THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket PD901
Order PC05-01

IN THE MATTER of applications by Loblaw Properties Limited for initial licenses for retail petroleum outlets in Charlottetown, Montague, Summerside and Woodstock.

BEFORE THE COMMISSION

on Thursday, the 15th day of December, 2005.

Maurice Rodgerson, Chair
Brian McKenna, Vice-Chair
Weston Rose, Commissioner
James Carragher, Commissioner

Order

Compared and Certified a True Copy

(Sgd) *Donald G. Sutherland*

Technical and
Regulatory Services Division

IN THE MATTER of applications by
Loblaw Properties Limited for initial licenses for
retail petroleum outlets in Charlottetown,
Montague, Summerside and Woodstock.

Reasons for Order

1. Introduction

[1] These Reasons for Order address applications filed with the Commission on September 19, 2005 by Loblaw Properties Limited (the "Applicant" or "Loblaws") for initial licenses for retail petroleum outlets in Charlottetown, Montague, Summerside and Woodstock, P.E.I. The applications are filed pursuant to the *Petroleum Products Act*, R.S.P.E.I. 1984, Cap P-5-1 (the "*Act*"), which requires, among other things, a license from the Commission in respect of each outlet operated by a retailer.

[2] Section 20 of the *Act* sets forth the criteria the Commission must consider when issuing a license:

> *20. When issuing a license with respect to the operation of an outlet operated by a retailer, the Commission shall consider the public interest, convenience and necessity by applying such criteria as the Commission may from time to time consider advisable including but not restricted to the demand for the proposed service, the location of the outlet, traffic flows and the applicant's record of performance.*

2. Procedure for Review

[3] The applications filed by Loblaws were published by the Commission in the province's two daily newspapers, *The Guardian* and the *Journal-Pioneer,* in late October and also publicly noticed on the Commission's website on and after October 25, 2005. Among other things, the *Notice of Applications* (the "Notice") stated, in part, as follows:

> *If you wish to comment on the applications, you can write to the Commission at the address below. Comments must be received by Thursday, November 10, 2005 in order to be considered. Comments provided to the Commission must also be forwarded to the Applicant at the address below.*

> *The Commission will determine the necessity of a public hearing into these applications following receipt of written comments.*

[4] In response to the Notice, the Commission received 84 written submissions, seven of which requested a hearing. It is noted that the seven respondents who requested a hearing are represented by either Eugene P. Rossiter, Q.C. or by Spencer Campbell. Many of the submissions relate to the requirements of Section 20 of the *Petroleum Products Act.*

[5] On the issue of whether a public hearing is necessary, Mr. Rossiter, counsel for a number of operators of existing petroleum outlets, submits, in part, as follows:

> *A public hearing is essential for various reasons. First, the Applicant seeks not one, but four new petroleum products licenses. Accordingly, the Applications, if successful, would have a significant impact on Prince Edward Island, including the rural areas. Loblaws would have gas bars in all three counties.*
>
> *Many public hearings have been held in connection with applications for petroleum products licenses in the past. In those hearings, only one license was sought, yet the Commission exercised its discretion in favour of holding a public hearing. It only stands to reason that if one Applicant seeks four licenses at the same time, the Commission should again exercise its discretion in favour of a public hearing.*
>
> *Further, there have been many comments filed by various sectors of the public in respect of these applications. As you are aware, in deciding whether to issue a license, the Commission is required to consider "the public interest, convenience and necessity". In our view, in considering the public interest, convenience and necessity in app1ications such as the present ones, it is necessary to hear from the publ1c. We, on behalf of our clients (the owners and/or operators of 43 retail gas outlets in Prince Edward Island) have a great deal of evidence to present to the Commission. This can only be done by way of a hearing, which will also give the Applicant an opportunity to respond to the evidence presented.*
>
> [Written submission of Eugene P. Rossiter, Q.C., dated November 29, 2005]

[6] The Commission notes that Mr. Campbell, representing another 38 owners or operators or both owners and operators of retail outlets, agrees with Mr. Rossiter's submissions and submits that a public hearing is necessary.

[7] The Applicant, Loblaw Properties Limited ("Loblaws") submits, in part, as follows:

> *In respect to the need for a Public Hearing to deal with this matter we have not seen any evidence raised by any of the correspondents/interveners to justify the expansion of this process by way of a Public Hearing.*
>
> *Ample opportunity has been given to allow for detailed input by all parties.*
>
> *We believe the Commission can judge the matter based on the information before it and render a decision in a timely matter (sic) to the benefit of all parties.*
>
> [Written submission of Brian Gillis, dated November 21, 2005]

[8] The requirement for a public hearing into licensing applications is discretionary. Section 38(1) of the *Petroleum Products Act* reads as follows:

> *38. (1) The Commission of its own motion may, and on the request of the Lieutenant Governor in Council shall, conduct a public hearing in respect of any matter involving licensing under this Act and any matter relating to the administration of this Act or the regulations.*

Although discretionary, this authority must be exercised reasonably and in a manner consistent with the overall purposes of the *Petroleum Products Act*.

[9] The principles of natural justice have developed in administrative law to provide a party with an interest in a proceeding with an opportunity to be heard before a decision contrary to that interest is made. Over time, the principles of natural justice have evolved into a general duty of procedural fairness which is owed by an administrative tribunal to those potentially affected by its decisions.

[10] In general terms, the duty of fairness requires that the tribunal, or decision maker, give notice to interested participants about a decision it is contemplating, as well as disclosure of information that is relevant to the issue. The participants should then be provided with an opportunity to present evidence or argument or both. The steps that are required by a tribunal to fulfill the duty of procedural fairness vary with the specific context of each case and all of the circumstances must be considered in order to consider the context of the duty.

[11] The Supreme Court of Canada has made it clear that the right to participate in the decision-making process does not automatically mean that a party has a right to an oral or a public hearing. A leading case on procedural fairness is *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, a decision of the Supreme Court of Canada where the court held, among other things, that a decision, by itself, not to hold a hearing is not a denial of fair procedure. The court stated that a number of factors should be considered, including the governing legislation and the factual circumstances of the matter under consideration. The court went on to state, at paragraph 22, as follows:

> *I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.*

[12] *Baker* was decided in 1999. Last year, the statements in that case relating to the duty of fairness were confirmed by the Supreme Court of Canada in *Congregation des te moins de Jehovah de St. Jerome-Lafontaine v. Lafontaine (Minicipalite)*, [2004] 2 S.C.R. 650, where Chief Justice McLauchlan stated, at

paragraph 5, that the content of the duty of fairness on a public body varies according to five factors:

> *(1) the nature of the decision and the decision-making process employed by the public organization;*
> *(2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates;*
> *(3) the importance of the decision to the individuals affected;*
> *(4) the legitimate expectations of the party challenging the decision; and*
> *(5) the nature of the deference accorded to the body.*

[13] In *Baker*, as well, the Supreme Court of Canada discussed the narrower issue of when an oral hearing must be held (at paragraph 33):

> *However, it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances . . .*

[14] Finally, a review of the relevant case law indicates that a decision on whether to hold a public hearing is often influenced by consideration of expense, delay and inconvenience. In fact, the Supreme Court of Canada made the following observation in 1979, which was approved as a statement of principle earlier this year in a Newfoundland decision *(Johnson v. The Board of Commissioners of Public Utilities)*, [2005] NLTD 53:

> *. . . Fairness, however, does not necessarily require plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed . . .*

[15] The Commission has fully considered the submissions of the parties on this issue as well as the applicable law and is of the view that an oral hearing is not necessary to ensure a fair hearing and consideration of the issues involved. The Applicant and the interveners have been given an opportunity to submit material related to the applications and to make argument. The Commission believes that procedural fairness has occurred in these proceedings through the public noticing and commenting process and through public access to all of the documentary evidence submitted by the parties.

[16] It is, in the Commission's view, significant that the Applicant is relying on the information it has filed with the Commission while, at the same time, indicating that it believes that the applications can be dealt with at this time without the necessity of a public hearing. In the circumstances, and for the reasons that follow, it is our view that the applications that have been submitted do not require a public hearing.

3. The Applications & Interventions

[17] Section 20 of the *Act* is repeated below:

> ***20.*** *When issuing a license with respect to the operation of an outlet operated by a retailer, the Commission shall consider the public interest, convenience and necessity by applying such criteria as the Commission may from time to time consider advisable including but not restricted to the demand for the proposed service, the location of the outlet, traffic flows and the applicant's record of performance.*

[18] As noted above, the applications are for four new retail outlets. In support of the applications, Loblaws made the following written submission respecting the requirements of section 20:

> *Loblaws Proposed Retail Fuel Outlets in PEI*
>
> *The retail fuel outlets proposed by Loblaws are [intended] to meet with the relevant criteria as set out in Section 20 of the Petroleum Pricing Act.(sic).*
>
> *Loblaws is continually striving to improve its retail offer, both merchandise and services, to the general public and its customers. A strategy is to offer convenience to the consumer with a one-stop shopping philosophy. As such a retail fuel outlet located on the same lot as the main store offers such a convenience.*
>
> *By having the gas bar located on the same lot as the main store offers many benefits to both Loblaws and our customers (and general public).*
>
> *>The gas bar takes advantage of the built in customer base and draws off the traffic already drawn to the main store.*
>
> *>It encourages customers to save time by doing more of their shopping at one destination and avoid the inconvenience of multiple shopping stops.*
>
> *>The main stores typically have large parking lots which easily accommodate the addition of gas bars and which also facilitate efficient traffic flow within the parking lot and provides good ingress/egress with the adjacent streets/roads.*
>
> *Loblaws in addition to continually striving to improve its product and service offerings also provides excellent value and cost savings opportunities.*
>
> *>Customers of Loblaws retail fuel outlets have the opportunity to earn "autocash" and/or "PC Points" which can be redeemed for merchandise at the main store.*
>
> *>The above cross merchandising programs can provide significant value and cost savings to customers.*
>
> *Loblaws retail fuel outlets record of performance in other Provinces is such that it provides modern, efficient and effective facilities that lead to higher than industry standard sales. Similar performance for our proposed PEI retail fuel outlets is expected.*
>
> *In summary Loblaws retail fuel outlets are [a] unique offering that is convenient for the customer, provides excellent value, offers cost saving opportunities and differentiates us from typical fuel outlets.*
>
> [Attachment to October 6, 2005 email from Brian Magdee, Loblaws]

[19] The above submission was made in respect of each of the four applications. In addition, the Commission received the following submission, also applicable to each application:

> *With respect to the applications made for retail gas outlets in Montague, Charlottetown, Summerside and O'Leary Corner the following factors should be considered:*
>
> *Loblaws, on whose behalf these applications are being presented, is Canada's leading grocery retailer who has developed innovative and value driven performance for its customers, operating from coast to coast in Canada.*
>
> *Loblaw's have brought such products as "President's Choice Financial" which offers customers core banking services along with other integrated customer loyalty programs under the President's Choice Branding.*
>
> *"At the Pumps" – offers Atlantic Superstore customers the opportunity to benefit from cross marketing of the grocer and gas product lines. This unique service has been implemented successfully in all markets in Canada with the exception of Newfoundland and PEI.*
>
> *This unique service can offer "real value" to consumers through discounts to their weekly purchases, helping householders to reduce their expenses during these periods of escalating prices. Additionally it opens the market to competitive forces that exist throughout Canada.*
>
> *There is the further benefit of creating investment in our Island economy and leveling the playing field with the other Maritime Provinces.*
>
> [Contents of letter dated September 28, 2005 from Brian Gillis on behalf of Loblaws]

[20] Apart from routine information required in the standard application forms used by the Commission—including a site plan for each proposed outlet and information on proposed promotional activities—the above constitutes the complete submission of Loblaws in relation to the requirements of section 20 of the *Act.*

[21] The Commission received 84 written submissions in response to the published Notice of Applications, most of them from existing petroleum licensees. All of the submissions oppose the applications, for several reasons, including:

- concerns over the loss of volume and business viability of existing retailers;
- concerns over possible harmful effects on rural communities through loss of employment;
- concerns over the prospects of unfair competition; and
- concerns that the requirements of public interest, convenience and necessity would not be satisfied with the issuance of the requested licenses.

[22] In response to the 84 written submissions, the Applicant made the following submission:

> *In response to the comments/interventions raised . . . there does not appear to be any information raised to deny the applications by [Loblaws].*
>
> *Society is an ever changing, dynamic and an evolving set of relationships. We witness everyday significant reworking of our economies with shifts in supply relationships whether it is in Transportation – THE JOINING OF THE ISLAND TO THE MAINLAND VIA A FIXED LINK, Communications – PHONE DEREGULATION OR THE GLOBAL BUSINESS NETWORK OF THE INTERNET and in Power Generation – SHIFT FROM OIL GENERATED ELECTRICITY TO WIND POWER. Islanders have embraced these changes which bring about a level playing field and real personal cost savings.*
>
> *This is a natural transition in the retail petroleum industry and yes, it will be resisted by parties that have a vested interest in the status quo.*
>
> *The four points we wish to stress are:*
>
> 1. *The Public interest is met in allowing Island consumers to have equivalent opportunity for participating in Customer Loyalty programs, just as in any adjacent market area.*
> 2. *Allowing consumers the convenience of cutting down on multiple trips and combining their purchasing power at a single location.*
> 3. *Necessity – by allowing new investment to be made in our local economy.*
> 4. *All of the sites selected are strategic, high-traffic locations with safe efficient access to the road network.*
>
> *The skill and excellence that [Loblaws] demonstrates on a daily basis with its retail programs from Coast to Coast are evidence of its record of performance and its ability to successfully carry out a retail gas bar program on Prince Edward Island.*
>
> *. . .*
>
> [Contents of letter dated November 21, 2005 from Brian Gillis on behalf of Loblaws]

[23] The requirements of section 20 of the *Act* have been discussed in numerous decisions and orders issued by the Commission over the years and need not, for the purpose of these reasons, be further discussed herein. These decisions and orders are readily available on the Commission's public website. In this instance, it is necessary to say only that the applications do not adequately address the specific criteria set out in section 20, nor do they contain sufficient information to enable the Commission to address whether the public interest, convenience and necessity require that any of the licenses be granted.

[24] While it is unknown to the Commission whether the Applicant carried out any research into the requirements of section 20, it is clear to the Commission that Loblaws has not put its mind to the requirements. There is little, if any, evidence addressing the requirements. The mere desire on the part of Loblaws to open the proposed outlets is simply not enough.

[25] The Commission finds that the Applicant has not, in respect of each of the four applications filed herein, persuaded the Commission that the licenses

applied for under section 20 of the *Act* should be issued. The applications are therefore dismissed.

4. Disposition

[26] An Order dismissing the applications will therefore issue.

IN THE MATTER of applications by Loblaw Properties Limited for initial licenses for retail petroleum outlets in Charlottetown, Montague, Summerside and Woodstock.

Order

UPON reading and considering the applications and the submissions filed herein;

NOW THEREFORE, for the reasons given in the annexed Reasons for Order;

IT IS ORDERED THAT

the applications are dismissed.

DATED at Charlottetown, Prince Edward Island, this 15th day of December, 2005.

BY THE COMMISSION:

(Sgd) *Maurice Rodgerson*
Maurice Rodgerson, Chair

(Sgd) *Brian McKenna*
Brian McKenna, Vice-Chair

(Sgd) *Weston Rose*
Weston Rose, Commissioner

(Sgd) *James Carragher*
James Carragher, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.*

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