



ALBERTA
ENVIRONMENTAL APPEALS BOARD

2019 ABEAB 34

November 27, 2019

Via E-Mail

To Distribution List:

Dear Ladies and Gentlemen:

Re: Decision Letter* - Sears Canada Inc., Concord North Hill GP Ltd., and Suncor Energy Inc. / EPEA Environmental Protection Order No. EPO-2018/01-SSR & Amendment 2 / Our File Nos.: EAB 17-069-070 and 18-013

The Board acknowledges receipt of the attached correspondence dated November 26, 2019, from Ms. Howard on behalf of Suncor Energy Inc. ("Suncor"), Mr. Collins on behalf of Concord North Hills GP Ltd. ("Concord"), Mr. Harper on behalf of the "Mall Owners," and Ms. Barron (without the attachment).

This is the Board's decision and reasons with respect to an application made by Suncor to cross-examine Concord at the upcoming hearing of these appeals. The Board has decided to deny the application. Suncor will not be permitted to cross-examine Concord. This decision was made by Ms. Meg Barker, Panel Chair.

The request by Suncor to cross-examine Concord is not consistent with the Board's normal practice because they are both appellants before the Board. They are both being permitted to cross-examine the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the "Director"), who has named them as persons responsible under an environmental protection order with respect to the contamination at a former gas station site. Consistent with the Board's normal practice, Suncor and Concord are considered adverse in interest to the Director. However, appellants are not routinely considered adverse in interest to each other.

In making this decision, the Board has reviewed: Suncor's Notice of Motion, dated November 22, 2019; Concord's response submission, dated November 25, 2019; and Suncor's rebuttal submission, dated November 26, 2019. The other parties to this appeal were also invited to respond to Suncor's Notice of Motion, but no other comments were received.

Submissions

* Cite as: *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (27 November 2019) Appeals Nos. 17-069-070 and 18-013-DL3 (A.E.A.B.), 2019 ABEAB 34.

In their Notice of Motion, Suncor argued they should be entitled to cross-examine Concord because “Suncor and Concord have presented conflicting legal and policy arguments....” According to Suncor, this has resulted “... in Suncor and Concord being adverse in interest with respect to Hearing Issue 2.” Hearing Issue 2 is: “Are the parties named in the Order persons responsible as defined in [the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12] for the purposes of section 113, and are there any other parties ... who should be named as persons responsible?”

In support of their position, Suncor acknowledges that there is no automatic right to cross-examination before an administrative tribunal, but argues that cross-examination should be allowed in this case because the Board is required to comply with the principles of natural justice. Further, Suncor cites Rule 28 of the Board’s Rules of Practice, which provides in part:

“Cross-examination shall be limited to the scope of the direct evidence and, subject to the discretion of the Presiding Board Member, shall always be limited to witnesses whose testimony is adverse to the Party desiring to cross-examine. Cross-examination will be permitted to the extent necessary for full and true disclosure of the facts.”

Concord opposes Suncor’s request to be allowed to cross-examine. Concord points to the Board’s direction that when Suncor initially asked to be allowed to cross-examine the other Appellants, the Board advised Suncor to hold off on its application and remake it once the expert reports had been filed. This delay was to allow the parties and the Board to determine if there were any expert reports that were adverse in interest to each other, such that cross-examination may be appropriate. Concord advised it specifically chose not to file expert reports to avoid being in a position adverse in interest to the other parties. Further, Concord argued that Suncor refers to “conflicting legal and policy arguments” and stated, “[d]isagreements over law and policy are the proper subject of argument....” Finally, Concord argued that if Suncor was entitled to cross-examine, then the hearing should be adjourned to allow Concord to file expert reports.

Suncor responded that the purpose of cross-examination is broader than just challenging the evidence filed by an opponent. Suncor cited the Alberta Court of Appeal in *Strathcona (County No. 20) v. Maclab Enterprises Ltd.* (1971) 20 DLR 200 at paragraph 10 stating, “[a] party is often able to advance his own case from the mouths of his opponent’s witnesses.” Further, Suncor argued that Concord should not be permitted to escape cross-examination by choosing not to file expert reports. Finally, Suncor argued that it would be prejudiced if an adjournment of the hearing was granted at this late date.

Analysis

The Board believes Suncor has correctly stated the law with respect to cross-examination: before an administrative tribunal there is no inherent right to cross-examine the other parties to the appeal. This is reflected in Rule 28 of the Board’s Rules of Practice, which limits cross-examination to parties adverse in interest to each other and states that the purpose of cross-examination is to ensure the full and true disclosure of the facts.

In applying this Rule, the Board must balance the principles of natural justice and procedural fairness, with the Board’s core function, which is providing the best possible advice to the

Minister in order to resolve the appeals. In balancing these interests, it is important to remember that the Board is not strictly bound by the rules of evidence.

The stated reason Suncor wishes to cross-examine Concord is that they disagree on legal and policy arguments. Respectfully, fully exploring differences in legal and policy arguments can be done fully within legal argument, which is particularly true given that all the parties that are potentially persons responsible are represented by skilled legal counsel. In the Board's view, cross-examination by one appellant of another is not necessary, in the context of this case, to understand fully the basis for the various arguments related to persons responsible. The Appellants will be able to cross-examine the Director who is arguing that they are persons responsible, and will be able to discuss the evidence of the other Appellants in their closing arguments and final comments. In the Board's view, this will provide the Board with a sufficient understanding of the matter to provide the Minister with the best possible advice and treat the parties in a manner consistent with natural justice and procedural fairness.

Adjournment Request

The Board also invited the parties to provide written submissions on Concord's request for an adjournment. As discussed, Concord indicated that if Suncor's request was granted, it would need an adjournment. The Board thanks the parties who provided comments, but given that the Board is not granting Suncor's motion, the Board need not consider the adjournment request. **The hearing will proceed as scheduled on December 3, 4, and 5, 2019.**

In her letter to the Board regarding the adjournment request, the Board notes Ms. Barron included an attachment. The Board will address this attachment in a separate letter.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6569 for Valerie Myrmo, Registrar of Appeals, 780-427-7002 for Denise Black, Board Secretary, and 780-427-4179 for Gilbert Van Nes, General Counsel and Settlement Officer. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca, denise.black@gov.ab.ca, and gilbert.vannes@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel and
Settlement Officer

Att.

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Distribution List**Parties****Appellants**

Mr. Alan Merskey
 Ms. Kellie Johnston
 Norton Rose Fulbright Canada
 (Counsel for Court Appointed Monitor)
*(Representing Sears Canada Inc. and
 FTI Consulting Canada Inc.)*

Mr. Bernard Roth
 Mr. Daniel Collins
 Dentons Canada LLP
(Representing Concord North Hill GP Ltd.)

Ms. Kimberly Howard
 McCarthy Tetrault LLP
(Representing Suncor Energy Inc.)

(17-069)

(17-070)

(18-013)

Director

Mr. Lee Plumb
 Ms. Vivienne Ball
 Alberta Justice and Solicitor General
 Environmental Law Section
 8th Floor, Oxbridge Place
 9820 – 106 Street
 Edmonton, AB T5K 2J6
 (lee.plumb@gov.ab.ca and vivienne.ball@gov.ab.ca)
(Representing the Director, AEP)

Intervenors

Mr. Dufferin Harper
 Blake, Cassels & Graydon LLP
*(Representing mall owners BIM North Hill Inc. and
 Bentall Kennedy Prime Canadian Property Fund Ltd.)*
 (Board granted party status for the hearing to Mall
 Owners on Aug 25, 2019)

Mr. Gavin Fitch
 McLennan Ross LLP
*(Representing Hounsfeld Heights
 Landowners Group – HHLG)*
 (on Oct 9, 2019 permitted to intervene in hearing)

Ms. Linda Barron
 (on Oct 9, 2019 permitted to intervene in hearing)

Interested Persons

Mr. Allan Legge

President
 Hounsfeld Heights-Briar Hill Community Association

Ms. Nicole Bradac

Mr. Allan de Paiva

Ms. Eileen Jones

Mr. George Kingston

