THE CANADIAN BAR ASSOCIATION
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January 11, 2008

The Honourable Loyola Hearn, P.C., M.P.
Minister of Fisheries and Oceans
Fisheries and Oceans Canada
Minister's Office, Centennial Tower
200 Kent Street
Ottawa, Ontario K1A 0E6

Dear Minister:

Re: Changes to Atlantic Fisheries Licensing Policy

I write to you on behalf of the Maritime Law Section of the Canadian Bar Association (CBA Section) regarding changes to the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* (Licensing Policy) announced on April 12, 2007.

The CBA Section is of the view that certain issues have not been adequately addressed to date in discussions regarding the amendments. The changes to the Licensing Policy are purportedly to return independent control of the inshore fishery to inshore fishers through the introduction of an Independent Core status fisher and through the abolition of Controlling Agreements. However, they may have unintended consequences that will undermine this objective. We hope that our comments providing the perspective of practicing members of the maritime/fisheries law bar are helpful to you in examining whether some of these changes should be reconsidered or further refined.

Controlling Agreements

One of the key concerns with the changes to the Licensing Policy is the prohibition against Controlling Agreements. The amended policy defines a Controlling Agreement as an agreement between a licence holder and an individual or corporation (except an agreement with a recognized financial institution) that permits a person other than the licence holder to control or influence the licence holder's decision to submit a request to the Department of Fisheries and Oceans (DFO) for issuance of a replacement licence to another fisher.

Only those fishers who have not entered into Controlling Agreements for the vessel-based licences they hold are eligible for Independent Core status. Further, only Independent Core status fishers will be eligible to hold new licences and obtain replacement licences. Licence holders who are parties to Controlling Agreements have seven years from the date these changes were announced to free themselves of those agreements.

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It is the CBA Section's view that the definition of Controlling Agreement is overly broad and affects not only those agreements in which the named licence holder has given up control of the licence to another, but could also be interpreted to include trust arrangements where control of the licence actually remains with the licence holder.

By way of example, the definition of Controlling Agreement does not adequately reflect the reality that many inshore fishers have incorporated their fishing enterprises to achieve various commercial objectives. In such cases, the fishers transfer their licences to the company by way of a trust agreement. As principal of the company, the fisher effectively retains control of the licence. The definition of Controlling Agreement could prevent these fishers, who have incorporated their fishing enterprises for sound business reasons, from becoming Independent Core fishers and thus prevent them from obtaining new and replacement licences. We acknowledge the recent statement from DFO that this is not the intent;[1] however, the wording of the definition remains problematic particularly given the inability of corporations to hold licenses under the Owner-Operator Policy.

Fishers may enter trust agreements with private investors who, other than provide financing, have little to do with the fishery. There are instances of trust agreements between fishers who share the beneficial interest in a licence, and between fishers and their spouses for income splitting purposes. Further, some fishers experience difficulties financing their operations and will purchase or lease additional quota through the framework of a trust or lease agreement. In the CBA Section's view the current definition of a Controlling Agreement would prohibit all of these agreements, which undoubtedly have a positive impact on the independence and the economic stability of fishers.

It is a reality of the fishery in Eastern Canada that limited sources of funding are available for the intergenerational transfer of licences. New entrants to the fishery find it difficult to access capital from traditional lenders and often will enter into trust arrangements with the seller of a fishing enterprise in order to obtain necessary funding. The effective prohibition of such trust agreements, which are legal and binding instruments, will prevent some new entrants from generating the financing they need to enter the fishery.

The prohibition of trust agreements is a very contentious matter which should be debated openly in Parliament rather than effected through policy. It concerns us that DFO has remained silent for many years while the Courts have given legal effect to trust agreements created to allow for the transfer of fishing privileges. Denying the legitimacy and legal effect of these agreements is unfair to those who have relied on the Court's enforcement of, and DFO's acquiescence to, the transfers. While there is a seven year timeframe within which fishers must remove themselves from Controlling Agreements, the effect of the prohibition is immediate on those fishers who are parties to trust agreements but who wish to acquire a new or a replacement licence.

Recognized Financial Institutions

The announced changes are intended to make it easier for fishers to achieve Independent Core status by obtaining financing for their fishing enterprises from recognized financial institutions. These financing arrangements would be at arm's length, as the recognized financial institutions would have no interest in controlling the industry.

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[1] Department of Fisheries and Oceans, Newsletter (January 3, 2008), online: http://www.dfo-mpo.gc.ca/communic/fish_man/PIIFCAF_NL-PIFPCCA_BI_e.htm

To effect a transfer of a licence, licence holders relinquish their licence and ask for a replacement to be issued to a particular person. DFO then ordinarily issues a licence in accordance with that request. Licence holders can now advise DFO in writing that they have an agreement with a recognized financial institution and that they have agreed not to effect a transfer of their licences as part of that financing arrangement. Where a licence holder files with DFO a Notice of an arrangement with a recognized financial institution, and the recognized financial institution has not acknowledged a transfer, DFO will take that arrangement into account when considering issuing the replacement licence while the Notice is effective. As noted above, these new measures are intended to make financing from traditional lenders more accessible.

It is the CBA Section's view that the policy changes leave recognized financial institutions with no means of enforcing security agreements in the event of default by a fisher. A recognized financial institution will in most cases require a mechanism to ensure that the debt is protected in the event of default by the licence holder, likely through the ability to sell (request a transfer of) the licence. If DFO intends to take away the ability of licence holders to obtain financing through trust agreements, then there must be a corresponding recognition of a lender's right to enforce security agreements in the event of default by the licence holder, to encourage financial institutions to extend credit in this market. Without the ability to enforce the security agreement in this manner, many recognized financial institutions will continue to be reluctant to accept a licence as collateral security.

The CBA Section is also concerned about the possibility that a licence pledged as collateral security for a loan can be cancelled and reissued to a new licence holder even where DFO has knowledge of the existence of a financial arrangement with a fisher. By committing only to take that arrangement into account when considering the transfer request while the Notice is effective, there is no certainty that DFO will refuse to transfer the licence without the consent of the recognized financial institution.

As a final point, it is not clear if the term "recognized financial institution" includes only chartered banks, or if it would also include non-traditional lenders, such as community development corporations.

Conclusion

We hope our comments on the Licensing Policy have been helpful. Please do not hesitate to contact us to discuss these matters in greater detail.

Yours very truly,

(*original signed by Kerri Froc for Richard F. Southcott*)

Richard F. Southcott
Chair, National Maritime Law Section