

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 4, 2022

IN THE MATTER OF sections 91, 92, 94, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Sears Canada Inc., Concord North Hill GP Ltd., and Suncor Energy Inc. of Environmental Protection Order No. EPO-2018/01-SSR and Amendment No. 2 to Environmental Protection Order No. EPO-2018/01-SSR issued by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: Costs Decision: *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (4 February 2022), Appeal Nos. 17-069-070 and 18-013-CD (A.E.A.B.), 2022 ABEAB 6.

BEFORE:

Ms. Meg Barker, Panel Chair and Board Member; Ms. Anjum Mullick, Board Member; and Mr. Chris Powter, Board Member.

PARTIES:

Appellants: Sears Canada Inc. and FTI Consulting Canada Inc. (the Court Appointed Monitor), represented by Mr. Alan Merskey and Ms. Kellie Johnston, Norton Rose Fulbright Canada LLP.

Concord North Hill GP Ltd., represented by Mr. Daniel Collins, Dentons Canada LLP.

Suncor Energy Inc., represented by Mr. Paul Cassidy and Ms. Kimberly Howard, McCarthy Tetrault LLP.

Director: Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball and Mr. Lee Plumb, Alberta Justice and Solicitor General.

Intervenors: BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd., represented by Mr. Dufferin Harper, Blake, Cassels & Graydon LLP.

Ms. Linda Barron.

Hounsfield Heights Landowners Group, represented by Mr. Gavin Fitch, McLennan Ross LLP.

EXECUTIVE SUMMARY

Sears Canada Inc. was the original owner of a service station in Calgary, Alberta. Sears operated the service station from 1958 until 1984. A predecessor company of Suncor Energy Inc. operated the service station on behalf of Sears from 1984 until the service station was decommissioned in 1994. Concord North Hill GP Ltd. purchased the former service station site from Sears in 2015. Liquid petroleum hydrocarbons (gasoline) were discovered in the soils under the service station site in 1984. The contamination migrated underneath a shopping mall to the west and below a residential neighbourhood, known as Hounsfield Heights, to the south.

Sears had been working to remediate and risk manage the contamination both on and off the service station site until the end of 2017 when it advised Alberta Environment and Parks (AEP) that it was insolvent, and it would no longer be able to continue the remediation work. In response to this information, AEP issued an Environmental Protection Order (the EPO). In the EPO, AEP found that Sears, Concord, and Suncor were “persons responsible” under the *Environmental Protection and Enhancement Act* and named them as parties to the EPO. Sears, Suncor, and Concord appealed the EPO to the Board. The Board granted intervenor requests from the following:

- BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd., the owners of the shopping centre next to the service station (the Mall Owners);
- Hounsfield Heights Landowners Group (HHLG), a group of residents of the Hounsfield Heights community; and
- Ms. Linda Barron, a resident of the Hounsfield Heights community.

The Board held a hearing on the appeal and made recommendations to the Minister of Environment and Parks. Based on the Board’s recommendations, the Minister issued a Ministerial Order varying the EPO.

The Minister ordered that:

- (a) the naming of Sears and Suncor as parties to the EPO be confirmed;
- (b) Concord be removed as a party to the EPO; and
- (c) the terms and conditions of the EPO be varied.

At the hearing, the Mall Owners, HHLG, Suncor, and Concord reserved their right to request costs. Sears stated they would not seek costs. Ms. Barron made a late application to reserve her right to request costs. After the Board released its Report and Recommendations and the Minister's Order, Concord, the Mall Owners, HHLG and Ms. Barron filed costs applications with the Board on February 25, 2020. Sears, Suncor, and the Director, did not file costs applications.

The costs applications claimed amounts as follows:

- Concord for \$21,170.00;
- Mall Owners for \$55,782.36;
- HHLG for \$36,568.50; and
- Ms. Barron for \$503.89.

The Board reviewed the costs applications and the response comments on the applications from Concord, the Mall Owners, HHLG, Ms. Barron, Sears, and Suncor, to determine if costs should be awarded.

The Board awarded costs as follows:

- HHLG was awarded a total of \$25,463.80 for legal and consultant costs;
- Ms. Barron, Concord, and the Mall Owners' costs applications were denied.

The Board ordered Sears and Suncor to each pay half the costs awarded.

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I. BACKGROUND

[1] This is the costs decision of the Environmental Appeals Board (the “Board”) dealing with appeals of Environmental Protection Order No. EPO-2018/01-SSR (the “EPO”) and Amendment No. 2 to the EPO, issued under section 113(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).¹ The EPO was issued by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the “Director”) to Sears Canada Inc. (“Sears”) and Concord North Hill GP Ltd. (“Concord”), for the release of liquid petroleum hydrocarbons, commonly referred to as gasoline (the “Substances”), into the environment from an automotive service centre and gas bar, located at Plan 8210266, Block 21 (the “Site”), in the City of Calgary, Alberta.

[2] The Director issued the EPO on February 28, 2018, naming Sears and Concord as “persons responsible” for the release of the Substances.² On October 11, 2018, the Director amended the EPO to add Suncor Energy Inc. (“Suncor”) as a person responsible for the release of the Substances.

[3] The Board received Notices of Appeal from Sears on March 6, 2018, from Concord on March 7, 2018, and from Suncor on October 17, 2018.

¹ Section 113(1) of EPEA provides:
“Subject to subsection (2), where the Director is of the opinion that
(a) a release of a substance into the environment may occur, is occurring or has occurred, and
(b) the release may cause, is causing or has caused an adverse effect,
the Director may issue an environmental protection order to the person responsible for the substance.”

² A “person responsible” is defined in section 1(tt) of EPEA as follows:
“In this Act, ... ‘person responsible’, when used with reference to a substance or a thing containing a substance, means
(i) the owner and a previous owner of the substance or thing,
(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

[4] The Board held a hearing in Calgary, on December 3, 4 and 5, 2019. Participants at the hearing were:

- The Director;
- Sears;
- Concord;
- Suncor;
- BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd. (collectively the “Mall Owners”);
- Hounsfield Heights Landowners Group (“HHLG”); and
- Ms. Linda Barron (“Ms. Barron”) (collectively, the “Parties”).

[5] Sears, Concord, and Suncor (collectively, the “Appellants”) were recognized by the Board as the Appellants, while the Mall Owners, HHLG, and Ms. Barron (collectively, the “Intervenors”) were granted intervenor status in the appeal.

[6] At the hearing, Concord, the Mall Owners, and HHLG reserved their right to file a costs application. After the hearing, on December 9, 2019, the Board received an email from Ms. Barron advising she would like to reserve her right to file a costs application.

[7] The Board released its Report and Recommendations along with Ministerial Order 09/2020, on February 5, 2020, signed by the Minister of Environment and Parks (the “Minister”).³ The Ministerial Order provided for the following:

- (a) the naming of Sears and Suncor as parties to the EPO was confirmed;
- (b) Concord was removed as a party to the EPO;
- (c) the terms and conditions of the EPO were varied to require the parties to the EPO to:
 - (i) make the remediation in the Hounsfield Heights neighbourhood and Lions Park the first priority;
 - (ii) submit annual reports to the Director outlining their attempts to
- (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)....”

³ *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (3 February 2020), Appeal Nos. 17-069-070 and 18-013-R (A.E.A.B.), 2020 ABEAB 6.

gain access to the properties in the Hounsfield Heights neighbourhood, as needed for the effective delineation and remediation of the Substances;

- (iii) update and revise the Revised Remediation Plan for submission to and approval by the Director on an annual basis, or other frequency determined by the Director, and make the Plan available to the residents of Hounsfield Heights;
- (iv) submit annual reports to the Director, and to the community, regarding the work done in the Hounsfield Heights neighbourhood during the previous year, the results of that work, and plans for the following year; and
- (v) assign a key contact person to respond to questions from the community within five business days and to work collaboratively with the residents of the Hounsfield Heights neighbourhood and the parties to the EPO to develop an effective two-way communication strategy.

[8] On February 25, 2020, the Board received the following costs applications after the release of the Report and Recommendations and the Ministerial Order:

- (a) Concord requested \$21,170.00 for legal fees related to preparation for and attendance at the hearing, to be paid by Suncor and Sears as the “persons responsible”;
- (b) Mall Owners requested \$55,782.36, which included \$37,621.00 for legal fees, \$13,543.75 for expert fees and \$4,617.61 for disbursements, to be paid by Suncor and Concord;
- (c) HHLG requested \$25,447.69 for legal fees and \$11,120.81 for consultant fees, to be paid by Sears and Suncor, for a total of \$36,568.50; and
- (d) Ms. Barron requested \$503.89 for printing costs. Ms. Barron also requested an undetermined reimbursement at the discretion of the Board for approximately 127 hours to prepare for and attend the hearing.

[9] The Board asked for comments in response to the costs applications. The Director had no comment on the costs applications stating no costs were claimed against him.

[10] The Parties were also requested to comment on the late filed costs application from Ms. Barron.

II. SUBMISSIONS

A. Concord

[11] Concord stated that its written submissions and participation in the hearing supported the efficient and responsible utilization of the Board's resources and materially assisted the Board's analysis of the issues, particularly the issue of which parties should be a "person responsible." Concord stated its costs were for 115.5 hours for a lawyer with four years' experience at \$140.00 an hour, for a total of \$16,170.00. Concord estimated that there were approximately 21 hours of hearing time and an additional 4.5 hours of preparation per hour of hearing time, for a total of 94.5 hours of preparation time.⁴ Concord requested the Board award an additional \$5,000.00 for meaningful participation and raising issues of importance, for a total of \$21,170.00.⁵

[12] Concord noted its total legal costs were more than \$350,000.00, and an award of \$21,170.00 would not alleviate Concord from bearing its share of the costs. Concord submitted section 2(i) of EPEA recognizes the responsibility of polluters to pay for the costs of their actions. As the Board determined Suncor and Sears to be "persons responsible," Suncor and Sears should be responsible for paying Concord's costs.

[13] Sears submitted it was reasonable for Concord to pay its own costs.⁶ Sears noted Concord did not present evidence that its participation would cause an unreasonable financial burden or that Concord needed financial assistance.

[14] Suncor stated the Board has previously awarded costs based on the value of the contribution made to the Board in preparing its report and recommendations for the Minister, but

⁴ Concord Costs Application, February 25, 2020, at paragraph 16.

⁵ Concord Costs Application, February 25, 2020, at paragraph 21.

⁶ Sears Response to Concord's Costs Application, March 10, 2020, at page 2.

Concord's participation was not substantial enough to surpass the participation of the other Parties and did not raise any significant issues in the public interest that furthered the goals of EPEA.⁷

B. Mall Owners

[15] The Mall Owners' requested \$37,621.00 for legal fees, \$13,543.75 for expert fees, and \$4,617.61 for disbursements, totaling \$55,782.36, to be paid by Suncor and Concord.⁸

[16] The Mall Owners submitted they were innocent adjacent landowners impacted by the release of the Substances like other adjacent landowners, and they never owned the Sears lands. As a result of being considered a "person responsible" and potentially being added to the EPO, the Mall Owners stated they expended a greater time commitment and considerable financial expense to defend against the allegations.

- (a) The Mall Owners submitted Concord and Suncor should be liable for the Mall Owners' costs from August 10, 2019, onward, as Concord and Suncor asserted the Mall Owners should be added to the EPO as a "person responsible."
- (b) The Mall Owners acknowledged that the Board's general approach is that each party should bear its own costs. The Mall Owners submitted their costs should be covered as they were named as a possible "person responsible," which changed the nature of their participation. The Mall Owners suggested their situation is like that of the City of Calgary in *Imperial Oil and Devon Estates Imperial* ("*Imperial*"),⁹ and therefore, the Mall Owners should receive full indemnity of their costs.
- (c) Suncor submitted the Board should not deviate from its starting position that the Mall Owners should bear their own costs. Suncor noted that in *Imperial*, the Board found the City of Calgary made a substantial contribution to the issues in the hearing. Suncor argued the Mall Owners were not analogous to the City of Calgary in *Imperial*. The Mall Owners' evidence, expert witness, and participation in the hearing were not substantial enough to justify a costs award. Suncor observed that the

⁷ Suncor Response to Costs Applications, March 10, 2020, at page 5.

⁸ Mall Owners Costs Application, February 25, 2020.

⁹ Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.), 2003 ABEAB 43.

Board's Report and Recommendations did not analyze or rely on the Mall Owners' evidence and contributions to the hearing.¹⁰

- (d) Suncor stated that while the hourly rate charged by the Mall Owners' legal counsel was in line with the Alberta Justice Tariff, the Mall Owners failed to reduce the total legal fees by 50% as per the Board's starting point that all parties should be responsible for their costs. Suncor submitted it should not have to pay the Mall Owners' costs due to Suncor's assertion that the Mall Owners were a "person responsible" under the EPO. Suncor noted the Mall Owners had sufficient financial resources to make submissions to the hearing.
- (e) Concord submitted the Mall Owners requested to be involved in the appeals and could not now claim that Concord and Suncor are responsible for expenses incurred by the Mall Owners' participation. Concord stated the Mall Owners appear to be seeking costs to punish Concord for suggesting the Mall Owners might be a person responsible. Concord noted the Board has held in past decisions that costs are not intended to be punitive. Concord said the Mall Owners must bear their own costs as their submissions did not assist the Board.¹¹

C. HHLG

[17] HHLG's costs application for \$36,568.50 consisted of legal costs of \$25,447.69 and \$11,120.81 for their consultants. HHLG submitted their costs were directly related to the matters contained in the Notice of Appeal, were reasonable, and HHLG's participation in the appeal was of assistance to the Board in determining its recommendations.

[18] HHLG submitted their consultant's evidence at the hearing, was clear, concise and focused on the relevant issues before the Board and formed the basis for several of the Board's recommendations.

[19] HHLG stated their legal costs were based on a rate of \$350.00 per hour, which is the same rate used by the Alberta Utilities Commission and the Alberta Energy Regulator. HHLG noted the Alberta Justice Tariff of \$250.00 per hour was less than half their counsel's normal rate in 2019 of \$525.00 per hour. HHLG submitted the Alberta Justice Tariff was outdated and asked the Board to accept the \$350.00 per hour rate. HHLG noted it was

¹⁰ Suncor Response to Costs Applications, March 10, 2020, at page 9.

¹¹ Concord Response to Costs Applications, March 10, 2020, at page 1.

“prohibitively difficult and expensive for individual citizens to effectively bring forth environmental concerns without the assistance of legal and technical experts.”¹²

[20] HHLG said they had lost many members due to the “significant financial obligations associated with retaining legal counsel and a consultant.”¹³ HHLG stated the loss of membership was evidence of their need for financial resources so that they could effectively contribute to the Board’s deliberations.

[21] HHLG submitted it was appropriate to make the costs payable by Sears and Suncor as the persons responsible under the EPO.

[22] Sears argued the Board should reduce HHLG’s costs for the following reasons:

- HHLG’s consultant did not raise new and significant issues of public interest, and the consultant’s recommendations mainly were already incorporated or contemplated and explained in Sear’s Revised Remediation Plan;
- the Board does not generally award costs for travel when the hearing is held in a major city;
- HHLG did not provide sufficient reasons for the Board to depart from its usual practice of beginning an assessment of legal costs by reducing the amount claimed by 50%;
- the Board generally does not award costs for office supplies and deliveries;
- HHLG could have substantially reduced costs to all the Parties if they had agreed to “practical modifications to the Revised Remediation Plan and the EPO, as recommended by the Board...,”¹⁴ and had continued discussions with Sears;
- HHLG did not provide any exceptional reason for the Board not to use the Alberta Justice Tariff Fee; and
- HHLG did not provide evidence of an attempt to seek funding from other sources.

¹² HHLG Costs Application, February 25, 2020, at page 5.

¹³ HHLG Costs Application, February 25, 2020, at page 6.

¹⁴ Sears Response to HHLG’s Costs Application, March 10, 2020, at page 2.

[23] Suncor submitted HHLG participated in the hearing due to their concerns with Sears' remediation plan and its implementation and that Suncor was not the party responsible for HHLG's concerns. Suncor stated HHLG's involvement in the hearing did not extend beyond HHLG's responsibility to bring environmental issues to the forefront, and there was no evidence of financial circumstances that warranted the award of costs for fulfilling this obligation. Suncor argued that "to award costs against it simply on the basis it has been named a 'person responsible' under the Order is contrary to prior Board rejections of the 'loser pays' principle."¹⁵

D. Ms. Barron

[24] Ms. Barron requested the Board accept her costs application despite being late in reserving her right to file a cost application. Ms. Barron submitted she made a significant contribution in bringing this environmental matter forward to the Minister.

[25] Ms. Barron stated she dedicated a significant amount of time between January 9, 2018 and September 6, 2018, related to the community's Substances contamination and associated activities. Ms. Barron said she dedicated 127 hours to hearing preparation and submissions, attending the hearing, and communications. Ms. Barron indicated she would defer to the Board to set an appropriate rate for her work. Ms. Barron requested she be compensated for printing costs of \$503.89.

[26] Ms. Barron had initially claimed a \$1,000.00 contribution to the HHLG to help cover fees for their consultant, however, upon reviewing HHLG's costs application, Ms. Barron noted HHLG was not claiming part of the consultant's fees from July to August, 2018 for which her contribution was intended. Ms. Barron therefore withdrew her request for costs covering her contribution to HHLG, stating, "Given the HHLG are absorbing these costs, as part of the Community I too believe I must, and I want to do the same."¹⁶

¹⁵ Suncor Response to Costs Applications, March 10, 2020, at paragraph 56.

¹⁶ Linda Barron, Revised Costs Application, February 27, 2020, at page 1.

[27] Sears said Ms. Barron's cost application should be dismissed or reduced for being late in reserving her right to file a costs application. Sears noted the Board has generally held that the starting point for costs is that individuals are responsible for their own costs due to the obligation of each member of the public to accept some responsibility for bringing environmental issues to the forefront. Sears submitted Ms. Barron had not presented evidence that warranted a deviation from the Board's starting point. Sears stated Ms. Barron's evidence failed to address whether her participation in the hearing was an unreasonable financial burden or that she required financial assistance to participate.

[28] Alternatively, Sears submitted the Board should reduce Ms. Barron's cost claim as her evidence was biased and she did not play a major role or provide a substantial contribution to the hearing.¹⁷

[29] Suncor submitted that Ms. Barron's evidence was duplicative, did not provide a new or different perspective from HHLG, and her participation did not contribute substantially to the hearing. Suncor noted Ms. Barron's application did not provide details on how the hours claimed were allocated or reasonable.¹⁸

E. Director

[30] On March 10, 2020, the Director noted the costs applications did not seek costs from AEP, therefore, the Director had no comments.

III. ANALYSIS

A. Legal Basis for Costs

[31] The Board's legislative authority to award costs is found in section 96 of EPEA, which states:

¹⁷ Sears Response to Ms. Barron's Costs Application, March 10, 2020, at page 2.

¹⁸ Suncor Response to Costs Applications, March 10, 2020, at page 16.

“The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.”

The Board has broad discretion under this section in awarding costs.

[32] In *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (“*Cabre*”), the Court said:

“Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs ‘of and incidental to any proceedings before it...’. The legislation gives the Board broad discretion in deciding whether and how to award costs.”¹⁹

[33] The *Environmental Appeal Board Regulation*, A.R. 114/93 (the “*Regulation*”) provides the following regarding final costs:

- “18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
- (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
- (a) the matters contained in the notice of appeal, and
 - (b) the preparation and presentation of the party’s submission.
- ...
- 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
- (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:
- (a) whether there was a meeting under section 11 or 13(a);
 - (b) whether interim costs were awarded;
 - (c) whether an oral hearing was held in the course of the appeal;
 - (d) whether the application for costs was filed with the appropriate information;
 - (e) whether the party applying for costs required financial resources to make an adequate submission;

¹⁹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 294, at paragraph 23.

- (f) whether the submission of the party made a substantial contribution to the appeal;
 - (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
 - (h) any further criteria the Board considers appropriate.
- (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
- (a) any other party to the appeal that the Board may direct;
 - (b) the Board.
- (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate.”

The Board also considers section 2 of EPEA, which sets out the purposes of the legislation.²⁰

[34] The Board evaluates each costs application against the criteria set out in EPEA and the Regulation. The Board considers the following statement from its previous decision in *Costs Decision re: Cabre Exploration Ltd.*:

²⁰ Section 2 of the EPEA provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act.”

“To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:

- (a) substantially contributed to the hearing;
- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board’s hearing.”²¹

[35] Section 18(2) of the Regulation requires that costs awarded by the Board must be “directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party’s submission.” These elements are not discretionary.

[36] Costs in civil litigation are distinct from costs in quasi-judicial tribunals such as the Board. The Board must consider the public interest when it makes a final decision or makes recommendations to the Minister. The Board is not bound to apply the “loser-pays” principle used in civil litigation.²² The Board considers the public interest generally and the purposes identified in section 2 of EPEA when it determines whether it is appropriate to award costs in an appeal.

[37] The Board generally takes the position that costs incurred in an appeal are the responsibility of each party.²³ The public has an obligation to accept some responsibility to bring environmental issues to the forefront, and part of this obligation is for the party to pay their own way.

[38] Final costs are awarded after the completion of the hearing and are awarded in recognition of the assistance provided by a party at the hearing to allow the Board to prepare its recommendations.

²¹ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.), 2000 ABEAB 6, at paragraph 9.

²² Costs Decision: re: Mizera, Glombick, Fenske, et al. (29 November 1999), Appeal Nos. 98-271, 232 and 233-C (A.E.A.B.), 1999 ABEAB 33, at paragraph 9.

²³ Costs Decision: Paron et al. (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-C (A.E.A.B.), 2002 ABEAB 2.

[39] The award of costs by the Board is not intended to provide a benefit to a party but to defray expenses in preparing for a hearing and providing evidence and submissions that assisted the Board in making its recommendations. Furthermore, costs are not intended to penalize a party, except in exceptional circumstances.²⁴

[40] When the Board assesses whether costs should be awarded the Board looks at the degree to which each of the party's contributions to the hearing assisted the Board in developing its recommendations. The Board reviews the costs submissions and responses and the evidence presented during the hearing to determine to what extent the written submissions and oral evidence materially assisted the Board in preparing its report and recommendations to the Minister. The Board's practice is to apply the Alberta Justice Tariff to legal costs and reduce the legal costs by 50% as a starting point and then increase or decrease the amount based on how the legal argument and submissions assisted the Board in its report and recommendations.

B. Cost Analysis

(i) Concord

[41] Concord submitted that it incurred costs of more than \$350,000.00 and sought costs for 115.5 hours for a lawyer with four years' experience at \$140.00 per hour and an additional \$5,000.00 for meaningful participation and raising issues of importance.

[42] The Board found the nature of the participation and representations made by Concord was not of any greater degree than expected of a party advocating their private interests. Concord did not substantially contribute to the Board's Report and Recommendations or raise significant issues in the public interest that would warrant the award of costs.

²⁴ See: *Gadd* (2006), 19 C.E.L.R. (3d) 1 (Alta. Env. App. Bd.) at paragraph 83, (sub nom. Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.*) (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.); *Imperial Oil Ltd. v. Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2004), 4 C.E.L.R. (3d) 238 (Alta. Env. App. Bd.) at paragraph 75, (sub nom. Costs Decision: *Imperial Oil and Devon Estates*) (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.).

[43] Concord suggested that section 2(i) of EPEA recognizes “the responsibility of polluters to pay for the costs of their actions” supports their costs application for the Board to award costs against Suncor and Sears. However, the Board notes the polluter pays principle referred to under section 2(i) of EPEA pertains solely to the environmental remediation required of the polluter. It does not apply to the costs related to the hearing of an appeal.

[44] The Board therefore denies Concord’s application for costs.

(ii) *Mall Owners*

[45] The Mall Owners sought indemnity of their costs of \$55,782.36 for legal and expert consultants. The Mall Owners submitted being named a possible person responsible changed the nature of their participation. However, the Board found the Mall Owners were not a person responsible.

[46] The Board finds the Mall Owners’ contribution to the hearing was no more than what would be expected of a party advocating on its own behalf. The Mall Owners did not contribute beyond that expected of any party, and their contribution was of no greater significance than the other Parties to the appeal. The Mall Owners’ expert evidence and report were not significant to the Board in reaching its recommendations in its Report and Recommendations. The Mall Owners’ participation did not materially assist the Board.

[47] The Board routinely declines to award punitive costs except in exceptional circumstances, which the Mall Owners have not established in these appeals. The Mall Owners incurred costs due to their participation in the appeal process, which must be borne as part of their public obligation of bringing environmental issues to the forefront.

[48] The Board therefore denies the Mall Owners’ application for costs.

(iii) *HHLG*

[49] HHLG applied for an award of legal costs of \$25,447.69 and consultant costs of \$11,120.81, for a total of \$36,568.50. HHLG’s legal costs were based upon an hourly rate of

\$350.00. HHLG's consultant costs were \$4,882.50 to prepare the consultant's report and \$6,238.31 for the consultant's preparation and attendance at the hearing to give evidence based on the report.

[50] The Board found HHLG's submissions and participation significantly assisted the Board in developing the Report and Recommendations for the Minister. The Board therefore awards HHLG costs of \$11,120.80 for consultant fees,²⁵ and \$14,343.00 for legal fees, for a total of \$25,463.80.

[51] HHLG's costs application sought costs for legal fees calculated by applying the rate used by the Alberta Utilities Commission and the Alberta Energy Regulator of \$350.00 per hour for a lawyer with fifteen years or more experience. As noted in HHLG's costs application, the Board's practice is to utilize the Alberta Justice Tariff rate of \$250.00 per hour for legal costs. The Board found no compelling reason to change its practice and will continue to apply the Alberta Justice Tariff rate to legal costs.

[52] The Board's regular practice is to reduce legal costs by 50% as a starting point for calculating legal costs. The Board then adjusts the costs amount based on the degree the party's participation contributed to the hearing and assisted the Board in determining its recommendations. The Board found HHLG's submissions and evidence were helpful to the Board and, therefore, the Board adjusted HHLG's legal costs from 50% to 80% of the Alberta Justice Tariff of \$250.00 per hour, which calculates to \$200.00 per hour. Although HHLG's costs submission did not provide the total hours of legal work, the invoices included in Appendix B of the costs submission indicate a total of 68.3 hours legal counsel charged to HHLG.²⁶ The total legal costs awarded based upon 68.3 hours of legal work at \$200.00 per hour is \$13,660.00. HHLG's legal counsel charged for the 5% Goods and Services Tax, which the Board calculated for \$13,660.00 to be \$683.00, bringing the total of legal costs awarded by the Board to HHLG to \$14,343.00. As per the Board's usual practice, no costs were awarded to compensate for disbursements.

²⁵ For ease of payment of costs for Sears and Suncor, the Board has reduced the consultant costs by \$0.01.

²⁶ HHLG Costs Application, February 25, 2020, at Appendix B."

[53] The Board found Sears and Suncor are responsible parties and as such must pay HHLG's consultant costs of \$11,120.80 and HHLG's legal costs of \$14,343.00, for a total of \$25,463.80. Sears and Suncor will each pay 50% of HHLG's costs.

(iv) *Ms. Barron*

[54] The Board notes that Ms. Barron, who was not represented by legal counsel, was late in submitting her cost application. The Board finds the Parties have not been prejudiced by the late submission and had the opportunity to consider and respond to Ms. Barron's cost application.

[55] The Board notes Ms. Barron revised her initial costs application by withdrawing a claim for her \$1,000.00 contribution to HHLG for hiring its consultant. Ms. Barron appropriately revised her costs application when she recognized that HHLG was not claiming costs for the period of Ms. Barron's contribution.

[56] Ms. Barron submitted costs for 127 hours of preparation for the hearing and drafting submissions, attending the hearing, and communications. The Board finds such costs are the responsibility of a party participating in the hearing. Ms. Barron also applied for printing costs in the amount of \$503.89. The Board does not typically award costs for printing and finds no reason to depart from its usual practice in this instance. The Board declined to award costs to Ms. Barron.

IV. DECISION

[57] For the reasons set out above, pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs as follows:

- HHLG is awarded a total of \$25,463.80 for consultant and legal costs;
- the Board denies the costs applications from Ms. Barron, Concord and the Mall Owners.

[58] The Board orders Sears and Suncor to each pay half the costs awarded by the Board to the HHLG as follows:

- (a) Sears is to forward payment of \$12,731.90 to counsel for HHLG in trust, within 60 days from the date of this decision;
- (b) Suncor is to forward payment of \$12,731.90 to counsel for HHLG in trust, within 60 days from the date of this decision;
- (c) if Sears is unable to make the payment due to its bankruptcy circumstances, it must provide reasons to the Board and Suncor within 20 days of the date of this decision; and
- (d) if the Board finds Sears' reasons for nonpayment or partial payment reasonable, Suncor will be required to pay whatever costs amount Sears is unable to forward to HHLG.

[59] The Board requests counsel for HHLG provide written confirmation once payment has been received.

Dated on February 4, 2022, at Edmonton, Alberta.

"original signed by"

Meg Barker
Panel Chair and
Board Member

"original signed by"

Anjum Mullick
Board Member

"original signed by"

Chris Powter
Board Member