



RULING ON MOTION

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*.

(Matter No. 486)

February 17, 2021

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*.

(Matter No. 486)

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

Grassroots NB: Hafsah Mohammad

Leap4wards: Lynaya Astephen

New Brunswick Common Front for Social Justice:

Abram Lutes

Solidarité Fredericton Solidarity:

Simon Ouellette

The Scholten Group:

Jerry Scholten

PUBLIC INTERVENER:

Heather Black

A. Introduction

- [1] This ruling arises from a Notice of Motion filed by Irving Oil Marketing G.P. and Irving Oil Commercial G.P. (Applicants) on January 19, 2021. The motion is made in accordance with section 1.1 and subsection 12(1) of the *Petroleum Products Pricing Act*, S.N.B. 2006, c. P-8.05 (PPPA); subsection 9(1) of *General Regulation – Petroleum Products Pricing Act*, N.B. Regulation 2006-41; and section 40 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (EUB Act).
- [2] The Applicants seek an interim order approving (a) an immediate, non-rebatable interim increase of \$0.035 per litre in the maximum wholesale margin for motor fuels; (b) an immediate interim increase of \$0.030 per litre in the maximum wholesale margin for furnace oil; and (c) such further directions as may be necessary or appropriate.
- [3] The Applicants cite the following reasons for the motion:
- a. By Revised Application dated January 19, the Applicants applied for a \$0.0409 per litre increase in the maximum wholesale margin for motor fuels and a \$0.0302 per litre increase in the maximum wholesale margin for furnace oil;
 - b. Due to the anticipated delay between the date of the application and a final decision is rendered, there are risks to the security of supply, which requires immediate and urgent action by the Board;
 - c. The anticipated delay will have a deleterious impact on the Applicants' financial position and such delay could result in challenges maintaining a reliable supply to all or some markets; and
 - d. The Applicants propose that no portion of the interim increase in the maximum wholesale margin for motor fuels would be rebatable, given the inability to effectively and fairly provide a rebate. If the final maximum wholesale margin increase for furnace oil is lower than the interim increase, however, such over-collection will be rebated.
- [4] In support of its motion, the following evidence was filed: (a) Revised Evidence of Irving Oil, dated January 19, which replaced earlier filed evidence; and (b) Affidavit of Mr. Darren Gillis, President of Irving Oil Marketing G.P. and Irving Oil Commercial G.P., sworn on January 19.

- [5] In advance of the motion hearing, the Board received a written submission from the New Brunswick Common Front for Social Justice (Common Front). Grassroots NB, Leap4wards and Solidarité Fredericton Solidarity submitted other documents in support of their arguments.
- [6] Letters of comment were received from members of the public, which are part of the public record in this proceeding. Most of the letters addressed issues relevant to the application, and not whether interim margin adjustments should be permitted.
- [7] A public hearing of the application is scheduled to be held on April 26 to April 28. This will be followed by a final order of the Board.
- [8] A hearing of the motion was held on February 5. Mr. Gillis was cross-examined by Mr. Aditya Rao, Human Rights Representative at the Canadian Union of Public Employees (CUPE); Mr. Abram Lutes, Provincial Coordinator at the Common Front; Ms. Hafsah Mohammad, Organizational Representative at Grassroots NB; Dr. Beth McCann, a representative at Leap4wards; and Mr. Simon Ouellette, a volunteer at Solidarité Fredericton Solidarity.

B. Legislative Framework

- [9] Section 1.1 of the PPPA applies to this motion:

1.1 The Board shall, when making a decision under this Act respecting prices, margins, delivery costs or full service charges, consider the fact that consumers should benefit from the lowest price possible without jeopardizing the continuity of supply of petroleum products.

- [10] Section 40 of the EUB Act is also applicable:

40(1) The Board may, with respect to any matter before it, make an interim order where it considers it advisable to do so, and may impose such terms and conditions as it considers appropriate.

40(2) The Board may provide directions in the event that the interim order is different from the final order.

C. Issues

- [11] The Board will address the following issues:

1. Will there be a significant delay in the process leading to a final decision?

2. Will such delay cause a deleterious impact on the Applicants?
3. Does an exceptional circumstance exist?
4. Can any discrepancy between an interim order and the final determination be reviewed and remedied?

D. Analysis

- [12] Mr. Hoyt submitted that section 40 of the EUB Act authorizes the Board to grant interim orders. He stated that such orders must be made in an expeditious manner, based on the evidence available at the time of the hearing, which evidence would often be insufficient for the purposes of the final decision.
- [13] He also submitted that the Applicants have demonstrated that the length of the delay will cause it to suffer deleterious impacts and potentially jeopardize the continuity of supply of petroleum products in New Brunswick.
- [14] A number of interveners opposed the motion and presented arguments which are summarized below.
- [15] Mr. Lutes submitted that the Applicants did not provide sufficient evidence for an interim increase. He acknowledged that the requirements for an interim increase are lower than for a final increase, but stated that “less evidence is not the same as no evidence.” He was concerned about the impact that any interim adjustment would have on individuals living in poverty.
- [16] Ms. Mohammad submitted that the Applicants have not provided sufficient evidence for interim increases for both motor fuels and furnace oil. In her view, “...the interim increases are more than 11 percent growth in inflation that has occurred since the wholesale margins were last increased in March 2013, the request for an interim increase ought to be rejected by the Board due to insufficient, false, or contradictory evidence.” She stated that the Applicants claimed to have suffered hardship due the global pandemic but that no such evidence had been submitted.
- [17] Ms. Mohammad argued that even though an interim increase for furnace oil could be rebated after the final decision, the damage which would be caused to low- and middle-income families could be irreparable.

- [18] Mr. Mark Cunningham, on behalf of Mr. Rao, stated that CUPE opposes an interim increase and that the Applicants provided very little supporting evidence. He argued that the test set out by the Board has not been met. He also addressed the Board's discretion to consider exceptional circumstances. He acknowledged that although the pandemic is outside the Applicants' control, the Applicants should have anticipated its impact.
- [19] Mr. Ouellette opposed the requested interim adjustments. He stated that the pandemic has had an impact on low-income individuals. His organization was concerned about any adjustment to furnace oil.
- [20] Ms. Heather Black, the Public Intervener, opposed the motion on two grounds. First, the Applicants are not able to offer a rebate in case of over-collection for motor fuels to customers. Second, the motion does not meet the test for an interim order as the Applicants have not established a *prima facie* case to support its requested interim adjustments.
- [21] The Board considered a motion for an interim order in Matter 307. In its decision, the Board stated that interim increases are made based on *prima facie* evidence, which would typically be insufficient for the purposes of a final decision. The Board noted that rate increases should generally be granted following a full hearing, with interim increases being the exception.
- [22] The Board also established certain principles to be applied when deciding whether it is advisable to make an interim order and stated:
- [37] First, the Board should only grant an interim rate if there will be a significant delay in the process that would lead to a final decision following a full hearing on the merits.
- [38] Second, the applicant must show that such a delay would have a deleterious impact on the applicant. Whether an impact is deleterious depends on the circumstances, but mere evidence of a shortfall is not sufficient.
- [39] Third, the Board retains an overall discretion to deny an interim rate increase request. Even if the two previous tests are met, the granting of interim relief should only be done in exceptional circumstances. Such circumstances could include, for example, that a significant delay was beyond the control of the applicant or could not have been reasonably anticipated.
- [40] Finally, the fact that the Board can order the applicant to rebate any over-collection of revenue, following its final decision, cannot be part of a justification for an interim increase. A direction of this nature can only follow a determination that an interim order is advisable.

[23] These principles are reviewed below, in relation to the current motion.

1. Significant Delay

[24] Mr. Hoyt argued that the hearing, originally scheduled to start on March 30, is now commencing on April 26, which, he submitted, could be further delayed as a result of the COVID-19 pandemic.

[25] While the Board's test uses the term "significant delay", Mr. Hoyt noted that *Bell Canada v. (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (Bell Case), a leading case on interim relief, used the terms "length" and "duration." He submitted that the delay is of such a length as to warrant interim relief, because a final decision may not be issued until October, 2021. He referred to a nine-month period in adjusting the wholesale margins in Matter 181.

[26] Mr. Hoyt mentioned that even though there may only be four or five months until a final decision is rendered in this matter, this proceeding has already seen delays that would make a decision a lot closer to nine months. He also noted that the Applicants were unable to make their application earlier than in January 2021 because of the COVID-19 pandemic.

[27] Although Mr. Gillis referred to the nine-month period in Matter 181, there is nothing before the Board to suggest that this will be the case in this proceeding. The Applicants have not demonstrated that there will be a significant delay between the time of its application and the time a final decision will likely be rendered.

[28] Accordingly, the Board is not satisfied that there will be a significant delay in the process. Any delay would only result from a significant change in the current filing schedule. Given that the hearing is scheduled to conclude on April 28, the Board anticipates that a decision would likely be rendered in May.

2. Deleterious Impact

[29] Mr. Hoyt argued that a delay between the application and a final decision will cause deleterious effects on the Applicants. He submitted that an interim order is intended to protect an applicant from a deterioration in its financial position. As stated by Mr. Gillis, delaying the requested interim increases for a period of nine months would result in a decrease of millions of dollars in revenue for the Applicants.

[30] Ms. Black submitted that a deleterious impact cannot be proven by mere financial shortfall. This was echoed by CUPE.

[31] Mr. Hoyt also argued that there is a concern with the security of the petroleum supply. He stated that this concern is a key difference from prior applications for increases in either wholesale or retail margins. In his view, section 1.1 of the PPPA is an overriding consideration, and that for the purposes of its request, it is the primary basis for immediate action.

[32] Ms. Black stated that section 1.1 of the PPPA suggests that consumers should benefit from the lowest price possible without jeopardizing supply. In her view, the Applicants have not established, even on a *prima facie* basis, whether or to what extent the current wholesale margin is squeezing wholesalers such that continuity of supply is jeopardized during a regulatory delay. She argued that the evidence submitted by the Applicants was largely composed of broad statements about the petroleum industry as a whole, the effects of regulation in general, and the effects of the pandemic on the Applicants.

[33] In the Bell Case, the Supreme Court of Canada stated:

...there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable. [Emphasis added]

[34] The Board concludes that the Applicants have not demonstrated on a *prima facie* basis that such a delay would have a deleterious impact on either Irving Oil Marketing G.P. or Irving Oil Commercial G.P. The Board believes that a nine-month delay is not likely in this current matter. In addition, the Board has no conclusive evidence of any serious apprehended financial difficulties caused by the current duration of this proceeding on the Applicants.

[35] In the context of the PPPA, an appropriate test when evaluating the deleterious impact principle, is whether there is a *prima facie* case that the current wholesale margin is jeopardizing the continuity of supply during the regulatory process. Should this be established, the amount of the requested increase would then need to be evaluated as to whether it is the appropriate increase to alleviate that risk.

[36] The Board concludes that the Applicants have not established that current wholesale margins for motor fuels and furnace oil are such that security of supply will be jeopardized during the period between its application and the likely timeframe of the Board's final decision in this matter.

3. Exceptional Circumstances

[37] As the Board stated in Matter 307, even if the above tests have been met, the granting of interim margin adjustments should generally only be done in exceptional circumstances. An example would be where a significant delay is beyond the control of the applicant or could not have been reasonably anticipated.

[38] The Applicants submitted that the current COVID-19 pandemic could not have been anticipated and has had a significant impact on its costs and on the petroleum industry generally.

[39] Ms. Black argued that, even if the Applicants meet the *prima facie* tests, the motion should be granted only in exceptional circumstances. She submitted however, that the Applicants have not met the *prima facie* tests.

[40] As the Board has found that the Applicants have not met the tests of significant delay and deleterious impacts, an evaluation as to whether these circumstances are exceptional is not required.

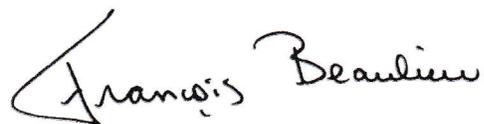
4. Review and Remedy of any Effect and Discrepancy

[41] Subsection 40(2) of the EUB Act gives the Board the authority to provide directions in the event an interim order is different from the final order. As the Board will not be issuing an interim order, this does not need to be considered.

E. Conclusion

[42] The Board concludes that the Applicants have not met the principles to be applied for an interim order. The Applicants have not established a *prima facie* case to support their motion in relation to both motor fuels and furnace oil. The motion is therefore denied.

Dated at Saint John, New Brunswick, this 17th day of February, 2021.

Handwritten signature of François Beaulieu in cursive script.

François Beaulieu
Acting Chairperson

Handwritten signature of Michael Costello in cursive script.

Michael Costello
Member

Handwritten signature of Patrick B. Ervin in cursive script.

Patrick Ervin
Member