

NEW BRUNSWICK FOREST PRODUCTS COMMISSION

JULY 2018

INSPECTION - SNB FOREST PRODUCTS MARKETING BOARD / SNB WOOD COOPERATIVE LTD.

INTRODUCTION

By Notice of Appeal dated October 28, 2016 (the "Appeal"), J.D. Irving, Limited (hereinafter "JDI") and four (4) additional appellants sought to appeal to the New Brunswick Forest Products Commission (hereinafter "the Commission") Order #2015-604 (hereinafter "the Order") of the Southern New Brunswick Forest Products Marketing Board (hereinafter referred to as "SNB"). Additionally, JDI filed a Notice of Application in the Court of Queen's Bench (hereinafter the "Application") to seek a ruling on the legality of the relationship between SNB and the SNB Wood Cooperative Ltd. (hereinafter the "Co-op"). During the hearings of the Appeal and the Application, issues were raised regarding the relationship between SNB and the Co-Op (hereinafter the "Relationship"). Additionally, the Commission received letters from woodlot owners and producers in the Southern New Brunswick region that raised concerns regarding the Relationship (hereinafter the "Concerns").

The Concerns included:

- a) That the Relationship was inconsistent with the *Natural Products Act* (hereinafter "the *NPA*");
- b) That the SNB Board of Directors did not have or was not exercising management control of SNB;
- c) That SNB signing authority provisions were not being adhered to; and
- d) That there is a lack of transparency of financial transactions between SNB and the Co-op.

As a result of hearing the Appeal, the Appeal Panel of the Commission raised its own concerns in its Appeal decision regarding the relationship between SNB and the Co-op. Specifically, the Appeal Panel made the observations that SNB has no employees and that it appeared that the Co-op was acting as, and on behalf of, SNB. Upon further examination of the *NPA*, the Panel determined that SNB is not given authority under the *NPA* to delegate its powers and, that while a Board may be authorized to appoint an agent to act on its behalf, that appointment requires an order of the Commission that specifies the nature of the agent relationship, the duties of the agent, terms and conditions of employment, and provision for the remuneration of the agent. Such order does not exist.

At the heart of this issue is the fact that, during its deliberations with regard to the Appeal decision, the Appeals Panel of the Commission arrived at a conclusion that, for a number of years, the relationship between SNB and the Co-op may have been misaligned with the legislation. In turn, on January 21, 2018, the Commission made a decision to conduct an investigation into the nature and extent of the relationship between SNB and the Co-op pursuant to the *NPA* and, particularly, s.12(4)(a). The Commission delegated its powers of investigation to Carol Dixon, CPA (Commission member representing the Department of

Energy and Resource Development) and Tim Fox, Executive Director of the Commission. On January 22, 2018, letters were delivered to SNB and the Co-op notifying them of the Commission investigation and detailing information required by the Commission to conduct the investigation.

Following correspondence between SNB, the Co-op, and the Commission over the course of several weeks and noting resistance by the Co-op to release the required information, the Commission appointed Ms. Dixon and Mr. Fox as inspectors under section 58(1) of the *NPA*. Following those appointments, an inspection was conducted at the premises of the Co-op, where all of the required information was collected.

Based on the information collected and follow-up discussions, this report will detail the relevant legislative provisions of the *NPA*, analysis and results of the investigation, and recommended remedies for any issues that are determined to be inconsistent with the legislation and/or normal governance and business practices.

RELEVANT LEGISLATION

Natural Products Act, ch. N-1.2, 1999

Section 12 of *NPA*:

12(3) The Commission may take any action referred to in subsection (4) if the Commission reasonably believes that an agency, board or person carrying out functions on behalf of an agency or board is committing an act or pursuing a course of conduct that may

- (a) violate this Act or the regulations,
- (b) constitute an unsound business practice,
- (c) prejudice the interests of persons for whose benefit the agency or board has been established,
- (d) constitute a failure by the agency or board or person to file a report or document required to be filed with the Commission or to provide information required to be provided to the Commission,
- (e) lead to a defect, irregularity or inconsistency in the administration of a plan, or
- (f) fall outside the scope, purposes or powers of the agency or board.

12(4) For the purposes of subsection (3), the Commission may do any one or more of the following:

- (a) investigate the business and affairs of the agency or board, or the business and affairs of the person carrying out functions on behalf of the agency or board;
- (b) prepare a report concerning the results of an investigation and, where the Commission considers it necessary, make the report public; and

(c) order the agency or board to take such remedial action as the Commission considers necessary.

Commission orders respecting agencies and boards

13 The Commission may make orders

(a) providing that each agency or board file with the Commission, within the time prescribed by the Commission, true copies of

(i) minutes of all meetings of the agency or board,

(ii) all by-laws of the agency or board,

(iii) all orders, decisions or determinations of the agency or board,

(iv) all annual reports of operations of the agency or board,

(v) all audited financial statements of the agency or board,

(vi) all bonds required to be provided under subsection 22(1) or 31(1), and

(vii) such further statements, reports and documents, regardless of form, that are in the possession of an agency or board as the Commission requires;

(a.1) respecting the system of bookkeeping and accounting to be adopted by an agency or board, and the form of and the manner in which all books of account, records, and other books and documents of an agency or board shall be kept;

(a.2) respecting the system of auditing of the accounts, records, and other books and documents of an agency or board, the qualifications of an auditor, the manner of performing an audit, the reports and information to be made and furnished by an auditor, and otherwise with respect to the performance of an auditor's duties;

(a.3) respecting information to be made and furnished by an agency or board to the Commission, and the time when and by whom the information shall be provided;

(b) providing for

(i) the furnishing to persons engaged in the marketing or the production and marketing of a regulated product of copies of the annual report of operations and the financial statements of each agency or board, or

(ii) the publication of the annual report of operations and the financial statement of each agency or board;

(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; and

(d) notwithstanding any other Act, respecting

(i) the carrying out by the Commission or a trustee of any or all of the powers of an agency or board,

(ii) the vesting in the Commission or a trustee of the assets of an agency or board and, where any order made under this subparagraph is in conflict with any by-law of the agency or board, the order prevails, and

(iii) the dissolving of an agency or board and the distribution of its assets.

15 The Commission has general supervision over all agencies and boards constituted under this Act and shall perform such other duties and functions and exercise such authority prescribed by regulation in order to carry out the purpose and intent of this Act.

19 Where there is a plan established by regulation under subsection 18(5), the Commission may, by regulation,

(a) prescribe the number of members of an agency or board and the method by which the members are to be chosen, whether by appointment or election, or partly one way and partly the other;

(b) prescribe by-laws for the conduct of the government of an agency or board, including one for the appointment of an executive committee of an agency or board to exercise such powers as may be conferred upon it by the agency or board, and provide that any power so exercised by the executive committee shall be deemed to have been exercised by the agency or board;

(c) provide for the establishment of advisory committees to advise and make recommendations to the agency or board in respect of any matter respecting which the agency or board is empowered to make orders under this Act, the regulations or the plan;

(d) determine the constitution of advisory committees and prescribe the practice and procedure to be followed by such committees;

(e) empower an agency or board to make by-laws not inconsistent with this Act, the regulations or the plan.

28(1) The Commission may make regulations vesting in a board the following powers:

(a) to regulate the quantity and quality, grade or class of a regulated product that may be marketed at any time and to prohibit, in whole or in part, the marketing of any grade, quality or class of a regulated product except through the board;

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

(c) 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;

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

58(1) The Commission may appoint any person as an inspector for the purposes of this Act and the regulations, orders and plans.

99(2) The Lieutenant-Governor in Council may authorize a Canadian Board or a Provincial Board to perform any function or duty or exercise any power relating to the production or marketing or both of a regulated product that a board may be authorized to perform or exercise under this Act, and in respect of which the Canadian Board or Provincial Board may exercise its powers under a Canadian Act or Provincial Act, and may authorize or direct a board to delegate that function, duty or power to the Canadian Board or Provincial Board.

Regulation 2014-1 New Brunswick Forest Products Marketing Board Plan Regulation – Natural Products Act, (O.C. 2014-1)

3(1) The purpose of this Regulation is to establish a separate plan for each of the following forest products marketing boards:

(a) the Carleton-Victoria Forest Products Marketing Board;

(b) the Madawaska Forest Products Marketing Board;

(c) the North Shore Forest Products Marketing Board;

(d) the Northumberland County Forest Products Marketing Board;

(e) the South East New Brunswick Forest Products Marketing Board;

(f) the Southern New Brunswick Forest Products Marketing Board; and

(g) the York-Sunbury-Charlotte Forest Products Marketing Board.

6(6)The regulated area for the Southern New Brunswick Forest Products Marketing Board is Albert County, Kings County, Queens County, Saint John County and the parish of Salisbury in Westmorland County.

Purposes for the establishment of a Board

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.

Mission statement and strategic objectives of a Board

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 or 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.

Powers of a Board

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.

Regulation 2005-146 Southern New Brunswick Forest Products Marketing Board Regulation – Natural Products Act

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.

18(1) All cheques, drafts, orders for the payment of money and promissory notes, acceptances and bills of exchange shall be signed by 2 employees designated by the Board or by 2 people from among an employee designated by the Board and the chair, vice-chair and treasurer of the Board.

18(2) Contracts, documents or written instruments, with the exception of commercial documents prepared in the normal course of business, that require the signature of the Board shall be signed by 2 members from among the chair, vice-chair and treasurer of the Board.

INSPECTION ANALYSIS AND RESULTS

The Commission requested the following list of records from SNB and the Co-op:

1. Current names and addresses of directors of the SNB Forest Products Marketing Board (hereinafter the “SNB Board”) by District and position held.
2. Current names and addresses of directors of the SNB Co-operative Ltd. (hereinafter the “Co-Op”) and position held.
3. Current list of members of the Co-op.
4. Current by-laws of the Co-op.
5. Minutes of all meetings of the Co-op from April 1, 2007 to present.
6. Minutes of all meetings of the SNB Board from April 1, 2010 to present (Minutes filed with the Commission appear to be incomplete).
7. Detailed General Ledger listing for both the SNB Board and the Co-Op (hereinafter, together, the “Companies”) for the period between April 1, 2016 and March 31, 2017.
8. Detailed General Ledger listing for the Companies for the period between April 1, 2017 and December 31, 2017.

9. Payroll records for the SNB Board for the period between April 1, 2016 and December 31, 2017.
10. Copies of all monthly bank statements / term deposit statements and copies of all cancelled cheques for the Companies for the period between April 1, 2016 and December 31, 2017.
11. Copies of any invoices and/or journal entries between the Companies for the period between April 1, 2016 and December 31, 2017.
12. A list of individuals with signing authority for each of the Companies.

ORGANIZATIONAL CONTROL

From the information collected, the Commission found the following:

1. The SNB Board has no paid employees. The Manager of the Co-op is referred to as having an appointment by the SNB Board to act as the manager of the SNB Board.
2. The signing authority for the SNB Board includes the Chairman and Vice-Chairman of the SNB Board. In addition to those two, signing authority is given to Pamela Folkins, Chris Spencer, and Christine Keating, who are all Co-op employees. Very few, if any, SNB Board cheques are signed by the Chairman or Vice-chairman.
3. On average, approximately 30 cheques per month are written from the SNB Board account. They consist mostly of payments for silviculture work funded by the Forest Management Fund, travel and per diem expenses of SNB Board Directors, invoices from the Co-op, and other expenses attributable to SNB Board (legal, accounting, Federation of Woodlot Owner dues, and Zone meeting expenses, etc.).
4. Conversely, the number of cheques that are written from the Co-op accounts totals from several hundred to over a thousand per month. They include all payments for wood deliveries, silviculture payments and expenses of the Co-op.
5. The same employees of the Co-op who have been granted signing authority for the SNB Board also have signing authority for the Co-op.
6. The Co-op makes and receives all disbursements with respect to private woodlot wood deliveries between the producers and mills. It handles all Marketing Board levies.
7. The minutes of SNB Board and/or executive committee meetings lack the detail required to reflect a proper review of invoicing from the Co-op to the SNB Board. Invoicing is done by Co-op employees and then payments are also made by Co-op employees.
8. The service agreement between the SNB Board and the Co-op stipulates that administrative services are to be at cost plus 15%. The invoicing for administrative services is exactly the same amount each month.

9. The service agreement between the SNB Board and the Co-op stipulates forest management services to be paid at a rate of \$49.50 per hour. This is substantially higher than the Co-op's cost of conducting the services. However, the Co-op does not charge rental fees to the SNB Board for space or equipment or any other occupancy fees. Although not transparent, the Commission believes that the Co-op must be accounting for some of this through the fee for service charges.
10. There appears to be a conscious effort to ensure that the Co-op profits from its relationship with the SNB Board. This is evidenced by the fees for services pursuant to the Co-op and SNB Board service agreement and also by other fees that appear to be more heavily charged to the SNB Board. For example, costs for spring Zone meetings and the Annual meetings of the SNB Board and the Co-op appear to be borne by the SNB Board as opposed to cost sharing with the Co-op.

GOVERNANCE & CONFLICTS OF INTEREST

The SNB Board has a board of directors comprised of 36 members representing its parishes. In recent years, there have been vacancies in some parishes which have resulted in 2 to 4 vacancies in any given year. One of the items that the Commission looked at was the decision-making process at the SNB Board of Director level. Although the SNB Board or its executive committee meeting minutes do not reflect substantial financial oversight, the Commission looked for evidence of decision making in regard to the service agreement between the Co-op and the SNB Board.

Due to the nature of the business of the Co-op, members of the Co-op have share capital in the Co-op and loan capital in the Co-op. The Co-op pays interest to the members on the value of the share capital and loan capital. Members may also receive an "allocation of profits" or increase in their loan capital when the Co-op is profitable. The Co-op has 2,065 members (according to its member register) out of the 8,547 woodlot owners in the SNB Board regulated area (Floyd Task Force Report – 2012).

In the most recent two years, between 72 and 76 percent of the Parish Directors for the SNB Board are also members of the Co-op. The Commission determined that while only a small number of the Parish Directors of the SNB Board who were also members of the Co-op had received "allocation of profits" payments, any of those Co-op members who were tasked as Parish Directors for the SNB Board would be in a potential conflict of interest when making decisions with respect to the service agreement between the SNB Board and the Co-op.

The Commission also noted that a substantial number of the employees of the Co-op are also listed as Co-op members. While there may not be any issue with this in terms of the Co-op bylaws and operation, there is a real cause for concern with respect to (at the very least) perceived conflict of interest for these employees to be tasked with the services being conducted for and on behalf of the SNB Board.

PRINCIPAL/AGENT RELATIONSHIP

The relationship between the SNB Board and the Co-op has been categorized by some during the Appeal hearing as simply a contractual fee for service agreement between two companies. The auditor for both organizations notes in the audited financial statement that *“Because of the nature of this contractual relationship and because key management personnel are shared by the Board and the Co-operative, these parties are considered to be related.”* The Commission is of the opinion that there is a principal/agent relationship between the SNB Board and the Co-op that has not been authorized by or through an order of the Commission pursuant to section 13(c) of the *NPA*. Such an order, if it existed, would authorize the appointment of the Co-op as the agent of the Board, prescribe the duties and terms and conditions of employment and to provide for remuneration.

While the Commission cannot purport to understand exactly what the Legislature of New Brunswick intended by section 13(c) of the *NPA*, the provision does mitigate the risk of inadequate oversight by the principal. When the priorities and directions of the SNB Board and Co-op are in alignment, problems with the nature of this relationship may not have been obvious. Despite this fact that it may not have been obvious, the Commission is of the opinion that substantial risk has existed as a result of this relationship. Due to the nature of this relationship, the SNB Board is not in a position to directly observe the agent’s (Co-op’s) activities. This case is further complicated by the fact that the Co-op manager, who also purportedly serves the SNB Board as the “appointed manager”, is in the almost impossible situation of serving both organizations concurrently.

Further, the *NPA* does not contemplate giving the authority to a Marketing Board to delegate their powers to another person. This is also evident in section 13(c) where the terms “prescribing their duties” are used. In the Commission’s opinion, the Legislature’s use of these words indicate that the Act intends to allow for an agent to conduct duties on behalf of a Marketing Board, but not powers. In this case, the Co-op is virtually conducting all of the business of the SNB Board with the exception of holding SNB Board meetings. As stated above, the Commission does not question whether or not there is a principal/agent relationship. However, the fact that the Co-op is virtually the hands and feet of the SNB Board, this leads the Commission to question whether the extent of the relationship between the Co-op and SNB Board is only the exercise of *duties* or actually the exercise of *powers*.

REMEDIAL ACTIONS

Based on the above, the Commission finds that the SNB Board is not compliant with provisions of the *NPA*. In order to return the SNB Board to compliance, the Commission orders the following:

1. Within 30 days of receipt of this report, the SNB Board must notify the Co-op that the Services Agreement dated February 20, 2017 has not been authorized by or through an order of the New Brunswick Forest Products Commission and is not

compliant with section 13(c) of the *Natural Products Act*. As a result, the Commission does not recognize the Services Agreement as a valid or legal appointment of the Co-op as the SNB Board's agent. Before contemplating any appointment of an agent for the SNB Board, the Board of Directors must communicate with the New Brunswick Forest Products Commission to seek authorization within the provisions of 13(c) under the NPA.

2. Pursuant to section 9(c) of Regulation 2005-146 under the Natural Products Act, the SNB Board must hire employees that are free from conflict of interest, assign their duties and fix their remuneration. (within 90 days)
3. Organizational control must be retained by the SNB Board. This is to mean that any of the activities that are currently conducted by the Co-op that are, or can be construed to be, the direct responsibility of, or an exercise of the powers of the SNB Board, must cease and be retained by employees and controlled and directed by the SNB Board of Directors. (within 90 days)
4. The SNB Board must provide an action plan with regard to implementation of the abovementioned orders of the Commission within 30 days of receipt of said orders. The action plan must include details with regard to organizational structure, financial management, and operations.
5. Collect on any and all cash, receivables and/or levies due from the Co-op to the SNB Board.(immediately)
6. The Chairman of the SNB Board is to provide a weekly update in writing to the Commission with regard to progress of implementation of the action plan.