

**IN THE MATTER OF AN  
APPEAL UNDER SECTION 65.1 OF THE *NATURAL PRODUCTS ACT* TO PANEL OF  
THE NEW BRUNSWICK FOREST PRODUCTS COMMISSION**

**BETWEEN:**

**J.D. IRVING, Limited**

(Appellant)

**-And-**

**AV GROUP NB INC.**

(Appellant)

**-And-**

**D. MURRAY HARVESTERS LTD. et al**

(Appellant)

**-And-**

**W&R GILLESPIE LTD. / J.D. TIMBER HOLDINGS LTD.**

(Appellant)

**-And-**

**SOUTHERN NEW BRUNSWICK FOREST PRODUCTS MARKETING BOARD**

(Respondent)

**Heard:**

**At the Maritime College of Forest Technology, Fredericton, New Brunswick on August 9 and 10, 2017**

**Panel: Chair: Brian W. Mosher, Q.C.**

**Members: Carol Dixon, CPA  
Claude Pelletier  
Gerard Robichaud**

**Appearances:**

**For the Appellants: Paul Steep, Esq., Byron Shaw, Esq. (J.D. Irving, Limited)  
Douglas Evans, Esq., David Shore, Esq. (AV Group NB Inc.)  
John Malone, Esq. (D. Murray Harvesters Ltd. et al  
David Ames, Esq. (W&R Gillespie Ltd. / J.D. Timber Holdings Ltd.)**

**For the Respondent: David D. Young, Esq.**

## REASONS FOR DECISION

### A. Procedural Background:

1. Commencing on August 9, 2017, a Panel constituted under section 66(6) of the Natural Products Act, hereinafter referred to as "NPA", heard submissions from the four Appellants and from the Respondent, as referenced in the attached Index to the Amended Appeal Book, heard *viva voce* evidence presented on behalf of the parties, and the oral and further written submissions of counsel for the respective parties.

2. The Appellants appealed Order # 2015-604 of the Southern New Brunswick Forest Products Marketing Board as follows:

Southern New Brunswick  
Forest Products Marketing Board  
ORDER No: 2015 – 604

#### NATURAL PRODUCTS ACT

The Southern New Brunswick Forest Products Marketing Board hereby makes the following Order pursuant to regulation *2014-1 New Brunswick Forest Products Marketing Plan Regulation - Natural Products Act*, S.N.B., c.N-1.2:

#### INTERPRETATION

1. The definitions in this section apply in this Order:

“Board” means the Southern New Brunswick Forest Products Marketing Board;

“marketing” means buying, selling or offering for sale and includes advertising, financing, assembling, storing, packing, shipping and transporting in any manner by any person;

“regulated area” means Albert County, Kings County, Queens County, Saint John County and the parish of Salisbury in Westmorland County;

“regulated product” means a primary forest product produced on a private woodlot within the regulated area.

#### MARKETING ETC. OF REGULATED PRODUCT

2. All persons shall register with the Board before commencing or continuing in the marketing of the regulated product.

3. All persons producing the regulated product shall sell the regulated product to the Board.

4. All persons are prohibited from buying the regulated product other than from the Board.

5. All persons are prohibited from processing any regulated product that has not been sold by the Board.
6. Order No. 2014-604 of the board is hereby repealed upon the coming into force of this order.

COMING INTO FORCE

7. This Order comes into force and effect on January 1, 2016.

Signed: John Sabine, Chairman

Signed: Pamela Folkins, Manager

**3. Extensive submissions were filed by counsel for the Appellants challenging the SNB Board's establishment of Order #2015-604. The Appellants' grounds for the appeal as presented through the notices and amended notices of appeals are summarized as follows:**

- a. The Order is *ultra vires* of the powers conferred upon the SNB Board under the *Natural Products Act* and the subordinate regulations;
- b. The Order is invalid because it lacks criteria or policy as to how it would be applied;
- c. The Order is invalid because it was animated by an improper purpose;
- d. The Order is invalid because it is inconsistent with the New Brunswick Court of Appeal's decision in *J.D. Irving v North Shore Forest Products Marketing Board et al*, 2014 NBCA 42;
- e. The Order is invalid due to a conflict of interest or a reasonable apprehension of bias on the part of the SNB Board;
- f. The Order is invalid because the Board violated the "procedural fairness rights" of the Appellants;
- g. The Order is invalid based on "grammatical" grounds of the use of the words "any and all" and "to or through"; and,
- h. The Order warrants that certain buyers and sellers of the regulated product, including the Appellants, be exempted from the Order.

**4. The Appellants seek Orders summarized as follows:**

- a. An Order setting aside the SNB Board Order # 2015-604;
- b. An Order that the SNB Board shall not require parties to register with the Board before they may market any of the regulated product;
- c. An Order that the SNB Board shall not prohibit persons from buying the regulated product other than from the Board;
- d. An Order that the SNB Board shall not prohibit persons from processing any regulated product that has not been sold by the Board;
- e. An Order exempting the Appellants from application of the SNB Board Order;
- f. Costs of the Appeal; and,
- g. Such other relief as the Commission deems appropriate.

## **B. Legislative Background**

5. The purpose and intent of the NPA is contained at Part II, section 3 which sets out the following:

### ***Purpose and intent of Act***

3. *The purpose and intent of this Act is to provide:*

*(a) for the promotion, control and regulation within the Province in any or all respects of the marketing of farm products over which the legislative jurisdiction of the Legislature extends, including the prohibition of such marketing in whole or in part,*

*(b) for the promotion, control and regulation within the Province in any or all respects of the production of farm products over which the legislative jurisdiction of the Legislature extends, including the prohibition of such production in whole or in part,*

*(c) For the promotion of farm products and for research relating to farm products over which the legislative jurisdiction of the Legislature extends,*

*(d) For the establishment of standards for farm products,*

*(e) For the establishment of standards for facilities used for the production, marketing or processing of farm products,*

*(f) For the establishment of commodity development councils to provide a forum for producers and industry to meet to discuss issues of mutual interest, and*

*(g) For the development, conservation and management of forestry resources on private woodlots in the Province.*

### ***Farm products originating from private woodlots***

*2007, c.36, s.2.*

*3.1 With respect to farm products of the forest, this Act and the regulations only apply to farm products originating from private woodlots.*

*2007, c.36, s.2.*

6. The NPA defines “farm product” as follows:

*“farm product” includes animals, meats, eggs, poultry, wool, milk, dairy products, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco and such other natural products of agriculture and of the forest, including wood chips and biomass produced at or on the harvest site, and any article of food or drink wholly or partly manufactured or derived from any such product that may be designated by regulation.*

7. In summary the NPA’s mandate is to provide for the regulation within the Province of any and all aspects of the marketing of farm products over which jurisdiction of the Legislature extends,

including the prohibition in whole or in part; and to provide for the development, conservation and management of forestry resources on private woodlots in the province.

8. The NPA provides for the establishment of commissions which with respect to the farm products of the forest is by reference to the New Brunswick Forest Products Commission (hereinafter referenced as the Commission) established under the *Forest Products Act, RSNB 2012 c. 105*, hereinafter referenced as FPA.

9. The NPA further provides in subsection 18(1) for the establishment of Boards, Agencies and plans for the purpose of promotion, control and regulation within the province or that area of the marketing of the farm product and, if requested, for any or any combination of the following purposes:

- (a) the promotion, control, and regulation within the Province or that area of the production of the farm product;*
- (b) if the farm product is a farm product of the forest, the development, conservation and management of forestry resources on private woodlots in the Province or that area;*
- (c) the promotion of the consumption and use of the farm product; or*
- (d) research activities pertaining to the farm product.*

10. In New Brunswick seven forest product marketing boards have been established under the NPA by regulation 2014-1, cited as the *New Brunswick Forest Products Marketing Plan Regulation*.

11. The purposes for which the SNB Board has been established are as follows:

*7 The purposes for which a Board is established are:*

- (a) the promotion, control and regulation within its regulated area of the marketing of the regulated product;*
- (b) the promotion within its regulated area of the production of the regulated product;*
- (c) the development, conservation and management of forestry resources on private woodlots in its regulated area; and*
- (d) the promotion of the consumption and use of the regulated product.*

12. The mission statement and strategic objectives of the SNB Board are defined within the regulation as follows:

*8 The mission statement and strategic objectives of a Board are:*

- (a) through communications, liaison, research and education, to represent people within its regulated area who market or produce and market the regulated product to other sectors of the forest industry, consumers and the public, with respect to all matters concerning the marketing of the production and marketing of the regulated product; and*
- (b) to promote the development and use of private woodlots within its regulated area as a dependable source of supply of high quality primary forest products for wood-using industries.*

**13. The powers vested in the SNB Board pursuant to regulation 2014-1 are as follows:**

*9 The following powers are vested in a Board:*

- (a) to market the regulated product;*
- (b) to prohibit the marketing or the production and marketing, in whole or in part, of the regulated product;*
- (c) to regulate the time and place at which, and to designate the body by or through which, the regulated product shall be marketed or produced and marketed;*
- (d) to require any and all persons before commencing or continuing in the marketing or the production and marketing of the regulated product to register with and obtain licences from the Board;*
- (e) to fix and collect periodic licence fees or charges for services rendered by the Board from any and all persons marketing or producing and marketing the regulated product, and for this purpose to classify those persons into groups, and fix the licence fees and charges or either of them payable by the members of the different groups in different amounts, and to recover any licence fees and charges or either of them in any court of competent jurisdiction;*
- (f) to suspend or cancel a licence for violation of any provision of the Act, the Plan, the regulation or any order of the Board and to reinstate a licence that has been suspended or cancelled;*
- (g) to require any person who produces the regulated product to offer to sell and to sell the regulated product to or through the Board;*
- (h) to prohibit any person from processing, packing or packaging any of the regulated product that has not been sold to, by or through the Board;*
- (i) to use, in carrying out the purposes of the Plan and paying the expenses of the Board, any money received by the Board;*
- (j) to require any person who receives the regulated product to deduct from the money payable for the regulated product any licence fee or charge referred to in paragraph (e) that is payable to the Board by the person marketing or producing and marketing the regulated product received and to forward that licence fee or charge to the Board or its agent designated for that purpose;*
- (k) to implement and administer forest management programs on private woodlots;*
- (l) to undertake and assist in the promotion of the consumption and use of the regulated product, the improvement of the quality and variety of the regulated product and the publication of information in relation to the regulated product;*
- (m) to undertake or engage other persons to advertise and promote the regulated product;*
- (n) to cooperate with any Canadian Board or Provincial Board to regulate the marketing of the regulated product and to act conjointly with the Canadian Board or Provincial Board for those purposes;*
- (o) to make the orders that are considered by the Board necessary or advisable to regulate effectively the marketing or the production and marketing of the regulated product or to exercise any power vested in the Board; and*
- (p) the powers of a corporation under the Business Corporations Act and, subject to the Act, in the exercise of those powers the members of the Board shall be deemed to be its shareholders and directors.*

**14. The Southern New Brunswick Forest Products Marketing Board is further governed by Commission regulation 2005-146 under the NPA, cited as the *Southern New Brunswick Forest Products Marketing Board Regulation*.**

15. Through regulation 2005-156, the SNB Board is vested additional powers by the Commission as follows:

*9 The following powers are vested in the Board:*

*(a) to exempt from any order of the Board any person or class of persons engaged in the marketing or the production and marketing of the regulated product or any class, variety or grade of the regulated product;*

*(b) to conduct a pool or pools for the distribution of money received from the sale of the regulated product, and, after deducting all expenses, to distribute the remainder of the money so that the payment to each person entitled to share is based on the amount, class, variety and grade of the regulated product delivered by him or her, and to make an initial payment on delivery of the regulated product and subsequent payments until the remainder of the money received from the sale is distributed; and*

*(c) to appoint officers and employees, assign their duties and fix their remuneration.*

**C. Facts:**

16. The SNB Board published in the January 14<sup>th</sup>, 2015 (Volume 173) of the Royal Gazette, Order #2014-604, which was put into force on December 31, 2014. The Order was established with the intent to address issues that had been identified in the decisions of the New Brunswick Forest Products Commission and the New Brunswick Court of Appeal.

17. The implementation of Order #2014-604 was not appealed to the New Brunswick Forest Products Commission and the SNB Board continued to operate under the Order with no changes to the marketing practices that were occurring in the SNB Board regulated area.

18. The SNB Board and J.D. Irving, Limited convened a meeting on September 23, 2015 for the purpose of negotiations. SNB Board's wishes in that negotiation were to establish a wood supply agreement between SNB Board and J.D. Irving, Limited. Both parties filed their own interpretation of the outcome of that meeting with the Commission. No wood supply agreement was reached in that meeting.

19. On November 2, 2015, the SNB Board convened a meeting of the full Board of Directors. It was reported at that meeting that after several meetings with the Board's legal counsel, the draft of Order #2015-604 was established and presented to the Board members present at the meeting. During the meeting, the Board passed a motion to bring the Order into force effective January 1, 2016 and subsequently sent the Order to the Commission for a decision on its general application and whether or not it would be required to be printed in the Royal Gazette.

20. On November 18, 2015, the Commission responded to the SNB Board, notifying them of its position that the Order #2015-604 was of general application and that it would be required to be printed in the Royal Gazette.

21. On January 4, 2016, the SNB Board notified customers, producers and woodlot owners of the new Order (#2015-604) by way of email. The email included a summary of the effect of the new Order.

22. Over the weeks following the notification of the Order, the Appellants filed separate notices of appeal to the Commission (JDI – January 12, 2016; AV Nackawic – January 14, 2016; D. Murray Harvesters et al. – January 27, 2016; and W&R Gillespie/JD Timber Holdings – January 28, 2016).

23. JDI and AV Nackawic are both mills that purchase, to varying degrees, a portion of the wood supply required for their mills from private woodlots within the regulated area of the SNB Board.

24. D. Murray Harvesters et al. are a group of forest harvesting contractors and woodlot owners (or both) who produce regulated products within the regulated area of the SNB Board.

25. W&R Gillespie Ltd. and J.D. Timber Holdings Ltd. are companies of common ownership that own private woodlots and produce regulated products within the regulated area of the SNB Board.

**D. Positions of the Parties:**  
**Positions of the Appellants**

26. The 4 appellant parties each submitted their positions separately to the Commission in both Notices of Appeal and in pre-hearing written submissions. Many of the positions presented by the Appellants are common in nature, and some unique. In most cases, the Appellants also rely on the grounds and positions of the other Appellants' written submissions.

27. JDI suggests that the Order exceeds the purposes and powers of the SNB Board by reasons of the advantages it confers on the SNB Co-op, alleging that the SNB Board delegates its powers without legal authority. JDI also proposes that given the nature of the relationship between SNB Board and SNB Co-op that the Order gives rise to an actual or apparent conflict of interest and a reasonable apprehension of bias. This position was shared by the other 3 Appellants.

28. JDI also suggests that the Order was animated by an improper purpose and allege that the SNB Board passed the Order in a direct response to JDI's unwillingness to agree to the Board contract as proposed by the SNB Board. This position was shared by AV Nackawic.

29. JDI and AV Nackawic suggest that the Order is invalid because it simply repeats the powers vested to the SNB Board through regulation 2014-1 and because the SNB Board failed to file policy statements to the Commission with regard to implementation of the Order.

30. All Appellants shared the position that the Order is invalid because the Board failed to adequately notify and consult with the Appellants, violating their rights to procedural fairness, despite the effect of the Order on their rights, privileges and interests. Further, the Appellants shared the position that the Order is invalid because the SNB Board failed to adequately notify the members of the SNB Board of the implementation and effect of the Order.

31. The Appellants shared the position that the Order, if implemented, would create unfairness and undue hardship because the Order would seek to eliminate freedom of contract and the economic incentives between willing buyers and sellers in the market for the regulated products.

32. AV Nackawic and D. Murray Harvesters et al. share the position that the SNB Board through the wording of the Order are attempting to indirectly empower the Board with powers that have only been vested in the Madawaska Forest Products Marketing Board, namely *to regulate the manner in which the regulated product may be marketed or produced and marketed; and to fix the price or prices, maximum price or prices or both maximum and minimum prices at which the regulated product, or any grade or class of it, may be bought or sold in the regulated area, and to fix different prices for different parts or areas of the regulated area.*

33. AV Nackawic relies on the position that the Order is invalid for grammatical reasons. At issue are the uses of the words “any” and “all” and the words “to” and “through” and the fact that selective use of these words are contrary to the purpose and intent of the *Natural Products Act*.

#### Positions of the Respondent

34. The powers vested in the SNB Board through the NPA and Regulation 2014-1 are ample authority for the SNB Board to create the Order #2015-604.

35. SNB Order #2015-604 was not animated by an improper purpose. The Order was established to be applied to all persons commencing or continuing in the marketing of the regulated product and therefore did not target specifically any of the appellants. Further, SNB Board established the Order with the desire for fairness, uniformity and predictability in order to facilitate the efficient promotion, control and regulation within its regulated area of the marketing of the regulated product.

36. SNB Order #2015-604 is not invalid for reasons cited in *JDI v. North Shore Forest Products Marketing Board et al.* 2014 NBCA 42 (CanLII)— 2014-06-26. The respondent relies on the position that the non-discretionary nature of the Order addresses the “arbitrariness” that the decisions in *North Shore* sought to address.

37. The respondent takes the position that the Order is not invalid for reasons of reasonable apprehension of bias because the primary function of the Board is “policy related or legislative in nature” and that there are insufficient grounds to apply a test for reasonable apprehension of bias.

38. The respondent also takes the position that the Board, in establishing the Order, has not violated the “procedural fairness rights” of the Appellants. The establishment of the Order was a decision of the Board in the nature of a legislative or policy decision and, as such, no “procedural fairness rights” are owed to the Appellants.

39. The respondent takes the position that the SNB Order is not invalid on the grounds of AV Nackawic’s grammatical argument on the basis that if there is a power to require “any person” to take a specific action, it would follow that every person or every individual person can be individually designated as one of “any person” and be bound by the Board’s requirement. Further, the respondent takes the position that the “or” in subsection 9(g) of regulation 2014-1 “*...to sell the regulated product to or through the Board*” indicates that the provision contemplates two separate courses of action for the Board, not one course of action that provides a choice for the party affected.

**E. Law and Analysis of Issues:**

**Issue 1: The Order is *ultra vires* of the powers vested in the SNB Board**

40. The Appellants first assert that Order #2015-604 (hereinafter referenced as the Order) is *ultra vires* of the powers vested in the SNB Board.

41. Through the NPA and its regulations, the Legislature of New Brunswick has vested the abovementioned powers in the Boards. The Panel notes specifically subsection 9(o) of regulation 2014-1 *New Brunswick Forest Products Marketing Plan Regulation – Natural Products Act*:

*9 (o) to make the orders that are considered by the Board necessary or advisable to regulate effectively the marketing or the production and marketing of the regulated product or to exercise any power vested in the Board; (emphasis ours)*

42. Insofar as the powers vested in the SNB Board, it is the Panel's opinion that the only appropriate and available method to exercise those powers is through an order made by the Board. Further, the Panel is of the opinion that the SNB Board did not act *ultra vires* of the powers that have been vested in them by creating an order intended to exercise those very powers. This premise is supported and consistent within the decision of the Commission in *JDI v. North Shore Forest Products Marketing Board et al.* and upheld by the Court of Appeal (paragraph 34) 2014 NBCA 42 (CanLII)—2014-06-26. Despite this conclusion, the validity of the Order and the issues around relationship between the SNB Board and the SNB Co-op will be dealt with later.

**Issue 2: The Order is invalid because it lacks criteria or policy:**

43. The Appellants argue that SNB Order #2015-604 lacks the specificity and certainty that is required for the SNB Board to properly exercise the powers vested in the Board.

44. While the SNB Board has been given the power to pass orders, as mentioned above, it is the Panels observation and decision that despite minor wording changes in Order #2015-604 as passed, the Order essentially repeats the powers they have been given thus converting such power from a legislative power to an arbitrary administrative function which was held by the Supreme Court of Canada in *Brant Dairy Co. v. Ontario (Milk Commission)* [1973] S.C.R. 131, to be an invalid exercise of power.

45. At tab 2 of the Appellant (JDI) Book of Authority, paragraph 23 of *Brant Dairy Co. (supra)*, Laskin, J. states:

*A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words it was conferred. ...*

*The Board is required to legislate by regulation. Instead it has purported to give itself random power to administer as it sees fit without any reference point in standards fixed by regulation.*

46. Thus, the SNB Board is empowered “to make orders that are considered by the Board advisable or necessary to regulate effectively (emphasis ours) the marketing or the production and marketing of the regulated product or to exercise any power vested in the Board”. The Panel recognizes that there is generous amount of discretion included in the powers vested to the SNB Board. At paragraph 41 in Roncarelli v. Duplessis, [1959] S.C.R. 121, the Panel considered the following:

*In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.*

47. The Panel considers it is essential that persons regulated by Board orders have access to information by reference to any Marketing Board Orders clearly setting out the standards or limits within which those persons will be regulated.

48. In the Panel’s opinion, the Order #2015-604 as written is an attempt by the SNB Board to exercise limitless and arbitrary power. The Panel is left with questions similar to those asked in *Roncarelli* above. Given the broad definition of marketing included in the order, is the SNB Board’s intent to have any person engaged in any of the activities listed in the definition register with the Board, or only those who buy or sell? What happens if someone does not register? How does this affect the producer who is selling firewood to his neighbor, must he sell it to the Board first? These are but a few examples of the questions that could arise from the Order as it has been established.

### **ISSUE 3: Relationship with SNB Co-op**

49. The Appellants raise concerns and issues with the relationship between the SNB Board and the SNB Co-op. They allege that the SNB Board has delegated some of its powers to the SNB Co-op without legal authority.

50. The Panel heard in the testimony of Mr. John Sabine, vice-chairman of the SNB Board (formerly Chairman) that Ms. Pamela Folkins is appointed as the Manager for the SNB Board, but is an employee of the SNB Co-op, employed as the General Manager of the Co-op. In this dual role, Ms. Folkins reports to the Board of Directors of both organizations separately.

51. The Appellants also allege that the SNB Co-op conduct services of harvesting woodlots within the SNB Board regulated area and that if the SNB Board Order #2015-604 was in force, the SNB Co-op would in effect control all marketing and put the SNB Co-op in a position of competitive advantage over the Appellants.

52. The Respondent characterizes the relationship between the SNB Board and the SNB Co-op as a “contracting out of services” between the Board who has no employees and the Co-op whose employees are providing the services to the Board. The testimony of Mr. John Sabine characterizes the SNB Co-op as the “hands and feet” of the SNB Board.

53. Also in the evidence of Mr. John Sabine on examination, it is explained that with respect to the marketing of regulated product, the SNB Co-op deposits payments for wood deliveries by producers to mills in the Co-op bank accounts, makes payments for the wood to the producers and the levy payments to the Board, after deducting the brokerage fee for the administration of the transactions. Although this practice has occurred for many years, the Panel notes that it has not been raised as an issue until this Appeal.

54. In consideration of this issue, the Panel relies on the definition of agent from Black’s Law Dictionary, 10<sup>th</sup> edition as follows: *Someone who is authorized to act for or in place of another; a representative.* The Panel also considers subsection 13(c) of the NPA: *The Commission may make orders (c) authorizing any agency or board to appoint agents, to prescribe their duties and terms and conditions of employment and to provide for their remuneration;*. Despite this being a long-standing practice in the SNB Board region, this issue raised on appeal to the Commission has brought to light that with respect to the “principal/agent” relationship between the SNB Board and SNB Co-op, the Commission has not established any such order authorizing SNB Board to appoint an agent.

55. Further, the Panel is of the opinion that provisions do not exist within the NPA that authorize a Board to delegate the powers that have been vested in them to another person. It is the Panel’s opinion that the fact that the SNB Board relies on people solely and legally employed by the SNB Co-op to carry out the functions of an order of the SNB Board exercising its statutory powers dissolves the line between a simple “principal/agent” relationship and delegation of the SNB Board’s powers.

56. While the evidence presented at this hearing might not be sufficient to satisfy a legal test for apprehension of bias, the Panel agrees with the appellants that there is reasonable apprehension of bias involved with SNB Co-op employees involved in the exercise of the functions of an order of the SNB Board. However, the Panel also recognizes that strict interpretation of the SNB Order #2015-604 as written would in effect exclude the SNB Co-op from the ability to participate in any way other than to register with the Board before commencing or continuing in the marketing of the regulated product and sell any regulated product that it produced to the Board. The Panel is of the opinion that if the Order was upheld as written, the issue of conflict or bias could become moot because it would be contra to the provisions in the Order for the SNB Co-op to have any involvement in the exercise of the powers under the Order.

#### **ISSUE 4: Order Animated by an Improper Purpose**

57. The Panel heard evidence from both JDI on the Appellant side and John Sabine on the Respondent side with respect to “failed” negotiations between JDI and the SNB Board. The Commission, pursuant to section 102 of the NPA has an established order respecting negotiating procedures (Commission Order # 2005-189). The only evidence presented by either party that the negotiations being conducted in accordance to the Commission Order #2005-189 were letters sent to the Commission by both JDI and SNB Board reporting on their respective versions of the negotiation meeting. In either case, there were no indications of negotiation of specific items such as price, quantities, delivery schedules, charges, costs or expenses or terms/conditions of a proposed agreement.

58. Based on the evidence, the Panel is of the opinion that the SNB Board’s intention was to negotiate a blanket agreement that would cover all producers in the SNB Region but was ill-prepared to attempt negotiations with JDI that were in accordance with the Commission Order #2005-189.

59. Based on the testimony of Mr. Sabine, the Board’s attempt to negotiate a blanket agreement with JDI was based on the desire to “level the playing field” between producers with direct contracts and those who were smaller or less willing to negotiate direct contracts with JDI. As stated by Mr. Sabine, “So one neighbor is not sitting there holding his chainsaw waiting to go to the woods while his neighbor is running down the road selling a load of wood.”

60. The Panel relies on the NPA for this issue, specifically subsections 3(a) and 3(g) of Part II Purposes of the Act where: *The purpose and intent of the Act is to provide (a) for the promotion, control and regulation within the Province in any or all respects of the marketing of farm products over which the legislative jurisdiction of the Legislature extends, including the prohibition of such marketing in whole or in part, and (g) for the development, conservation and management of forestry resources on private woodlots in the Province.* Additionally, in section 7 of Regulation 2014-1 the purposes for which a Board is established are: *(a) the promotion, control and regulation within its regulated area of the marketing of the regulated product; (b) the promotion within its regulated area of the production of the regulated product; (c) the development, conservation and management of forestry resources on private woodlots in its regulated area; and (d) the promotion of the consumption and use of the regulated product.*

61. The Panel considers that organized marketing or production and marketing, is intended by the wording in the NPA in order to provide a system that works fairly for any person involved in those activities within the regulated area of a Board. The intent in the NPA is also clear that organized negotiations will include a number of specific issues to be settled by agreement (ie. Price, quantity, grade, delivery schedules, etc.). It is clear that while some of the customers purchasing regulated products from the SNB Board do not seem to be concerned with all of the negotiable issues and are willing to sign a general wood supply agreement, this ‘one size fits all’ approach is not acceptable to

others. In the Panel's opinion, the Board's approach of establishing an Order to assist in organizing the marketing of regulated product to improve the fairness (perceived or otherwise) of how it is conducted was with good intent. However, the use the Order under appeal to "force" negotiations with any company is not within the intent of the NPA.

#### **ISSUE 5: Failure to File Policy Statements with Commission**

62. During the hearing and throughout submitted documents, the Appellants referred to the November 18, 2015 letter sent to SNB Board by the Executive Director of the Commission. The letter notified the SNB Board that the Order they were at the time proposing was considered by the Commission to be for general application and as such was required to be printed in the Royal Gazette pursuant to sub-section 95(5) of the NPA. The letter also included a reminder that policy documents were required to be filed with the Commission within 20 days of being made pursuant to Commission Order #2008-101.

63. Commission Order #2008-101 sets the requirements for the filing of various types of reports and documents for all of the Forest Products Marketing Boards.

64. The Appellants submit that there were no policy statements filed with the Commission with respect to SNB Order #2015-604, and therefore provides sufficient grounds for the Panel to set aside the Order.

65. The Panel disagrees. The Commission Order #2008-101 set specific time requirements to file certain documents, but in no way obligated the SNB Board to create policy documents with regard to the SNB Order #2015-604.

#### **ISSUE 6: Failure to Adequately Notify Stakeholders**

66. The Appellants all hold the position that the establishment and implementation of SNB Order #2015-604 violated their rights to "procedural fairness", while the Respondent believes that because the establishment of the Order by the SNB Board was not adjudicative or quasi-judicial, and therefore does not attract the kinds of "rights" that the Appellants suggest.

67. The Panel heard in the evidence that at a meeting of the full SNB Board in November of 2015, the Board had discussions with regard to the "new" Order and voted to pass the Order at that same meeting. The Panel also heard in the testimony of Daniel Folkins and Darren Keith, both of whom were directors on the SNB Board at the time of the passing of the Order that can be best described as confusion as to how the Order would impact stakeholders.

68. In both cases, Mr. Folkins and Mr. Keith described their understanding of the discussion prior to passing the Order. Their descriptions revealed to the Panel that there seemed to be some confusion among at least some of the directors present at the meeting with regard to the purpose and the effect of the order.

69. With regard to unfairness and the Appellants' oral evidence presented to the Panel, the Panel considered the concerns raised by JDI, AV Nackawic, Mr. Murray, Mr. Folkins, and Mr. Keith with respect to understanding how the Order would affect their respective businesses were valid. While some of these same concerns were raised by Mr. Doherty and Mr. Gillespie, it was also clear that there was a general disdain for the entire Marketing Board system and their dissatisfaction was based mostly on objections to being regulated in any way.

70. In any event, the evidence presented before the Panel revealed inadequacies in the communication of the establishment and implementation of SNB Order #2015-604. The only semblance of a plan was for the SNB Board to deal with issues with the Order as they were presented to the Board after the Order was established and brought into force, which in the view of the Panel is also inadequate.

#### **ISSUE 7: Order by SNB Board an Attempt to Exercise Powers not vested in Board**

71. The Appellants assert that the Order as written is an attempt to indirectly exercise powers that are not vested in the Board, namely, *to regulate the manner in which the regulated product may be marketed or produced and marketed; and to fix the price or prices, maximum price or prices or both maximum and minimum prices at which the regulated product, or any grade or class of it, may be bought or sold in the regulated area, and to fix different prices for different parts or areas of the regulated area.*

72. The Panel is of the opinion that this assertion by the Appellants is speculative. However, the Panel can also understand the reason for it. The Order as established is scant on detail as to how it would be applied or implemented and as a result, could easily lead one's mind to speculate on all of the possible outcomes.

73. Without sufficient evidence on either side of the argument on this issue, the Panel cannot rationalize the use of this issue alone to outright dismiss or allow the appeal. The issue does however highlight the lack of detail in SNB Order #2015-604 that could lead to speculation and assumptions about how widely the power could be extended, and as a result will play a role in the Panel's decision on this Appeal.

## **ISSUE 8: Grammatical Issues with the Order**

74. AV Nackawic proposed that the Order is invalid for grammatical reasons. Their issues are with the uses of the words “any” and “all” and the words “to” and “through” and the fact that selective use of these words are contrary to the purpose and intent of the *Natural Products Act*.

75. With respect to the use of the words “any” and “all”, AV Nackawic argues that subsection 9(d) of Regulation 2014-1 empowers SNB Board to require “any and all persons” to register with and obtain licenses from the Board before marketing of the regulated products and that subsections 9(g) and 9(h) of the Regulation empower the SNB Board “to require *any* person to offer to sell and to sell the regulated product...” and to “prohibit *any* person from processing...”.

76. The Respondent argues that if the SNB Board has the power to require *any* person to take a specific action, or *any individual person*, it follows that *every person* or *every individual person* can be designated as one of *all* persons and be bound by the Board’s requirement.

77. In consideration of the arguments with regard to “any” and “all”, the Panel is of the opinion that the power vested in subsection 9(d) of the regulation can be interpreted that the Board has a choice to require “any” individual or group of persons or “all” persons to register with *and obtain licenses from* the Board (emphasis ours). The Panel notes that the “obtain licenses from” part of the requirement has been omitted from the SNB Order #2015-604 and may be more problematic than the interpretation issue between “any” and “all”.

78. Similarly, and as argued by AV Nackawic with respect to the use of “to” versus “to or through”, the “or through” part of subsection 9(g) and the “by, or through” part of subsection 9(h) has been selectively omitted from SNB Order #2015-604.

79. In its deliberations and in consideration of these “interpretive” issues, the Panel relies on E.A. Driedger’s “Construction of Statutes” (2<sup>nd</sup> Edition), where in consideration of adding or deleting words, Driedger states “In reading a statute words should not be added or deleted and the reader should not try to fill in any gaps he thinks he sees.” (pg. 94)

80. The Panel is of the opinion that because of the violation of this principal and others to be discussed later in this decision, that the SNB Order #2015-604 has been improperly constructed and is not within the full intent of the legislation under the NPA.

## **F. Conclusion**

81. In its simplest form, this case is seen by the Panel to be a focus on two different disputes; one between a party who is empowered and is desperately attempting to exercise its legislated powers and parties who desire that the exercise of those powers be done fairly, consistently and within the intent of the Natural Products Act; the other between a party who is empowered to regulate and parties who do not wish to be regulated in any way at all. With respect to the latter, the Panel is of the opinion that if the legislature did not intend for regulation of the marketing or production and marketing of primary forest products in New Brunswick, it would not be contemplated at all in the Natural Products Act.

82. With that in mind, the Panel is left to consider the validity of SNB Order #2015-604 in terms of the appropriate exercise of the powers vested in the SNB Board under the NPA. To do so, the Panel has considered the evidence and testimony of the Appellants and the Respondent in this Appeal, and as a result and in addition to, has been forced to bring forth an interpretation of the intent of the legislation contained in the Natural Products Act.

83. The Panel relies again on E.A. Driedger – “Construction of Statutes” – 2<sup>nd</sup> edition in that respect at pages. 91- 92 “Not only must the whole Act be read, but every provision of the Act, should if possible, be given meaning; hence, if there are rival constructions the general principle is that the construction that gives effect to the whole of the statute, or to the provision under consideration, should be adopted in preference to one that renders part thereof meaningless.” In the Panel’s view, the SNB Board failed to establish the Order #2015-604 in the context of the whole Act.

84. The omission of the words “and obtain licenses from” in the Order paragraph 2 between the power vested in the SNB Board through Regulation 2014-1 is one example. The powers vested in the Board in the Regulation refer to the collection of license fees and charges in subsection 9(e) and suspension and cancellation of a license in subsection 9(f). The Panel considers that the use of the word “and” in “register with *and* obtain licenses from” is conjunctive in nature and must therefore be considered together. Further, the Natural Products Act contemplates the nature of Licenses in Part XII and issues further directions and authorities to Boards in that respect.

85. Additionally, the Panel considers the omission of the words “or through” and the words “by, or through” from the powers vested in the Boards under subsections 9(g) and (h) of the Act are also improper. The Panel is of the opinion that the extent of the power of the Board to require any person to offer to sell or sell the regulated product is to require it be sold under the condition of either *to or through* the Board, not one of the two conditions. Similarly, the Panel finds that under subsection 9(h), the Boards authority should be limited to prohibiting any person from processing, packing or packaging, any of the regulated products that have not been sold under the conditions of any of *to, by*

*or through* the Board, not just one of the conditions singularly. As such, the Panel finds that the Board's omission of these words renders the Order inappropriate for application.

86. In its deliberations and with respect to the specificity of the SNB Order being appealed, the Panel examined similar types of Orders from a number of other commodity Boards. In all of the Orders examined, the Order sought out to establish a framework that in most cases very specifically defined who was to be regulated and how they would be regulated. The specificity of these Orders examined by the Panel included extensive definitions, instructions, processes and repercussions to deal with contraventions to the Orders, and exemptions from application of the Orders. This kind of specificity cannot be found in the SNB Order.

87. The Commission has not established an Order authorizing the SNB Board to appoint the SNB Co-op as its agent. Despite having been given the power to do so, the SNB Board has not appointed its own employees to conduct the day to day business of the Board and relies solely on employees who report to the Board of Directors of the SNB Co-op. The Panel concludes that this practice is not acceptable within proper application of the NPA, nor does it prevent from reasonable apprehension of bias or conflict of interest. If the SNB Board wishes to properly exercise the powers vested in them through the NPA and its regulations, the Board should do so through the appointment of employees who are employed exclusively by the Board.

88. The Panel notes that this is the SNB Board's third attempt to establish an Order to effectively regulate the marketing within its regulated area. Previous attempts were either challenged and found to be not specific enough to be practical or were unchallenged because the Order in practice did not provide the kind of regulatory power that the SNB Board was seeking to exercise.

89. Pursuant to the subsection 68(1) of the NPA, the *Panel may consider fairness, undue hardship and the effect of the order, decision, direction or determination of an agency or board on the person appealing and may make a decision on the appeal which it considers fair and equitable in the circumstances*. (Emphasis ours)

90. Further, the Panel has options in terms of its decision under subsection 68(2) as follows:

*68(2) On an appeal under section 65, a panel may*

*(a) dismiss the appeal, or*

*(b) allow the appeal and*

*(i) set aside the order, decision, direction or determination of the agency or board,*

*(ii) substitute its order, decision, direction or determination for that of the agency or board, or*

*(iii) exempt the person who made the appeal from application of the order, decision, direction or determination of the agency or board.*

91. For all of the reasons above, the Panel allows the appeal.

92. Further, the Panel will substitute its own order in place of the SNB Board Order #2015-604, and will provide the parties with an opportunity to make submissions in that regard. The substituted order shall be Order #2018-604 - General Marketing Order - Southern New Brunswick Forest Products Marketing Board.

93. The Panel's proposed substitute order is attached to this decision. Due to the fact that the parties did not address a substitute order in their written submissions or in oral argument at the hearing, before a substitute order is put into force by the Commission, the Panel requests the Parties to make written submissions with respect to the same no later than January 5, 2018. Upon consideration of the written submissions, the Panel will make a substitute order that will come into force no later than April 1, 2018.

94. The Panel wishes to thank Counsel and all participants who have assisted this Panel in reaching its decision both through your oral and written submissions.

95. With respect to costs, the Panel is limited to only consider the cost of the hearing. There will be no assessment of cost.

DATED at Fredericton, New Brunswick this 11th day of December, 2017.

Signed by:

Brian W. Mosher, Q.C., Panel Chair and Chair of  
New Brunswick Forest Products Commission

Carol Dixon, CPA  
Panel Member

Gerard Robichaud  
Panel Member

Claude Pelletier  
Panel Member