S.C.C. File No.:

**IN THE SUPREME COURT OF CANADA**
(On Appeal from the Court of Appeal for Newfoundland and Labrador)

**BETWEEN: BGI ATLANTIC INC.**

**FIRST APPLICANT**
**(First Appellant)**

**-and-**

**BARRY GROUP INC.**

**SECOND APPLICANT**
**(Second Appellant)**

**-and-**

**JAMES MATCHIM**

**RESPONDENT**
**(Respondent)**

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# APPLICATION FOR LEAVE TO APPEAL

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**OVERVIEW**

1. This case raises the issue of the right of an appeal court to determine a matter on a basis not addressed by counsel at trial or appeal, without providing the parties with an opportunity to be heard.

2. The majority decision of the Newfoundland and Labrador Court of Appeal observed, in a footnote, that collective bargaining regimes did not permit separate individual contracts to operate in addition to an agreement between companies and unions. Notwithstanding this, the majority proceeded to determine that in the instant case, an arrangement between the Applicants and Mr. Matchim was a binding contract, that had effect in addition to the collective agreement governing the fishing industry in the Province.

3. The consequences of the Union Agreement had not been raised by counsel at trial or before the Court of Appeal.

4. As the process of paying discretionary bonuses is systematically used in all coastal communities, the result has enormous implications for the fishing industry on all three coasts of Canada.

## PART I - STATEMENT OF FACTS

1. This is an Application for Leave to Appeal from a decision of the Newfoundland & Labrador Court of Appeal dated February 11, 2010. The Court of Appeal considered an earlier decision of Faour J. dated March 4, 2009.

2. The initial action arose between the Applicant, The Barry Group Inc. (hereinafter referred to as the "**Barry Group**", a consolidation of a variety of other corporate entities, including BGI Atlantic Inc.) and the Respondent, James Matchim ("**Matchim**").

3. The Barry Group was, at all material times, engaged in the business of purchasing, processing and marketing crab.

4. Matchim was, at all material time, an independent crab harvester engaged in the commercial crab fishery in Newfoundland and Labrador.

5. During the 2003 calendar year, there were four (4) relevant agreements which involved the parties in some capacity: the Guarantee Agreement; the Supply Agreement; the Trust Agreement; and, the Collective Agreement.

6. The first three of these agreements, being the Guarantee Agreement, the Supply Agreement and the Trust Agreement (hereinafter the "Agreements") were between the Barry Group and Matchim and/or Matchim's company, Morningstar Enterprises Ltd. While the content of the Agreements was varied, the principal effects of the Agreements can be summarized as follows:

a. The Barry Group provided Matchim with financial guarantees to allow him to obtain bank financing for his fishing operations and interests;

b. Matchim transferred his rights under certain fishing licenses to the Barry Group;

c. Matchim was bound to sell his crab catch exclusively to the Barry Group so long as certain obligations, including the guarantee extended by the Barry Group, remained outstanding;

d. The price to be paid by the Barry Group, to Matchim, for Matchim's catch was to be the "fair market price" (as referenced in the Supply Agreement) and/or the "then prevailing market price" (as referenced in the Trust Agreement).

7. The Collective Agreement was not negotiated strictly between the Barry Group and Matchim. Rather, it arose from a collective bargaining scheme mandated by the legislature of the Province of Newfoundland & Labrador. Under the terms of the ***Fishing Industry Collective Bargaining Act***, RSNL 1990, c. F-18, as amended, there is a legislative scheme in place to ensure that, *inter alia*, the sale of fish harvested by independent Newfoundland & Labrador fishers, to seafood producers such as the Barry Group, is governed by a collective agreement.

8. One of the critical functions of this collective bargaining process is to identify the price to be paid to harvesters, by producers, for particular species of fish/seafood.

9. In 2003, the events which gave rise to the dispute between the Barry Group and Matchim arose from the crab fishery. At that time, the Collective Agreement was in place, negotiated by the Fishery Food and Allied Workers Union (the

"FFAW") and seafood producers. The Collective Agreement did set an explicit price, per pound, for the sale of crab from harvesters to producers. There is no dispute that the Collective Agreement bound the actions of both the Barry Group and Matchim during the course of 2003.

10. At the same time as the period of operation of the Agreements and the Collective Agreement, the Barry Group and Matchim were periodically engaged in another practice common in the fishing industry in Newfoundland & Labrador, and indeed throughout Canada. The Barry Group was, for portions of 2003, buying crab from Matchim at a price which was $0.60/pound greater than the price set by the Collective Agreement (the "***Premium Price***"). The evidence at trial was that such arrangements were quite common in the fishing industry, and served to: (a) improve the profitability of harvesters; and, (b) provide producers with a means to incentivize harvester loyalty and ensure a steady supply of product.

11. During the 2003 crab fishing season, the Barry Group paid Matchim the Premium Price up until a temporary, but general, industry shutdown in May, 2003. Once the period of shutdown ended, and for the remainder to the 2003 crab season, the Barry Group paid Matchim the price dictated by the Collective Agreement.

12. In 2005 the Barry Group commenced a civil action to recover monies paid to Matchim as advances on future sales of crab to the Barry Group. In defending this action, Matchim initiated a counter claim alleging that he had been underpaid for his 2003 crab harvestings. In particular, Matchim alleged that, contrary to the terms of a legally binding contract governing the issue, he was not paid the

Premium Price for crab harvested after the shutdown. In essence he was claiming that he should have been paid an additional $0.60/pound (above the price set in the Collective Agreement) for all crab sold to the Barry Group in 2003.

13. Faour J., in his oral decision of March 4, 2009, dismissed the counterclaim. While there was conflicting evidence on the nature of the differential between the Collective Agreement price and the Premium Price, the Trial Judge found that payments above and beyond the Collective Agreement standard were gratuitous bonuses, which were not paid as part of any legally binding contract.

14. Matchim appealed to the Court of Appeal. By a 2-1 majority decision, the Court of Appeal overturned the trial decision. The majority judgment, offered by Green, C.J., re-considered the evidence offered at trial, and substituted new findings as well as the appropriate remedy. The Majority ruled that the Premium Price was payable throughout the 2003 season, and found that there was a binding contractual promise, made by the Barry Group, to pay Matchim the Collective Agreement price, plus an additional $0.60/pound, for the entire 2003 crab season.

15. Green C.J, concluded that the Trial Judge had made the following palpable and overriding errors:

1. Mischaracterizing the evidence of Sullivan as indicating that the arrangement between Barry and Matchim was a discretionary one;
2. Failing to address Matchim's evidence as to the nature and terms of the arrangement and failing to attempt to resolve conflict between his perceptions of the evidence of Sullivan on one hand, and the evidence of Matchim, his wife and son on the other;
3. Failing to give consideration to the Supply Trust Agreements and their potential relationship to and impact on the arrangements for payment of bonus;

4. Extrapolating from his perceptions of the understanding in the industry as to the way a payment of bonuses were treated in applying those perceptions (which in any event were not supported by the evidence) to the specific arrangement between Matchim and Barry without focusing on the limited amount of evidence pertaining to that arrangement;

5. Failing to consider other *indicia* in the evidence that point to an intention on the part of the parties to create legal relations when viewed from the perspective of the reasonable bystander;

6. Failing to address whether consideration for a promise to pay a bonus was present.

16. At the Court Appeal, a dissenting opinion was offered by Cameron, J.A. The dissent agreed that the Trial Judge's decision must be overturned, but argued that it was inappropriate for the Court of Appeal to substitute its own findings and remedy based on the trial record:

> In my view, this is not an appropriate case to exercise the jurisdiction of an appellate court to make a fresh assessment of the evidence on the record. I do not agree that the documentation and the uncontroverted evidence is sufficient to determine whether there was a contractual arrangement between Mr. Matchim and Barry which included the payment of a bonus of 60 cents per pound for the whole of the 2003 season. Neither do I agree that the conflicts in the evidence of, in particular, Mr. Matchim and Mr. Sullivan, can be resolved without having to decide credibility. The assessment of credibility by a trial judge involves the weighing of a number of factors, some of which have been addressed by Chief Justice Green. But this Court does not, in my view, have the full package which a trial judge would use to make that assessment. The trial judge having made no findings as to credibility, I would allow the appeal and order a new trial.

17. At the conclusion of the Court's judgment, the majority decision contains a series of footnotes. Of those footnotes, number four (4) particularly relates to the subject of this Appeal:

> I note in passing that while collective bargaining regimes normally exclude the possibility of individual bargains being struck "on the side" between an employer and an individual employee, no one raised this

issue as a matter for consideration at trial or on appeal by suggesting that any agreements made between an individual processor and harvester would be unenforceable because of illegality or violation of the *Fishing Industry Collective Bargaining Act*, R.S.N.L. 1990, c. F-18 or any other applicable statute. The answer may be found in the applicable collective agreement. In **Fish, Food and Allied Workers v. Quinlan Brothers,** 2003 NLSCTD 86 (a case not cited on appeal) an application by the union for an injunction restraining a lockout by crab processors was granted. The injunction did not, however, require the processors to pay any particular price, only that the processors could not refuse to accept crab where the refusal was for the improper purpose of compelling harvesters to agree to alteration of "terms and conditions concerning the supply of crab." In the course of his reasons, however, Mercer, J. referred to Article 4.04 of the collective agreement which read: "Prices listed in the attached schedules are minimum prices", thereby suggesting that individual bargaining for higher prices was not precluded.

18. The issue of conflict between the alleged bonus agreement and the collective bargaining agreement was not addressed in the majority decision, nor was it referred to counsel for further comment or submissions.

## PART II – QUESTIONS IN ISSUE

19. This case raises the following questions which are of public and national importance to the administration of justice in Canada:

    a. Did the Court of Appeal err by validating a 'side deal' between parties otherwise bound by a collective agreement?

    b. Did the majority of the Court of Appeal violate the principle of *audi alteram partem* by identifying the issue of the collective agreement without offering the parties an opportunity to be heard on the issue?

    c. Did the majority of the Court of Appeal inappropriately re-assess the trial evidence, and reconsider the findings of fact, given that the Trial Judge was faced with unresolved conflicts in evidence on material points of fact?

## PART III - ARGUMENT

*Issue is of National Importance*

20. The proposed appeal is of national and public importance because:

    a. A decision from this Honourable Court will clarify whether the general prohibition on individual employment contracts in a workplace governed by a collective agreement are applicable to the statutorily mandated collective bargaining regimes which govern the fishing industries in various parts of Canada.

    b. A decision from this Honourable Court will clarify the circumstances under which an Appellate Court should let the parties be heard on legal issues that were identified in the Court's deliberations, but were not argued at Trial or on Appeal; and,

    c. A decision from this Honourable Court on this issue will clarify the circumstances under which an Appellate Court may consider, and make findings based on, unresolved conflicts of material testimony at Trial:

***When may an Appellate Court reconsider the evidence given at Trial?***

21. It has been well established in Canadian Courts that there are circumstances where an Appellate Court can appropriately offer a fresh assessment of evidence found in a trial record. As Rothstein J. stated in ***Madsen Estate* v. *Saylor***, 2007 SCC 18, at para. 24:

> It is well established that where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record: *Hollis* v. *Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33; *Prudential Trust Co.* v. *Forseth*, [1960] S.C.R. 210, at pp. 216-17.

22. It is important to note, however, that such an intervention is an appropriate pursuit only where "the circumstances warrant". Indeed, it is a long standing principle that Appellate Courts, when considering the merits or re-assessing trial evidence should be mindful of the inherent advantages possessed by the finder of fact who actually observes the testimony of a witness. In ***Prudential Trust***, *supra*, referenced by Rothstein J. in the *Madsen, supra*, decision, reliance was placed on the following comments of Lord Shaw in ***Clarke* v. *Edinburgh Tramways Co.***, 1919 S.C. 35 (H.L.):

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour [sic], in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment. [Emphasis added]

23. This passage clearly identifies that the Trial Judge is uniquely positioned to assess the credibility and veracity of evidence, particularly in instances where conflicting impressions are left, either implicitly or explicitly, by opposing witnesses. Unless the Appellate Court can reach the conclusion that the Trial Judge, notwithstanding his or her advantages, was plainly wrong, then the Appellate Court should be loathe to assert its own impressions of the evidence.

24. The Applicants submit that this view is further refined by more recent decisions which draw a distinction between cases where credibility and conflicting evidence are critical, and those other cases where the matter turns on inferences drawn on evidence known to be truthful. In ***Diversified Products Corp.*** v. ***Tye-Sil Corp.*** (1991), 125 N.R. 218 (F.C.A.), the Federal Court of Appeal was considering an appeal from a patent judgment. In upholding the Trial result, the Decary J. offered the following comment on Appellate Court intervention in matters of evidence:

> With respect to findings of fact and credibility, an appellate court sitting on an appeal from a decision at trial in a case of this type ought not to interfere with the decision of the Trial Judge unless it is clear that the Trial Judge has made some palpable and overriding error which affected his assessment of the facts. An appellate court will defer to the judgment of the Trial Judge unless it can be satisfied that the Trial Judge was plainly wrong. One must bear in mind that a distinction is to be drawn between cases in which the issue depends on the veracity of the witnesses and those in which it depends upon the proper inferences to be drawn from truthful evidence. In the latter cases the Trial Judge is in no better position to decide than the judges of an appellate court.
>
> [Emphasis added]

25. The comments of Decary J. are particularly pertinent to this application. At trial, critical factual evidence surrounded the discussions between Matchim and the

Barry Group, particularly Karl Sullivan, Senior Vice President of the Barry Group. In numerous instances, this evidence was directly and obviously contradictory. For example, Mr. Sullivan, on direct examination, was asked about promising Mr. Matchim the ongoing payment of the 'bonus' (Premium Price). His response was blunt:

> **Q:** Do you remember telling him that?
> **A:** That's an absolute, an absolute lie that.
> **Q:** I'm just putting it to you.
> **A:** That's totally untrue.
> **Q:** Didn't happen?
> **A:** Absolutely never happened.

26. Mr Matchim's evidence was equally blunt on this point:

> **Q:** You heard Mr. Sullivan's evidence?
> **A:** Yes.
> **Q:** He's saying that he did not discuss bonus with you?
> **A:** As far as I know, Mr. Sullivan lied in no uncertain terms. An outright lie.
> **Q:** But are you – how adamant are you that Mr. Sullivan promised you that bonus?
> **A:** I'm just as sure as I am standing in this box here this afternoon, the bonus was promised and in my opinion it is just another ploy to try and get away from the obligation that they made.

27. In the face of such fiercely conflicting evidence, where the parties were each accusing the other of lying under oath, credibility is at the very heart of the matter. In such circumstances, with polar opposite views on the record, and where the Trial Judge did not vocalize his own determinations, if any, on credibility, it simply cannot lie with the Court of Appeal to determine the outcome of the matter on the basis of the evidentiary record. The Applicants endorse the dissenting opinion of Cameron J.A. who concluded her dissenting opinion with the following assessment of the within matter:

> In my view, this is not an appropriate case to exercise the jurisdiction of an appellate court to make a fresh assessment of the evidence on the record. I do not agree that the documentation and the uncontroverted evidence is sufficient to determine whether there was a contractual arrangement between Mr. Matchim and Barry which included the payment of a bonus of 60 cents per pound for the whole of the 2003 season. Neither do I agree that the conflicts in the evidence of, in particular, Mr. Matchim and Mr. Sullivan, can be resolved without having to decide credibility. The assessment of credibility by a trial judge involves the weighing of a number of factors, some of which have been addressed by Chief Justice Green. But this Court does not, in my view, have the full package which a trial judge would use to make that assessment. The trial judge having made no findings as to credibility, I would allow the appeal and order a new trial. [Emphasis added]

***Did the Court of Appeal breach the rule of audi alteram partem by declining to hear from the parties on the collective agreement issue, once it was identified by Green C.J.?***

28. The common law has long recognized the concept of *audi alteram partem*, whereby a party to a proceeding has the right to be heard on all issues. This has principle has been recognized and discussed by this Court in ***International Woodworkers of America, Local 2-69*** v. ***Consolidated Bathurst Packaging Ltd.***, [1990] 1 S.C.R. 282, and in ***Ellis-Don Ltd.*** v. ***Ontario (Labour Relations Board)***, [2001] 1 S.C.R. 221.

29. In ***International Woodworkers***, *supra*, the Court considered the actions of the Ontario Labour Relations Board in holding a full Board meeting, including the panel members hearing a dispute, where a draft decision was reviewed. When the panel ultimately rejected the position of the union, a series of appeals were launched to challenge the Board's adherence to the rules of natural justice, including the concept of *audi alteram partem*. The Court found that the Board's process had adequate safeguards to protect the *audi alteram partem* principle, particularly surrounding new issues which might arise at a Board meeting:

> I have already outlined the reasons which justify discussions between panel members and other members of the Board. It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the audi alteram partem rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.
>
> I agree with Cory J.A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate. The decision to call such a hearing is left to the Board as master of its own procedure: s. 102(13) of the Labour Relations Act. However, this is not a case where a new policy undisclosed or unknown to the parties was introduced or applied. The extent of the obligation of an employer engaged in collective bargaining to disclose information regarding the possibility of a plant closing was at the very heart of the debate from the outset and had been the subject of a policy decision previously in the Westinghouse case. The parties had every opportunity to deal with the matter at the hearing and indeed presented diverging proposals for modifying the policy. There is no evidence that any new grounds were put forward at the meeting and each of the reasons rendered by Chairman Adams and Messrs. Wightman and Lee simply adopts one of the arguments presented by the parties and summarized at pp. 1427-30 of Chairman Adams' decision. Though the reasons are expressed in great detail, the appellant does not identify any of them as being new nor does it contend that it did not have an opportunity to be heard or to deal with them. [Emphasis added]

30. The judgment of Gonthier, J. in ***International Woodworkers**, supra*, was further validated by this Court in ***Ellis-Don**, supra*, where Lebel, J., writing for the majority, held:

> The other issue in Consolidated-Bathurst concerned the impact of the consultation proceeding on the application of the audi alteram partem rule. The reasons of Gonthier J. conceded that there existed risks in that regard, but held that they could be addressed by ensuring that the parties be notified of any new issue raised during the discussion and allowed an opportunity to respond in an effective manner. The mere fact that issues already litigated between the parties were to be discussed again by the full Board would not amount to a breach of the audi alteram partem rule.
> [Emphasis added]

31. As this Court has previously ruled, there are legitimate cases where a Court or Tribunal may identify issues that were not argued in the hearing room. In such cases, it can be appropriate for the matter to be decided on the basis of the new issue, provided that the parties were provided an opportunity to speak on the matter. By failing to allow either party to speak to the collective agreement issue identified in footnote four (4) to the majority decision, it is submitted that the Court of Appeal clearly violated the principle of *audi alteram partem*, and thus reached its decision in a manner inconsistent with the principles of natural justice.

***Can employment 'side deals' exist within a statutorily mandated collective bargaining regime?***

32. By virtue of its decision in the within matter, the Newfoundland & Labrador Court of Appeal has validated the existence of binding (individual) contracts, between employers and employees, notwithstanding the existence of an over-arching collective agreement mandated by the legislature. Indeed, the Court of Appeal has validated such an agreement even where it directly addresses an issue (in this case the purchase price of crab) which is expressly dealt with in the relevant collective agreement.

33. The Applicant acknowledges that the collective bargaining regime in question is not a typical one. The regime is, first and foremost, a construct of statute. It also involves many 'employers' (fish processors) who, while engaged in the same business, are direct competitors of each other. Furthermore, the 'employees' (fish harvesters) are, in many respects, independent business operators in their own right. That being said, the harvesters are members of a trade union, the FFAW.

The processors also operate through a trade association. Through and with the infrastructure established by the Act, the parties are bound, during each fishing season, by a collective agreement that specifies, *inter alia*, the price to be paid for crab. In these respects, the collective bargaining regime which is prescribed by the Act is quite like the more typical scenario of one employer, direct employees, and a privately negotiated collective agreement.

34. This Court has consistently taken a strong view to limit the potential for 'side deals', between the employer and select employees, which might serve to circumvent the force and effect of a valid collective agreement. This line of cases began with ***Syndicat Catholique des Employes de Magasins de Quebec* v. *Cie Pacquet***, [1959] S.C.R. 206 (S.C.C.). In this case, the union was the certified bargaining agent for the workplace, which meant that the employer was obliged to retain, from the wages of each employee, a sum equivalent to union dues for that wage period. The employer was retaining, but not forwarding to the union, the monies collected from employees who were not members of the union, and who had signed an endorsement to the effect that the employer was not authorized to collect their 'dues'.

35. The Court ruled that the endorsement of the non-members had no legal effect:

> The union is, by virtue of its incorporation under the Professional Syndicates' Act and its certification under the Labour Relations Act, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. ... It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.

[Emphasis added]

36. A similar result followed in the matter of ***Canadian Pacific Railway Co.* v. *Zambri***, [1962] S.C.R. 609 (S.C.C.). In this case the Court ruled that a lawful strike action by the workers could not have the effect of terminating their respective employment contracts, irrespective of any common law doctrine relating to breach of employment contracts. Judson J. offered the following commentary on behalf of the majority:

> There can be no dispute that breach of contract or inducing breach of contract gives a cause of action but these principles are not involved in this appeal and the extent to which these cases fit in with a Labour Relations Act or with collective agreements is better left untouched. When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship. Conversely, when there is a collective agreement in effect, it is difficult to see how there can be anything left outside, except possibly the act of hiring. [Emphasis added]

37. Again, this Court took the view that a collective agreement cannot co-exist with other arrangements or common law principles which seek to alter the very effect of the collective agreement itself. Subsequent decision of this Court (notably: ***McGavin Toastmaster Ltd.* v. *Ainscough***, [1976] 1 S.C.R. 718; ***St. Anne-Nackawic Pulp & Paper Co.* v. *C.P.U., Local 219***, [1986] 1 S.C.R. 704; and, ***Isidore Garon Ltee* v. *Tremblay***, [2006] 1 S.C.R. 27) have consistently upheld this principle. In their excellent summary of the case law on this issue in Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 3d ed., looseleaf (Aurora, ON: Canada Law Book, 2006) at 2:1200, Brown and Beatty offer the following comment:

> The only scope for individual bargaining with regard to terms and conditions of employment would appear to be where it is sanctioned by the collective agreement, by the collective bargaining agent, where it is

> ancillary to routine administration of the collective agreement, where the terms fall outside the scope of the agreement, such as an agreement concerning an early retirement arrangement, a confidentiality acknowledgement in the health care sector or reimbursement for employment expenses, in some cases where there is a voluntary waiver of a collective agreement benefit that does not undermine the collective agreement, or where it involves statutory benefits not covered by the collective agreement.

38. The Applicant respectfully submits that there are no valid reasons to carve out fishing industry collective agreements from such principles of law. Indeed, the effect of such an action would seriously undermine (fishing) collective agreements in multiple jurisdictions. As such, arrangements for the payment of 'bonuses' such as the one at issue in the instant case, cannot be seen as enforceable contracts without attacking the core principles of the collective bargaining regimes that various provincial legislatures have, in their wisdom, created.

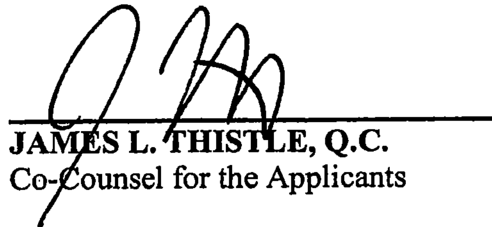
## PART IV – SUBMISSIONS AS TO COSTS

39. The Applicant submits that there should be no costs on this application for leave to appeal.

## PART V – ORDER SOUGHT

40. The Applicants request an order granting leave to appeal before this Court from the judgment of the Newfoundland & Labrador Court of Appeal in file Docket 09/33 dated February 11, 2010.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16th day of April, 2010.



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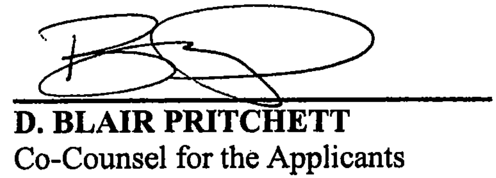

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