



## **RULING ON OBJECTION**

**IN THE MATTER OF** an application by Irving Oil Marketing G.P. and Irving Oil Commercial G.P. requesting an increase in the maximum wholesale margins for motor fuels and furnace oil pursuant to section 1.1 and subsection 12(1) of the *Petroleum Products Pricing Act* and subsection 9(1) of the *General Regulation – Petroleum Products Pricing Act*.

### **Ruling regarding objections to a Claim for Confidentiality**

(Matter No. 486)

February 1, 2021

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

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(Matter No. 478)

**NEW BRUNSWICK ENERGY AND UTILITIES BOARD:**

Acting Chairperson: François Beaulieu

Members: Michael Costello

Patrick Ervin

Counsel: Matthew Letson

Chief Clerk: Kathleen Mitchell

**APPLICANTS:**

Irving Oil Marketing G.P. and Irving Oil Commercial G.P.: Len Hoyt, Q.C.

**INTERVENERS:**

Canadian Union of Public Employees: Aditya Rao

Common Front for Social Justice New Brunswick: Abram Lutes

Grassroots NB: Hafsa Mohammad

Leap4wards:

Lynaya Astephen

The Scholten Group:

Chris Scholten

Jerry Scholten

Solidarité Fredericton Solidarity:

Jennifer Bueno

Simon Ouellette

**PUBLIC INTERVENER:**

Heather Black

## **RULING ON OBJECTION**

- [1] On January 25, 2021, a pre-hearing conference was held in this matter. At the pre-hearing, certain parties expressed an intention to object to a Claim for Confidentiality (Claim) dated January 19, which was filed by Irving Oil Marketing G.P. and Irving Oil Commercial G.P. (Applicants or Irving Oil). This replaced an earlier claim dated January 5.
- [2] The Board directed that any party wishing to file an objection to the Claim do so by January 28 at 4:30 p.m.
- [3] This ruling deals with Notices of Objection filed pursuant to Rule 6.4.3 of the Board's Rules of Procedure (Rules of Procedure) by the Common Front for Social Justice New Brunswick (Common Front) and Grassroots NB dated January 28.
- [4] The Board also received correspondence from the Canadian Union of Public Employees, Leap4wards and Solidarité Fredericton Solidarity, concurring with the arguments and orders sought in the Notice of Objection filed by the Common Front.
- [5] A public interest hearing was held on January 29, pursuant to Rule 6.4.6 b), at which time the Board heard submissions from Irving Oil, the Interveners opposing the Claim and the Public Intervener.
- [6] In its Claim, the Applicants allege that certain documents contain proprietary, financial, and/or commercially sensitive information in relation to Irving Oil and its affiliates. Because some evidence was replaced, the current versions of the evidence for which the Claim is made are:
- a. Revised Evidence of Irving Oil, dated January 19, 2021; and
  - b. Affidavit of Darren Gillis, dated January 19, 2021.
- Mr. Len Hoyt, Counsel for Irving Oil, confirmed that the Claim would also be applicable to the evidence previously filed on January 5.
- [7] The above referenced documents were provided to the Public Intervener, pursuant to a Confidentiality Undertaking, as well as to applicable Board staff, counsel for Board staff and members of the Board. Redacted copies of the documents were posted on the Board's website and were accessible to all parties and the general public.
- [8] The Common Front and Grassroots NB object to the Claim for the following reasons:

- a. That the information is not established as confidential in nature, and that the onus to establish the confidentiality rests with Irving Oil. Further, sufficient reasons for their claims for confidentiality were not provided;
- b. That crucial financial information is being withheld from the interveners who wish to fully examine these claims for confidentiality;
- c. That the interveners have public interest concerns relating to allowing only the Public Intervener and their experts to view the materials; and
- d. That limited disclosure of the information to other parties to the proceeding, or their designated recipients, should be permitted.

[9] The Board heard arguments from Mr. Hoyt; Mr. Abram Lutes, a Provincial Coordinator of the Common Front; Ms. Hafsa Mohammad, an Organizational Representative & Community Advocate of Grassroots NB; and Ms. Heather Black, the Public Intervener.

[10] Mr. Hoyt submitted that the redacted information falls within the definition of confidential information, as set out in Rule 1.3.1 of the Rules of Procedure.

[11] Referring to section 34 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18, Mr. Hoyt submitted that the first part of that section, being cost of operations, have clearly been met. Further, he noted that under section 34, the onus is on those objecting to claims for confidentiality to establish that disclosure is necessary in the public interest. He argued that the onus has not been met and that such disclosure would provide financial and other commercially sensitive information detrimental to Irving Oil's competitive position.

[12] Mr. Hoyt also submitted that the public can have confidence, knowing that members of the Board, Board staff and the Public Intervener all have access to the confidential information, and are able to test Irving Oil's evidence and arguments.

[13] He noted that if the Claim is denied, Irving Oil will not be in a position to submit sufficient evidence to make its case. This will make it difficult for not only Irving Oil but also other wholesalers and retailers to make any case for adjusting margins as contemplated under the *Petroleum Products Pricing Act*, S.N.B. 2006, c. P-8.05 (PPPA).

- [14] In addition to the arguments in the Common Front’s Notice of Objection, Mr. Lutes maintained that it is the Applicants’ responsibility to establish the confidentiality of the information. In his view, since his organization does not have access to the information, it is not possible to establish why the information should be confidential. While Mr. Hoyt referred the Board to previous decisions, Mr. Lutes submitted that the Board is not bound by them.
- [15] Ms. Mohammad confirmed that Grassroots NB’s Notice of Objection was identical to that filed by Common Front. She argued that, despite Mr. Hoyt’s assertion that the information is confidential, it had not been proven. She submitted that there was an issue with respect to the disaggregation of data and that public interest is relative. She argued that by adding many interveners, it would enhance the robust nature of this information and that any legal loopholes could be addressed. On the issue of withdrawal pursuant to Rule 6.4.11, she noted that if the Applicants were able to withdraw their evidence, the Board would not be able to make a determination.
- [16] Section 16 of the PPPA states:
- 16(1)** Where information obtained by the Board concerning the costs of a person in relation to the operations of the person that are regulated under this Act, or other information that is by its nature confidential, is obtained from such person in the course of performing its duties under this Act, or is made the subject of an inquiry by any party to any proceeding held under the provisions of this Act, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.
- [17] The Board must accordingly make a determination whether the information contained in the evidence for which the Claim applies is, by its nature confidential, and if so, whether such publication or revelation is necessary in the public interest.
- [18] The Rules of Procedure defines “confidential information” as including “...any personal, business, public security or operational information within the knowledge or possession of a person which is accessible only by those authorized to have access, or any other information deemed by the Board to be confidential in nature.”
- [19] The Board finds that the redacted information is consistent with the above definition, subject to one exception as set out below.
- [20] In the current circumstances, certain Interveners and members of the public will not have access to the confidential versions of the evidence to which the Claim applies.

The Board is satisfied that the roles of the Public Intervener and Board staff are sufficient to ensure that the public interest is served in this proceeding.

- [21] The role of the Public Intervener is set out in *An Act Respecting a Public Intervener for the Energy Sector*, S.N.B. 2013, c. 28. That role is to advocate in the public interest in matters before the Board. In so doing, the Public Intervener may present evidence, call witnesses, cross-examine witnesses, and make submissions and representations to the Board.
- [22] In addition, Board staff may file evidence and call witnesses to provide the Board with a complete record. Mr. Jason Parent, Managing Director at the Kent Group Ltd., has been retained by Board staff to review and evaluate the wholesale margin regulatory regime.
- [23] The Board must protect confidential evidence from being published or revealed. For example, this protects the provider of such information from the risk of financial harm by denying key information that might advantage competitors.
- [24] Conversely, if the Board were to make such information freely available, parties in future proceedings would be reluctant to provide certain key evidence that the Board requires in order to make well informed decisions.
- [25] The Board has considered the submission of the parties and reviewed the confidential evidence in this matter. The Board orders as follows:
- a. In relation to the Revised Evidence of Irving Oil dated January 19: At page 4, question 10, the redacted second sentence in the second paragraph shall be revealed, with the exception of the financial amount within the sentence. All other redacted information shall remain confidential. This also applies to the equivalent content of the January 5 document.
  - b. In relation to the affidavit of Darren Gillis dated January 19: This document is to remain confidential.
  - c. These confidential documents shall be provided to the Public Intervener, Mr. Matthew Letson as Counsel for Board staff, and their respective retained experts. Each individual is required to sign a Confidentiality Undertaking.
- [26] Mr. Hoyt requested clarity as to how Rule 6.4.11 would be applied, which states:

**6.4.11** Subject to Rule 6.4.13, where the Board makes an order under Rule 6.4.7, the party who filed the document may, prior to the Board implementing such order, request that it be withdrawn.

- [27] He submitted that the intention of Rule 6.4.11 is to permit any party seeking a Claim for Confidentiality to withdraw a confidential document in the event that the document is ordered to be published or revealed. In his view, a party should be offered the opportunity, before implementing any Board's order, to not place the information on the public record.
- [28] The Board concludes that, until an implementation order is made, a party may choose to withdraw, under Rule 6.4.11, that portion of the evidence to be published or revealed. If a party wishes not to withdraw the information, it will be considered as part of the evidence upon being marked as an exhibit.
- [29] The above order shall be implemented by February 1, 2021 at 2 p.m.

Dated in Saint John, New Brunswick, this 1<sup>st</sup> day of February, 2021.

Handwritten signature of François Beaulieu in black ink.

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François Beaulieu  
Acting Chairperson

Handwritten signature of Michael Costello in blue ink.

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Michael Costello  
Member

Handwritten signature of Patrick Ervin in black ink.

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Patrick Ervin  
Member