

Noteworthy Decision Summary

Decision: WCAT-2005-00120 **Panel:** Heather McDonald **Decision Date:** January 12, 2005

Assessment – Fishing industry – Former policy versus current policy – Section 4 of the Workers Compensation Act – Section 5 of the Fishing Industry Regulations – Policy item #40:20:10 of the Assessment Manual – Decision No. 225 in Volume 3 of the Workers Compensation Reporter

This decision is noteworthy for providing a comprehensive summary of the history of the law and policy regarding assessments in the fishing industry.

The Workers' Compensation Board (Board) assessed the employer, a fish processing company, as owing an additional \$130,000 in assessments for the years 2000 and 2001. The Board included amounts paid to limited companies and payments made to aboriginal bands for roe on kelp (ROK) in its assessment. The employer requested a review by the Review Division of the Board, which confirmed the Board decision. The employer appealed to the Workers' Compensation Appeal Tribunal.

The panel noted there had been a disordered entanglement of law, policy and practice of performing assessments within the fishing industry. The relevant law was found in section 4 of the *Workers Compensation Act* (Act) and section 5(1) of the *Fishing Industry Regulations*, B.C. Reg. 674/76 (Regulations). However, in 1976, a few days after the Regulations were issued, the Board concluded they were "inappropriate and unworkable". The Board then purported to replace the Regulations by way of a policy decision – *Decision No. 225* in Volume 3 of the *Workers' Compensation Reporter* - rather than by a regulatory amendment. Thus, the Regulations remained in force under section 4 of the Act despite not being followed in practice. Policy item #40:20:10 of the *Assessment Manual*, another applicable policy, was based on the assumption that *Decision No. 225* had amended section 5(1) of the Regulations.

The panel concluded that, in deciding whether the employer was liable to pay additional assessments, the relevant issue was whether the employer was the first commercial buyer or recipient of the fish in any given transaction under paragraph 5(1)(a) of *Decision No. 225* and item #40:20:10. These policies provided the Board with a broad power to seek assessments from many persons (individuals, corporations and other organizations) involved in many aspects of commercially caught fish. The panel concluded that the Act and Board policy in 2000 and 2001 allowed the Board to seek assessments in the fishing industry from commercial recipients who may not have had any direct relationship to the commercial fishers and who may have lacked the knowledge or documentation related to salaries, labour component of established settlements, and even the market value of the fish. The panel also noted, as an aside, that the current *Assessment Manual* identifies the person or organization primarily liable to pay assessments to the Board with more certainty.

The panel concluded the employer was a commercial recipient of fish under the former policy and thus was liable to pay assessments on the fish. However, the Board had erred in its application of item #40:20:10 and should return additional assessments the employer made based on that decision. If the Board wished to pursue the employer for additional assessments, it must make the appropriate inquiry and necessary determinations under the hierarchy of formulas in item #40:20:10.

The panel further concluded the employer was not liable to pay additional assessments with respect to its ROK transactions with First Nations bands, limited companies and unregistered firms. There was evidence that other commercial entities, including trucking companies and offloading businesses, acquired the ROK in commercial transactions prior to the employer acquiring the ROK under the custom processing arrangements it had with these suppliers. The panel noted, as an aside, that under current Board policy and practice, the employer would likely be liable to pay assessments on ROK.

The employer's appeal was allowed in part.

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Introduction

The appellant is a fish processing company. It is appealing a decision dated October 27, 2003 by the Review Division of the Workers' Compensation Board (Board). In that decision, the review officer confirmed a decision dated April 3, 2003 by a Board audit manager. The audit manager increased the appellant's assessments payable for the years 2000 and 2001. For the year 2000, the audit calculated additional assessments owing of \$45,591.29. For the year 2001, the audit calculated additional assessments owing of \$87,630.44.

In deciding that the appellant owed additional assessments to the Board, the audit manager included in the appellant's assessable payroll:

- (a) amounts paid by the appellant for fish purchases from limited companies; and
- (b) payments made by the appellant to First Nations bands for roe on kelp (ROK) custom processed by the appellant and sold, as a processed product, to third parties.

The appellant appeals the Review Division decision on several grounds. First, it submits that the limited companies and aboriginal bands are not "commercial fishers" under Board policy and the *Fishing Industry Regulations* (B.C. Reg. 674/76; O.C. 3779/76 as amended). Secondly, the appellant submits that it did not "buy, obtain or pay for" or "acquire" ROK, and is not, under Board policy, the first commercial recipient of the fish. For those two reasons, the appellant says that it is not liable to pay the additional assessments as specified by the audit manager.

In the alternative, the appellant submits that if it is liable to pay additional assessments, the Board auditor did not properly calculate the assessments owing.

Issue(s)

Is the appellant liable to pay additional assessments to the Board for the years 2000 and 2001 as specified by the Board audit? If the appellant is liable to pay additional assessments to the Board, did the Board correctly calculate the amount owing?

Jurisdiction

The Workers' Compensation Appeal Tribunal's (WCAT) jurisdiction in this appeal arises under section 239(1) of the *Workers Compensation Act* (Act), as an appeal of a final decision made by a review officer in a review of an assessment matter under section 96.2 of the Act.

Legal counsel represented the appellant in these appeal proceedings. Legal counsel provided written submissions in support of the appellant's notice of appeal. WCAT invited the Assessment Department to participate in the appeal by providing a written submission and other information (affidavit evidence) in response to the appellant's submission. As well, I convened an oral hearing on November 10, 2004 at WCAT's Richmond premises. The appellant attended, and two witnesses on behalf of the appellant gave evidence at the oral hearing. On behalf of the Assessment Department, the director and the policy manager both attended. An assessment officer who had provided affidavit evidence attended so that the appellant's legal counsel was able to cross-examine him on his affidavit. I also permitted the policy manager to ask questions of the appellant's witnesses. The Assessment Department's participation in this case falls within the role referred to in item #4.32 of WCAT's *Manual of Rules of Practice and Procedure*, and is grounded in WCAT's statutory authority under sections 246(2)(i) and 247(3) of the Act. A WCAT panel has the discretion to invite such participation if it believes it would be of assistance in deciding issues in an appeal.

Section 253(1) of the Act states that on an appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 254 of the Act provides that WCAT may consider all questions of fact, law and discretion arising in an appeal. Under section 250 of the Act, WCAT is not bound by legal precedent. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, this is an appeal by way of a rehearing. This is the final level of appeal.

Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the board of directors that is applicable in that case. Section 251 of the Act provides that WCAT may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

Relevant Law and Policy

There is important history regarding the relevant law and policy in this case, and it will be provided in detail in this decision. I have found it important to review the history of the law and policy, as there is a dispute between the Board and the appellant in this case regarding the interpretation and application of law and policy. The history and development of the law and policy may be one key to determining correct interpretation.

Section 4 of the Act, in the version that existed during 2000 and 2001 (the audit years at issue in this case) dealt with the fishing industry. I reproduce section 4 in full, as it is the statutory foundation for the policy and regulations dealing with the fishing industry. Section 4 stated:

- (1) The Lieutenant Governor in Council may make regulations to
 - (a) define the terms used in this section, and, for this purpose, the term “fish” may be defined to include any species of animal living in water, and the term “commercial fisher” may be defined to include the master and crew of a fishing vessel, the master and crew of a fish packing vessel and any other person who contributes in any manner to the catching or landing of fish for sale or commercial use;
 - (b) provide that any provision of Part 1 relating to workers applies or may be applied to any commercial fishers working in or out of British Columbia ports, or on or about the waters of British Columbia, or resident in the Province, notwithstanding that they may not otherwise be workers under this Act;
 - (c) provide that any provision of Part 1 *relating to employers applies or may be applied to any commercial buyers or other commercial recipients of fish, or to any person engaged in the Province in transmitting payments to commercial fishers, notwithstanding that they may not otherwise be employers under this Act*, and, to the extent the regulations provide, each buyer, recipient or payor is deemed to be the employer of all commercial fishers who contributed in any manner to the catching or landing of the fish bought, obtained or paid for by or though that person;
 - (d) provide that methods of calculating and levying assessments additional to or different from the methods otherwise provided under Part 1 may be used for levying assessments for the purposes of this Part on commercial buyers and other commercial recipients of fish, and on a person engaged in the Province in transmitting payments to commercial fishers for fish whether landed in the Province or elsewhere;
 - (e) create obligations, different from the terms of this Act, on commercial buyers and commercial recipients of fish, and masters of fishing vessels, to report to the Board injuries and occupational diseases sustained by commercial fishers, and to provide transportation for initial medical treatments;

- (f) exclude a portion of the fishing industry or a category of workers or employers in that industry to whom a provision of this Part would otherwise apply from the application of that provision, and to substitute provisions contained in regulations made under this section; and
 - (g) delegate to the Board to the extent the regulations provide any power conferred by this section.
- (2) *Where it appears to the Board that a provision of this Act or of a regulation made under another section of this Act is inappropriate or unworkable in relation to commercial fishers, the fishing industry or commercial buyers, or other commercial recipients of the fish, the Board may, by regulation, make the rules and give the decisions it considers fair and appropriate having regard to the intent that all commercial fishers must as far as possible receive the benefit of and be subject to Part 1.*
- (3) *Where the death of a commercial fisher resident in British Columbia arises out of and in the course of his or her occupation in the Province or waters off the Province after January 1, 1975, and the death is not otherwise compensable under this Part, the Board may treat the death in the same manner as if the commercial fisher were a worker employed by the Crown in the right of the Province.*

[Italic emphasis added]

On December 22, 1976, the Lieutenant-Governor in Council promulgated *Fishing Industry Regulations*. They were reported as "Item No. 223" in the *Workers' Compensation Reporter* (Volume 3, page 58). Item No. 223 defined "commercial fisherman" as follows:

- (a) a master or member of a crew of a licensed commercial fishing vessel who is a possessor or required to be a possessor of a current personal commercial fishing licence; or

- (b) a master or member of a crew of a fish packing, fish collecting, or other vessel which is licensed or required to be licensed under the Fisheries Act of the Province to engage in buying or collecting fish for commercial sale or use; or
- (c) any other person who, in the opinion of the Board, contributes to the catching or landing of fish for commercial sale or use;

and who,

- (d) in the course of his occupation as a fisherman contributes to the catching or landing of fish for arrival in British Columbia ports for sale to or use by a commercial buyer or other commercial recipient of fish; or
- (e) has made arrangements with the Board for the payment of assessments; or
- (f) is a person who, apart from these regulations, would be a “worker” under Part 1 and a fisherman but, subject to clause (e) of this regulation does not include; or
- (g) a fisherman who rarely contributes to the catching or landing of fish for arrival in British Columbia ports for sale or use by a commercial buyer or other commercial recipient of fish.

In Item No. 223, “commercial buyer” or “commercial recipient” was defined as meaning:

A person who is buying or receiving fish for re-sale or commercial use, but excludes a person who is buying for personal or family consumption;

Section 5 of Item No. 223 pertained to the manner in which the Board would collect assessments relating to commercial fishers. Section 5(1) dealt with who was responsible to pay assessments to the Board. It stated as follows:

5. (1) *Unless the Board otherwise determines*

- (a) a fish processing establishment licensed or required to be licenced under the Fisheries Act of the Province which directly or indirectly acquires fish from a commercial fisherman shall pay assessments on the fish bought, obtained or paid for by or through such fish processing establishment, except where the fish are acquired from another such fish processing establishment;

- (b) any other commercial buyer or other commercial recipient who acquires fish from a commercial fisherman other than for re-sale to such a fish processing establishment or as agent for such a fish processing establishment, shall pay assessments on the fish bought, obtained or paid for by or through such commercial buyer or other commercial recipient of fish;
- (c) a person who engages the services of a master or crew of or for a fishing vessel shall pay assessments on any fish in respect of which assessments are not paid or payable under (a) and (b);

[Italic emphasis added]

Thus section 5 of the Regulations in Item No. 223 provided rules for which entities would be liable to pay assessments to the Board, and those rules were to apply “unless the Board otherwise determines.” Section 15 of Item No. 223 stated that the Board had the authority to add to and amend the *Fishing Industry Regulations* in Item No. 223.

On December 31, 1976, nine days after the *Fishing Industry Regulations* in Item No. 223 came into effect on December 22, 1976 by Lieutenant Governor in Council promulgation, the Board adopted a Minute to amend them. In effect, the Board “otherwise determined,” by replacing section 5(1) of the *Fishing Industry Regulations* with the Board Minute.

The Board Minute adopted on December 31, 1976 was reported as *Decision No. 225* in Volume 3 of the *Workers’ Compensation Reporter* (page 65). That Minute referred to section 5(1) of the Regulations in Item No. 223 and stated that the Board, through its experience in 1976, “found that it is inappropriate and unworkable to require payment of assessments as set forth in that provision.” Accordingly, effective January 1, 1977, the Board replaced section 5(1) of the Regulations in Item No. 223 with the following provision:

- (a) a commercial buyer or other commercial recipient of fish who directly or indirectly acquires fish from a commercial fisherman shall pay assessments on the fish bought, obtained or paid for by or through such commercial buyer or other commercial recipient of fish, except where the fish are acquired from another commercial buyer or other commercial recipient;

- (b) a person who engages the services of a master or crew of or for a fishing vessel shall pay assessments on any fish in respect of which assessments are not payable under (a), except fish which are sold by the fisherman for personal or family consumption.

At the oral hearing, the evidence of the Board was that while Item No. 223 reflects a Fishing Industry Regulation under section 4 of the Act (as it was promulgated by the Lieutenant-Governor in Council), the Minute in *Decision No. 225* was never a regulation under the *Regulations Act* or the Act. Section 3(1) of the *Regulations Act* states that a regulation has no effect unless it, or a copy of it, is deposited with the registrar. The evidence is that the Minute in *Decision No. 225* was never deposited with the office of the Registrar of Regulations, and therefore, even if it could be considered to be a regulation, it has never been in effect as a regulation under the *Regulations Act* (or the Act).

In effect, *Decision No. 225* forms part of Board policy. This is because the Board approved the Minute, and according to *Decision of the Governors No. 3, 7 W.C.R. 17*, the published policies of the Governors, as of June 3, 1991, included *Workers' Compensation Reporter Decisions Nos. 1 – 423*. Since then, many of those Decisions have been retired as Board policies. *Decision No. 225*, however, has never been retired. (The Board's Policy Bureau confirmed this information as of December 17, 2004.) Thus for the period relevant to the audit years at issue in this case (2000 and 2001), *Decision No. 225* was still in effect as Board policy.

Further, although *Decision No. 225* constitutes Board policy, it purports to change section 5(1) of the *Fishing Industry Regulations* in Item No. 223, as section 5(1) in Item No. 223 expressly stated that it would apply "unless the Board otherwise determines." As I earlier indicated, nine days later, on December 31, 1976, by *Decision No. 225*, the Board did otherwise determine new assessment rules to replace section 5(1) of the *Fishing Industry Regulations* in Item No. 223. Thus the *Fishing Industry Regulations* in Item No. 223 (including section 5(1)) remain in effect as regulations under the *Regulations Act*, but for practical purposes, section 5(1) ostensibly has been replaced by Board policy in *Decision No. 225*. Regulation 7 of the *Fishing Industry Regulations* is still in effect, and it provides that "all commercial buyers and other commercial recipients of fish and all other persons required to pay assessments under Regulation 5 must register with the Board and provide such information as the Board may require." Further, Regulation 11 of the *Fishing industry Regulations* is still in effect, and it provides that any officer of the Board has the right to examine the books, accounts and other records "of any person whose records may or should show the catching and landing of fish, or payments made in respect of fish, and may make such other enquiry as the Board may deem necessary."

It is also important to note that apart from section 5(1), several other provisions of the *Fishing Industry Regulations* in Item No. 223 have been amended over the years by the

Lieutenant-Governor in Council. It is not important in this decision to dwell on those other amendments, but the version of the *Fishing Industry Regulations* in *B.C. Gazette* October 19, 2004 reveals the amendments up to *B.C. Reg. 384/2003*. The *Fishing Industry Regulations* in the *B.C. Gazette* are cited as *B.C. Reg. 674/76*, and section 5(1) still exists as a Regulation in the same format that it did in 1976 when it was filed with the Registrar of Regulations.

Both the appellant and the Board's Assessment Department representatives in this case agreed that *Decision No. 225* effectively amends section 5(1) of the *Fishing Industry Regulations*, and therefore for the purposes of this appeal proceeding, I will accept that this is so.

Other assessment policy applicable to this case was policy 40:20:10 of the *Assessment Operating Policy Manual* (Manual), in the version applicable to the 2000 and 2001 audit years. The language in policy 40:20:10 indicates that the Board was proceeding on the basis that *Decision No. 225* was in effect as an amendment to section 5(1) of the *Fishing Industry Regulations* in Item No. 223.

The relevant portions of policy 40:20:10 stated as follows:

Compensation coverage for commercial fishers is provided for by Section 4 of the *Workers Compensation Act* and the Fishing Industry Regulations made under it. The regulations are found in Workers' Compensation Reporter Decision 223 to 225. The matters covered by those decisions include the right of fishers to claim compensation for injury or disease, the transportation of injured fishers, claims procedures and appeals, the situation where the injury is caused by a third party, the payment of assessments on fishers' earnings and the provision of first aid.

Almost all "commercial fishers" are automatically covered for compensation. A "commercial fisher" is a master or crew member of a licenced commercial fishing boat who has or should have a current personal commercial fishing licence. The fisher may also be a master or crew member of a boat which has or should have a *B.C. Fisheries Act* licence to buy or collect fish for commercial sale or use, or any other person who, in the opinion of the Board, contributes to the catching of fish for commercial sale or use. The commercial fisher must also be involved in catching or landing fish for arrival at B.C. ports for commercial use (selling to the public is not "commercial use"), or have made individual arrangements with the WCB for payment of assessments.

Most fishers who sell less than 10% of total value of their catch in B.C. to commercial buyers are not automatically covered, but they may apply for optional coverage. Coverage is not available to fishers who have totally removed themselves from the B.C. Fishing industry. An example of this is

a fisher who catches and lands tuna in South America. No coverage is offered for sports fishing activity, even though the fisher may have a personal commercial fishing licence.

In the Fishing industry, the employer for assessment payment purposes is basically the first commercial buyer of the catch. A commercial buyer or other commercial recipient of fish who directly or indirectly acquires fish from a commercial fisher is responsible for paying the assessment on those fish, except where they are obtained from another commercial buyer or recipient who has or should have already paid the assessment on those fish. For fish not covered by the above statement, the assessment must be paid by the person who hired the master or crew of a fishing boat, unless the fish are sold to people who will use them for personal consumption.

[Bold emphasis added]

Policy 40:20:10 also provided formulas for calculating assessable payroll in the fishing industry. Those formulas corresponded to the regulatory provisions issued by the Board on December 31, 1976, reported as *Decision No. 224* in Volume 3 of the *Workers' Compensation Reporter* (page 63). (*Decision No. 224* was retired effective January 1, 2003, but was in effect for the 2000 and 2001 audit years in question in this case.) The relevant provisions of policy 40:20:10 with respect to calculating assessable payroll stated as follows:

There are three formulas for calculating Assessable Payroll in the Fishing Industry:

1. Where the commercial fisher is paid a salary (for example, with tendermen), the Assessable Payroll is calculated on the basis of that salary.
2. Where the commercial fisher is paid by established settlement, and where the labour component is clearly identified, the Assessable Payroll is based on the gross labour component. That labour component will include bonuses and any other payment which, according to the practice of the industry, are part of the fisher's share.
3. Where the commercial fisher is not on salary and the labour component cannot be clearly identified, then the Assessable Payroll is based on 60% of the gross purchase price of the fish.

Assessments paid are limited to the Maximum Wage Rate for each fisher (see Section 40:10:20). If records are retained by the fish buyer/processor to identify payments to individuals, excess deductions can be considered regardless of whether the commercial fishing firm is incorporated. This consideration would include verification of the number of crew members, etc. Excess earnings, as is the case with all industries, are allowed only with respect to earnings paid through one specific source or employer. In other words, if a fisher sold to three buyers in a year, only the amounts paid by each buyer would be considered when calculating excess for each fisher.

Policy 40:20:10 goes on to deal with fishing industry classifications. Generally there are two classifications in the industry: (i) fish processing and (ii) fishing (or fish buying). The final two paragraphs of the policy deal with compensation coverage for commercial fishers. For example, a commercial fisher who is engaged in the maintenance or minor repair of the fisher's own fishing vessel or equipment during the fishing season or on the off-season is automatically covered for compensation, as those activities are considered incidental to the fishing operations.

Finally, I turn to the current assessment policy in the *Assessment Manual* effective January 1, 2003. The assessment policy with respect to the fishing industry is found in policy AP1-4-1 of the *Assessment Manual*. This policy is not the policy applicable to the Board's audit of the appellant's 2000 and 2001 years. However, for purposes of historical development of Board law and policy on the issues in dispute, it is interesting to look at the Board's current policy. By way of brief summary, the definition of "commercial fisher" in AP1-4-1 is the same as the definition of "commercial fisherman" in the *Fishing Industry Regulations* referred to Item No. 223. The definition of "commercial buyer" or "commercial recipient" is the same as in Item No. 223. Further, and of particular note, section 5(1) of AP1-4-1 similarly echoes section 5(1) of the *Fishing Industry Regulations* in Item No. 223.

Therefore, although the Assessment Department's position is that *Decision No. 225* has never been retired, that it is still effective as Board policy, and that for the purposes of the appellant's 2000 and 2001 audit years, it effectively amended section 5(1) of the *Fishing Industry Regulations* in Item No. 223, nevertheless section 5(1) in Item No. 223 appears to have resurfaced in current assessment policy as valid law applicable to determining fishing assessments.

Indeed, legal counsel for the appellant referred to current assessment Practice Directive 1-4-1(A) (Fishing Industry – Assessing Spawn on Kelp Harvesters), which indicates that a fish processing company who obtains spawn-on-kelp for custom-processing is responsible to pay assessments to the Board. Under current Board policy and practice, the appellant would appear to be liable to pay assessments on ROK. Arguably, the appellant would be caught by the wording that refers to “a fish processing establishment” which “indirectly” obtains fish from a commercial fisherman. Practice Directive 1-4-1(A) indicates that its reference points are policy AP1-4-1 and Fishing Industry Regulation 5(1), which Regulation it states says in part as follows:

Unless the Board otherwise determines:

- (a) a fish-processing establishment licensed or required to be licensed under the Fisheries Act of the Province which, directly or indirectly, acquires fish from a commercial fisherman shall pay assessments on the fish bought, obtained or paid for by or through such fish-processing establishment, except where the fish are acquired under another such fish-processing establishment;

The foregoing wording is essentially the same as section 5(1)(a) of the *Fishing Industry Regulations* in Item No. 223, apparently amended by the Board in *Decision No. 225* for the stated reason that it was an “inappropriate and unworkable” way in which to require the payment of assessments.

Effective January 31, 2001, the Board amended section 5(2) of the *Fishing Industry Regulations* to permit the collection of assessments from persons engaged in transmitting payments to commercial fishers (*B.C. Reg. 364/2000*). Thus there is a new subsection (2) in the *Fishing Industry Regulations*, which reads as follows:

The provisions of Part 1 relating to employers apply to a person engaged in transmitting payments to commercial fishers as if the person is engaged in the fishing industry and that person is deemed to be the employer of any persons or organizations other than commercial buyers or commercial recipients who contributed in any manner to the catching or landing of the fish bought, obtained or paid for through or by that person and in respect of which assessments are not otherwise paid.

The former subsection (2) in section 5 of the *Fishing Industry Regulations* became subsection (3). Subsection (3) provides in part that “Assessments shall be paid on the total wages, prices or other payments made or payable to or on behalf of commercial fishermen and shall be calculated, determined and notified to the board in such manner as the board may prescribe.” Section 7 of the Regulations remains the same, stating that “All commercial buyers and other commercial recipients of fish and all other persons required to pay assessments under section 5 must register with the board and provide such information as the board may require.”

AP1-4-1 of the current assessment policy also has a new provision entitled “Determining persons who should pay assessments.” It states that in determining persons who should pay assessments under section 5(2) of the Regulations, the Board considers the following factors:

1. whether collecting assessments from the person is within the authority of the Act;
2. whether the person makes the economic decision to sell fish to persons or organizations other than B.C. commercial buyers or commercial recipients;
3. whether the person has control to act upon the economic decision on where to sell the fish;
4. whether it is practical or operationally feasible for the Board to collect the assessments; and
5. any other factor that is consistent with the Act, Regulations and Board policy.

The foregoing analysis of the historical development of the *Fishing Industry Regulations* and relevant Board policy applicable to assessments in the fishing industry reveals a disordered entanglement of law, policy and practice. Almost immediately after the Lieutenant-Governor in Council issued fishing industry regulations in 1976 dealing with how to collect assessments in the fishing industry, the Board determined those rules to be “inappropriate and unworkable” and purported to replace the rules relating to liability for assessment payments. It replaced the rules by way of a policy decision, not by formal regulatory amendment. This meant that the allegedly inappropriate and unworkable regulation for determining liability to pay fishing assessments remained and remains valid as a regulation under section 4 of the Act. Although the Board’s stated position in the oral hearing in these appeal proceedings was that the formal regulation no longer has any effect because it has been replaced by Board policy in *Decision No. 225* (still not retired), current Board policy in the *Assessment Manual* embraces what the Board formerly characterized as the “inappropriate and unworkable” section 5(1) in the *Fishing Industry Regulations*. Given that under board of directors’ *Resolution 2003/02/11-04*, item 2.1, any conflict between policy in the current *Assessment Manual* and policy in *Reporter Decisions*, policy in the manual is paramount, it would seem that *Decision No. 225*, albeit that it is not retired, is now superseded by the policy provisions in the *Assessment Manual*.

This situation is confusing for the workers’ compensation community, in particular for stakeholders in the fishing industry, for practitioners advising clients in that industry, and for participants in the workers’ compensation appeal system. My recommendation

would be for the Board to reconcile its assessment practices and policies (in formal policy Manuals, unretired policy decisions, and practice directives) with *Fishing Industry Regulations* promulgated under section 4 of the Act. That would achieve a cohesive consistency between policy, practice, statutory and regulatory law relating to assessments in the fishing industry.

In any event, for the purposes of this case, the relevant policy in effect for the 2000 and 2001 audit years was found in policy 40:20:10 of the Manual and *Decisions 224* and *225*. (*Decision No. 224* was not retired until January 1, 2003). The relevant statutory provision was section 4 of the Act in the version that existed in 2000 and 2001. As well, apart from section 5(1) of the *Fishing Industry Regulations*, the other provisions of those Regulations were in effect during the years 2000 and 2001.

Background and Evidence

The appellant is a fish processing company that has been in business for over 25 years, processing a wide variety of seafood products as well as other food items. The appellant is registered as an employer with the Board. The appellant has “core staff” that work on salary at the appellant’s plant and office, and the employer regularly pays assessments to the Board with respect to the earnings of those staff. This appeal, however, deals not with additional assessments payable by the appellant regarding the earnings of its core staff, but rather with amounts the Board included in its assessable payroll for the years 2000 and 2001 relating to fish purchases from limited companies and payments received by First Nations bands for ROK custom processed by the appellant.

The first two products were prawns and sea urchins, which the appellant purchased from suppliers to process, and then for resale either locally or overseas. Where the suppliers were individual fishers (human persons, not corporations) who had caught the prawns or sea urchins, the appellant remitted assessments to the Board with respect to the fishers’ earnings.

In some cases, the suppliers were vessels (boats identified by name), owned by individuals. In those cases, the appellant paid the individual fishers (master and crew) on the vessels by cheque, relying on information given by the vessel owner. In that situation, the appellant would remit appropriate assessments to the Board with respect to the payments it had made. With respect to payments to the boat owner, the appellant would deduct a 40% equipment allowance and then remit the Board the appropriate assessment on the owner’s earnings.

If a vessel was owned by a corporation, the appellant would usually issue a cheque directly to the corporation, not to the individual fishers. In that case, the appellant would not remit assessments to the Board on that payment, as the appellant understood that the corporation was responsible for paying the individual fishers (master and crew) and remitting assessments to the Board. If, however, a corporation that owned a vessel

instructed the appellant to make payments directly to the individual fishers, the appellant would pay the master and crew and then remit assessments on those payments to the Board. If there were any residual monies owing to the limited corporation after the appellant had paid the crew directly, the appellant would pay the corporation the residual amount, but would not remit assessments on that amount to the Board.

The other product involved roe-on-kelp, also known as herring spawn on kelp (ROK). The appellant made payments to various entities with respect to its receipt of ROK. Usually those payments were to First Nations bands, with whom the appellant had custom processing written agreements. However, the appellant had also dealt with limited companies in that regard, as well as with other entities not registered with the Board as employers. The appellant did not include any of those payments as part of its assessable payroll reported to the Board, and did not remit to the Board any assessments with respect to payments related to ROK. In these proceedings, legal counsel for the appellant indicated that with respect to one ROK supplier, a vessel "GC" owned by a company "GC Enterprises Co. Ltd.", the appellant did not have a custom processing arrangement with GC. The appellant purchased the ROK after it had been custom-processed. The appellant concedes that it was a commercial buyer, but not the first commercial recipient of the ROK. Its position is that GC Enterprises Co. Ltd. was the first commercial recipient of the ROK in that case. The appellant did not remit assessments with respect to the ROK product it purchased in that case.

The most significant category relates to the appellant's business relationship relating to ROK with First Nations bands. The First Nations bands held the ROK licenses issued by the federal Department of Fisheries and Oceans. The bands either owned or chartered the vessels, hiring and paying the masters and crew of the vessels for harvesting the herring, and those who harvested the roe.

A sample 2001 agreement between one band and the appellant was tendered in evidence as exhibit #2. The appellant's special projects manager and director of Marketing, Mr. S, testified at the hearing to explain the appellant's ROK processing/marketing agreements with First Nations bands. The evidence was that exhibit #2 generally represented the terms of the agreements between the appellant and other bands, although there might not be a lending provision in some of the other agreements, or the lending provisions might have variations not relevant to the issues in this case.

The agreement acknowledged that the band was holder of a herring spawn on kelp (ROK) licence issued by the Department of Fisheries and Oceans, and pursuant to that licence carried on a fishery harvesting ROK. The appellant was acknowledged to be carrying on a seafood processing business, and was "desirous of assisting" the band to establish and operate its ROK production, process the production and market the production. Under the agreement, the appellant assisted the band financially in setting up and operating its ROK production, by lending the band \$54,300.00, upon repayment terms set out in the agreement and an attached promissory note.

Mr. S testified that the appellant usually would not know the identity of the fishers who had harvested the ROK, although the bands would know because the bands would be hiring and paying the fishers. The appellant might generally know the number of fishers involved in the harvest, but would not know their identities. Mr. S testified that to the best of his knowledge, sometimes the bands would pay the fishers a daily rate, or a set amount in advance, and sometimes crew payments might depend on the ultimate sale price of the processed product. This was a matter between the bands and the fishers, not a matter in which the appellant was involved.

Mr. S testified regarding the general process of ROK harvesting and custom processing. He explained that the herring would be harvested from a seine net. When the net filled with herring, it would be towed underwater by the fishers to a holding pond. Before the herring would be released into the holding pond, the holding pond would need to be prepared. Typically, workers would string kelp into the pond so that the herring could spawn onto the kelp. After the roe was harvested, it would be delivered to a licenced off-loading site. The appellant does not own the off-loading sites, which are separate business entities under different ownership. The band would lose possession of the ROK at the off-loading site. The roe would then be "off-loaded" and later delivered by a trucking business to the appellant in Vancouver. The appellant would receive the ROK at its Vancouver plant where it would re-brine the product, determine a drain weight, and grade it. Then the appellant would preserve the ROK in cold storage, and approach customers on the band's behalf. The band would have a representative at the plant while the appellant was processing the product, as title in the product remained with the band.

Under the written agreement, the band agreed to deliver all of its ROK production to the appellant, with the appellant agreeing to process the ROK. The custom processing rate payable to the appellant was \$1.00 per pound, with the appellant's marketing fee being 2% of the final sales price based on net weight. The custom processing fee included:

1. receiving toted production and weighing confirmation
2. re-brining
3. grading and pailing product
4. cold storage fee

Under the agreement, it was the band's responsibility to deliver ROK totes to the appellant's plant in Vancouver, and to pay for brine salt and fine salt. However, the appellant would assist the band to ensure the efficient transport and handling of the product. Thus exhibit #1 in the proceedings was a sample 2002 statement from the appellant to one band, indicating that the appellant had paid for salt, trucking fees and off-loading fees on the band's behalf. Those charges (totaling \$4,416.67) were added to the appellant's custom processing charge and marketing commission (totaling \$23,120.76), and deducted from the processed product's sales proceeds payable by the appellant to the band.

The evidence was that the appellant would approach customers on the band's behalf and negotiate a sales price acceptable to the band. The customers would not necessarily know the exact identity of the band, as they would be dealing with the appellant. However, Mr. S testified that the customers would understand that the product was owned by a First Nations band and that the appellant would need to consult with the band regarding terms of sale. The band would not know the identities of prospective customers. Prior to finalizing sales of the ROK product, the appellant would advise the band of the sales opportunities and sales strategies. Final decisions would be made through discussion and agreement between the band and the appellant, although the band would have the right of final determination of any matter related to the sales. When a price agreeable to both the customer and the band was achieved, the appellant would execute sales agreements between the customer and the appellant. Mr. S testified that there was better control of the process when the appellant controlled the shipping of the product to the customer, and the invoicing process.

After completion of sales, the appellant would provide the band with copies of all invoices and sales documents. The appellant would pay the band the net proceeds of the sales of the product within 7 days of the appellant receiving payment from the customers.

As earlier stated, the appellant would pay costs such as salt, trucking, processing fees and marketing costs, and then deduct them from the sales proceeds payable to the band.

All sales of the band's ROK production would be completed through the appellant and all proceeds of the sales would be payable by the customers in the first instance to the appellant. Proceeds of such sales would be applied firstly in payment of interest on the loan from the appellant to the band, secondly in payment of any expenses incurred by the appellant in connection with the agreement, thirdly to retire the loan and lastly, in payment to the band.

To reiterate, with respect to payments made by the appellant regarding sales of ROK product, the appellant did not remit assessments to the Board with respect to any of those payments. In these proceedings, the appellant conceded that it had erred in one respect relating to ROK, and that the Board was correct to find an additional assessment owing by the appellant for the year 2000. This was regarding a payment by the appellant for ROK received directly from an individual fisher (not a corporation). The appellant did not remit assessments to the Board with respect to that payment, and concedes that the Board accurately included that payment as part of the employer's assessable payroll. Otherwise, the appellant's position was that it was not liable to remit any assessments to the Board with respect to payments it had made to anyone regarding ROK.

In reviewing the appellant's records for years 2000 and 2001, the Board auditor determined that the appellant had not included payments for prawns or sea urchins that it had purchased from corporations. He then referred to the three formulas in Manual policy 40:20:10 for calculating assessable payroll in the fishing industry. He found that the first formula (where a commercial fisher is paid a salary, the assessable payroll is calculated on the basis of that salary) was inapplicable. He found that the second formula (where the commercial fisher is paid by established settlement, and where the labour component is clearly identified, assessable payroll is based on the gross labour component) was not applicable, as the appellant's payroll records did not show that payment to the fishers was by established settlement or that the labour component was clearly identified. Therefore the auditor selected the third formula, which is applicable where the "commercial fisher is not on salary and the labour component cannot be clearly identified". According to that Manual formula, the assessable payroll is based on "60% of the gross purchase price of the fish." The auditor stated that he had included as assessable payroll 60% of the total payments that the appellant had made to the corporations.

With respect to ROK, the auditor viewed the appellant as having "purchased" the ROK from "vendors," being the First Nations bands and other suppliers of the product. The auditor testified that if a supplier, including a First Nations band, was not registered with the Board as an employer, the auditor automatically included as part of the appellant's assessable payroll, 60% of the payments (related to ROK) made by the appellant to the supplier.

The auditor testified that if a supplier was registered with the Board as an employer and had paid assessments in a fishing industry classification for the year in question, the auditor contacted the supplier to see if it had included any ROK-related payroll in its assessable payroll. If the supplier had included it, the auditor did not include in the appellant's assessable payroll any payments made by the appellant to that supplier. If, however, the supplier had not included ROK-related payments in its assessable payroll, the auditor included 60% of the ROK-related payments made by the appellant to the supplier in the appellant's assessable payroll.

The auditor testified that if an ROK supplier was registered with the Board but did not have a fishing classification unit, the auditor considered the three formulas in Manual policy 40:20:10, and just as with the prawn and sea urchin payments, applied the third formula on the reasoning that the appellant's payroll records did not show that payment to commercial fishers was by established settlement, nor did they show that the labour component was clearly identified. Therefore the auditor calculated assessable earnings based on 60% of the gross payments made by the appellant to the supplier.

The auditor testified that he did not make any attempts to contact ROK suppliers who were not registered with the Board or those who were registered as employers but were without a fishing classification unit, to obtain payroll information related to harvesting ROK. Under cross-examination, he conceded that the Board had the statutory authority to obtain payroll information from them, but that it was not Board practice to inquire about that information. Rather, the onus was on the appellant to produce such records.

After the auditor was cross-examined by the appellant's legal counsel, it was evident that the auditor had included in the appellant's assessable payroll not 60% of the gross payments it had actually made to the ROK suppliers, but rather 60% of the total purchase price for the ROK product that it had negotiated on their behalf with the third party customers. This amount did not have deducted the charges for custom processing and marketing, as well as other charges (for example, salt/trucking/off-loading payments paid by the appellant on behalf of the suppliers) that the appellant had first deducted from the gross payments it made to the suppliers. Thus the amount on which the auditor based the 60% formula did not in fact represent the payment received by the suppliers from the appellant, but also included other charges in addition to the payment.

Mr. S testified that for the audit years in question, the appellant did not consider making it a term of the written agreements with suppliers such as the bands, to have the suppliers identify the fishers' payroll for workers' compensation purposes. After the audit by the Board, Mr. S contacted the ROK suppliers and determined that some of them, including some bands, were registered with the Board and some had paid assessments on ROK-related payroll. With respect to one band that was not registered with the Board, Mr. S requested and obtained for the year 2001 the wages paid by the band to the crew regarding the ROK harvest. The wages totaled \$6,216.72, whereas the Board auditor had included in the appellant's assessable payroll 60% of \$117,527.00 (total sale price to the third party customer of the band's ROK) or \$70,516.20. There were other examples of crew wages for the year 2000 paid by other bands. Again, there was a large discrepancy between the assessable payroll when calculated using actual crew wages, and when calculated using the third formula in Manual policy 40:20:10, applying the 60% calculation.

The appellant requested the Board's Review Division to review the Board's decision to increase the appellant's assessments payable for the 2000 and 2001 years. In a decision dated October 27, 2003, the Review Division upheld the Board's decision, with respect to the issue of the appellant's liability to pay additional assessments to the Board, and with respect to the calculation of the additional assessments payable.

Submissions of the Board and the Appellant

The arguments of the Board and the appellant are summarized in this decision for purposes of brevity, although I have considered them in the detail in which they were presented.

The Board submitted that paragraph 5(1)(a) of *Decision No. 225* does not place a "commercial buyer" or "commercial recipient" in an ordinal sequence. The Board argued that it is the first of either a commercial buyer or commercial recipient who enters into a commercial transaction in or from which the market value of the fish can be ascertained and consequently assessment calculated, who will be liable for payment of the assessments to the Board.

The Board submitted that it is important to look at the nature of the commercial transaction to determine if assessable earnings are ascertainable from the transaction. Paragraph 5(1)(a) refers to a commercial buyer or other commercial recipient of fish who directly or indirectly "acquires" fish from a commercial fisherman. The Board gave the example of a fisher delivering roe to a refrigeration facility operated by another entity, and contracting with that entity to store the roe for 48 hours until the roe is relocated to another place for auction. The Board argued that although the refrigeration facility undoubtedly "acquires" the roe in the ordinary grammatical meaning of "to acquire," it would not be reasonable to suggest that such an "admittedly commercial transaction also gives rise to premium liability under the Act." The Board submitted that this would not be an appropriate interpretation of paragraph 5(1)(a), as by what measure would assessable earnings be calculated? In this regard, the Board stated as follows:

If the price or other payment related to the dollars exchanged in this commercial transaction, the Board could assess on a \$1,000 storage charge for roe which may have a market value of \$100,000. The consequences of such are patent, but the resulting inequity in premium liability is noteworthy of singular mention.

By contrast, the Board offered an example of the fisher contracting with an entity to store the roe for 48 hours and to thereafter act as the fisher's agent in auctioning the roe. The Board argued that in such a case, a commercial transaction would exist from which the assessment could be calculated, as the market value of the roe would be ascertainable from the commercial transaction involving the auction.

Relying on the principle of statutory interpretation that words in a statute should be given a construction that gives a reasonable meaning and effect to them, to best serve the object of the statute and the intent of the legislature, the Board submitted that the word “acquires” in paragraph 5(1)(a) “must be interpreted to mean acquires in a transaction from which assessable earnings (which are contingent on a determination of fair market value) may be calculated. For it to mean otherwise, either the scheme or object of the Act or the remedial aspects of the Act would be occluded.”

The Board submitted that the appellant was a commercial recipient or buyer of the fish who had directly or indirectly acquired the fish from commercial fishermen. Thus it was liable to pay assessments to the Board pursuant Board policy in paragraph 5(1)(a) of Item No. 225. The Board submitted that the definition of “commercial fisherman” and “commercial fisher” requires a contextual or purposive interpretation, consistent with section 4(2) of the Act’s broad discretion to the Board in determining who will pay assessments in the fishing industry. The Board submitted that commercial fishers are not limited to individuals, but include First Nations bands and corporations. The Board stated that while judicial jurisprudence has pointed out that bands and band councils are not legal persons under the *Indian Act*, it has also found them to be legal persons for certain purposes under certain statutes. For example, the Board submitted that *Isaac v. WCB* (1994) 10 W.C.R. 715 is authority for the proposition that a band, registered or otherwise, is an employer for workers’ compensation purposes under the Act.

Alternatively, the Board submitted that even if the corporations or bands could be construed as commercial buyers or recipients of the fish, there was no evidence that they bought or received the fish for resale or commercial use; hence, the appellant would be the first commercial buyer or recipient under paragraph 5(1).

The Board referred to the phrase “bought, obtained or paid for by or through” in paragraph 5(1), noting that it describes three distinct ways in which a commercial buyer or commercial recipient may acquire fish. “Bought” refers to a simple purchase and necessitates a transfer of title; “obtained” relates to attaining possession, and “paid for by or through” relates to an exchange of consideration but not necessarily a transfer of title. The use of the phrase “paid for by or through” means that the commercial recipient may either purchase the fish or facilitate the purchase of the fish. The Board submitted that the appellant’s business arrangement with the First Nations bands relating to ROK is an example of a commercial recipient facilitating the purchase of the fish it acquires.

With respect to calculating assessments payable, the Board submitted that the appellant was required by section 38(1) of the Act to keep “at all times at some location in the Province...complete and accurate particulars of the employer’s payrolls.” Further, Regulation 7 places a similar obligation on all commercial buyers and other commercial recipients of fish and all other persons required to pay assessments in the fishing industry, to register with the Board and to provide the Board the information it requires. Manual policy 40:20:10 gave direction as to what comprised complete and accurate particulars of payroll in the fishing industry. Therefore the appellant knew or should

have known the three formulas for calculating assessable payroll and ensured that it had complete and accurate particulars of matters such as salaries or establishment settlements paid to commercial fishers. Given that formulas 1 and 2 were inapplicable on the state of the information provided in the appellant's records, the Board was correct in applying formula 3.

The Board disagreed with the appellant's reliance on Regulation 11, which refers to the Board's authority to examine books, records and accounts of any person whose records may or should show the catching or landing of fish or payments made in respect of fish. The Board submitted that Regulation 11 did not place an onus on the assessment officer to make inquiries of vessel owners, limited corporations, or the First Nations bands. In this regard, the Board relied on *Appeal Division Decision #2002-0464* (February 21, 2002) for the proposition that if an employer's payroll records are inadequate, it is not improper for the Board to remedy that matter by way of appropriately estimating payroll amounts pursuant to relevant policy. In the case at hand, the appellant's payroll records were deficient and the Board appropriately applied formula 3 in Manual policy 40:20:10 to remedy the situation.

The appellant submitted that the suppliers of prawns, sea urchins and ROK do not qualify as commercial fishermen under the definition set out in the *Fishing Industry Regulations*. Each of the suppliers is either a First Nations band or a limited company. The appellant submitted that neither limited companies nor First Nations bands fall within the definition of "commercial fisherman" in section 1 of the *Fishing Industry Regulations*.

The appellant submitted that limited companies and First Nations bands both qualify as commercial recipients within the definition in section 1 of the Regulations, as they all hire and pay the master and crews of the vessel, who are by definition the commercial fishermen. The companies and the bands are deemed to be employers by section 5(2) of the Regulations because they "transmit payments to commercial fishers." Therefore, as "commercial recipients" acquiring fish from "commercial fishermen" of whom they are deemed to be employers, the bands and the companies fall under paragraph 5(1) of *Decision No. 225* as commercial recipients and should be paying assessments to the Board.

The appellant argued that while it may also be a commercial recipient of the fish, both Manual policy 40:20:10 and paragraph 5(1) expressly state that a commercial recipient is not liable to pay assessments where it has acquired the fish from another commercial buyer or other commercial recipient. Thus the intent is for the Board to assess the first commercial buyer/recipient. The appellant noted that some limited companies and bands were paying assessments to the Board, and in those cases, the Board did not look to the appellant to pay assessments.

Further, with respect to the ROK, the appellant also pointed to the trucking companies and the off-loading businesses which "acquired" the fish for commercial purposes

before the appellant acquired the fish. The appellant submitted that those business transactions also constituted commercial transactions which made the trucking companies and the off-loading businesses “commercial recipients” under paragraph 5(1) before the appellant became involved as a commercial recipient of the ROK.

In the further alternative, if the appellant is liable to pay any additional assessments in this case, the appellant submitted that the Board erred in calculating the assessments. The appellant argued that it did not hire the vessels or pay the crews, and therefore there was no way for it to determine what constituted the salary or established settlement amount for the individual fishers. With respect to purchases from companies, the appellant knew the gross amount it paid to the companies, but only the companies knew the salaries and settlement of the individual fishers. Under Manual policy, formula 3 is only to apply if fishers have not been paid salaries or by established settlement. The appellant submitted that although the fishers may have been paid salaries or settlements in these cases and an assessment made pursuant to formulas 1 or 2 of Manual policy, the Board made no effort to determine that type of assessment calculation. With that approach, the only method of calculating assessable payroll for the appellant would ever be to apply 60% of the gross purchase price paid by the customer. In that regard, the appellant submitted that the Exhibit 3 evidence regarding payments to fishers relating to ROK, illustrates that assessable payroll based on actual crew payments had no relation to assessable payroll calculated on the Formula 3 method in Manual policy.

The appellant submitted that section 11 of the *Fishing Industry Regulations* gives the Board the authority to examine the records of persons whose records may or should show the catching or landing of fish or payments made in respect of fish. Under Manual policy 40:20:10, if a fish buyer or processor has records identifying payments to individuals, a fish buyer or processor may seek deductions in excess of the 40% equipment deduction. The policy refers to a fisher selling to “three buyers in a year,” and that only the amounts paid by each buyer would be considered when calculating excess for each fisher. The appellant submitted that the Manual example is dealing with where a fish buyer or processor is buying directly from the fishers and can therefore identify the salaries or established settlements paid to the fishers. The appellant argued that the example would not apply to its situation, where it did not have access to the records regarding the salaries or settlement of the master and crew because it did not hire them. Instead, that information was retained by the companies and the First Nations bands. Thus the Board’s position on liability to pay assessments, argued the appellant, makes responsibility for assessments divorced from the entity that had control over payments to the fishers and appropriate records relating to same. The appellant submitted that it is the companies and the First Nations bands that should be paying the assessments, and the Board should be using its statutory and regulatory powers of inquiry to obtain the pertinent “payroll” information from them.

Reasons and Findings

In order to determine whether the appellant is liable to pay additional assessments to the Board for the 2000 and 2001 years, the relevant inquiry is whether the appellant was the first commercial buyer or recipient of the fish in any given transaction. The language in paragraph 5(1)(a) of *Decision No. 225* and policy 40:20:10 indicated that the liability to pay Board assessments was primarily on the first commercial buyer or recipient of the fish who directly or indirectly acquired fish from a commercial fisher. Where assessments were “not payable” by such a first commercial buyer or recipient, then the policy imposed liability on the person who engaged the services of a master or crew of a fishing vessel. I agree with the Board’s submission that there is no ordinal sequence to “commercial buyer” or “commercial recipient” – it is the first of either entity which directly or indirectly acquired the fish from a commercial fisher which had the primary responsibility to pay assessments to the Board under the applicable policy.

I do not agree, however, with the Board’s submission that the appropriate interpretation of the concept of “acquiring fish” or “commercial recipient” under Board policy required an examination of the nature of the commercial transaction to determine if the market value of the fish was ascertainable from the commercial transaction. The Board’s submission on that point equated “assessable earnings” with the market value of the fish. Thus the Board submitted that a commercial transaction involving the acquisition of fish, for the purposes of applying Board policy would require a transaction in which it would be readily possible to calculate assessable earnings based on the market value of the fish.

The Board’s approach, however, is inconsistent with the approach for calculating assessments in the fishing industry referred to in the three formulas for calculating assessable payroll in *Decision No. 224* and policy 40:20:10. The policies indicated a hierarchy of process for the Board to calculate assessments and did not make any necessary link between calculating assessable earnings and calculating the market value of the fish until the final step in the process.

Under the first formula, assessable payroll was calculated on the basis of the salary of a commercial fisher. If the fisher was not paid a salary but rather by established settlement, and where the labour component of the settlement was clearly identified, the second formula based assessable payroll on the gross labour component. Thus the first two formulas focused on the amounts paid to commercial fishers for their labour. Finally, where the fisher was not on salary and the labour component could not be clearly identified in an established settlement, then the third formula based assessable payroll on 60% of the gross purchase price of the fish.

Based on that formula hierarchy, I find that the policy first aimed at calculating assessments based on determinations of the salaries and labour components of established settlements for fishers, and only turned to the gross purchase price of the fish as a final resort where the first aims could not be met. With that in mind, I disagree

with the Board's submission that a purposive interpretation of the Act and Board policy requires interpreting the acquisition of fish in a commercial transaction as requiring an ability to determine the market value of the fish.

The Board provided an example of an unfair result in which a commercial transaction involving a refrigeration facility acquiring fish would be made liable for excessive assessment liabilities, when the profit it made from the commercial acquisition of the fish would be far less than the assessment premiums due the Board. However, I note the evidence in this case involving crew salaries for a particular ROK harvest totaling a little over \$6,000.00, whereas the appellant had been assessed on the basis of an assessable payroll of over \$70,000.00 with respect to that ROK transaction. Further, the custom processing charge and marketing commission (the profit made by the appellant in the custom processing arrangement) was significantly less than the assessable payroll calculated by the Board on the basis of the market value of the fish. Arguably there was inequity in that situation as well, where the market value of the fish did not reflect a reasonable value for the services of the crew nor the actual profit made by the appellant in the custom processing transaction.

Undoubtedly the third formula in policy 40:20:10 tended to provide a higher assessment premium for the Board and in many cases may also have been more operationally expedient for the Board to calculate assessments. Current policy in AP1-4-1 permits the Board to consider, when determining which entities should pay assessments in the fishing industry, matters such as practical and operational feasibility of collecting assessments. The current policy refers to other important factors as well, such as whether the entity has control to act upon the economic decision on where to sell the fish, and whether the entity makes the economic decision to sell fish to persons other than commercial buyers or commercial recipients in British Columbia. None of those factors, however, were expressed in the policies applicable to the case at hand. Although for reasons of expediency the Board may have preferred to apply the third formula wherever it could do so, and may have preferred to impose primary liability to pay assessments on the entities from which it was most expedient to collect, I am unable to ignore the directive in the policies applicable to the case at hand that the Board was to apply the first two steps in specified circumstances, and only turn to the third formula where the first two steps did not apply. For that reason, and also considering that the policies in question (*Decision No. 225* and policy 40:20:10) lacked the factors that exist in current Manual policy allowing the Board to consider matters of operational expediency in collecting assessments and practical matters such as an entity's economic authority over the sale of the fish, I find that it is inappropriate to interpret the acquisition of fish in a commercial transaction under those policies as requiring an ability to determine the market value of the fish.

In the *Fishing Industry Regulations* (see Item No. 223), the definition of "commercial buyer" or "commercial recipient" is "a person who is buying or receiving fish for re-sale or commercial use, but excludes "a person who is buying for personal or family consumption."

At this point I note that policy 40:20:10 also appeared to exclude the person who hired the master or crew of a fishing boat from the definition of a commercial buyer or commercial recipient of fish. This is because the policy stated that with respect to fish not directly or indirectly acquired by a commercial buyer or commercial recipient, the liability to pay assessments was imposed on the person who hired the master or crew of a fishing boat (except where the fish were sold for personal consumption, in which case there would be no liability). That would suggest that the person who hired the master or crew did not fall within the definition of a commercial buyer/commercial recipient, because if the person were within that definition, he or she would thereby be primarily liable to pay assessments and there would be no need for the policy to impose a secondary liability for assessments on the person for the situation where there was no commercial buyer or commercial recipient. It makes sense that the person who hired the fishers (master and crew) would be the owner of the fish caught by the fishers, and would not therefore be considered to be a commercial buyer of the fish. In order for this policy exclusion from the regulatory definition of “commercial recipient” to be consistent, recipient must also be interpreted to exclude the owner of the fish at the time the fish were caught by the commercial fishers. If the fishers were viewed as agents of those who “own” the fish at the time of capture, then the owners would not “receive” or otherwise “acquire” the fish from the fishers, and would not fall within the definition of “commercial recipients.”

Policy 40:20:10 and paragraph 5(1) in *Decision No. 225* referred to a commercial buyer or other commercial recipient of fish who “directly or indirectly” “acquires” fish from a commercial fisherman, and imposed liability to pay assessments on the fish “bought, obtained or paid for by or through such commercial buyer or other commercial recipient of fish.” In my view, the distinction that receiving fish for personal or family consumption was a non-commercial use of fish implied that anyone else who obtained fish for the purposes of making a profit could fall within the definition of a commercial recipient. Further, the broad terms referring to those commercial recipients who received, acquired, bought, obtained or paid for fish “by or through” the commercial transaction indicate that liability to pay assessments was not to be restricted to only those entities in situations where title to the fish passed to them, or to those entities which had purchased the fish or paid for the fish in terms of market value for the fish. In my view the broad terms used in policy 40:20:10 and paragraph 5(1) in *Decision No. 225* illustrate an intent that any first recipient who acquired possession of the fish for a commercial purpose was liable to pay assessments to the Board at first instance.

I do acknowledge, however, that a broader interpretation of “commercial recipient,” not limited to commercial transactions in which the market value of the fish is readily ascertainable, would not necessarily assist in calculating assessments based on the first two formulas (salary and labour component of established settlements) in *Decision No. 224* and policy 40:20:10. Quite clearly, it would be the entity who hired the master and crew of or for a fishing vessel (or the entity that transmitted payments to the fishers) who would have the records regarding fishers’ salaries or the labour component

of monetary settlements for fishers. Although Board policy indicated that assessments in the fishing industry should be calculated on the basis of salaries and labour components of established settlements where fishers were paid in that way, the policy would, in many situations, impose only a secondary liability for assessments on those persons with the direct knowledge and records of that essential information regarding assessable payroll. Primary liability for paying assessments was imposed on the first commercial buyer or recipient, even where the fish had been acquired indirectly from the fishers, and even where legal title to the fish did not pass to the commercial recipient and the recipient had “obtained” but not bought or paid for the fish. Thus the policy envisioned a primary liability to pay assessments on a commercial recipient of fish even where the recipient might not have any knowledge of the salary or settlement paid to the fishers, or of the market value of the fish. In effect, the policy did not link primary liability to pay assessments in the fishing industry with any necessary knowledge regarding the elements for determining assessable payroll in the industry.

The policy may seem to have been unfair in that it imposed liability to pay assessments on persons not directly involved in hiring or paying commercial fishers for their catch. But as a result the policy did provide the Board with a very broad power to seek assessments from many persons (individuals as well as corporate entities and other organizations) involved in many aspects with commercially caught fish. At the oral hearing, there was speculation but no real evidence regarding the rationale for the Board having legal authority to collect assessments relating to the fishing industry beyond the traditional “employer/worker” relationship found in other industries. In the fishing industry, the relationship most closely related to the employer/employee relationship would seem to be the relationship between the person who hired the fishing vessel and its crew, and the master and crew of the vessel. It is important to emphasize that section 4(1)(c) of the Act expressly contemplates that Part 1 of the Act relating to employers may be applied to commercial recipients or any person transmitting payments to fishers, notwithstanding that they would not otherwise be considered to be employers under the Act. Thus there is statutory recognition that in the fishing industry, it may be appropriate to collect assessments from entities beyond those in a traditional “employer” role with respect to commercial fishers. Whatever the rationale, I am satisfied that the Act and Board policy during the period of time relevant to this case allowed the Board to seek assessments in the fishing industry from commercial recipients who may not have had any direct relationship to the commercial fishers and who may have lacked the knowledge and/or documentation related to salaries, labour component of established settlements, and even the market value of the fish involved in the commercial transaction.

This situation needs to be contrasted with the earlier authority provided the Board by section 5(1) of Item No. 223, the regulatory provisions that the Board deemed inappropriate and unworkable and so replaced with a broader authority under paragraph 5(1) of *Decision No. 225* and policy 40:20:10. Under the earlier regulatory provisions, primary liability to pay assessments in the fishing industry was imposed on the first fish processing establishment which directly or indirectly acquired fish from a

commercial fisherman. This is also the situation in the current *Assessment Manual*, which reverted to the provisions of that earlier authority. I note that while that imposition of liability might not also link liability with knowledge necessary to accurately calculate assessable payroll, at least it had (and currently has) the advantage of more certainty regarding identity of those primarily liable to pay assessments to the Board. Thus fish processing establishments can at least readily identify themselves as such under Board policy as primarily liable to pay assessments, and can take steps, perhaps in contractual negotiations with fish suppliers, to obtain information regarding salaries or settlements paid to fishers (or information regarding the gross purchase price of the fish). Unfortunately the policies in *Decision No. 225* and 40:20:10, applicable in the case at hand, lacked that degree of certainty. The policies had general references to broad, ill-defined terms such as “commercial buyers,” “commercial recipients,” “acquires” and “obtained.” The policies also made it necessary to work through a chain of transactions in the Province involving commercial fish to find the “first” of a commercial buyer or recipient in order to determine the primary liability to pay assessments. Further, the ultimate determination could well come as a surprise to participants in the fishing industry, as the entities with the best knowledge of assessable payroll (salaries and settlements paid to fishers) might not be primarily liable to pay assessments to the Board. It is this substantial degree of uncertainty and confusion that led to the dispute in this case.

The Appellant’s Liability to Pay Additional Assessments for the 2000 and 2001 Audit Years

Turning to the facts of the case at hand, I find that the appellant came within the regulatory definition of a commercial recipient of fish, as it received the fish indirectly from commercial fishers, for a commercial use as opposed to a personal use or for family consumption. The policy’s reference to an “indirect” acquisition of fish from commercial fishers captured the appellant in this case, as the policy did not require a direct relationship between a commercial fisher and the first commercial recipient (or buyer). This renders irrelevant the parties’ submissions regarding whether First Nations bands and limited corporations fell within the definition of commercial fishers.

My interpretation of the Act, *Fishing Industry Regulations*, and Board policy applicable to the 2000 and 2001 audit years is that it was unlikely that the First Nations bands and limited corporations came within the definition of commercial fishers or commercial fishermen. Without belabouring the point, apart from one reference in Board policy to the fact that a fisher might be incorporated, the Act, Regulations and policies are rife with references to fishers in the context of fishers as human individuals. However, as I stated, I do not have to decide that point, as the policy's reference to an indirect acquisition from commercial fishers is sufficient to capture the appellant as a "commercial recipient" of the fish in all the transactions at issue in this case. The appellant indirectly received the fish, down the chain of capture and landing, and, where applicable, storage and transport, from the individual humans who caught the fish in the first place. Undoubtedly those individuals were "commercial fishers," and the appellant indirectly received fish from them. I note that the appellant did not seriously dispute that it came within the regulatory definition of a commercial recipient.

The important issue, however, regarding liability for paying assessments is whether the appellant was the *first* commercial recipient in the transactions at issue in this case.

The first type of commercial transaction I will deal with is the appellant's purchase of prawns and/or sea urchins from corporations where the appellant issued a cheque to the corporations rather than the individual fishers. The appellant's position was that it was the corporations' responsibility to pay assessments to the Board, and therefore the appellant did not remit assessments to the Board in those situations. The appellant argued that the corporations fell within the regulatory definition of "commercial recipients" and therefore were the first commercial recipients of the fish under policy 40:20:10. Further, the appellant submitted that as the corporations hired the commercial fishers and transmitted payments to the commercial fishers, the corporations are deemed to be employers under section 5(2) of the *Fishing Industry Regulations* (effective January 31, 2001).

I agree that the limited corporations are deemed to be employers of the fishers under section 5(2) of the *Fishing Industry Regulations*, and that as well there was a liability to pay assessments to the Board under paragraph 5(1)(b) of *Decision No. 225* and under policy 40:20:10 as the persons who hired the master and crew of the fishing boats. But the liability was a secondary liability, following the primary liability imposed by Board policy on the first commercial recipient (or buyer) of the fish who directly or indirectly acquired the fish from the commercial fishers.

My interpretation of "commercial recipient" in the *Fishing Industry Regulations* and pursuant to Board policy (earlier explained in this decision) is that it excluded a person who engaged the services of a master or crew, and that policy imposed a secondary liability to pay assessments on such a person. Thus I agree with the Board auditor's decision in this case that the evidence supported a finding that the appellant was the first commercial recipient of the fish in these transactions, having acquired the fish indirectly, through the corporations, from the commercial fishers. This imposed a

primary liability on the appellant to pay assessments to the Board. I understand the appellant's position that where a corporation had already paid assessments to the Board, the Board accepted those payments and did not pursue payment from the appellant, essentially treating the corporation as the first commercial recipient of the fish with primary liability under Board policy to pay assessments. I agree that the Board's practice was inconsistent in that regard, but I must make my findings based on applicable law and policy. In so doing, I find that Board policy imposed primary responsibility to pay assessments, in the transactions described, on the appellant. Therefore I uphold the Board's decision to find the appellant liable in these transactions. The matter of calculating assessments I will defer to a later point in this decision.

The next type of transaction involved the appellant's ROK arrangements with the First Nations bands. Where the bands were registered with the Board under a fishing classification and had included ROK-related payroll in making assessments to the Board for the year in question, the Board auditor accepted those assessments and did not pursue payment from the appellant. Essentially, the Board treated the bands in those cases as though they were the first commercial recipients (or buyers) of the ROK. Otherwise, if no assessments were paid on ROK-related payroll, whether or not the First Nations bands were registered as employers with the Board, the auditor pursued payment of assessments from the appellant, treating the appellant as though it was the first commercial recipient or buyer of the ROK. Again, I note the inconsistency in Board practice, which was undoubtedly confusing to stakeholders in the fishing industry. However, again, I must make my findings on applicable law and policy.

My interpretation of commercial recipient and commercial buyer under the *Fishing Industry Regulations* and Board policy is that the definition excluded those entities that hired the master and/or crew of a fishing vessel, and that under Board policy they were secondarily liable for paying assessments. The evidence before me in these proceedings is that the First Nations bands did hire the crew and/or master of the fishing vessel, and therefore my interpretation would exclude them from the definition of commercial recipient or commercial buyer.

That does not end the matter, however. With respect to the ROK transactions, the evidence must satisfy me that the appellant was the *first* commercial recipient of the fish who acquired it indirectly from the fishers, before the appellant would be liable to pay assessments to the Board under paragraph 5(1)(a) of *Decision No. 225* and according to policy 40:20:10. The evidence does not satisfy me that was the case in the ROK transactions. I have earlier discussed why I do not accept the Board's submission that the policy's reference to a "commercial recipient" who has acquired fish indirectly from a commercial fisher must refer to a commercial transaction whereby the market value of the fish must be ascertainable. If that were the intent, it would have been a relatively easy matter for the regulations and policy to have simply stated so. But the history of the development of Board policy with respect to assessments in the fishing industry, and the general language used by the Board in developing the policy applicable to the 2000 and 2001 audit years, persuades me that the intent was to provide the Board with

a very broad power to collect assessments from a wide number and type of entities involved with the fish caught and landed by commercial fishers, not restricted to those entities that would necessarily have a knowledge of assessable payroll related to fishers' salaries, established settlements, or market value of the fish.

In this case, there was evidence of other commercial entities that acquired the ROK in commercial transactions prior to the appellant acquiring the fish under the custom processing arrangements it had with the First Nations bands. There was evidence of trucking companies and off-loading businesses that were involved in commercial transactions with the fish prior to the appellant acquiring the fish. This distinguishes this case from *Appeal Division Decision #1998-1083* (July 8, 1998), where the panel stated that it was unable to conclude from the evidence available on file or from the submissions advanced by the fish processing plant in that case that there had been a commercial recipient or buyer prior to the fish processing plant that had or should have already paid assessment on the fish. It is unnecessary for me in this case to identify which entity was the first commercial recipient in each of the transactions. Indeed I would not be able to do so as there was insufficient evidence of identities, corporate or otherwise, in that regard. As well, the evidence may have been incomplete with respect to all the commercial transactions involving the fish prior to the appellant's involvement, and thus there may be other commercial entities potentially liable as the first commercial recipient of the fish. It is up to the Board, if it wishes to pursue payment of assessments in this case regarding ROK transactions for the 2000 and 2001 audit years, to pursue that matter and obtain the necessary evidence. I have found an error in the Board's decision to assess the appellant with respect to its ROK transactions with the First Nations bands, and I find that no additional assessments for the 2000 and 2001 audit years are payable by the appellant in that regard.

My findings with respect to the appellant's ROK transactions with the First Nations bands apply equally to the appellant's ROK transactions involving limited companies and unregistered firms, as I understand from the evidence that as well, there were other commercial recipients of the fish prior to the appellant's acquisition of the fish for custom processing. This also applies to the transaction involving GC Enterprises Ltd., as I am satisfied that the appellant was not the first of a commercial recipient or buyer of the custom processed ROK product in that case. It may have been the first commercial buyer, but the evidence suggests that there was a first commercial recipient prior to the appellant's purchase of the custom processed ROK.

However, I agree with and accept the appellant's submission that the Board was correct to find an additional assessment owing for the year 2000 with respect to payment for ROK that the appellant had received directly from an individual fisher ("Mr. CC"). The evidence satisfies me that the appellant was the first commercial recipient of the ROK in that situation.

The next issue concerns the calculation of additional assessments payable for the 2000 and 2001 audit years.

Calculating Additional Assessments Owing for the 2000 and 2001 Audit Years

I have found the appellant liable to pay additional assessments for the audit years 2000 and 2001 regarding the purchase of prawns and/or sea urchins from limited corporations. As the appellant's records did not indicate whether or not the fishers were paid by salary or by established settlement with a clearly identified labour component, the auditor applied the third formula in policy 40:20:10, and based assessable payroll on 60% of the gross purchase price of the fish.

In this case I have found an error in the Board's application of the third formula in policy 40:20:10, as there was insufficient inquiry for there to be a determination that the commercial fishers of the prawns and sea urchins had not been paid by way of salary or by way of established settlement with a clearly defined labour component. There was no determination by the Board that the commercial fishers of the prawns and sea urchins had not been paid by way of salary or by way of established settlement with a clearly defined labour component, and hence it was wrong for the Board auditor to proceed to apply the third formula in policy 40:20:10.

The Board's practice was to interpret the hierarchy of formulas in policy 40:20:10 as reading that if the commercial recipient did not have adequate records indicating that the fishers were paid by salary or established settlement with a clearly defined labour component, the Board could default to applying the third formula and assess on the gross purchase price of the fish. However, words to that effect were not in the policy. This is in contrast to the situation in *Decision No. 224*, with respect to "fish purchased during the year 1976 otherwise than from a commercial fisherman," where the policy did expressly state that "where adequate records of the original purchase" from the fishermen were "not available to an assessable buyer," the Board was entitled to assess the buyer on the gross purchase price to the buyer, less 40%. Policy 40:20:10, applicable for the 2000 and 2001 audit years in question, deleted such words with respect to calculating assessable payroll in the fishing industry. Instead, the three formulas are set out in a hierarchy that requires the Board to calculate assessable payroll on the basis of salary where a commercial fisher is paid in that way, and proceed to the next step only where the Board has made a determination that the fisher was not paid by salary.

I agree with the Board that section 38(1) of the Act and Regulation 7 imposed an obligation on the appellant as well as other commercial recipients of fish and every one else liable to pay assessments in the fishing industry, to register with the Board and provide such information as the Board might require. However, Regulation 11 provided the Board with legal authority to examine the "books, accounts and other records of any person whose records may or should show the catching or landing of fish, or payments made in respect of fish, and may make such other enquiry as the Board may deem necessary."

In the typical assessment cases involving employers in industries other than the fishing industry, I think it reasonable for the Board to expect employers to achieve substantial, perhaps even perfect, compliance with their legal obligations under the Act to maintain adequate records regarding assessable payroll. I think it reasonable for the Board, in most cases, to generally rely on those records as evidence of an employer's assessable payroll. But as this decision illustrates, the fishing industry and liability for paying Board assessments in that industry was a difficult and complex matter during the audit years in question. I have earlier referred to the broad and ill-defined terms in Manual policy that determined liability for paying assessments, and the potential need for industry participants to work through a complex chain of transactions involving commercial fish in order to find the "first" of a commercial buyer or recipient in order to determine the primary liability to pay assessments. Further, even on the assumption that virtually everyone in the industry was potentially liable to pay assessments to the Board, Board policies imposed liability on entities that might be many times removed from a direct relationship with commercial fishers, and who therefore might have little, if any, knowledge or records regarding the details of payments to commercial fishers.

In light of the unique circumstances of the fishing industry, and given that the Board's policy in 40:20:10 establishes a hierarchy of formulas to be applied with an emphasis on first calculating assessable payroll based on the salary paid to a commercial fisher where that was the case, and given the Board's broad powers of inquiry under the Act and Regulation 11, I find that in appropriate cases, the onus would have been on the Board to make the necessary inquiries to determine whether or not formula 1, 2 or 3 applied in policy 40:20:10.

The evidence satisfies me that the circumstances in the case at hand were such that the Board should have used its powers of inquiry to determine whether or not the limited corporations had paid the commercial fishers by way of salary or established settlement with a clearly defined labour component, before moving to apply formula 3. The appellant was registered with the Board as an employer. The evidence is that the appellant kept adequate records regarding the assessable payroll of the workers in its fish processing plant, and that where it paid commercial fishers directly for their catch, it kept records of the payments and remitted assessments to the Board in that regard. I do not find it unreasonable, given the complexity of Board policy and the circumstances of the fishing industry, for the appellant to have assumed that limited corporations who had directly hired and paid commercial fishers would have already remitted assessments to the Board. For this reason, the appellant lacked records relating to payments made to the commercial fishers. I find that in these circumstances, the Board erred in applying formula 3 as a default position. It erred in failing to make an adequate inquiry pursuant to its statutory and regulatory authority and therefore failed to make a determination under policy 40:20:10 that formulas 1 and 2 were not applicable in the circumstances.

I have found that the appellant was not liable to pay the Board assessments with respect to its ROK arrangements with First Nations bands, limited companies and

unregistered firms. In the alternative, if I am wrong in that regard and the appellant was liable to pay additional assessments as a first commercial recipient, my comments regarding the calculation of assessable payroll with respect to the appellant's prawn/sea urchin transactions apply with respect to the Board's calculation of assessable payroll on the ROK transactions. The Board had a responsibility to use its statutory and regulatory powers of inquiry to obtain the relevant assessable payroll information from other entities in order to first make a determination whether or not formula 1 and 2 in policy 40:20:10 applied. The Board should not have automatically defaulted to applying the third formula where the appellant lacked records indicating the method of payment to the commercial fishers.

Conclusion

I allow, in part, the appellant's appeal of the Review Division decision dated October 27, 2003 that confirmed a Board decision dated April 3, 2003 regarding an audit of the appellant for the 2000 and 2001 audit years. I vary the Review Division decision dated October 27, 2003 by finding that:

- (a) Although the appellant was liable to pay the Board additional assessments for the audit years 2000 and 2001 with respect to its purchase of prawns and/or sea urchins from limited corporations, the Board's audit erred in automatically applying the third formula in policy 40:20:10 without first making a determination, based on relevant records from other fish suppliers, that the first two formula did not apply. Thus the Board's decision calculating additional assessments owing by the appellant was erroneous, and the Board should return the additional assessments made by the appellant to the Board based on that decision. If the Board wishes to pursue the appellant for payment of additional assessments for the audit years 2000 and 2001, it must make the appropriate inquiry and make the necessary determinations under the hierarchy of formulas in policy 40:20:10.
- (b) The appellant was not liable to pay the Board additional assessments for the audit years 2000 and 2001 with respect to its ROK transactions with First Nations bands, limited companies and unregistered firms. (The appellant has conceded, and I have confirmed, that the Board was correct to impose an additional assessment for the year 2000 with respect to the appellant's payment for ROK that it had received directly from an individual fisher, Mr. CC).

In concluding, I note that current Manual policies regarding assessments in the fishing industry are different than the policies that were applicable in this case, for the audit years 2000 and 2001. Having said that, it is important that given the complex

relationships that exist in the fishing industry, assessment policies be written clearly so that everyone involved in the industry can readily understand their obligations to the Board. This is especially so when entities may find themselves liable to pay assessments to the Board in circumstances where they are not directly involved in transmitting payments to commercial fishers. It is also helpful when policies provide a rationale for imposing assessment liabilities, and when policies are consistent with the Act, *Fishing Industry Regulations*, and unretired Board Reporter Decisions.

Heather McDonald
Vice Chair

HM/hb