the name of the organization or association, and for the purpose of the prosecution an association or

a processor's organization shall be considered to be a person, and an act or thing done or omitted by an officer or agent of a processors' organization or of an association within the scope of the officer's or agent's authority to act on behalf of the organization or association shall be considered to be an act or thing done or omitted by the processors' organization or association.

(2) An information or complaint in respect of a contravention of this Act may be for one or more offences and an information, complaint, warrant, conviction or other proceedings in a prosecution is not objectionable or insufficient by reason of the fact that it relates to 2 or more offences.

1971 No53 s41; 2000 c4 ss1&11; 2022 c31 s10

Labour Relations Act

43. Sections 129, 130, with the necessary changes, and 133 of the *Labour Relations Act* apply to all matters within the scope of this Act.

2006 c1 s22

Proceedings under this Act

44. For the purposes of this Act, an application to the board or a notice or a collective agreement may be signed, where it is made, given, or entered into

- (a) by a processor who is an individual, by the processor;
- (b) by several individuals, who are jointly processors, by a majority of the individuals;
- (c) by a corporation, by one of its authorized managers, or by one or more of the principal executive officers;
and
- (d) by an association or processors' organization, by the president and secretary or by 2 officers, or by a person authorized for that purpose by resolution passed at a meeting of the organization.

1971 c53 s43; 2000 c4 ss1&12; 2022 c31 s11

Labour Relations Act

45. Section 114 of the *Labour Relations Act* applies to the extent of its reference to a conciliation officer and sections 136, 137 and 139 of that Act apply to all matters within the scope of this Act.

2006 c1 s23; 2014 c19 s11

Agreement to be filed

46. (1) Each of the parties to a collective agreement shall immediately upon its execution and upon the execution of a revision of the agreement or amendment to the agreement file with the minister a copy of the agreement and of the revision or amendment.

(2) The board may direct an association or processors' organization which is a party to an application for certification, or is a party to an existing collective agreement, to file with the board

(a) a statutory declaration signed by its president or secretary stating the names and addresses of its officers;
and

(b) a copy of its constitution and by-laws,

and the association or processors' organization shall comply with the direction within the time prescribed by the board.

1971 No53 s45; 2000 c4 s1

Labour Relations Act

47. Section 140 of the *Labour Relations Act* respecting Industrial Inquiries shall, with the word "employers" being replaced by the word "processors" and the word "employees" being replaced by the word "fishers", apply to all matters within the scope of this Act.

1971 No53 s46; 2000 c4 s1

Powers of board

48. (1) An association, a processor or processors' organization may apply to the board for a determination of a matter referred to in subsection (1.1).

(1.1) Where

(a) in a proceeding before the board under this Act a question arises as to; or

(b) on the application of an association, processor or processor's organization to the board or a referral by the minister to the board to determine

whether,

(c) a person is a processor or a fisher;

(d) an organization or association is a processors' organization or an association;

(e) a processors' organization is an accredited processors' organization;

(f) a collective agreement has been entered into and the terms of the agreement and the persons who are parties to or are bound by the collective agreement or on whose behalf the collective agreement was entered into;

(g) a collective agreement is by its terms in effect;

(h) a party to collective bargaining has failed to comply with paragraph 16(a) or with paragraph 17(a);

(i) a group of fishers is a unit appropriate for collective bargaining;

(j) a processors' organization is appropriate to bargain collectively; or

(k) a person is a member in good standing of an association,

the board shall decide the question and its decision is final and conclusive for all the purposes of this Act.

(1.2) The minister may refer a matter set out in subsection (1.1) to the board for a determination.

(2) A decision or order of the board is final and conclusive and not open to question or review but the board may, where it considers it advisable to do so, reconsider a decision or order made by it under this Act and may vary or revoke a decision or order made by it.

1971 No53 s48; 2000 c4 s1; 2006 c1 s24

Regulations

49. (1) Section 147 of the *Labour Relations Act* applies to all matters within the scope of this Act except that in applying that section

- (a) "employer" shall be replaced by the word "processor";
- (b) "employee" shall be replaced by the word "fisher";
- (c) "employers" shall be replaced by the word "processors"; and
- (d) "employees" shall be replaced by the word "fishers".

(2) Regulations made under the *Labour Relations Act*, shall, with the necessary changes and where they are not inconsistent with this Act, apply to all matters within the scope of this Act.

1971 No53 s49; 1977 c64 s150; 2000 c4 s1

Regulations

49.1 The Lieutenant Governor in Council may make regulations

- (a) setting the guidelines for arbitrations;
- (b) outlining the arbitration processes; and
- (c) generally, to give effect to the purpose of this Act.

2000 c4 s13

Labour Relations Act

50. Without limiting the powers, authorities, or jurisdiction conferred by this Act and except where inconsistent with this Act, the provisions of the *Labour Relations Act* relating to the constitution, powers, procedures and practices of the board apply to and in respect of the board when acting under this Act.

1971 No53 s50

Application of Act

51. This Act applies in respect of a corporation established to perform a function or duty on behalf of the Government of the province, except a corporation that the Lieutenant-Governor in Council by order excludes from the provisions of this Act.

