

**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-

**NORTH SHORE FOREST PRODUCTS MARKETING BOARD,
MADAWASKA FOREST PRODUCTS MARKETING BOARD,
NORTHUMBERLAND COUNTY FOREST PRODUCTS MARKETING BOARD,
CARLETON-VICTORIA FOREST PRODUCTS MARKETING BOARD,
YORK SUNBURY CHARLOTTE FOREST PRODUCTS MARKETING BOARD,
SOUTH EAST NEW BRUNSWICK FOREST PRODUCTS MARKETING BOARD,
SOUTHERN NEW BRUNSWICK FOREST PRODUCTS MARKETING BOARD**

(Respondents)

Heard:

At the Maritime College of Forest Technology, Fredericton, New Brunswick on May 22 and 23, 2013

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

Members: Ronald LeBlanc

Douglas Prebble

Appearances:

For the Appellant : Neil Finklestein, Esq., Byron Shaw, Esq., and Brandon Kain, Esq.

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

REASONS FOR DECISION

A. Procedural Background:

1. Commencing on May 22, 2013, a Panel constituted under section 66(6) of the Natural Products Act, hereinafter referred to as "NPA", heard submissions from the Appellant and from the Respondent, as referenced in the attached Index to the Amended Appeal Book, heard *viva voce* evidence presented on behalf of the Appellant, and the oral and further written submissions of counsel for the respective parties.

2. The Appellant appealed two instances where the Boards have made an order or direction summarized as follows:

- a. A decision of all Boards by letter dated the 29th day of August, 2013 and September 4, 2012, following an inquiry by counsel for the Appellant on August 27, 2012, wherein Boards stated that the Boards do have authority to require all “stumpage contracts” to be approved by the Boards pursuant to their regulatory powers. The letter indicated that the term “stumpage “ is the agreed upon price for the right to harvest upon a private woodlot and the “stumpage contract” outlines the terms and conditions of those rights such that the whole of the process comes under the mandate of “marketing” to which the Boards have been given regulatory jurisdiction.
- b. A December 2012 decision or direction of the Boards requiring the Appellant to submit for approval certain information relating to “stumpage agreements” and prohibiting the Appellant from harvesting, transporting or processing wood acquired under “stumpage agreements” pending the submission and approval of such information.

3. In reply and by its own submission, the Respondent raised a preliminary issue challenging the authority of the Panel to hear the appeal on the grounds that there was no decision made by the Boards in the first instance. The Respondent abandoned their preliminary objection, conceding that the decision was a decision of the Boards.

4. Extensive submissions were filed by counsel for the Appellant challenging the Board’s ability to regulate “stumpage contracts” in any manner, including the requirement that such contracts be submitted to or approved by Boards. The grounds for the appeal as presented through a series of amended appeals are summarised as follows:

- a. Stumpage is not a regulated product under the *Natural Products Act* and therefore the Boards have no jurisdiction to regulate stumpage agreements from private woodlot owners in New Brunswick
- b. That regulatory power of the Board is an invalid sub-delegation of the regulation –making authority of Cabinet under the *Natural Products Act*.
- c. That the Boards have exercised discretion and have acted in a discriminatory and unlawful manner toward the Appellant.

5. The Appellant seeks Orders summarized as follows: setting aside the decision of the Boards, that the Boards have no jurisdiction to regulate agreements for the purchase and sale of stumpage from private woodlot owners, that prior approval from Boards is not required for such purchases, that written agreements relating to stumpage purchases not be required to be submitted to the Boards, and, alternatively that the Appellant, specifically JDI, be exempted from the Board’s decision, and in the further alternative that certain persons related to Boards have disqualifying conflicts and that the Boards have acted in a discriminatory and unlawful manner.

B. Legislative Background

6. 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.

7. 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.

8. 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.

9. 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 established under the *Forest Products Act, RSNB 2012 c. 105*, hereinafter referenced as FPA.

10. The NPA further provides 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 a number of purposes including the specificity in subsection 18() (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.

11. In New Brunswick seven forest product marketing boards and marketing plans have been established under the NPA by regulations, namely:

South East Forest Products Marketing Board	Regulation 2005-105 Regulation 2005-106
Carleton –Victoria Forest Products Marketing Board	Regulation 2005–139 Regulation 2005-140
North Shore Forest Products Marketing Board	Regulation 2005-141 Regulation 2005-142
Southern New Brunswick Forest Products Marketing Board	Regulation 2005-145 Regulation 2005-146
Madawaska Forest Products Marketing Board	Regulation 2006-85 Regulation 2006-87
York-Sunbury-Charlotte Forest Products Marketing Board	Regulation 2005-147 Regulation 2005-148
Northumberland County Forest Products Marketing Board	Regulation 2005–143 Regulation 2005-144

12. The powers vested in all of the above referenced boards by virtue of their regulations are similar.

13. Pursuant to the powers vested in them the Boards passed almost identical orders requiring any person who produces the regulated product to offer to sell and to sell the regulated product to or through the Board; permitting the Boards to regulate the time and place and to designate the body by or through which the regulated product shall be marketed or produced and marketed; and providing that any person who fails to comply with the Order may be prohibited from marketing, processing, packing or packaging any of the regulated product that has not been sold to, by or through the board. The orders are as follows:

South East Forest Products Marketing Board	Order 2012-05
Carleton-Victoria Forest Products Marketing Board	Order 2012-01
North Shore Forest Products Marketing Board	Order 2012-03
Southern New Brunswick Forest Products Marketing Board	Order 2012-06
Madawaska Forest Products Marketing Boards	Order 2012-02
York-Sunbury-Charlotte Forest Products Marketing Board	Order 2012-07
Northumberland County Forest Products Marketing Board	Order 2012-04

14. Based upon this framework the Appellant is of the opinion that the Boards lack the jurisdiction to make the orders and directions from which they appeal upon the grounds and relief sought as summarized above at paragraphs 4 and 5.

15. The *Natural Products Act, SNB 1999, c. N-1.2 (NPA)*, provides for an appeal process and that upon filing an appeal the Board's decision is stayed pending the outcome of the appeal, including appeals to the New Brunswick Court of Appeal from a decision of the panel. The Panel recognizes that the decisions of the Board were stayed pending outcome.

C. Issues:

Argument 1: The Agreement and Regulated Product

16. The Appellant first asserts that "stumpage" is not a regulated product under the NPA and therefore the Boards have no jurisdiction to regulate agreements for the purchase and sale of stumpage from private woodlot owners in New Brunswick. The Appellant specifically references an Agreement between the Appellant and Gray Valley Farms Limited hereinafter referenced as the "Agreement".

17. Once standing trees are cut or harvested they fall within the definition of a "primary forest product" as do trees lying on the land.

18. The Appellant further argues that the land upon which the trees are located is not a private woodlot as defined by the FPA, a definition incorporated by reference in the order to the NPA because the Appellant acquires an ownership interest in the land by virtue of an agreement and hence the land is owned by a person whose business is the operation of a wood processing facility is therefore not included in the definition of private woodlot. They argue that if this is the case forest products originating on that land is not a regulated product for the purpose of the marketing regulations.

19. The Panel considers that while the Appellant may well have an enforceable right to or interest in the land covered by their Agreement, the vendor in that same Agreement covenants that the vendor holds good and marketable title to the lands in fee simple. The vendor retains this interest subject to the terms of the Agreement which in the opinion of the Panel is sufficient to keep the land

within the definition of “private woodlot” within the meaning of the terms as used and intended to be used within the FPA and as referenced within the NPA. As such, the *marketing* (emphasis added) of such a farm product of the forest originating from a private woodlot is properly included in the mandate of marketing and is within the jurisdiction as set out by the NPA, FPA and associated regulations and orders.

Argument 2: Powers Vested in Boards:

20. The powers vested in the Respondents by virtue of their marketing plan regulation referenced herein are set out in section 9 of the various regulations as follows:

(a) to market the regulated product;

(a.1) to prohibit the marketing or the production and marketing, in whole or in part, of the regulated product;

(a.2) 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;

(b) 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 licenses from the Board;

(c) to fix and collect periodic license 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 such 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 such license fees and charges or either of them in any Court of competent jurisdiction;

(d) to suspend or cancel a license for violation of any provision of the Act, the Plan, a regulation or any order of the Board and to reinstate a license that has been suspended or cancelled;

(d.1) to require any person who produces the regulated product to offer to sell and to sell the regulated product to or through the Board;

(d.2) to prohibit any person from processing, packing or packaging any of the regulated products that has not been sold to, by or through the Board;

(e) to use, in carrying out the purposes of the plan and paying the expenses of the board, any money received by the board;

(f) to require any person who receives the regulated product to deduct from the money payable for the regulated product any license fee or charge referred to in paragraph (c) that is payable to the Board by the person marketing or producing and marketing the

regulated product received and to forward that license fee or charge to the Board or its agent designated for that purpose;

g) to implement and administer forest management programs on private woodlots;

(h) 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;

(i) to undertake or engage other persons to advertise and promote the regulated product;

(j) to cooperate with any Canadian Board or Provincial Board to regulate the marketing of the regulated product of the province and to act conjointly with the Canadian Board or provincial board for such purposes;

(k) to make such orders as 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

(l) The powers of a corporation under the Business Corporations Act and subject to the Act, in the exercise of such powers the members of the Board shall be deemed to be shareholders and directors.

21. The NPA defines “marketing” as:

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

22. The Panel acknowledges the NPA’s application for the farm product of the forest:

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. (emphasis added)*

2007, c.36, s.2.

23. The Panel acknowledges that the subsections under section 9 (set out herein at paragraph 20) give the Boards power to regulate their marketing plans. However, the Panel finds that the Boards have not properly exercised their jurisdiction to regulate the powers afforded the Boards. Such jurisdiction is exercised only when a proper marketing order is in place.

24. The Appellant maintains in their submission that the powers vested in the Boards by the Lieutenant-Governor in Council in the marketing regulations are invalid. With respect to this issue the Panel notes that in vesting the enumerated powers in the Boards the Lieutenant –Governor in Council did exactly what was authorized by the NPA. The Panel considers that the above powers are sufficient

to authorize the Respondents to pass the orders referenced above. The Panel takes the position that further consideration of such a claim is beyond the jurisdiction of the Panel.

25. The Panel does not take the position that the powers granted to the Boards are invalid or inapplicable to the subject matter, as raised. However the panel does have major concerns for the Orders as presented in their current form and in the manner of the application of those Orders based upon the submissions of the Appellant.

26. While the Boards have been given the power to pass orders, it is the Panels observation and decision that the Orders of the Boards as passed do simply repeat 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.

27. At tab 11 of the Appellant's Book of Authority, page 12 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.*

28. Thus, the Boards are required to regulate by orders and they cannot administer as they see fit without reference to standards required to be set out by their orders. For example, while the Boards may require the regulated product to be sold through the Boards, there is no indication of the criteria to be used by the Boards in determining whether the Boards will permit the regulated product to be sold through them or at all. This places the matter solely as a matter of policy as may be determined from time to time by a Board.

29. The Panel considers it is essential that persons regulated by Board orders have access to information by reference to the Orders clearly setting out the factors allowing and prohibiting the marketing of a regulated product.

30. The Boards' current Orders, exemplified by Exhibit "D" and "F", specifically Order 2012-06 of the Affidavit of David Palmer, merely re-state the Board's jurisdiction without specifics, e.g. :

- a. **At Paragraph 2 states :** *The Southern New Brunswick Forest Products Marketing Board shall require... not that they do require persons to sell through the Board;*
- b. **At Paragraph 3:** *The Southern New Brunswick Forest Products Marketing Board shall require the time and place at which and to designate the body by which or through*

which the regulated product shall be marketed or produced and marketed rather than providing that this is a requirement and the specifics of the requirement;

- c. **At Paragraph 4: Any person who fails to comply with sections 2 or 3 of this Order may be subject...without the specifics of the compliance or direction as to when the discretions may or may not be exercised.**

The Boards' Orders referenced lack the procedural specificity required to be uniformly applicable. As such the Panel considers the Appellant's point well taken.

ARGUMENT 3: Challenge of Bias

31. The Appellant further raises the issue of bias with respect to board members and officers in alleging that some of the Boards are in direct competition with the Appellant. In reply, the Respondent argues that merely making suggestions relating to unnamed boards and unnamed members as being in competition with the Appellant is not sufficient to properly raise the issue of bias. They allege that there must be evidence to demonstrate to a reasonable person that there is a sound basis making such an allegation and proof that the person against whom bias is asserted will not bring an impartial mind to bear upon the issue before the board.

32. The issue of bias was raised with respect to the Panel itself. The procedure for an appeal as set out in the NPA was followed. To the extent that an apprehension of bias may exist with Panel members, the Panel takes the view that the Panel was simply complying with the mandate of the Commission as set out by the legislation.

33. While the evidence presented at this hearing might not be sufficient to satisfy a legal test for apprehension of bias, the Panel considers this to be of sufficient importance to indicate to any Board that great caution should be exercised in the decision making process particularly to any orders requiring the disclosure of proprietary information.

D. Conclusion

34. For the above reasons the Panel makes the following determination:

- a. The Boards' decision as reflected in the letter dated August 29, 2012, and clarified by letter dated September 4, 2012, remains a valid decision of the Boards based upon the legislative and regulatory framework. The Panel concludes that the Boards have jurisdiction to require all direct agreements relating farm products of the forest originating from private woodlots, regulated product, to be reviewed and approved.

- b. While the Boards have the jurisdiction under their marketing mandate, the Panel concludes that the Boards have not exercised their authority in a proper manner. The Panel concludes that the current framework or lack thereof, for the review and inspection of agreements relating to farm products of the forest originating from private woodlots is insufficient to require the Appellant to produce the information sought either by the decision by letter dated August 29, 2012 or the letter dated December 21, 2012.
- c. That the substantive portions of the Boards' orders, exemplified in Order No. 2012-06 , specifically parts 2,3 and 4 and which came into effect on August 16th, 2012, are insufficient to properly support the decision of either of the decisions of the Boards evidences by letters dated August 29, 2012 or letter dated December 21, 2012, lacking the specificity required. The Boards must seriously consider their regulatory responsibility in drafting their Orders and resulting decisions in conformity with the principles of administrative law.

35. 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.

36. Each of the parties shall be responsible for ½ of the Panels costs and each party shall bear their own costs.

DATED at Fredericton, New Brunswick this ___ day of October, 2013.

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

**Ronald LeBlanc
Panel Member**

**Douglas Prebble
Panel Member**