ALBERTA
ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – February 3, 2020

IN THE MATTER OF sections 91, 92, 94, 95, 97, and 99 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: *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.

BEFORE:	Ms. Meg Barker, Panel Chair; Ms. Anjum Mullick, Board Member; and Mr. Chris Powter, Board Member.
BOARD STAFF:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; and Mr. Andrew Bachelder, Associate Counsel.
SUBMISSIONS BY:	
Appellants:	Mr. Alan Merskey and Ms. Kellie Johnston, Norton Rose Fulbright Canada, representing Sears Canada Inc. and FTI Consulting Canada Inc. (the Court Appointed Monitor). Mr. Daniel Collins, Dentons Canada LLP, representing Concord North Hill GP Ltd. Mr. Paul Cassidy and Ms. Kimberly Howard, McCarthy Tetrault LLP, representing Suncor Energy Inc.
Director:	Ms. Vivienne Ball and Mr. Lee Plumb, Alberta Justice and Solicitor General, representing Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks.
Intervenors:	Mr. Dufferin Harper, Blake, Cassels & Graydon LLP, representing BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd. Ms. Linda Barron. Mr. Gavin Fitch, McLennan Ross LLP, representing the Hounsfield Heights Landowners Group.

WITNESSES:

Sears Canada Inc. and FTI Consulting Canada Inc.:	Mr. Greg Paliouras, Divisional Vice President, Construction, Energy & Maintenance, Sears Canada Inc.; Mr. Steven Bissell, Managing Director, FTI Consulting Canada Inc.; Mr. Stephen d'Abadie, Projects Manager, Clifton Associates Ltd.; and Mr. David Pritchard, Principal Environmental Geoscientist, Clifton Associates Ltd.
Concord North Hill GP Ltd.:	Mr. Matt Meehan, Senior Vice President, Concord Pacific Developments Inc.; and Mr. Calvin Chan, Project Manager, Concord Pacific Developments Inc.
Suncor Energy Inc.:	Ms. Emma Kirsh, Senior Geologist, SLR Consulting (Canada) Ltd.; Mr. Robert Lipman, Senior Valuation Consultant, Avison Young Valuation and Advisory Services Alberta Inc.; Ms. Beatrice Weller, (retired) Dealer Sales Representative and Market Manager, Business Development Advisor and Retail Territory Manager, Sunoco Inc. (predecessor of Suncor Energy Inc.); and Mr. Les Wojtanowski, (retired) Manager, Operations & Engineering, Environment, Health and Safety, Sun-Canadian Pipeline Inc. (predecessor of Suncor Energy Inc.).
Director:	Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks; and Mr. Rick McClelland, Environmental Protection Officer, South Saskatchewan Region, Alberta Environment and Parks.
BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd.:	Mr. Eric Johnson, Operations Manager, Southern Alberta, Pinchin Ltd.; and Mr. Alex Bath, Senior Technical Advisor, Pinchin Ltd.
Ms. Linda Barron:	Ms. Linda Barron.
Hounsfield Heights Landowners Group:	Ms. Lise Houle; Dr. Allan Legge; and Mr.

Marc Bowles, Wyndham Environmental Ltd.

EXECUTIVE SUMMARY

These appeals deal with historical contamination at a former service station. A predecessor company of Sears Canada Inc. (Sears) was the original owner of the service station and operated it from 1958 until 1984. A predecessor company of Suncor Energy Inc. (Suncor) operated the service station on behalf of Sears from 1984 until it was decommissioned in 1994. Concord North Hill GP Ltd. (Concord) 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 into a commercial property, a shopping mall, to the west and into 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 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* (EPEA) and named them as parties to the EPO. Under the EPO, the parties were required to:

1. continue soil vapour monitoring and groundwater sampling;
2. complete delineation activities both on and off the site; and
3. submit and implement a remediation plan to address the contamination both on and off the site.

Sears, Concord, and Suncor appealed the EPO, and raised three main issues:

1. Was it appropriate for AEP to issue the EPO? This included whether AEP's decision was improperly based on Sears' financial situation and whether the EPO should have been issued under the contaminated site provisions of EPEA.
2. Are Sears, Concord, and Suncor properly persons responsible as defined in EPEA, and are there other parties, such as the owners of the shopping mall, who should be named as persons responsible?
3. Are the terms and conditions of the EPO appropriate?

The Board held a hearing and prepared this Report and Recommendations for the Minister of Environment and Parks (the Minister). In this Report and Recommendations, the Board made the following recommendations to the Minister:

1. The Board recommended the Minister confirm the EPO with respect to naming Sears and Suncor as parties to the EPO. Sears and Suncor are persons responsible under EPEA.
2. The Board recommended the Minister vary the EPO with respect to naming Concord as a party to the EPO. Concord is not a person responsible under EPEA, and therefore, not a proper party to the EPO. Likewise, the owners of the shopping mall are not persons responsible under EPEA, and therefore, not proper parties to the EPO.
3. The Board recommended the Minister vary the EPO to make the remediation of the Hounsfield Heights neighbourhood, and adjacent parkland, the first priority in the remediation plan required by the EPO.
4. The Board recommended the Minister vary the EPO to require the delineation of the presence of liquid petroleum hydrocarbons in the Hounsfield Heights neighbourhood be completed within 18 months of the date of the Minister's decision in these appeals. The Board's recommendation allows AEP to extend this deadline if there are difficulties accessing privately owned property.
5. The Board recommended the Minister vary the EPO to require the remediation plan to be updated and reviewed on an annual basis or other frequency determined by AEP. The updated remediation plan should be made available to the residents of the Hounsfield Heights neighbourhood.
6. The Board recommended the Minister vary the EPO to require annual reports be submitted to AEP and the community regarding the work done in the Hounsfield Heights neighbourhood during the previous year, the results of that work, and the plans for the following year.
7. Finally, the Board recommended the Minister vary the EPO to require the appointment of a key contact person to: (1) respond to questions from the community within 5 business days, and (2) to work collaboratively with the Hounsfield Heights neighbourhood and the parties to the EPO to develop an effective two-way communication strategy.

One of the reasons for a number of these recommendations is the concern raised by the intervenors (residents of the Hounsfield Heights neighbourhood) over the length of time the remediation will take. The revised remediation plan approved by AEP suggests remediation is estimated to take 15 years to complete. The intervenors have asked that this timeline be reduced to 5 to 10 years. The Board has reviewed the revised remediation plan, and regrettably, the

Board is of the view that the estimated 15-year timeline is the most reasonable expectation of when the remediation work could be completed given the existing data gaps. Beyond the Board's recommendations, there does not appear to be any additional work that could be done to reasonably accelerate the 15-year timeframe.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Environmental Appeals Board (the "Board") to the Minister of Environment and Parks (the "Minister"), regarding the appeals of Environmental Protection Order No. EPO-2018/01-SSR (the "EPO") and Amendment No. 2 to Environmental Protection Order No. EPO-2018/01-SSR,[1] issued by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the "Director") under section 113(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ("EPEA").[2] On February 28, 2018, the Director issued the EPO to Sears Canada Inc. ("Sears") and Concord North Hill GP Ltd. ("Concord"), because of a release of liquid petroleum hydrocarbons, commonly referred to as gasoline (the "Substances" or "LPH"). into the environment from an automotive service centre and gas bar (the "Service Station"), located on land legally described as Plan 8210266, Block 21 (the "Site"), in the City of Calgary, Alberta. Sears and Concord were named as the "persons responsible" for the release of the Substance in the EPO.[3] 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.[4]

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[1] The Director issued three amendments to the EPO. The first was Amendment No. 1 to Environmental Protection Order No. EPO-2018/01-SSR, which amended a deadline in the EPO. The second was Amendment No. 2 to Environmental Protection Order No. EPO-2018/01-SSR ("Amendment No. 2"), which amended the EPO to add Suncor Energy Inc. as a party to the EPO (a "Party to the EPO"). The third was Amendment No. 3 to Environmental Protection Order No. EPO-2018/01-SSR, which deleted the requirement for the parties to the EPO to develop a remediation plan. This was because a "revised" remediation plan had been filed and accepted by the Director in accordance with the EPO.

Sears Canada Inc. (EAB Appeal No. 17-069) and Concord North Hill GP Ltd. (EAB Appeal No. 17-070) appealed the EPO, and Suncor Energy Inc. appealed the EPO and Amendment No. 2 (EAB Appeal No. 18-013).

[2] 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."

[3] 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,

[2] The EPO deals with three separate areas.[5] The first area is the Site, formerly owned by Sears and currently owned by Concord, which is the source of the Substances. The second area is the property located immediately to the west of the Site, occupied by what is now known as the North Hill Centre (the "Mall Lands"). The Mall Lands are owned by BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd. (the "Mall Owners"). The third area is to the south of Site and the Mall Lands, which includes Lions Park and the Hounsfield Heights neighbourhood.[6] A number of landowners for the Hounsfield Heights neighbourhood have intervened in these appeals.[7] The Mall Lands, Lions Park, and the Hounsfield Heights neighbourhood are collectively referred to as the "Off-Site Areas." As the Parties to the EPO, the EPO required Sears, Concord, and Suncor (collectively, the "Appellants") to:

(a) recommence the soil vapour monitoring program and groundwater sampling initiated by Sears;

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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

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)…."

4 Sears has been involved in the Site since 1958 and Suncor has been involved in the Site since 1984. During this time these two companies have changed names for a variety of reasons. For clarity, in this Report and Recommendations the Board will only refer to Sears and Suncor, which are the successors to these various entities.

5 See: Appendix A - Area Map – Hearing Exhibit #4 – Annotated by the Board.

6 The Hounsfield Heights neighbourhood is located south of 14th Avenue NW. It is bordered on the west side by 17A Street NW, on the east side by 14th Street NW, and on the south side by 10th Avenue NW. Lions Park is located between 14th Avenue NW and the Hounsfield Heights neighbourhood. The Calgary C-Train LRT tracks run parallel along the south side of 14th Avenue NW, with Lions Park to the south and the Mall Lands and the Site to the north.

Officially, the neighbourhood is referred to as the Hounsfield Heights-Briar Hill community, with the Briar Hill portion of the community located to the west of 17A Street NW. According to the evidence before the Board, the Briar Hill portion of the community is unaffected by the released Substances.

7 The landowners who have intervened in these appeals are Ms. Linda Barron and the Hounsfield Heights Landowners Group (the "HHLG") (collectively the "Intervenors"). The Intervenors in these appeals were granted intervenor status on October 9, 2019. See Board's letter, dated October 9, 2019. See also Intervenor Decision: *Sears Canada Inc. et al*. v. *Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (13 November 2019), Appeal Nos. 17-069-070 and 18-013-DL2 (A.E.A.B.), 2019 ABEAB 33.

The "Main Parties" are Sears, Concord, Suncor, the Mall Owners, and the Director. The Board added the Mall Owners as a Main Party to the appeals on August 25, 2019. See Board's letter, dated August 25, 2019. The Parties to the appeal should not be confused with the Parties to the EPO.

(b) complete delineation activities to fully delineate the Substances on the Site and in the Off-Site Areas;

(c) submit and implement a plan to the Director to remediate the Substances on the Site and any Substances that have migrated from the Site into the Off-Site Areas;

(d) provide to the Director written status reports as required in the EPO;

(e) promptly respond to inquiries from affected landowners; and

(f) develop, publish, and activate a communications website.

As identified in the EPO, the LPH that was released on the Site has now migrated into the Off-Site Areas. The LPH is a concern because it can migrate through soils into groundwater and can release hydrocarbon vapours into the surrounding soils. These vapours, commonly referred to as soil vapours, can then migrate, and have the potential to impact human health. Further, the LPH contains benzene, toluene, ethylbenzene, and xylene (collectively referred to as "BTEX") and, in this case, 1,2-dichloroethane ("1,2-DCA"). BTEX and 1,2-DCA are a concern because they are known carcinogens and, therefore, have the potential to cause human health impacts. Components of the LPH have also dissolved in the groundwater and are mobile, which has created a contamination plume.[8]

[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.

[4] The Board held a public hearing in Calgary, on December 3, 4 and 5, 2019, to hear submissions and evidence on the following issues:

1. Was it appropriate for the Director to issue the EPO? This includes:
2. Are the parties named in the EPO persons responsible as defined in EPEA and for the purposes of section 113, and are there other parties, such as the Mall Owners, who should be named as persons responsible?
3. Are the terms and conditions of the EPO appropriate?[9]

[5] After considering the oral evidence and arguments, expert reports, written submissions, and the Director's record, the Board recommends the Minister vary the EPO.

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[8] See Appendix B - Known Extent of the Contaminant Plume.

[9] (9 August 2019), Appeal Nos. 17-069, 17-070 and 1 8-013-DLI (A.E.A.B.), 2019 AEAB 28. See Board's letter August 23, 2019.

Specifically, the Board is recommending that the Minister confirm that Sears and Suncor are persons responsible for the release of the Substances, and are therefore proper Parties to the EPO. Further, the Board is recommending that the Minister vary the EPO to confirm that Concord is not a person responsible for the release of the Substances, and therefore, Concord should be removed as a Party to the EPO. Finally, the Board is recommending the terms and conditions of the EPO be varied to address several concerns raised by the Participants in the hearing. Most importantly, the Board wants to ensure the first priority for active remediation by the Parties to the EPO is Lions Park and the Hounsfield Heights neighbourhood.

II. BACKGROUND

[6] Sears, or one of its predecessors, owned the Site from October 1958 until June 15, 2015. Sears operated the Service Station on the Site from 1958 until 1984. On March 1, 1984, a predecessor to Suncor, entered into a management agreement (the "Management Agreement") with Sears to manage and operate the Service Station until June 1994.[10]

[7] In 1985, Suncor upgraded the piping at the Service Station to galvanized steel pipes. In August 1989, Suncor replaced three steel underground storage tanks, used to store gasoline for the Service Station, with fibreglass tanks. During the replacement operation, Suncor discovered the soil around the underground storage tanks was contaminated with high concentrations of BTEX and 1,2 -DCA, which are components of gasoline. Suncor retained Rossmar Construction Ltd. ("Rossmar") to remove 1,075 tonnes of contaminated soil from the Site. Suncor also oversaw the installation of a soil vapour extraction system on the Site.

[8] In May 1995, Sears and Suncor agreed to decommission the Service Station and divide the costs equally, up to an agreed-upon amount, after which Sears would be responsible for the remaining costs.

[9] The decommissioning work on the Service Station was started in October 1995. Sears and Suncor hired SEACOR Environmental Engineering Inc. ("SEACOR") to conduct the decommissioning work.

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[10] A portion of the Simpsons-Sears Limited (a predecessor to Sears) and Sunoco Inc. (a predecessor to Suncor), Management Agreement, undated, was filed as Hearing Exhibit #8.

[10] In August 1997, SEACOR provided a report to Suncor regarding the decommissioning of the Service Station. In the report, SEACOR identified that a serious leak of LPH from the underground storage tanks might have occurred in the 1970s or early 1980s. SEACOR found high levels of the Substances that had spread through the soil on the Site and the Mall Lands, and through the geological strata, into the groundwater, forming a plume underlying the Off-Site Areas (the "Plume"). SEACOR also found the concentrations of the Substances in the Plume exceeded the Alberta guidelines that were in place at the time.[11] After the release of the Substances was discovered, Sears began environmental testing, ecological and human health risk assessments, remediation activities, and site management. From mid-1998, Suncor acted in an advisory role for the remediation of the Site, when requested by Sears.

[11] In 2000, Sears began to use in-situ chemical injections to remediate the Site, followed by further efforts to delineate the extent of the release of the Substances and to extract the Substances, where possible.

[12] In 2004 and 2005, Sears conducted an assessment of health impacts on the Hounsfield Heights neighbourhood from the release of the Substances into the Off-Site Areas. The assessment concluded there was no present or obvious threat to human health and safety or to the environment.

[13] In 2006, Sears submitted a Site Management Plan to Alberta Environment and Parks ("AEP"), which AEP approved. As part of the Site Management Plan, Sears excavated contaminated soil on the Site. The excavated soil was remediated to meet Alberta guidelines at the time and placed back into the excavation along with clean fill.

[14] In 2010, Sears began using a dual-phase vapour extraction system to remediate Lions Park and the Hounsfield Heights neighbourhood.

[11] The applicable standards were prescribed in "Alberta Environmental Protection (AEP) Risk Management Criteria (RMC) Level II and Level III – Coarse Grained Soil (CGS) Criteria."

[15] In July 2012, AEP required Sears to comply with the new Alberta Tier 1 Soil and Groundwater Remediation Guidelines, December 2010.[12] Sears updated the Site Management Plan in 2014 to reflect the new guidelines.

[16] On March 10, 2015, Concord and Sears entered into an Agreement of Purchase and Sale (the "PSA"), in which Concord purchased the Site, along with two other properties in Burnaby and Chilliwack, British Columbia. The PSA included the following:

(a) Sears leased the Site and buildings from Concord for $1.00 per year (the "Leaseback") to operate as a Sears department store, and licensed certain buildings to Kal Tire Ltd. (the former gas station building);

(b) Sears indemnified Concord ("Environmental Indemnity") from all costs resulting from a failure by Sears to perform any of its environmental remediation obligations for 50 years, or, in the case of the Site, the date of the expiry or termination of the Leaseback.

[17] On March 29, 2016, Sears' environmental consultants, Clifton Associates Ltd. ("Clifton"), submitted a report entitled "Remedial Action Plan - Mall and Hounsfield Heights Areas" (the "Remedial Action Plan") to AEP. The Remedial Action Plan acknowledged the presence of the Substances on the Site and the Off-Site Areas and provided a plan for remediation of the Substances.

[18] In October 2016, Clifton submitted a report entitled *Revised Soil Vapour Monitoring Program, Update Fall 2016* to AEP that confirmed the release of the Substances had impacted the groundwater and soil at the Site. The update included a risk management and contingency plan for the Off-Site Areas.

[19] On May 19, 2017, Clifton provided AEP with an Annual Summary Report, which acknowledged the concentration of the Substances exceeded the Alberta Tier 1 Guidelines.

[20] On June 22, 2017, Sears received protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985 c. C-35, (the "CCAA") as part of its bankruptcy proceedings.

[21] In October 2017, Sears commenced liquidation of its business.

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[12] *Alberta Tier 1 Soil and Groundwater Remediation Guidelines, December 2010*. The guidelines applicable to the EPO are the *Alberta Tier 1 Soil and Groundwater Remediation Guidelines, February 2, 2016* (the "Alberta

[22] On December 13, 2017, Sears informed AEP that, due to its financial difficulties, Sears was unable to commit to further environmental work on the Site or the Off-Site Areas.

[23] On February 14 and 23, 2018, the Director met with Concord to discuss a draft of the EPO and Concord's potential inclusion as a person responsible for the release of the Substances.

[24] On February 29, 2018, the Director issued the EPO to Sears and Concord.

[25] On March 6, 2018, Sears filed a Notice of Appeal with the Board. Sears requested the Board recommend the Minister reverse the Director's decision to issue the EPO to Sears on the following grounds:

(a) Sears had followed the Remedial Action Plan, which was approved by the Director;

(b) some of the timelines in the EPO were arbitrary and unreasonable;

(c) the environmental circumstances of the Site and the Off-Site Areas had not materially changed for several years, and there was no risk to human health. Therefore, there was no reason for the Director to impose an accelerated or arbitrary timeline; and

(d) the only change in circumstances was Sears' financial situation, which was irrelevant and improper for the Director to consider and exceeded the Director's jurisdiction.

[26] On March 7, 2018, Concord, filed a Notice of Appeal with the Board. Concord requested the EPO be reversed on the following grounds:

(a) Concord was not a person responsible as defined in section 1(tt) of EPEA;

(b) Sears was the owner of the Substances at the time of any release and continued to have charge, management, and control of the Substances up to the date of the filing of the Notice of Appeal;

(c) Sears was remediating the released Substances according to management and monitoring plans the Director approved;

(d) even if Concord were a person responsible due to its ownership of the Site, which Concord denied, the Substances were contained on the Site and had no probability or likelihood of causing any adverse effect; and

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Tier 1 Guidelines"). See Mall Owners' Written Submission, dated November 12, 2019, List of Authorities, Tab 1. See also https://open.alberta.ca/publications/1926-6243.

(e) Concord was not responsible for the Substances that may have migrated to the Off-Site Areas.

[27] On March 8, 2018, the Board requested a copy of all of the records upon which the decision to issue the EPO was based from the Director (the "Director's Record"). On April 16, 2018, the Director provided the Director's Record to the Board. The Board distributed the Director's Record to the Appellants and interested parties on May 2, 2018.

[28] On March 21, 2018, the Mall Owners requested to participate in the appeals as intervenors.

[29] On April 11 and 12, 2018, the Board received requests from landowners from the Hounsfield Heights neighbourhood, specifically Mr. Allan de Paiva, Ms. Nicole Bradac, Ms. Eileen Jones, Dr. Allan Legge, and Ms. Linda Barron, to participate in the appeals as intervenors.

[30] On April 25, 2018, after reviewing comments from the Director and the Appellants, the Board decided to permit the Mall Owners to participate in the appeals and attend a mediation meeting. Mr. de Paiva, Ms. Bradac, Ms. Jones, Dr. Legge, and Ms. Barron were not permitted to participate in a mediation meeting. However, the Board advised them they could request to participate in the appeals if the matter proceeded to a hearing.

[31] On October 11, 2018, the Director amended the EPO to add Suncor as a Party to the EPO, because the Director determined they were a person responsible for the release of the Substances.

[32] On October 17, 2018, Suncor filed a Notice of Appeal with the Board. Suncor requested the Board recommend the Minister reverse the EPO on the following grounds:

(a) the Director erred by failing to provide Suncor with an opportunity to comment on the terms of the Order before it was issued;

(b) the timelines in the EPO were unreasonable;

(c) the Director failed to consider evidence showing the release of the Substances occurred between 1970 and the early 1980s, which was before Suncor managed the Service Station;

(d) the environmental circumstances of Site and the Off-Site Areas had not materially changed for several years, and there was no risk to human

health. Therefore, there was no reason for the Director to impose an accelerated or arbitrary timeline;

(e) the only change in circumstances is Sears' financial situation, which was irrelevant and improper for the Director to consider and exceeded the Director's jurisdiction; and

(f) the Director erred in law and fact by concluding Suncor was a person responsible because Suncor managed the Service Station, and failed to consider that Suncor's activities fall under the exception in section 1(tt)(vi) of EPEA.[13]

[33] Suncor also applied for a stay of the EPO until the Board concluded its hearing of the appeals.

[34] On October 18, 2018, the Board requested the Director provide the Director's Record for the Suncor appeal. On November 30, 2018, the Director provided the Board with the Director's Record. The Board distributed the Director's Record for the Suncor appeal to the Appellants and interested parties.

[35] On January 24, 2019, the Board, after reviewing submissions from the Appellants, granted Suncor's and Concord's stay request.[14] While Concord did not initially make a stay request, Concord joined Suncor in the stay application through its written submissions. The stay only related to further implementation of the remediation plan required by the EPO and did not stop any work involving the dual-phase soil vapour extraction system.

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[13] Section 1(tt) of EPEA provides, in part:

"1 In this Act, …

(tt) "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

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),…."

[14] See Board's Letter, dated January 24, 2019.

[36] The Board scheduled a mediation meeting for February 27, 2019, and a hearing for June 4 and 5, 2019.

[37] The mediation meeting was rescheduled and held on March 20, 2019, in Calgary with Sears, Concord, Suncor, the Director, and the Mall Owners (the "Main Parties"). Although the Main Parties did not reach a resolution to the appeals, they agreed to continue negotiations and provide regular updates to the Board.

[38] On April 17, 2019, Suncor requested an adjournment of the hearing as one of Suncor's key witnesses was unavailable. On April 28, 2019, with the support of all the hearing participants, the Board granted the request to adjourn the hearing set for June 4 and 5, 2019, for three months. Upon adjourning the hearing, the Board began canvasing the Main Parties for available hearing dates. There were no common dates available for September, October, or November.

[39] On June 7, 2019, the Board noted there was no desire by the Main Parties for further mediation meetings. The Board closed the mediation and requested available dates from the Main Parties for a hearing in December 2019. On August 1, 2019, based on its consultations with the Main Parties, the Board set the hearing dates for December 3, 4, and 5, 2019, in Calgary. As is the Board's standard practice, it advertised the hearing and invited persons to apply to intervene in the hearing.[15] Further, as is the Board's standard practice, in consultation with the Main Parties, the Board set the issues to be considered at the hearing of the appeals.[16]

[40] On August 13, 2019, Clifton Associates, on behalf of Sears, filed the Revised Remediation Plan (the "Revised Remediation Plan") with the Director.[17] In a letter dated September 12, 2019, the Director advised Sears that the Revised Remediation Plan had been

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[15] The Board published the Notice of Hearing in the Calgary Herald on September 4, 2019. The Board also provided a copy of the Notice of Hearing to the City of Calgary on August 26, 2019 to place on its website. The Notice of Hearing was also placed on the Board's website, and a News Release was distributed to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that any person, other than the Parties, who wished to make representations before the Board, should contact the Board by September 20, 2019.

[16] (9 August 2019), Appeal Nos. 17-069, 17-070 and 1 8-01 3-DLI (A.E.A.B.), 2019 AEAB 28. See Board's letter August 23, 2019.

[17] See Director's Supplemental Record, dated October 21, 2019, at Tab 2.

accepted as meeting the requirement of the EPO. The Parties to the EPO were directed to implement the Revised Remediation Plan.[18]

[41] On September 20, 2019, the Board received requests to participate in the hearing process as intervenors from the HHLG, representing ten families who are landowners in the Hounsfield Heights neighbourhood, and Ms. Linda Barron, who is also a landowner in the Hounsfield Heights neighbourhood. The Board reviewed submissions from the Main Parties regarding the intervenor applications. On October 9, 2019, the Board granted intervenor status to the HHLG and Ms. Barron for the hearing.

[42] On November 22, 2019, Suncor filed a motion with the Board requesting the right to cross-examine Concord at the hearing. The Board reviewed submissions from the Participants regarding Suncor's request and denied the motion.[19] The Board determined that in the context of these appeals, cross-examination by one appellant of another was not necessary for the Board to understand fully the basis for the various arguments related to the designation of a person responsible.

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

1. Was it appropriate for the Director to issue the EPO? This includes:
    (a) Did the Director rely on Sears' financial circumstances as a basis to issue the EPO, and if so, was this an irrelevant consideration?

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[18] On December 17, 2018, Clifton Associates submitted a remediation plan to the Director as required by the EPO. Between February 20, 2019 and May 31, 2019, the Director and Clifton exchanged comments regarding the remediation plan and the need for certain changes to the remediation plan.

With respect to the remediation requirements in the Revised Remediation Plan, the Board notes that at the time the EPO was issued and at the time the remediation plan was filed the remediation requirements were set out in the *Alberta Tier 1 Soil and Groundwater Remediation Guideline* (2 February 2016). In the Revised Remediation Plan the Board notes the remediation requirements had changed and were the *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* (January 2019). The Revised Remediation Plan, states: "The regulatory framework through which the Revised Remediation Plan will be administered is based off the AEP 2019 Alberta Tier 1 and 2 Guidelines." *Revised Remediation Plan*, dated August 13, 2019, Director's Supplemental Record, dated October 21, 2019, at Tab 2, at page 16. See https://open.alberta.ca/publications/1926-6243.

[19] *Sears Canada Inc.* v. *Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (27 November 2019) Appeals No. 17-069-070 and 18-013-DL3 (A.E.A.B.), 2019 ABEAB 34.

(b) Did the Director err in issuing the EPO under section 113 (substance release) of EPEA? This is as opposed to issuing the EPO under section 129 of EPEA (contaminated site).

(c) Did the Director arbitrarily issue the EPO even though the Appellants argue there was no indication the Substances on the Site or Off-Site Areas caused, were causing, or may cause an adverse effect?

2. Are the parties named in the EPO persons responsible as defined in EPEA and for the purposes of section 113, and are there other parties, such as the Mall Owners, who should be named as persons responsible?

3. Are the terms and conditions of the EPO appropriate?

(a) This includes whether the deadlines included in the EPO are appropriate.[20]

[44] On December 6, 2019, the Supreme Court of Canada released its decision in *R.* v. *Resolute FP Canada Inc.*, 2019 SCC 60. The Board noted the case referenced an indemnity agreement in relation to historical contamination and how the indemnity affected remediation orders issued by the Ontario Department of Environment and Climate Change. The Board reviewed the case and determined it was not relevant to the appeals. The Board reopened the hearing to request the Parties and the Intervenors advise the Board if they disagreed with the Board's interpretation of the case. As there was no disagreement with the Board's view, the hearing was closed on December 19, 2019.

III. SUBMISSIONS

[45] The Board received written submissions and heard oral testimony from the Participants. The following is a summary of the submissions and testimony.

A. Sears

[46] Sears stated it was represented by FTI Consulting Canada Inc. in its capacity as a court-appointed monitor in relation to Sears' bankruptcy proceedings.

[20] (9 August 2019), Appeal Nos. 17-069, 17-070 and 1 8-01 3-DLI (A.E.A.B.), 2019 AEAB 28. See Board's letter August 23, 2019.

[47] Sears acknowledged it owned the Site from 1958 to 2015, until it sold the Site to Concord on June 15, 2015. Sears stated it operated the Service Station from 1958 until 1984. Sears noted that in 1995 the Service Station was decommissioned.

[48] Sears said a leak of the Substances from the underground storage tanks on the Site contaminated the Site and the Off-Site Areas. At the hearing, Sears submitted it began remediation work in 2006, which included conducting environmental testing, health risk assessments, and site management. Sears stated the contaminated soil at the Site was excavated, remediated, and then returned to the excavation along with clean fill.

[49] Sears submitted that in response to the Director issuing the EPO on February 28, 2018, it prepared a remediation plan. Following the receipt of comments from the Director, Sears filed a Revised Remediation Plan on August 13, 2019. The Director approved the Revised Remediation Plan on September 12, 2019.

[50] At the hearing, Sears stated it was remediating and risk managing the released Substances through the operation of the dual-phase vapour extraction system and groundwater and soil vapour monitoring. Mr. David Pritchard and Mr. Stephen d'Abadie, Sears' witnesses from Clifton, acknowledged there were gaps in the data from locations in the Hounsfield Heights neighbourhood where they did not receive access for testing, but there was a plan to obtain better access and conduct additional testing. Mr. Pritchard stated the long-term estimated timeframe of greater than 15 years to remediate the released Substances was based on the data collected to date, which contained gaps within the Hounsfield Heights neighbourhood. Mr. Pritchard said if they can obtain better access to properties in the Hounsfield Heights neighbourhood for testing, they would have a greater understanding of the extent of the Plume, and in particular, the location of the LPH, and therefore, the estimated timeframe for remediation.

[51] At the hearing, Mr. Pritchard stated the current Alberta Tier 1 Guidelines for groundwater being applied to the Site and the Off-Site Areas are based on the domestic use aquifer exposure pathway. Mr. Pritchard recommended that the domestic use aquifer exposure pathway not be applied in this case since the groundwater underlying the impacted areas is not being used as a domestic use aquifer. He suggested that should AEP exclude the domestic use aquifer exposure pathway for the Site and Off-Site Areas, the majority of the remaining

concentrations of BTEX and 1,2-DCA would meet the modified Alberta Tier 1 Guidelines (e.g., the Tier 2 Guideline) leaving the impacts of the LPH and the soil vapour. This would result in reducing the size of the area in need of remediation, which, in turn, would allow resources to be concentrated on the areas of greatest concern. Mr. Pritchard maintained the most important concern is delineating the presence of LPH, which releases the contaminants (including BTEX and 1,2-DCA) into the groundwater and is the source of the hydrocarbon vapours, which are a potential concern to human health. Mr. Pritchard explained the strategy is to locate and remove the LPH, which has currently been identified in the Lions Park area and in the north end of the Hounsfield Heights neighbourhood, in order to stop the southward migration of BTEX and 1,2-DCA, through the groundwater flow. Mr. Pritchard noted that this is of importance as there is increased potential for vapours to migrate to the surface and potentially impact homes at the southern end of the Hounsfield Heights neighbourhood. Mr. Pritchard explained that their objective is to conduct delineation activities by working their way down the slope of the hill in the neighbourhood, from north to south, in a systematic fashion.

[52] Sears stated it has continuously provided updates to Ms. Barron, the Mall Owners, AEP, and the HHLG and its predecessor. Sears said Clifton had taken the following measures to communicate with the community and landowners affected by the release of the Substances:

(a) developed a communications website;

(b) communicated directly with off-site landowners;

(c) prepared quarterly reports;

(d) provided regular updates on the remediation and the development of the Revised Remediation Plan; and

(e) communicated directly with the HHLG and the Mall Owners.

[53] At the hearing, Sears acknowledged that communications with those affected by the released Substances could be improved. Sears noted that different residents in the Hounsfield Heights neighbourhood want different levels of information, and as a result, varied approaches to communicating with the residents are required. Sears said there is a danger in simplifying the technical information too much, as valuable information may be missed.

[54] Sears said the current data shows there have been no concentrations of the Substances that exceed the current soil guidelines at the Site and only one exceedance for each of the current groundwater guidelines and current soil vapour guidelines found in the Alberta Tier 1 Soil and Groundwater Remediation Guideline (2 February 2016). These exceedances were found in the Off-Site Areas.

[55] Sears noted Clifton, which helped develop the Revised Remediation Plan, has extensive knowledge and understanding of the Site and remediating released the Substances. Sears stated Clifton's experience should give weight to the Revised Remediation Plan and the EPO, which Sears submitted is the best plan for the impacted areas.

[56] Sears said it informed the HHLG and the Mall Owners of all the work in the impacted areas, and information related to the Revised Remediation Plan. Sears stated that for Clifton to better delineate the extent of released Substances in the Hounsfield Heights neighbourhood, it needed to access properties in the area. However, according to Sears, some HHLG members and some landowners refused to allow access to their property. Mr. Pritchard stated that concentrating delineation activities on city-owned land is not optimal. Better access to the privately owned properties would be optimal to definitively determine the presence of LPH and eliminate the sources of BTEX, 1,2-DCA, and soil vapours.

[57] Sears noted there was no identified risk to human health or safety in the Mall Lands. Sears stated if the Mall Owners decided to redevelop the property, the Mall Owners would have to remediate any soil concentrations that exceeded the applicable *Alberta Tier 1 Soil and Groundwater Remediation Guideline* of the day. At the hearing, Sears said the Mall Owners wanted the Director to order Sears to remediate the impacted groundwater underlying the mall parking lot. Sears submitted the Mall Owners are being opportunistic as the parking lot land was "ripe for redevelopment." Sears stated the Revised Remediation Plan is the best solution to manage the Substances in the Off-Site Areas, including the Mall Lands.

[58] Sears submitted that the submissions from the HHLG and the Mall Owners are duplicative and outside the scope of the hearing. Sears stated when the Board set the issues for the hearing, and it limited the hearing to issues related to the EPO. Sears referred to the Board's Rules of Practice that require an intervening person's participation to offer evidence or argument

directly relevant to the appeal.[21] Sears said the Federal Court of Canada decision in *Rudolph* v. *Canada*, supported the Board's rule, with the Court saying the "moving party should not, of course, be granted leave to speak to questions which were not raised by the underlying proceeding."[22]

[59] On this basis, Sears requested the Board limit the HHLG and the Mall Owners' evidence to the issues of the parties named in the EPO, and the appropriateness of the EPO's terms and conditions.

[60] Sears stated that it and Concord entered into the PSA for the sale of three properties, including the Site, to Concord for $140,000,000. Sears noted the PSA did not allocate the purchase price for each property, but a title search of the Site indicates $25,000,000 was allocated to the Site.[23]

[61] Sears stated that at the time of Concord's purchase of the Site, Sears was moving towards insolvency and was operating at a loss from 2014 to 2015. Sears said the report filed by Suncor from Avison Young Valuation and Advisory Services Alberta Inc. ("Avison Young"), valued the Site in June 2015, at $45,000,000. Sears submitted Concord purchased the Site at a significant discount at a time when Sears' financial operations were deteriorating. Sears stated Concord was aware of the release of the Substances when it purchased the Site. Sears said Concord was a person responsible under section 1(tt) of EPEA.[24]

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21 See Rule of Practice, Environmental Appeals Board, June 2015, at Rule 14.

22 *Rudolph* v. *Canada (Minister of Employment and Immigration)*, 1992 FC 22, at paragraph 6.

23 See Hearing Exhibit #7.

24 Section 1(tt) of EPEA provides, in part:

> "1 In this Act, …
>
> (tt) "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

[62] Sears noted section 112(1) of EPEA sets out the duty to take remedial measures. Section 112(1) states:

> "Where a substance that may cause, is causing or has caused an adverse effect is released into the environment, the person responsible for the substance shall, as soon as that person becomes aware of or ought to have become aware of the release,
>
> (a) take all reasonable measures to
>
> (i) repair, remedy and confine the effects of the substance, and
>
> (ii) remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect, and
>
> (b) restore the environment to a condition satisfactory to the Director..."
>
> [Emphasis added by Sears.]

[63] Sears submitted the EPO is reasonable and appropriate to meet the requirements in section 112(1) of EPEA.

B. Concord

[64] Concord submitted the Director had no basis for naming Concord as a person responsible in the EPO. Concord stated it does not meet the description of a person responsible, as set out in section 1(tt) of EPEA.[25] Concord said that even if the Board found Concord was a

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(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),…."

[25] Section 1(tt) of EPEA provides, in part:

"1 In this Act, …

(tt) "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

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),…."

person responsible, it would only be responsible for the Substances on the Site, which would have no likelihood of causing any adverse effect.

[65] Concord said Sears and Concord agreed to the PSA, which involved the purchase from Sears of the Site and all buildings on the Site, as well as properties in Burnaby and Chilliwack, B.C., for $140,000,000. Concord submitted Sears agreed to remain responsible for maintaining the Site and assume 100 percent of the liability for the release of the Substances, and that Concord would not accept any responsibility for the Substances in the Off-Site Areas caused by the Service Station.

[66] Concord stated it paid fair market value for the Site. Concord said the overall purchase price under the PSA was not reduced to reflect the environmental condition of the Site or the surrounding area, and there was no "reserve fund," "holdback," or "abatement" to account for the environmental condition of the Site.

[67] At the hearing, Concord submitted Suncor's expert, Avison Young, did not establish the fair market value of the Site in its report or testimony at the hearing. Concord said Avison Young valued the Site based on vacant land values and did not consider that Sears sold Concord three properties together.

[68] Concord noted the PSA required Sears to pursue all work required by a governmental authority for the remediation of hazardous substances and to carry out such work on the Site as long as the Leaseback remains in effect.

[69] Concord stated that under the PSA, Sears agreed to the Environmental Indemnity, which indemnified Concord from any costs that may result from Sears failing to perform its remediation obligations. Concord said the Environmental Indemnity remains in effect for fifty years or, in the case of the Site, the date of expiry or termination of the Leaseback. The Board notes Concord argued the Leaseback had not been terminated. Concord stated the Environmental Indemnity states Sears' obligations "under the Environmental Indemnity shall 'in no way be affected or impaired' by the liquidation, dissolution, receivership, insolvency,

bankruptcy, assignment for the benefit of creditors or other similar application or proceeding affecting Sears."[26]

[70] Concord submitted that immediately after Sears advised the Director that Sears was unable to commit to carrying out further environmental work on the Site or the Off-Site Areas, the Director determined that Concord, as the owner of the Site, was a Party to the EPO.

[71] Concord said that at a meeting on February 14, 2018, the Director explained AEP generally considers the landowner as a person responsible for a release of substances. Concord submitted the Director's Record does not show the Director undertook any other analysis or consideration in determining whether to name Concord in the EPO.

[72] Concord referred to section 113(1) of EPEA, which 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."
>
> [Emphasis added by Concord.]

[73] Concord submitted the words "may cause" means the Director must reasonably conclude there is nothing less than a probability of an actual or future result or consequence.

[74] Concord noted section 1(b) of EPEA defines the term "adverse effect" as the "impairment of or damage to the environment, human health or safety or property." Concord submitted adverse effects must be more than trivial for the Director's jurisdiction to apply, and the basis for the Director to issue an EPO must be more than just a change in the financial circumstances of a person responsible. Concord stated the threshold the Director must meet to issue an EPO is whether the Substances on the Site have caused, is causing, or may cause, an adverse effect.

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[26] Concord's Written Submission, dated November 12, 2019, at paragraph 38.

[75] Concord stated Sears' remedial activities since the discovery of the Substances release has resulted in no LPH being detected on the Site or the Mall Lands since 2007, and AEP confirmed in 2017 that there was a negligible risk to human health on the Site or Off-Site Areas.[27]

[76] Concord said the Director's only basis for issuing the EPO was Sears' changed financial status, which did not affect risks to the environment, human health or safety, or property. Concord submitted the Director had no jurisdiction to issue the EPO, as he did not have any basis to form the opinion the released Substances were causing, or likely to cause, an adverse effect.

[77] Concord stated: "[O]n a plain reading of section 1(tt) of EPEA, ownership of land affected by a historical release does not, without more, make the landowner a person responsible and potentially liable to be named in an EPO issued under section 113 of EPEA."[28] Concord noted past decisions of the Board agree with Concord's interpretation.

[78] Concord referred to the Board's decision in *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* ("*McColl*")[29] where the Board considered an appeal of an Environmental Protection Order issued regarding a property with historical contamination and multiple past users and owners. Concord stated the Board rejected the position that a third party should be named in an Environmental Protection Order just because it purchased the property that was the source of the pollution.

[79] Concord also referred to the Board's decision in *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director (Monitoring, Bow Region, Regional Services, Alberta Environment)* ("*Imperial*"),[30] regarding hydrocarbon contamination underlying residential properties. Concord stated AEP issued an Environmental Protection Order that named two of the parties as "persons responsible," but did not name other parties involved. Concord said the Board determined AEP

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27 See: Concord's Initial Submission, dated November 12, 2019, paragraphs 22 and 23.

28 Concord's Written Submission, dated November 12, 2019, at paragraph 58.

29 *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.).

30 *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director (Monitoring, Bow Region, Regional Services, Alberta Environment)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

was wrong to name a third-party purchaser of the polluted property as a person responsible in the order simply because the third party had purchased some of the property.

[80] Concord noted the Board's past decisions determined that orders under section 113 of EPEA placed responsibility on the person with ownership or control of the substances, rather than the owner of the contaminated land. Concord stated the Board's past decisions recognized the distinction between the issuance of Environmental Protection Orders under section 113 of EPEA ("Section 113 EPO") and the issuance of Environmental Protection Orders under the contaminated site provisions of Section 129 of EPEA ("Section 129 EPO"). Concord submitted the definition of a person responsible for a Section 113 EPO, is related to the pollution, and not the property where the pollution is located. Concord noted that a Section 129 EPO refers to "a person responsible for a contaminated site," which includes the person responsible for the pollution and the owners of the contaminated site.

[81] In naming Concord as a person responsible, Concord submitted the Director failed to consider the following:

> "(a) Concord was not directly or indirectly responsible for any hydrocarbons released;
>
> (b) significant remedial work had been carried out on the Site prior to the Concord Acquisition;
>
> (c) there is no evidence of hydrocarbon contamination continuing to migrate off the Site; and
>
> (d) Concord has not undertaken any work on the Site or the Off-Site Areas that might affect the hydrocarbon plume."[31]

[82] Concord stated it was an undisputed fact that all the Substances released on the Site occurred decades before Concord purchased the Site. Concord said between the time when the Substances were first discovered on the Site and Concord's purchase of the Site, tens of thousands of cubic metres of contaminated soil were excavated and either replaced or remediated and then returned to the excavation.

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[31] Concord's Written Submission, dated November 12, 2019, at paragraph 76.

[83] Concord stated it has never been the owner of the Substances and has never exercised "charge, management or control" over the Substances, which is a requirement to be considered a person responsible under EPEA. Concord said:

(a) it has never excavated or graded the soil on the Site;

(b) conducted any other development activity on the Site;

(c) it is not the principal of any party responsible for developing the Site; and

(d) has not been in any position to direct or prevent activities on the Site that might exacerbate the Substances.

[84] Concord said its position in the appeal is similar to the parties the Board found were not a person responsible in the *McColl* and *Imperial* cases. Concord stated that, like those parties, it simply purchased a contaminated property after the pollution had already occurred. Concord submitted that the Board should find it is not a person responsible.

[85] Concord stated section 113 of EPEA implements the "polluter-pays" principle, which assigns responsibility for remedying environmental damage to the polluter. Concord said that naming it in the EPO does not further the objectives of the polluter-pays principle, and acts as a disincentive to prospective buyers of contaminated lands, such as brownfield sites. Concord stated would-be buyers of contaminated sites must consider the real possibility they could be held liable for the pollution they did not cause.

[86] Concord submitted if the Board determines Concord can be held responsible for the release of the Substances as the owner of the Site, it could only be responsible for Substances on the Site, and not the Substances that migrated to the Off-Site Areas. Concord said:

(a) it did not purchase the Substances in the Off-Site Areas;

(b) it did not acquire any ownership interest in any of the properties in the Off-Site Areas;

(c) it has no right or obligation to access any portion of the Off-Site Areas to carry out monitoring or remediation;

(d) if any rights or obligations existed before Concord purchased the Site, those rights were contractually allocated to Sears in the PSA and the Environmental Indemnity; and

(e) EPEA does not have any provisions to transfer obligations related to the Substances in the Off-Site Areas to Concord.

[87] Concord submitted it does not have any ability to exercise "charge, management or control" over any of the Substances located in the Off-Site Areas, and is not the owner of such Substances. Therefore, Concord could not be a person responsible for the release of the Substances into the Off-Site Areas.

[88] Concord stated that the original source of the release of the Substances, the underground storage tanks from the Service Station, were removed from the Site and much of the work to remediate the Site was completed, resulting in a negligible risk to human health. Concord submitted that since the Substances on the Site are not causing an adverse effect, the Site cannot be the subject of the EPO.

[89] Concord stated that if the Board decides to recommend Concord remain as a person responsible in the EPO, then the Mall Owners must also be named as a person responsible. Concord noted the following similarities between the Mall Owners' situation and Concord's situation:

(a) the Mall Owners had no involvement with the historical releases that caused the Plume;

(b) the Mall Owners knowingly purchased a contaminated property; and

(c) the Mall Owners would have had a mechanism in the sale agreement for the mall to account for the released Substances in the Mall Lands.

[90] Concord requested the Board recommend the Minister reverse the Director's decision to issue the EPO. Alternatively, Concord requested the Board recommend the Minister vary the EPO by removing Concord as a person responsible. In the further alternative, Concord requested the Board recommend the Minister vary the EPO to:

(a) limit Concord's liability to the Substances under the Site;

(b) clarify that Concord is not liable for remediation or monitoring work in the Off-Site Areas; and

(c) add the Mall Owners as a person responsible for the Substances on the Mall Lands.

C. Suncor

[91] Suncor confirmed Sunoco Inc. was a predecessor company to Suncor, and in 1984 it entered into the Management Agreement with Sears to manage and operate the Service Station from March 1985 to June 1994. Suncor stated Sears maintained ownership of the equipment and business throughout the duration of the Management Agreement, and Suncor was never the assignee or successor of Sears.

[92] Suncor hired SLR Consulting (Canada) Ltd. ("SLR") to provide an opinion (the "SLR Report") on the timing of the fuel releases at the Service Station. Suncor said SLR concluded that the release of the Substances occurred before Suncor operated the Service Station. SLR stated there is evidence of four underground storage tanks used by Sears from 1958 until the Service Station was decommissioned in 1995, and that the release likely occurred at one of the underground storage tanks before 1972. SLR noted Mr. Lou Lindblad, a former Sears employee, reported that leaking underground storage tanks were replaced in the late 1960s or early 1970s, and a Calgary Herald article mentioned a pool of gasoline found in a trench on the Site in 1980. Suncor submitted it was only in 1989 when the underground storage tanks were replaced that it became aware of the released Substances.

[93] Suncor stated it upgraded the Site in 1985 with new steel galvanized piping, which reduced the risk of leaks, and replaced the three existing steel underground storage tanks in 1989. Suncor said there is no indication any of the repairs or upgrades occurred as a result of a spill or leak.

[94] Suncor submitted it was diligent in completing and maintaining volumetric reporting records during the period it operated the Service Station. Regular analysis and audits of liquid level measurements were conducted to monitor volume and detect leaks. At the hearing, Ms. Beatrice Weller, an employee of Suncor's predecessor company from 1981 to 2010, testified she was the Fuel Field Person responsible for evaluating the operations of Suncor service stations in Ontario and Alberta. Ms. Weller said part of her responsibilities were to reconcile the gasoline levels in the underground storage tanks with the recorded sales and look for trends that could indicate a leak. Ms. Weller said she did not find any evidence in the

reconciliations to suggest there was a leak or spill from the underground storage tanks. Ms. Weller indicated that the records that she referred to in her testimony are no longer in existence.

[95] Suncor stated it ceased operation of the Service Station in June 1994 and removed the underground storage tanks it had installed in 1989. Suncor said it was reported the underground storage tanks were found in good condition.

[96] Suncor submitted it provided Sears with expert assistance to organize and coordinate the decommissioning and remediation of the Service Station, but the responsibility and decision-making always remained with Sears. Suncor stated there was no evidence of its actions at the Site aggravating any existing contamination. Suncor said its involvement at the Site ceased in 2000, and it has not had any input at the Site since then.

[97] Suncor noted that on October 11, 2018, the Director amended the EPO to add Suncor as a person responsible.

[98] Suncor submitted EPEA generally has two regulatory approaches to contamination:

(1) Part 5, Division 1, which addresses the release of substances generally; and

(2) Part 5, Division 2, which deals with contaminated sites.

[99] Suncor stated Part 5, Division 1, provides for a Section 113 EPO, and Part 5, Division 2, provides for a Section 129 EPO.

[100] Suncor noted a Section 113 EPO can be issued to a person responsible for the substance causing the pollution and includes an owner or previous owner of the substance, and every person who has had charge, management, or control of the substance.

[101] Suncor said a Section 129 EPO may be issued to a person responsible for the contaminated site, including the current owner, where the person knew or ought reasonably to have known, the substance was present when they became the owner. Suncor stated a Section 129 EPO enables a director to allocate responsibility and cost to present and past site owners who may have contractually assumed liability for a contaminated site. Suncor noted AEP's *Guideline for the Designation of Contaminated Sites under the Environmental Protection and*

Enhancement Act (2000) states, "the designation of a contaminated site will only occur as a last resort when there are no other appropriate tools."[32]

[102] Suncor submitted the Director should have pursued a Section 129 EPO, given the complexity of the Site and the historical offsite contamination. Suncor noted that in the *Imperial* case, the Board found a significant motive behind the Director's decision to issue a Section 113 EPO rather than a Section 129 EPO was the urgent need to manage the pollution. Suncor stated such urgency does not exist in this appeal as the Site does not pose any immediate risk to human health or public safety. Suncor said it was only the Sears bankruptcy that motivated the Director to issue the EPO.

[103] Suncor stated the Director did not need to issue the EPO when Sears was fulfilling its obligations to monitor and remediate the Site, and there was no immediate risk to human health. Suncor acknowledged the landowners in the affected neighbourhood are concerned about the release of the Substances; however, Suncor noted property values had not been adversely affected, and there are no restrictions on the use of the property.

[104] Suncor submitted it was not a person responsible under section 113 or section 129 because Suncor:

(a) was never the owner or previous owner of the released Substances and never had charge, management and control of the released Substances.

(b) at no time was the person responsible for the Substances that were in, or under, the Site;

(c) did not cause or contribute to the release of the Substances into the environment;

(d) is not the owner or previous owner of the Site when the Substances was in, or under, the Site; and

(e) is not a successor, assignee, principal or agent of Sears.

[105] Suncor stated under the Management Agreement it arranged for the delivery of fuel, but the title for the fuel passed from Suncor to Sears upon delivery to the underground

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[32] *Environmental Services Division, Guideline for the Designation of Contaminated Sites under the Environmental Protection and Enhancement Act (April 2000),* at page 1. See https://open.alberta.ca/publications/0778511820

storage tanks at each outlet. Suncor said it never had ownership of the Substances while it was stored in the underground storage tanks and sold to customers at the Service Station.

[106] Suncor said its actions during and immediately following its time as an operator of the Service Station fall under the exemption for a person responsible under section 1(tt)(vi) of EPEA, which provides:

> "'person responsible', when used with reference to a substance or a thing containing a substance… does not include…
>
> (vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel…"

Suncor submitted the Board should take a broad and purposeful approach when applying the exemption provision under EPEA, as it is in the public interest to exempt those who are brought in to improve operations, reduce risk, and remediate the original release.

[107] Suncor said its assistance to Sears in decommissioning the Service Station was prudent and in good faith in support of an ongoing business relationship. Suncor submitted if it remains as a person responsible in the EPO, it will deter other operators from assisting with problematic sites.

[108] Suncor said Concord, as a successor and assignee to Sears, is a person responsible under the EPO. Suncor stated Sears "assigned and transferred all of its rights, title and interest in the Site to Concord." Suncor stated the Environmental Indemnity between Sears and Concord is evidence of an allocation of risk between the parties, but it in no way limits the Director's statutory powers to issue an EPO under EPEA.

[109] Suncor said Concord purchased the Site from Sears for significantly less than fair market value. At the hearing, Suncor's witness, Mr. Robert Lipman, Senior Valuation Consultant with Avison Young, testified the value of the Site at the time of purchase was $45,000,000.

[110] Suncor noted the PSA between Sears and Concord did not set out the individual value of the properties purchased, but a review of the certificate of title and transfer of land indicated a value of $25,000,000 was allocated to the Site.

[111] Suncor stated Concord's website publicizes that Concord will be redeveloping the Site for urban housing. Suncor submitted, "Concord knowingly acquired a contaminated site at a price heavily discounted from its fair market value and did so because of the exponential upside gains it will receive from the new urban neighbourhood it has planned on the Site." Suncor said Concord is positioned to benefit the most from the redevelopment of the Site and should not be unjustly enriched.

[112] Suncor stated the Mall Owners had knowledge of the release of the Substances before buying the Mall Lands. Suncor said the Mall Owners likely factored the released Substances into their plans to purchase and redevelop the Mall Lands and would be unjustly enriched if they were not named in the EPO.

[113] Suncor stated the Revised Remediation Plan prepared by Clifton provides a practical approach for managing the potential health risks associated with the Substances. Suncor submitted the reports from the HHLG, *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment* (the "Wyndham Report"), and from the Mall Owners (the "Pinchin Report") reviewed the Revised Remediation Plan with unreasonable expectations of available funds and timelines that did not reflect the complexity and reality of the Site or the released Substances, and the negligible risks to human health. Suncor said the Wyndham Report and the Pinchin Report failed to acknowledge the responses from Clifton to inquiries from the Director, which indicated the complexity of the conditions at the Site. Suncor submitted the Revised Remediation Plan is reasonable in the circumstances.

[114] Suncor requested the Board make the following recommendations to the Minister:

(a) the EPO be withdrawn on the basis that the Director inappropriately relied on Sears' financial circumstances, and did not consider the evidence that there was a negligible risk to human health, the environment, or property;

(b) Suncor be removed from the Order on the basis that Suncor:

(i) is not a person responsible pursuant to section 113 of EPEA; and

(ii) falls within the exemption to the definition of a person responsible in section 1(tt)(vi) of EPEA;

(c) the Mall Owners be added to the Order as a person responsible;

(d) uphold the Director's decision to name Concord as a person responsible in the EPO; and

(e) uphold the Revised Remediation Plan as approved by the Director on September 12, 2019.

D. Director

[115] The Director submitted he had jurisdiction under section 113 of EPEA to issue the EPO to each of the Appellants, and the terms and conditions were appropriate.

[116] The Director noted Sears or one of its predecessor companies was the registered owner of the Site from October 31, 1958 until June 18, 2015, and that Sears owned or operated the Service Station from 1958 until 1995 when it was decommissioned.

[117] The Director stated Suncor entered into the Management Agreement with Sears on March 1, 1984, to manage and operate the Service Station and supply motor fuels for retail sale.

[118] The Director noted Concord became the registered owner of the Site on June 18, 2015.

[119] The Director stated the August 1997 report from SEACOR identified a leak from an underground storage tank at the Service Station sometime between the late 1970s and the early 1980s.

[120] The Director said to issue a Section 113 EPO there had to be a release of a substance into the environment which may cause, is causing, or has caused, an adverse effect. The Director determined that the criteria set out in section 113 existed at the Site and the Off-Site Areas. Therefore, according to the Director, he had the jurisdiction to issue the EPO.

[121] The Director said he considered the notification received from Sears that it was no longer able to meet its regulatory obligations to remediate the released Substances. The Director submitted the notification from Sears affected the timing of the issuance of the EPO, but Sears' financial situation did not affect the issuance of the EPO.

[122] The Director stated the only constraints on his discretion in section 113 of EPEA are those expressly stated in the legislation. The Director noted that in the *Imperial* case, the Board stated:

> "[T]he Director is only constrained from applying any of the provisions of EPEA to the extent that the text of the specific provision requires such constraint. Thus, if the circumstances of a particular matter meet the criteria prescribed within a section, the Director may proceed under that section."[33]

[123] The Director said the appellants in the *Imperial* case argued the Director had issued the EPO based on irrelevant considerations, such as the ease of access to the appellant or the appellant's financial assets. The Director stated the Board rejected this argument and quoted the Board as stating that "administrative fairness obliges the Director to also name other clearly responsible parties in an EPO [environmental protection order] so that the cleanup burden might be shared."[34]

[124] The Director noted section 1(mmm) of EPEA defines "substance" as:

> "(i) any matter that
>
> (A) is capable of becoming dispersed in the environment, or
>
> (B) is capable of becoming transformed in the environment into matter referred to in paragraph (A),
>
> (ii) any sound, vibration, heat, radiation or other form of energy, and
>
> (iii) any combination of things referred to in subclauses (i) and (ii)."

[125] The Director stated he concluded the Service Station had leaked gasoline into the environment between the late 1970s and early 1980s based on the report from SEACOR in 1997, and three reports from Clifton dated March 29, 2016, October 20, 2016, and May 19, 2017. The Director said he used the objective standards outlined in these reports to form his opinion that the Substances caused, are causing, or may cause an adverse effect.

[126] The Director noted section 1(b) of EPEA defines adverse effect as meaning "the impairment or damage to the environment, human health or safety or property." The Director

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[33] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director (Monitoring, Bow Region, Regional Services, Alberta Environment)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 173.

stated he determined there was a risk that impairment or damage had either already occurred or would occur in the future. The Director submitted he did not have to prove the risk of impairment or damage as the onus is on the Appellants to show there is no risk of impairment or damage, or the risk is negligible.

[127] The Director stated the Court in *R.* v. *Edmonton* determined the Director only needs to prove it is more likely than not that the release of a substance has caused, is causing or may cause an adverse effect.[35] The Director noted the Supreme Court of Canada's approach in *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*[36] followed by the Board in *Imperial*. The Director said the Board quoted the Court as follows:

> "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[37]

[128] The Director submitted the Board in the *Imperial* case found:

> "(a) the director may use objective standards, like environmental quality guidelines, to form his or her opinion whether an adverse effect may occur, is occurring or has occurred;
>
> (b) the lack of full scientific certainty should not be used as a reason for postponing measures to prevent, or minimize impairment of or damage to the environment, human health or safety or property;
>
> (c) the director may reasonably reach a conclusion that there has been an adverse effect if there is a risk of impairment or damage either occurring in the future or having already occurred;
>
> (d) the Director does not have to prove the risk of impairment or damage; and
>
> (e) the Appellants must convince the Board that there is no risk or negligible risk of impairment or damage."[38]

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34 *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director (Monitoring, Bow Region, Regional Services, Alberta Environment)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 197.

35 *R.* v. *Edmonton (City)*, 2006 ABPC 56.

36 *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, 2001 SCC 40.

37 *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director (Monitoring, Bow Region, Regional Services, Alberta Environment)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 141.

38 Director's Submission, dated November 12, 2019, at paragraph 94.

[129] The Director submitted Sears is a person responsible under section 113 of EPEA because Sears:

(a) owned or operated the Service Station from 1958 until 1995, which includes the time the release of the Substances was discovered in 1989;

(b) previously owned the Substances and had charge, management and control of the Substances as defined in section 1(b) of EPEA; and

(c) does not dispute that it is a person responsible.

[130] The Director submitted Suncor is a person responsible under section 113 of EPEA because Suncor:

(a) operated the Service Station from April 1984 to June 1994, which includes the time the release of the Substances was discovered in 1989;

(b) retained Rossmar in 1989 to replace the underground storage tanks with fibreglass underground storage tanks, to conduct safety inspections and to conduct environmental testing on the Site;

(c) took the following remedial steps once the Substances were discovered:

(i) retained Rossmar to remove 1,075 tonnes of contaminated soil from the Site;

(ii) initiated a vapour management program on the Site;

(iii) retained SEACOR to decommission the Service Station and remove the underground storage tanks; and

(iv) paid for a portion of the remediation costs.

[131] The Director submitted Concord is a person responsible because Concord:

(a) owns the Site and, therefore, is the owner of the Substances; and

(b) has control of the Substances as defined in section 1(b) of EPEA because Concord (or a related company):

(i) had knowledge of the release of the Substances on and in the subsurface under the Site when it purchased the Site from Sears;

(ii) agreed to "diligently prosecute until it is complete any and all work pursuant to [r]emedial [o]rders issued by a [g]overnmental [a]uthority with respect to the property in Calgary and relating to the release of [h]azardous [s]ubstances at any time up to the Closing Date" once Sears ceases to be in possession and occupation of its store on the Site.

[132] The Director noted the Court in *R.* v. *Edmonton* found control over a substance was established by being present on the defendant's property:

> "While the defendant may not have had control over the Stadium and therefore the pollutant at the time of release, the pollutant came to be under the defendant's control because the pollutant came to rest on the defendant's property and the defendant was aware of that fact. If the pollutant had similarly landed on a neighbouring land, to the knowledge of the owner or occupier of that land, that owner or occupier too would be a person who had control of the pollutant.
>
> Moreover, the defendant acquired a degree of charge, management or control over the released pollutant in its capacity as maintenance provider of the Stadium lighting during the Games, upon the defendant taking possession of the ruptured capacitors and commencing an investigation as to the nature and characteristics of the pollutant by having it tested."[39]
>
> [Emphasis added by the Director.]

[133] The Director noted, in the *Imperial* case, the Board found Devon Estates was a person responsible under EPEA even though Devon Estates did not cause the pollution, but owned the lands that contained the pollution.

[134] The Director referred to the Board's decision in *Legal Oil and Gas Ltd.* v. *Director of Land Reclamation Division, Alberta Environmental Protection* ("*Legal*"), where the appellant, Legal Oil, leased land that was already contaminated by another party.[40] The Director stated the Board found when Legal Oil inherited the property, it also inherited a pollution problem and became a person responsible under EPEA.

[135] The Director noted section 113(3) of EPEA states:

> "An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:
>
> (a) investigate the situation;
>
> (b) take any action specified by the Director to prevent the release;
>
> (c) measure the rate of release or the ambient concentration, or both, of the substance;

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39 *R.* v. *Edmonton (City)*, 2006 ABPC 56, at paragraph 610 and 611.

40 *Legal Oil and Gas Ltd.* v. *Director of Land Reclamation Division, Alberta Environmental Protection*, (22 December 1997) EAB Appeal No. 97-024 (A.E.A.B.).

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order."

The Director submitted all the terms and conditions in the EPO were enabled by one or more of the emphasized sections above, and are reasonable.

[136] The Director requested the Board:

(a) find that the EPO was properly issued, that the terms and conditions are reasonable, and that it remain in force; and

(b) recommend to the Minister the appeals be dismissed.

E. HHLG

[137] The HHLG said Hounsfield Heights is an inner-city residential neighbourhood in northwest Calgary. The Hounsfield Heights neighbourhood is part of the larger Hounsfield Heights-Briar Hill Community.[41] The HHLG noted the members of the HHLG are property owners and residents of Hounsfield Heights who did not know of, or had very little knowledge of, the release of the Substances when they purchased their properties.

[138] At the hearing, Ms. Lise Houle and Dr. Allan Legge, landowners in the Hounsfield Heights neighbourhood, testified on behalf of the HHLG. Ms. Houle said her home was located directly in the middle of the Plume. Ms. Houle expressed concern about health,

[41] The Hounsfield Heights-Briar Hill Community has been represented by the Hounsfield Heights-Briar Hill Community Association in dealing with Sears and the Substance Release through the Hounsfield Heights-Briar Hill Community Association Sears Plume Committee, which appears to have been disbanded in recent years.

property values, and the "never-ending lack of closure." Ms. Houle stated dealing with released Substances was exhausting, and there was an "overall cloud" on the residents.

[139] Dr. Legge said he purchased a home in the area in 1978. Dr. Legge stated he learned about the released Substances in 1995 by asking a worker about the piles of soil at the Site. Dr. Legge said the main issue is that the remediation of the Substances has gone on for a long time. He stated that there is a fear in the community of exposure to the Substances. Dr. Legge said the impact is psychological and stressful, especially for families with children.

[140] Ms. Houle and Dr. Legge said neither of them have been approached to grant access to their properties for testing and did not know anyone who had refused access.

[141] The HHLG said their homes are their biggest investments, and the residents are concerned about the potential stigma of living in a contaminated area, something that is always in the back of their minds. The HHLG stated the release of the Substances has created uncertainty for the community for almost 20 years, and the Revised Remediation Plan may not achieve guideline compliance until 2045, which would be 50 years after the release of the Substances was initially discovered. The HHLG submitted Sears must increase its efforts to remediate the Substances and achieve compliance within 5 to 15 years.

[142] The HHLG said Sears' communication with the residents in Hounsfield Heights was irregular and ineffective at keeping them informed about the Substances and the effects on their community. At the hearing, both Ms. Houle and Dr. Legge agreed the communication from Sears had been sporadic. The HHLG submitted some of the communication from Clifton has been inaccurate, with one letter, dated November 27, 2006, stating the source of Substances had been removed, and any remaining impacts were stable and not migrating. The HHLG stated their understanding was that the Plume is not stable and continues to migrate.

[143] The HHLG retained Mr. Marc Bowles, a hydrologist with Wyndham Environmental Ltd., to review the historical data related to the release of the Substances and evaluate the 2019 Revised Remediation Plan, which Mr. Bowles documented in the Wyndham Report filed for the hearing. The Wyndham Report concluded the Plume appears to be still

expanding, control of the source had not been achieved, and that remediation could take upwards of 75 years unless additional remedial efforts were undertaken.

[144] The Wyndham Report made several recommendations to improve the Revised Remediation Plan, including the following:

(a) use existing and newly collected data to refine the Conceptual Site Model and construct a numerical hydraulic model;

(b) use additional modelling to help refine the estimated timeframe for remediation of the Substances;

(c) complete a formal Remedial Options Assessment to determine what additional complementary remediation methodologies should be employed in addition to those planned, to accelerate the timeframe for remediation of the Plume;

(d) formalize the Risk Management Plan and seek input and approval from all stakeholders including the HHLG as well as other local residents and property owners;

(e) modify the vapour monitoring plan by evaluating the relationship between groundwater and soil vapours and improving vapour delineation in areas where exceedances are found; and

(f) sampling during low atmospheric pressure events to better characterize the worst-case scenarios.[42]

[145] The HHLG noted in particular, the final recommendation from the Wyndham Report, which reads:

> "Finally, it is suggested that given the extended timeframe during which the Plume has been in place and allowed to grow/migrate, as well as the lack of aggressive remedial measures undertaken to date, an expectation of achieving

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[42] See *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment*, November 4, 2019, Wyndham Environmental Ltd., at page 12, where it states:

> "… [V]apour sampling programs in Calgary [have] demonstrated that sampling during low pressure events better reflects potential impact to residents. Results from vapour sampling programs strategically targeted to take place during low pressure events has shown that vapour concentrations can increase by as much as two orders of magnitude during these events, thus better characterizing a worst case risk scenario. Accordingly, conducting a focused vapour sampling program during a low pressure event is recommended. This is in keeping with the *CCME Guidance Manual for Environmental Site Characterization in Support of Environmental and Human Health Risk Assessment* (CCME, 2016) which states "Barometric pressure fluctuations may also result in episodic soil gas intrusion."

> guideline compliance in, at very least, the medium term [5 to 15 years] would appear reasonable, regardless of the effort or cost required to achieve this goal."[43]

[146] The HHLG requested the Board adopt these and the other recommendations in the Wyndham Report.

[147] The HHLG submitted there is no doubt the Substances released from the Service Station have had, are having, and will continue to have, an adverse effect on the Off-Site Areas, including the Hounsfield Heights neighbourhood, for many years to come.

[148] The HHLG requested the Board vary the EPO to require the Revised Remediation Plan to achieve compliance with Alberta Tier 1 Guidelines within, at the very least, five to fifteen years, and to include all of the recommendations stated in the Wyndham Report.

F. Linda Barron

[149] Ms. Barron stated she has been a resident of the Hounsfield Heights-Briar Hill community since August 1, 2005. Ms. Barron said she first learned of the release of the Substances by a letter from Clifton dated August 8, 2005. Ms. Barron stated she met with several parties, including Sears, to discuss the released Substances and was assured remediation would take five years.

[150] Ms. Barron noted Clifton circulated a questionnaire to the Hounsfield Heights-Briar Hill community in 2015. Ms. Barron stated she responded to the questionnaire and submitted it to Clifton. Ms. Barron said she received a follow-up email from Clifton on January 27, 2016, in which Clifton indicated the next step in the remediation process would be to contact residents regarding access to her property to install shallow vapour probes and potentially boreholes and monitoring wells. Ms. Barron stated she met with Clifton in February 2016 and was advised it was considering applying Regenesis Plume Stop along 11th Avenue and 13th Avenue NW to control and remediate the Substances and reduce the remediation time to six years.

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[43] *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment*, November 4, 2019, Wyndham Environmental Ltd., at page 14.

[151] Ms. Barron noted the Revised Remediation Plan stated the first step to remove the source of the Plume was the need to delineate the extent of its spread by obtaining access to private residences for the purposes of delineation drilling. Ms. Barron submitted she was not contacted in 2019 for access to her property for delineation drilling, and neither were any other landowners in the area that she spoke to.

[152] Ms. Barron stated she sent a letter dated November 1, 2019, to legal counsel for both the Director and Sears seeking to understand the extent to which other homeowners may have been contacted by Clifton or the Director in 2019, but did not receive a response.

[153] Ms. Barron said she is concerned this matter has lingered too long. At the hearing, Ms. Barron said if the Plume had been aggressively dealt with years ago, it would be gone today. Ms. Barron said she was initially told in 2005 that the remediation would be completed within five years, and now the Revised Remediation Plan states it will take longer than 15 years. Ms. Barron noted Clifton indicated in the Revised Remediation Plan the whereabouts of the Plume are unknown, and access to residential properties is required before the extent of the Plume can be determined.

[154] Ms. Barron requested the Board help her find answers to the following questions:

> "1. Have all remedial options been explored for the [Off-Site]? Are there other ways to address remediation of the hydrocarbons, particularly the LPH in the [Off-Site]?
>
> 2. If access to residential property was unnecessary in 2005, is access truly necessary now?
>
> 3. How does a landowner, as a single member of a broader Community make any informed decision with respect to their property if they do not know what neighboring landowners are planning?
>
> 4. How does a landowner, as a single member of a broader Community make any informed decision with respect to their property if they do not know what plans Clifton has for remediation of Source contaminants and how remediation timelines might change if property access was granted by a sufficient number of homeowners or an insufficient number of homeowners?
>
> 5. If a) the whereabouts of Source contamination LPH is unknown and b) as [ARO Environmental Solutions Ltd.] has suggested, the vapour

monitoring system is biased, is it reasonable to discontinue monitoring for vapours in areas of the [Off-Site] at this time?

6. Is there any possibility that contamination continues to migrate into the [Off-Site], particularly given [the excavation of lands at the Mall in 2006 and 2007. Having excavated Unit 1 and Unit 2 at the Mall, is it possible that this excavation has created a conduit for residual hydrocarbons in Unit 1 and Unit 2 to move to Unit 3 and flow into the [Off-Site]?

7. Are there other remedial measures that can be employed to expedite the remediation process?

8. Is the Board able to suggest additional communication practices that might help landowners in the [Off-Site]?"[44]

G. Mall Owners

[155] The Mall Owners submitted the standard of review for an EPO under section 113 of EPEA is correctness.

[156] The Mall Owners said if the Director's sole basis for issuing the EPO was Sears' financial circumstances, he would have issued the EPO immediately after becoming aware of Sears' difficulties. The Mall Owners stated the EPO was issued after Sears had provided notice it could no longer fulfill its environmental obligations for the Site and would cease remediation activities.

[157] The Mall Owners submitted the Director was justified in issuing the EPO and acted consistently with the purposes of section 2(a) of EPEA to "support and promote the protection, enhancement and wise use of the environment while recognizing… the protection of the environment is essential to the integrity of the ecosystems and human health and the well-being of society."

[158] The Mall Owners stated Suncor and Concord narrowly interpreted section 113 of EPEA to only apply to the person who was originally responsible for the initial release of the Substances. The Mall Owners said such an interpretation is contrary to the Board's decision in *Imperial*:

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[44] Letter from Ms. Linda Barron, dated November 12, 2019, at pages 6 and 7. See ARO Environmental Solutions Ltd., dated February 22, 2018, which is Exhibit O to Ms. Barron's Written Submission, dated November 12, 2019.

> "Next, the Board must consider whether the presence of the substances within the Subdivision Lands may constitute an ongoing release. One of the primary concerns of the Director, the CHR, and the Residents Committee is that the substances may not remain in the same location. The Board is satisfied on the evidence that there is a risk, albeit small, that lead in dust particles and hydrocarbon vapours have migrated or may migrate into residents' houses. To the extent that the substances are existent and mobile may present ongoing releases. Such an interpretation is consistent with the language of section 102 [now section 113].
>
> Section 102 [now section 113] states that in order to issue an [environmental protection order], the Director must be of the opinion that a release may occur, is occurring, or has occurred and it may cause, is causing or has caused an adverse effect. There is no specific requirement that the release must be directly attributable to vapours, it may still fall within section 102 [now section 113]. This interpretation is further supported by the final phrase of section 102(1) [now section 113(1)], which provides that the Director may issue an [environmental protection order] to the 'person responsible' for the substance rather than merely the 'person responsible' for the release. It is also supported by section 2(a) of EPEA.
>
> The Director's choice of persons upon whom to issue an [environmental protection order] is not limited to persons responsible for the release or who actively released the substance. Thus, in the Board's view, the Order applies in respect of releases which occurred before EPEA came into force in connection with Imperial Oil's operations, after EPEA came into force, when the Substances migrated through the Subdivision Lands, and which occur presently or in the future."[45]
>
> [Emphasis added by the Mall Owners.]

[159] The Mall Owners said the Director's opinion was that the Substances had caused, are causing, or may cause an adverse effect. The Mall Owners argued the Director was correct in concluding that there was an adverse effect occurring that exceeded the Alberta Tier 1 Guidelines and that this adverse effect continued to occur while high levels of the Substances remain in the soil.

[160] The Mall Owners noted the *Remediation Regulation*, AR 154/2009:

(a) adopts the Tier 1 Guidelines as the remediation standard for a release;

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[45] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*, (21 May 2002) EAB Appeal No. 10-062-R (A.E.A.B.), at paragraphs 82 to 84.

(b) makes compliance with the Tier 1 Guidelines or the Alberta Tier 2 Guidelines a prerequisite to obtaining a remediation certificate;[46] and

(c) provides protection against a subsequent Environmental Protection Order being issued for the Substances after a Remediation Certificate has been issued.

[161] The Mall Owners submitted the Director was correct to:

(a) find a release of the Substances occurred;

(b) find a person responsible for the Substances is not required to be the person who actively released the Substances;

(c) rely upon the exceedance of Tier 1 Guidelines as the basis for determining "the release may cause, is causing or has caused an adverse effect"; and

(d) issue the EPO under section 113 of EPEA.

[162] The Mall Owners submitted Concord, as the owner of the Site, is also the owner of the Substances in or under the Site and has responsibility for the Substances. The Mall Owners stated:

> "Concord presumably could have required the Site to be fully remediated prior to their purchase. The fact that the Site was actively subject to ongoing investigation and remediation activities prior to purchase (which Concord knew or ought to have known) and Concord only insisted upon an indemnity from Sears, rather than requiring the Site to be fully remediated prior to purchase, is evidence of Concord exercising charge, management or control over the Substances."[47]

[163] The Mall Owners said Concord's negotiations with Sears and purchase of the Site placed Concord in a position to prevent activities on the Site and satisfied the test of someone who was in "charge, management or control" of the Substances.

[164] The Mall Owners retained Pinchin Ltd. to conduct a peer review of the environmental reports related to the release of the Substances onto the Mall Lands, which Pinchin Ltd. provided in the Pinchin Report. The Mall Owners said the Pinchin Report found the Substances are still migrating from the Site to the Mall Lands.

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[46] Alberta Tier 1 Soil and Groundwater Remediation Guidelines (January 2019) (the Alberta Tier 1 Guidelines) and Alberta Tier 2 Soil and Groundwater Remediation Guidelines (January 2019) (the Alberta Tier 2 Guidelines). See https://open.alberta.ca/publications/1926-6243 and https://open.alberta.ca/publications/1926-6251 respectively.

[47] Mall Owners' Written Submission, dated November 12, 2019, at paragraph 60.

[165] The Mall Owners submitted Concord is responsible for the migration of Substances onto the Mall Lands for the following reasons:

(a) the Substances continue to migrate from the Site;

(b) Concord had and continues to have the ability to prevent the release of Substances onto the Mall Lands;

(c) Concord's negotiated an Environment Indemnity with Sears, which placed Concord in a position to prevent activities that impacted the Mall Lands; and

(d) Sears and Cadillac Fairview Corporation Limited, the former owner of the Mall Lands, reached an indemnity agreement which required Sears to carry out remedial work regarding the Substances that migrated to the Mall Lands. Concord is a successor to Sears, and the Mall Owners are successors to Cadillac Fairview Corporation Limited.

[166] The Mall Owners noted EPEA does not permit a person responsible transfer or terminate their liability through contract unilaterally.

[167] The Mall Owners submitted the Director was correct to name Suncor as a person responsible in the EPO as the following evidence demonstrates Suncor exercised "charge, management and control" of the Substances:

(a) under the Management Agreement with Sears, Suncor was the exclusive manager of the Service Station and had sole responsibility for environmental compliance;

(b) Suncor initiated the replacement of the storage tanks and hired and paid contractors to investigate and remediate the Substances discovered;

(c) Suncor directly hired and paid contractors to complete the vapour management program and monitor the status of the program;

(d) Suncor became aware the vapour management program was not properly constructed but did not take steps to address the problems;

(e) Suncor managed the decommissioning of the Service Station and hired an environmental consultant to carry out the work under Suncor's direction;

(f) Suncor hired and paid contractors to investigate and remediate contamination discovered during the decommissioning of the Service Station; and

(g) Suncor postponed full delineation of the Site during the decommissioning work, despite recommendations from its environmental consultants.

[168] The Mall Owners stated the Director was correct in finding Suncor's activities went beyond any exemption in EPEA.

[169] The Mall Owners submitted the Director was correct not to name the Mall Owners, and other parties, as a person responsible in the EPO. The Mall Owners said it would be contrary to the legislative intent of EPEA to name innocent third-parties whose lands have been directly affected by the release of the Substances from the Site, for which they had no ownership or operational interest.

[170] The Mall Owners stated the Board should modify the EPO by ensuring the Revised Remediation Plan includes the following requirements:

(a) additional soil vapour probes installed within the Mall Lands;

(b) additional groundwater and sampling activities within the Mall Lands;

(c) address the residual pollution remaining on the Site to ensure continued migration of Substances ceases; and

(d) a timeline to achieve unconditional closure for the Site and the Mall Lands.

H. Sears' Response

[171] Sears chose not to file a formal written response submission. However, Sears provided a response (the "Clifton Response Report")[48] to the Wyndham Report[49] filed by the HHLG. According to the Clifton Response Report, the Wyndham Report made the following recommendations:

"• Refine the Conceptual Site Model … through additional investigation;

- Evaluate monitoring [of] natural attenuation … potential and natural source zone depletion … rates;
- Refine remedial timeframes;
- Complete a formal remedial option assessment;
- Formalize a risk management plan…;

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[48] *Response to Expert Report of the Hounsfield Heights Landowners Group*, dated November 19, 2019, Clifton Associates.

[49] *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment*, November 4, 2019, Wyndham Environmental Ltd.

- Complete statistical analysis on datasets;
- Address monitoring well BH1943 and BH1979;
- Modify the soil vapour monitoring program; and
- Complete an updated record of site conditions … form."[50]

Clifton went on to state,

> "With a few exceptions, Clifton is in agreement with the recommendations provided by Wyndham as they have already been incorporated in the Revised Remedial Plan. However, some of the recommendations would benefit from clarification of the facts surrounding access within the [Hounsfield Heights neighbourhood] as well as uncertainty surrounding characterization of the dissolved phase plume and [LPH] beneath private residences."[51]

[172] In its response, Clifton agreed with the Wyndham Report that all existing and new data should be used to update the Conceptual Site Model as required. However, Clifton argued that the need for a numerical groundwater flow model would need to be assessed as additional information is gathered.

[173] Clifton agreed with the Wyndham Report that developing a numerical flow and transport model may provide some value in assessing Plume behaviour once the LPH is better characterized, the permeable reactive barrier is in place, and performance data is available. However, Clifton argued that at this point, the benefit in developing a numerical groundwater model, with an added expense in the order of $50,000 or more, is not clear.

[174] With respect to the evaluation of monitored natural attenuation potential recommended in the Wyndham Report, Clifton stated it had been incorporated into the Revised Remediation Plan.

[175] In response to the Wyndham Report, Clifton argued that while the natural source zone depletion rate has merit in its ability to refine the remedial timeframe, there is still significant uncertainty surrounding the extent of residual LPH on the Site. According to Clifton, the biodegradation rates may not provide an accurate representation of what can be expected

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[50] *Response to Expert Report of the Hounsfield Heights Landowners Group*, dated November 19, 2019, Clifton Associates, at page 4.

across the entire Plume. Therefore, until the LPH has been fully delineated, Clifton argued the assessment of natural source zone depletion might be premature.

[176] Clifton stated that a remedial options assessment was completed for the Site and provided to AEP. According to Clifton, this included a detailed assessment of various remedial technologies to ensure the selected approach was the most appropriate and reasonable given the Site characteristics.

[177] Clifton acknowledged that third-party sign-off might be required where exposure control is used in the final remediation of the impacted properties. However, as a final remediation plan has not yet been prepared for the impacted properties, this requirement is premature.

[178] Clifton noted that the Wyndham Report recommended that statistical analysis on all contaminant datasets with eight or more data points be completed to evaluate trends. Clifton advised it is currently completing statistical analysis on the groundwater sampling datasets to assess whether the Plume is remaining stable or showing an increasing or decreasing trend. According to Clifton, this analysis is not being completed on all wells, but on wells that are located near or at the defined extents of the Plume.

[179] Clifton noted that the Wyndham Report recommended that monitoring wells BH1943 and BH1979 be properly abandoned and replaced due to their location. Clifton advised it agrees with the recommendation to properly abandon and replace monitoring wells BH1943 and BH1979. This recommendation was made to Sears within the most recent groundwater monitoring and sampling event report.

[180] Clifton advised that Wyndham reviewed the current soil vapour monitoring program and provided a series of recommendations related to the relationship between the soil vapour and dissolved phase LPH, the extent of the soil vapour monitoring network, the timing of sampling events, the quality assurance program.

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[51] *Response to Expert Report of the Hounsfield Heights Landowners Group*, dated 19 November 19, 2019, Clifton Associates, at page 4.

[181] Clifton confirmed that all future reports to AEP would be accompanied by a record of site conditions form. The record of site condition form ensures that consistent information is collected with each report.

I. Concord's Response

[182] Concord submitted the Director did not establish that the Substances on the Site and the Off-Site Areas are causing, or may cause, an adverse effect on the environment. Concord stated the Director, the HHLG, and the Mall Owners, all mischaracterized the Board's *Imperial* case by claiming the decision allowed the Director to use objective standards to form an opinion on whether an adverse effect may occur, is occurring, or has occurred. Concord said the Board in *Imperial* cautioned against using objective standards such as guidelines developed by the Canadian Council for Ministers of the Environment ("CCME"). Concord quoted the Board in *Imperial* as follows:

> "Section 102 [now 113] requires the Director to form the opinion that the release of the Substances may cause, is causing, or has caused an adverse effect. EPEA does not refer to standards or guidelines to assist the Director in determining whether such impairment or damage exists or may exist. The Director must make his decision, as delegated to him by legislation, based on the information he has before him and using his reasonable judgment. The Director reviewed the various studies and reports before him, consulted the [Calgary Health Region], and ultimately determined that as some of the levels of Substances reported were higher than the CCME Guidelines, the adverse effect requirement of section 102 was satisfied….
>
> And in this regard it is relevant that the Director submitted that discussions he had with the Calgary Health Region lead him to conclude that there is a significant, immediate and real risk to human health posed by the presence of the substances."[52]
>
> [Emphasis added by Concord.]

[183] Concord submitted the Director, the HHLG, and the Mall Owners were attempting to justify the issuance of the EPO without assessing actual risks. Concord said the Director's Record establishes that the existence of the Substances under the Site and the Off-Site Areas does not meet the definition of an adverse effect.

[184] Concord stated the Director oversimplified the Board's statements in the *Imperial* case when the Director observed the Board found Devon Estates did not cause the pollution in certain subdivision lands but became a person responsible under EPEA as a result of subsequently owning the land that contained the pollution. Concord submitted there are several factors in the *Imperial* case that support Concord's position in this appeal that it should not be a person responsible:

(a) Devon Estates was involved in a joint venture that developed the subdivision and potentially exacerbated the pre-existing contamination. Concord has done nothing to impact the released Substances on the Site;

(b) Devon Estates was a wholly-owned subsidiary of Imperial Oil, the original polluter. Concord has no corporate relationship to Sears; and

(c) there is no indication Devon Estates paid fair market value for the subdivision lands which it received from Imperial Oil.

[185] Concord said, in the *Imperial* case, the Board dismissed arguments from Devon Estates and Imperial Oil that Calhome Properties Ltd. ("Calhome"), should be named as a person responsible on the basis Calhome had acquired the subdivision lands with knowledge of the contamination. Concord quoted the Board from the *Imperial* case as follows:

> "To us, the convincing argument is that, in a similar manner to all other landowners in the Subdivision Lands, Calhome did not manufacture the Substances, manage, or deposit the Substances on the Subdivision Lands: Calhome was not the polluter. Although Calhome assumed the ability to exercise charge, management, or control over the substances in the land that it purchased, the Board would consider it unreasonable on these facts if the Director had named Calhome a person responsible [under] the Order."[53]

[186] Concord stated the assertion by the Director, Suncor, and the Mall Owners that Concord should be named in the EPO based on the Board's decision in *Legal* is incorrect. Concord said the facts in *Legal* are distinguishable from the facts in this appeal and do not support any argument that Concord is a person responsible. Concord observed the agreement to transfer the polluted well site from the original polluter, Sinclair Canada Oil Co. ("Sinclair"), to

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[52] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*, (21 May 2002) EAB Appeal No. 10-062-R (A.E.A.B.), at paragraphs 153 to 154.

[53] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*, (21 May 2002) EAB Appeal No. 10-062-R (A.E.A.B.), at paragraph 245.

Legal Oil, expressly transferred all of Sinclair's obligations, including environmental liability, to Legal Oil. Concord noted it did not assume any environmental liability in its PSA with Sears. Additionally, Concord stated Legal Oil continued to operate the well site for several years, tying it to the pollution. In contrast, Concord said it did not assume ownership of the Site until after the Service Station had been decommissioned, and substantial remediation occurred.

[187] Concord submitted the Director mischaracterized the Court's decision in *R.* v. *Edmonton.*[54] Concord argued the Court found the City of Edmonton to be a person responsible based on multiple factors, not just ownership of the land where the pollution occurred. Concord noted the Court said, "[t]he defendant was not in my view a person having control over the substance merely because it was the owner of the Stadium, the equipment of which was the source of the release."[55] Concord said the Court found the City of Edmonton had charge, management and control over the substances because the release happened on the City's property, and the City was aware of the release. In the current appeal, Concord stated it did not own the Site when the release occurred.

[188] Concord said Suncor's position that the Board should uphold the Director's decision to name Concord in the EPO based on the "beneficiary pays" principle, is flawed for the following reasons:

(a) the "beneficiary pays" principle is not the law in Alberta, where the polluter pays principle is in effect;

(b) naming Concord to the EPO based on the "beneficiary pays" principle would amount to re-writing EPEA, which is the role of the Alberta Legislature, not the Board; and

(c) Concord did not receive a "windfall" from its purchase of the Site. Therefore, the "beneficiary pays" principle would not apply to it.

[189] Concord submitted the evidence in the record did not establish that Concord received a purchase price discount to reflect the contaminated nature of the Site or the Off-Site Areas. Concord said the Avison Young Report failed to consider the millions of dollars in forgone rent under the Leaseback. Concord also stated the Avison Young Report based its

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54 *R.* v. *Edmonton (City)*, 2006 ABPC 56.

55 *R.* v. *Edmonton (City)*, 2006 ABPC 56, at paragraph 609.

conclusions on property sales that were not comparable to Concord's purchase of the Site. Concord submitted the properties the Avison Young Report used as comparable property sales were less than 30 percent of the size of the Site and did not have comparable municipal approvals. Concord noted the assessed value of the Site in 2015 was $19,820,000. Concord submitted its objective in the PSA was to acquire the property in Burnaby, and Sears would only sell all three properties together. Concord maintained Sears was not deprived of any value from the PSA that could have been used for the environmental remediation work.

[190] Concord submitted that if the Board upheld the Director's decision to name Concord in the EPO, then the Board must also recommend the Minister vary the EPO to add the Mall Owners as a person responsible in the EPO. Concord stated that the Board has established in past decisions that administrative fairness requires the Director to name other responsible parties to an EPO so the burden of remediation can be shared. Concord said that the Mall Owners are in the same position as it is and, therefore, the Mall Owners should be named in the EPO if the Board finds Concord should be named.

[191] Concord rejected the Mall Owners' assertion that Concord assumed control over remediation activities by negotiating with Sears and requiring Sears to maintain control over remediation efforts. Concord stated that even if the Mall Owners' alleged facts about commercial negotiations between Sears and Concord were true, which Concord denies, it would still not cause Concord to have charge, management, or control over the Substances as per section 113 of EPEA.

J. Suncor's Response

[192] Suncor submitted the Mall Owners' argument that Suncor is a person responsible under section 1(tt) of EPEA is not supported by the evidence on the record.

[193] Suncor noted the Mall Owners claimed Suncor did nothing to address soil compaction around the venting wells. However, Suncor said the issue of soil compaction was only in relation to land restoration and not the subsurface vapour management program.

[194] Suncor denied it postponed full delineation drilling activities from the fall of 1995 to the spring of 1996 against the advice of its environmental experts, as alleged by the Mall

Owners. Suncor stated it postponed delineation drilling activities due to the cold weather conditions in consultation with SEACOR.

[195] Suncor disagreed with the Mall Owners' assertion the Management Agreement between Sears and Suncor placed sole responsibility for environmental compliance on Suncor. Suncor said the agreement was silent with respect to environmental obligations and responsibility.

[196] Suncor distinguished the Board's decision in *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director* ("*Gas Plus and Handel*")[56] from the current appeal, noting Gas Plus Inc. ("Gas Plus") was named a person responsible by the Board because:

(a) Gas Plus operated the gas station on the site and held the business licences for the gas;

(b) Gas Plus accepted responsibility by initially contracting a company to remove liquid petroleum hydrocarbons;

(c) Gas Plus retained consultants to conduct the remediation work; and

(d) Gas Plus acknowledged they had charge, management, or control over the sump pumps that released the hydrocarbons into the environment.

[197] Suncor submitted its operation of the Service Station is distinguishable from *Gas Plus and Handel* because:

(a) although Suncor obtained the licenses and permits required for the business, all permits were issued in the name of Sears;

(b) Suncor has never taken responsibility for any of the legacy contamination at the Service Station;

(c) undertaking remediation work and steps to prevent reoccurrence of the event causing the release of the Substances is not an acceptance of responsibility for the Substances;

(d) based upon the SLR Report, the release of the Substances occurred prior to 1985 and Suncor's operation of the Service Station; and

(e) although Suncor provided the services of Mr. Les Wojtanowski, Manager of Environment, Health and Safety for Suncor, to act as an expert consultant to Sears to coordinate and organize the Service Station

[56] *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment*, (29 December 2011), Appeal No. 10-034, 11-002, 008, and 023-R (A.E.A.B.).

> decommissioning, at no time were such actions an acceptance of responsibility for the release of the Substances or the remediation work.

[198] Suncor submitted the letter dated July 14, 1998, referenced by the Director, inadvertently linked Suncor and Sears as responsible for costs of compliance with AEP requirements for site remediation. Suncor noted a subsequent letter dated September 11, 1998, from Sears to Mr. Wojtanowski, stated:

> "That Sears proceed immediately to clean up the contaminated lands at North Hill as described in the "Off-Site West Delineation Summary Report' dated March 31st, 1998 and to restore the aforesaid property to residential cleanup protocol as is established by all authorities having jurisdiction…. That all costs and expenses in performing the Work are the sole responsibility of Sears."

Suncor said the September 11, 1998 letter made it clear that Sears was solely responsible for all costs of compliance with AEP requirements.

K. Director's Response

[199] The Director submitted Suncor, as a sophisticated and diligent party, ought to have investigated the environmental condition of the Site before entering into the Management Agreement with Sears, and before replacing the three steel underground storage tanks. The Director stated Suncor is responsible for the environmental consequences resulting from any lack of due diligence and its management, operation and decommissioning of the Service Station.

[200] The Director noted Suncor operated the Service Station for a nine-year period, during which Suncor had charge, management and control of the Substances. The Director submitted Suncor's direct involvement with the Substances brought it directly within the definition of a person responsible, and disqualified it from any of the exemptions in EPEA.

[201] The Director said Suncor's position that the release occurred before it operated the Service Station is based on anecdotal evidence not supported by forensic chemical analysis to confirm its claim.

[202] The Director stated he had discretion under EPEA to select the most appropriate enforcement tool, including issuing a Section 113 EPO or a Section 129 EPO. The Director said he determined, based on the facts, to issue a Section 113 EPO.

[203] The Director submitted Suncor overemphasized comments from the Minister of Environment and Parks that any potential risk to human health from the release of the Substances was negligible.[57] The Director noted the Minister also stated ongoing monitoring was required to confirm that the risk to human health was negligible, as well as further monitoring, vapour extraction, and remediation.

[204] The Director stated Concord assumed responsibility for the released Substances under section 4.3(b) of the PSA, which reads:

> "As and from the time the Vendor ceases to be in possession and occupation of its store on the Property in Calgary pursuant to the Leaseback therefore, the Purchaser shall diligently prosecute until it is complete any and all work pursuant to Remedial Orders issued by a Governmental Authority with respect to the Property in Calgary and relating to the release of Hazardous Substances at any time up to the Closing Date."

The Director noted Sears disclaimed the Leaseback as of January 22, 2019, and vacated the lands in the same month.

[205] The Director said Concord's position is similar to Legal Oil's in the Board's decision in *Legal*. The Director stated that Legal Oil did not contribute to the pollution, but was found by the Board to be a person responsible under EPEA because it assumed responsibility for the pollution by contract. The Director submitted Concord also assumed responsibility for the released Substances through the PSA. The Director noted there is nothing in EPEA allowing Concord to limit or absolve its statutory liability through a private contract.

[206] The Director clarified that groundwater exceedances noted in the Wyndham Report are exceedances based on guidelines to protect domestic use aquifers and that there are no discussions at AEP, that he is aware of, regarding the exclusion of the domestic use aquifer as an exposure guideline when the groundwater is not used for domestic purposes or restrictions are placed on the use of groundwater for domestic purposes (e.g., City of Calgary by-laws). The Director stated the groundwater is not being used as a drinking water source and is not a health risk to members in the community.

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[57] See Letter from Shannon Philips, Minister of Alberta Environment and Parks to David Swann, Member of Legislative Assembly, dated November 30, 2017. See also Suncor's Written Submission, dated November 12, 2019, at paragraph 40.

[207] The Director submitted reasonable efforts are being made to remove the source of the Substances, and prevent the further spread of the Plume. The Director noted the Revised Remediation Plan could be further revised as subsequent information regarding the extent and mobility of the Plume is obtained, and other remedial options are evaluated to remediate the Substances actively.

L. HHLG's Response

[208] The HHLG clarified it has no affiliation with the Hounsfield Heights-Briar Hill Community Association. The HHLG said Sears' statement that it has continuously provided updates to the HHLG since the 1990s is not correct as the HHLG was formed in late June 2018, and since its formation, it has received no communications from Sears.

[209] The HHLG disputed Sears' assertion that the HHLG members have been uncooperative in allowing access to Clifton for delineation sampling and testing. The HHLG submitted only a small number of its members had been contacted by Clifton to arrange access for delineation testing and sampling. Of those contacted, the HHLG notes:

(a) the first individual granted access, and soil vapour sampling was conducted in 2003;

(b) in 2019, the second individual consented to the installation of a soil vapour probe on his property after a monitoring well in the alley behind his house reported a soil vapour exceedance;

(c) the third individual granted access, and soil vapour sampling was conducted in 2018;

(d) in a letter to the City of Calgary dated November 27, 2006, Clifton suggested it would install soil vapour monitoring once construction of the fourth individual's house was completed. However, the sampling was not carried out, and this individual does not recall ever being asked by Clifton to allow access; and

(e) in or about 2015, the fifth individual granted Clifton's request for access to his basement to conduct for vapour sampling. However, the sampling was never carried out.

[210] The HHLG rejected Clifton's refusal to consider more active forms of remediation until the delineation of the Plume is complete. The HHLG stated it was unacceptable that almost 25 years after the release of the Substances was discovered, Sears still

does not have a complete understanding of the impacted area or a timeframe for compliance with applicable AEP guidelines.

[211] The HHLG submitted the Wyndham Report estimated remediation would cost approximately $12,600,000, and Mr. Bowles stated an increase to $18,000,000 could significantly expedite the timeframe for compliance with relevant AEP guidelines. The HHLG stated $18,000,000 for such a remediation project is reasonable compared to the cost of remediating other large contaminated sites in Alberta.

[212] The HHLG submitted the Revised Remediation Plan could be improved by stopping the migration of the source of the Plume, which will expedite the timeframe for compliance with AEP guidelines.

M. Linda Barron's Response

[213] Ms. Barron stated she understood the delineation in the Off-Site Areas was sufficient to justify the vapour extraction program from 2007 to 2008. Ms. Barron said Clifton, Sears, and a Director of the Hounsfield Heights-Briar Hill Community Association Sears Plume Committee optimistically estimated the timelines for remediation of the Site to be from one to five years.

[214] Ms. Barron submitted it was unacceptable that the Revised Remediation Plan now suggests the source Substances are unknown, and further delineation is required, with a corresponding timeframe for remediation of greater than 15 years.

N. Mall Owners' Response

[215] The Mall Owners rejected Concord's submission that if Concord is held to be a person responsible, then the Mall Owners should also be held to be a person responsible. According to the Mall Owners, this argument misses the point that they are not in control of the property that is the source of the Substances. In the Mall Owners' view, the Director correctly concluded that owners of the Off-Site Areas should not be considered persons responsible.

[216] The Mall Owners rejected Sears' argument that they should be restricted from commenting on the Revised Remediation Plan approved by the Director. According to Sears,

this is because the Mall Owners already had an opportunity to provide comments and failed to do so. The Mall Owners rejected Sears' argument because they were only provided with the Revised Remediation Plan after it had been approved by the Director. According to the Mall Owners, it would be a breach of procedural fairness to restrict them from commenting on the Revised Remediation Plan. The Mall Owners' principal concern with the Revised Remediation Plan is that it should not include any exposure control requirements, which would limit the ability of the Mall Owners to use their land.

IV. STANDARD OF REVIEW

[217] The Board will first address the appropriate standard of review for this matter and then deal with each of these issues that have been set for the hearing.

[218] The Board was not expressly requested to deal with the standard of review by the hearing Participants, and the Board did not specifically set this as one of the issues for the hearing of these appeals. However, several of the hearing Participants referenced the appropriate standard to apply to these appeals in their submissions. Therefore, the Board believes it is appropriate to address the standard of review. The Board has concluded the appropriate standard for the Board to apply to a review of the Director's decision to issue the EPO is correctness.[58]

[219] In stating the appropriate standard of review for the Board to apply to the Director's decision is correctness, it is important to understand the Board's role is to make a report and recommendations to the Minister. Therefore, in applying the correctness standard, the Board decides if it agrees with the Director or not, and if it does not, the Board will recommend to the Minister that he should substitute his decision for that of the Director. In fact, not only can the Minister substitute his decision for that of the Director, the Minister can "make any further order that the Minister considers necessary for the purpose of carrying out the decision." [59] The

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[58] The Board is aware that on December 19, 2019, the Supreme Court of Canada released two decisions dealing with the standard of review the Courts are to apply to tribunals: *Bell Canada* v. *Canada (Attorney General)*, 2019 SCC 66 and *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65. The Board has generally reviewed these cases, and the Board's initial view is that these cases do not change the outcome of the analysis on the standard of review a reviewing tribunal (the Board) should apply to a decision-maker of first instance (the Director), given there is a statutory right of appeal. Given the timing of these decisions, the Board has not had an opportunity to receive comments from any of the Participants in these appeals.

[59] The Minister is empowered to make such a decision by section 100(1) of EPEA, which provides:

purpose of this approach is to make a better decision, which addresses the valid concerns of the person filing the appeal.

[220] The standard of review is addressed in the two main cases the Participants have discussed before the Board: *McColl* and *Imperial*.[60] In both cases, the Board concluded the appropriate standard of review was correctness. In concluding the appropriate standard was correctness in these cases, the Board pointed to the role of the Board in advising the Minister of the correct decision, the *de novo* nature of the Board's hearing,[61] and the deference showed to the Board by the Courts as a result of the Board's expertise.[62] The *McColl* and *Imperial* cases deal with the same issues and the same statutory provisions that are relevant in this case. Therefore, the Board believes the same standard of review is applicable, and that standard of review is correctness.

[221] More recently, the Board considered the standard of review in *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL*

"On receiving the report of the Board, the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, … and

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

60 *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.) and *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

61 See section 95(2)(d) of EPEA, which provides:

"Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following … (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made…."

The Board's de novo jurisdiction was confirmed by the Court of Appeal in *Chem-Security (Alberta) Ltd*. v. *Lesser Slave Lake Indian Regional Council*, 1997 ABCA 241 at paragraphs 11 and 12.

62 See: *Sarg Oils Ltd.* v. *Environmental Appeal Board*, 2007 ABCA 215 at paragraph 13:

"The Board is an expert appellate tribunal, established to decide polycentric fact and policy intensive issues about the protection of the environment. While its decisions are in form only recommendations to the Minister, they can have a significant effect on the rights of those before it. The Board recognized this, by affording the respondents a full viva voce hearing with the right to cross-examine and call witnesses."

Constructors, A Partnership[63] ("*KGL*"). In this case, the Board conducted an extensive review of the standard of review as it applies to the Board's review of the Director's decision. The Board concluded the appropriate standard of review was correctness. While *KGL* dealt with an approval under the *Water Act*, R.S.A. 2000, c. W-5, the Board believes the same principles, and therefore the same standard of review applies in this case.

[222] The Board also recently reviewed the standard of review as it applies to the Board's review of the Director's decision in *Cherokee Canada Inc. et al.* v. *Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks*[64] ("*Cherokee*"). This case dealt with the Director's decision to issue an enforcement order, and in the Board's view, the same standard of review is applicable in this case. In *Cherokee*, the Board cited the leading case of *Newton* and concluded the respective roles of the reviewing decision-maker (the Board) and reviewed decision-maker (the Director) are first and foremost a question of statutory interpretation.[65] The Board noted the decision from the Saskatchewan Court of Appeal in *City Centre Equities Inc.* v. *Regina (City)*[66] ("*City Centre*") supports this position. In the *City Centre* case, the Court undertook a cross-jurisdictional survey of the approaches taken to determine the appropriate approach to the standard of review. In applying the findings, the Saskatchewan Court of Appeal affirmed *Newton* and summarized the central theme for determining the appropriate standard as being: "What role did the Legislature intend the appellate tribunal to play?"[67] As in *Cherokee*, the Board believes the role the Legislature intended the Board to play in this case is to determine whether the Director's decision was correct.

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63 *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.).

64 *Cherokee Canada Inc. et al.* v. *Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.).

65 *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399, at paragraph 57.

66 *City Centre Equities Inc.* v. *Regina (City)* 2018 SKCA 43.

67 *City Centre Equities Inc.* v. *Regina (City)*, 2018 SKCA 43, at paragraph 43.

V. WAS IT APPROPRIATE TO ISSUE THE EPO?

[223] The first issue set for consideration by the Board in these appeals was: Was it appropriate for the Director to issue an EPO? In its discussion of this issue, the Board will also deal with the related question: Did the Director arbitrarily issue the EPO even though the Appellants argue there was no indication the Substances on the Site or Off-Site Areas caused, were causing, or may cause an adverse effect?

[224] The Board has concluded it was appropriate for the Director to issue the EPO, and this decision was not arbitrary. Substances have been released into the environment, and have caused, are causing, or may cause adverse effects to both the Site and the Off-Site areas. The adverse effects are: (1) the potential human health impacts as a result of hydrocarbon vapours migrating through the soil, (2) the on-going presence of LPH, which is one of the sources of the hydrocarbon vapours, the extent of which remains unknown, (3) the contamination of a domestic use aquifer, and (4) the impacts on the peace of mind and quality of life of the residents of the Hounsfield Heights neighbourhood.

A. Authority for the EPO

[225] The Director's authority to issue the EPO is found in section 113 of EPEA. The relevant part of this section provides:

> "(1) 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."[68] (Emphasis added.)

Therefore, there are two conditions to be met for the Director to have the authority to issue an EPO. The first is there must be a release of a substance. The second is the release of the substance may cause, is causing, or has caused an adverse effect.

[68] Subsection (2) provides for a limitation on issuing an EPO where the release of the substance was authorized by the Director. For example, the Director's ability to issue an EPO is limited where the release of the substance was authorized by an approval. None of the Participants in these appeals suggested this limitation applies.

B. Release

[226] All the participants before the Board in these appeals agree there has been a release of Substances, specifically LPH. The participants may disagree about timing and extent, but none of them argued there has been no release. The evidence before the Board is clear; at some point in time, there was a release of Substances (LPH) on the Site and, over time, the Substances migrated off-site, west into the Mall Lands and south into Lions Park and the northern end of the Hounsfield Heights neighbourhood. Components of the LPH, such as BTEX and 1,2-DCA, are dissolving into the groundwater and are migrating as a Plume that extends south, under the Hounsfield Heights neighbourhood, and as such, there is an ongoing release.

C. Adverse Effect

[227] The core argument the Appellants have raised is that, because the release of the Substances is currently being managed, the Substances that have been released are not causing an adverse effect, and therefore, the Director's decision to issue the EPO was "arbitrary." The Board disagrees.

[228] In the Board's view, the release of the Substances has caused, is causing, or may cause an adverse effect on the environment, in particular, human health and the domestic use aquifer, notwithstanding that it is currently being managed. This is a sufficient basis for the Director to issue the EPO, and it is not an arbitrary decision on the part of the Director.

[229] Section 113(1) of EPEA does not limit the ability of the Director to issue an EPO where the release of the Substances is being managed. Section 113 is clear the Director can issue an EPO where the release of the Substances has the potential to cause an adverse effect; this includes the situation of what could happen where management measures stop. The Board heard evidence that one of the reasons the Substances are not currently causing an adverse effect on human health is the operation of the dual-phase vapour extraction system, which is removing components of the LPH that could migrate through the groundwater and soils. But for the operation of this system, the location of the Substances under the Hounsfield Heights neighbourhood could result in petroleum hydrocarbon vapours entering homes and impacting human health.

[230] The Board notes the likelihood of the petroleum hydrocarbon vapours entering homes is low, because of the significant depths at which the Substances are found under most of the Hounsfield Heights neighbourhood, and the presence of a relatively thick clay layer (referred to as Unit 2 in the Clifton reports) above the Substances, which provides a natural barrier to the upward migration of the vapours. However, the topography in the neighbourhood slopes to the south toward the Bow River Valley and the relatively flat geologic units or layers underlying the neighbourhood are truncated by the slope of the hill. As a result, in the vicinity of 11th Avenue NW, the thick clay layer that acts as a natural barrier to the soil vapours "daylights" – it comes to the surface because of the downslope of the land – and, as a result, creates a potential opportunity for the vapours from the Substances, including BTEX and 1,2-DCA, dissolved in the groundwater flowing through lower geological layers to migrate to the surface. Because of the topography, the lower sandy silt layer through which the Substances are travelling (referred to as Unit 3 in the Clifton reports) is closer to the ground surface south of 11th Avenue NW, and "daylights" in the vicinity of 10th Avenue NW. As a result, there are currently vapour readings exceeding established threshold limits that require further investigation in this area of the neighbourhood, near 10th Avenue NW. The Board notes it is expected the latest intervention – the injection of "PlumeStop"[69] along 11th Avenue NW – will likely remediate the Plume prior to the further southward migration of the Substances and address these concerns, but the effectiveness of this intervention remains to be seen. Additionally, the unknown extent of the LPH, and therefore no definitive remedial action to address the LPH, other than the continued operation of the dual-phase vapour extraction unit, is concluded to be an adverse effect.

[231] The evidence before the Board is that on December 13, 2017, Sears provided the Director with a letter advising that because Sears was insolvent and involved in proceedings under the CCAA, it would no longer be able to meet its obligations under EPEA to continue managing the substance release at the Site and in the Hounsfield Heights neighbourhood.[70] As a result, when the Director issued the EPO, it was expected that, if not for the EPO, the current risk

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69 "PlumeStop" is the brand name for a permeable reactive barrier of liquid activated carbon, said to adsorb hydrocarbons that have been dissolved in groundwater. The adsorbed hydrocarbons are held in place and biodegrade over-time. See https://regenesis.com/en/remediation-products/plumestop-liquid-activated-carbon/.

70 Letter from Mr. Greg Paliouras, Sears to Mr. Dave Gower, AEP, dated December 13, 2017. Director's Record (April 16, 2018) at Tab 19.37.

management would come to an end. In the Board's view, the issuance of the EPO to Sears was a prudent decision on the part of the Director to ensure the risk management measures continued, and therefore, it was not an arbitrary decision.

[232] Further, with respect to the domestic use aquifer, this valuable resource has already been impacted by the Substances released. The domestic use aquifer is contaminated by a hydrocarbon plume that underlies the Hounsfield Heights neighbourhood. Currently, a City of Calgary Bylaw and the *Water Act*, R.S.A. 2000, c. W-5, prohibit the use of this groundwater.[71] There were arguments presented at the hearing that the domestic use aquifer exposure pathway should be excluded because of these prohibitions and because the aquifer under this area would likely provide an insufficient volume to make it a viable domestic use water supply.

[233] The Board notes that AEP does not support the exclusion of the domestic use aquifer exposure pathway in these circumstances. In their submission, the Director stated,

> "Even though the [domestic use aquifer] pathway is not currently eligible for exclusion, groundwater is not currently being used as a drinking water source within the City of Calgary. Therefore, groundwater concentrations exceeding guidelines for the protection of the [domestic use aquifers] are not a health risk to members of the [Hounsfield Heights neighbourhood]….. In the future if the Alberta Tier 2 Soil and Groundwater Remediation Guidelines for [the domestic use aquifer] exclusions is amended, this pathway could potentially be eliminated, which would leave the soil vapour quality guidelines as the remaining outstanding remedial target to be achieved."[72]

The Board agrees with the Director's assessment.

[234] Finally, the mere presence of the Substances under the Hounsfield Heights neighbourhood is causing an adverse effect, regardless of whether it is being risk managed. The adverse effect is the impact on the peace of mind of the residents of Hounsfield Heights. The evidence before the Board from Ms. Linda Barron, and from Ms. Lise Houle and Dr. Allan Legge on behalf of the HHLG, was clear that the mere presence of the Substances under their

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[71] Section 8 of the *Water (Ministerial) Regulation*, Alta.Reg. 2005/1998 provides: "A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the Act." This section prohibits residents of the City of Calgary from exercising what is commonly referred to as the riparian right to take water from a groundwater source underlying their land.

[72] Director's Written Submission, dated November 12, 2019, at paragraph 44 and 46.

community was causing the residents to worry, interfering with the decisions they make about their use of their properties, and potentially impacting their property values. The Board finds that all these impacts constitute a current ongoing adverse effect.

[235] Based on the evidence before the Board that there has been a release and that the release has caused, is causing, or may cause an adverse effect, the Board is recommending to the Minister that he confirm the Director's decision to issue the EPO.

D. Sears' Financial Circumstances

[236] The next issue the Board set for the hearing of these appeals was, "Did the Director rely on Sears' financial circumstances as a basis to issue the EPO, and if so, was this an irrelevant consideration?" In the Board's view, the Director did not rely on Sears' financial circumstances as a basis to issue the EPO.

[237] The evidence before the Board was that on December 13, 2017, Sears provided the Director with a letter advising that because Sears was insolvent and involved in proceedings under the CCAA, it would no longer be able to meet its obligations under EPEA to continue managing the substance release at the Site and in the Hounsfield Heights neighbourhood. This was the reason the Director issued the EPO. It was not Sears' financial circumstances that caused the Director to issue the EPO, but Sears' advice that it would no longer be able to meet its obligations under EPEA.

[238] Up to this point, Sears had willingly been meeting its obligations under EPEA to deal with the Substances. As a result, there was no need for an EPO. Among other things, Sears was operating the dual-phase vapour extraction system, which was minimizing the potential for vapours to migrate into homes in the Hounsfield Heights neighbourhood. When Sears advised, it was no longer able to meet its obligations under EPEA to deal with the release of the Substances the Director issued the EPO. Given the importance of the continued operation of the dual-phase vapour extraction system, the Director's motivation was focused solely on environmental protection and, in particular, the protection of human health, and that was the motivating factor to issue the EPO.

[239] To be clear, the Board notes that the Director did not issue the EPO because of Sears' financial circumstances, but rather because Sears advised the Director that it would no longer be able to meet its obligations to continue to address the release of the Substances resulting from its operation. The result of this would be continued and on-going adverse impact on the environment and increased potential for impacts on human health. The Board finds that this reason was entirely a relevant consideration.

E. Section 113 vs Section 129

[240] Some of the Appellants argued the Director should have issued the EPO under section 129 of EPEA, which is under the contaminated site provisions, instead of section 113. Section 129(1) provides: "Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site."

[241] There are several significant differences between the EPO powers under section 113 and 129. Most notably, prior to issuing an EPO under section 129, the Director must first designate the property that is going to be subject to the EPO as a contaminated site. The Director's authority to designate the site as a contaminated site is found in section 125(1). This section provides: "Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site." Under section 125(1) the Director can only designate the site as a contaminated site, and therefore issue an EPO under section 129, if the Director is of the opinion the substance that has been released is causing a <u>significant</u> adverse effect as opposed to simply an adverse effect as provided for in section 113. As a result, the threshold for the Director to issue an order under section 129 is higher than issuing an order under section 113. There are several other significant differences between a Section 113 EPO and a Section 129 EPO, which will be discussed later in this report. However, for the purpose of this issue, those differences are not important.

[242] The Director's ability to choose between using section 113 to issue an EPO and using section 129 to issue an EPO was one of the core issues in *McColl* and *Imperial*.[73] In both

[73] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.) and *Imperial Oil Ltd. and Devon Estates*

McColl and *Imperial*, the Board held that the Director had the broad discretion to choose between issuing an EPO under section 113 and issuing an EPO under section 129. As stated in *McColl*:

> "… [T]he Board notes at the outset that EPEA provides no express criteria for guiding the Director's exercise of discretion in deciding to issue an order under section [113] or to apply the contaminated site process in Part 4, Division 2.
>
> Ordinarily, the absence of express legislative criteria for a discretionary decision suggests that the decision-maker has quite broad discretion."[74]

Further, as stated in *Imperial*:

> "The Board previously explained in *McColl*, that there is a necessary overlap between the coverage of section [113] and [129]. After comparing section [113] and the 'contaminated sites' provisions in Part 4 Division 2 in detail, the Board concluded in *McColl* that it had '…difficulty determining the Legislative intent regarding the [overall] functional differences between section [113] and [129] orders.' [*McColl* at paragraph 63.] The Board also noted that '…EPEA provides no express guidance on when the Director should use one section or the other, or even what factors the Director should consider in choosing between the two sections.' [*McColl* at paragraph 63.]
>
> … The Board agrees that a neat compartmentalization of legislative functions may be a worthy objective of new legislation aimed at consolidating and updating several prior statutes [, which is what was done with EPEA]. However, given the complexity of the environmental issues addressed, legislatures seldom, if ever, achieve this objective in practice. Rather, the more typical environmental legislative model is one where new provisions are simply added onto the existing consolidated framework. Based on our current analysis, and in *McColl*, the Board believes that the 'contaminated sites' provisions in Part 4, Division 2 fit this legislation by [the] accretion model. In the Board's view, they were added to the existing (consolidated) set of legislative tools, including section [113] EPOs, to enhance Alberta Environment's ability to address pollution and the risks it poses to human health, but were not intended to replace other legislative tools entirely with respect to 'contaminated' sites."[75]

Ltd. v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

[74] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.) at paragraphs 125 and 126.

[75] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraphs 171 and 172.

[243] Both *McColl* and *Imperial* were subject to judicial review.[76] In both cases, the Court of Queen's Bench upheld the Board's report to the Minister and the Minister's decision. In the judicial review of the *McColl* case, the Court held:

> "…This was an evaluation of the various polycentric issues to be considered when the Director exercises his discretion. The [the Board] was not unsympathetic to [McColl-Frontenac's] point, but it was also aware d timeliness issues and the higher 'significant adverse effect' standard. It noted that there are some policy reasons for proceeding under s. [129], but it also noted there were legitimate policy reasons for using s. [113]. … Its reasoning was not patently unreasonable."[77]

In the judicial review of the Board's *Imperial* case, the Court held:

> "When I review the detailed analysis of the Board, which is the basis of the recommendations to the Minister, and I consider the wording of [EPEA] (which uses past language in s. 113) as well as the broad legislative scheme, I do not find that the decision of the Minister on this point was patently unreasonable. I note that Marceau J. dealt with a similar argument and came to a similar conclusion in the case of *McColl-Frontenac Inc.* v. *Alberta (Minister of the Environment)*, [2003 ABQB 303] which decision was rendered after the oral argument in this case."

[244] Having reviewed *McColl* and *Imperial*, the Board sees no reason to depart from the reasoning in these cases in preparing its report and recommendations to the Minister in this matter. In the Board's view, the Director's decision to issue an EPO under section 113 was a reasonable decision. In the circumstances of this case, the Board sees no reason for the Director to have considered issuing an EPO under section 129. Therefore, the Board is recommending to the Minister that he confirm the Director's decision to issue the EPO under section 113 of EPEA.

VI. ARE THE APPELLANTS PERSONS RESPONSIBLE?

[245] The main focus of the hearing was the question of whether the Director correctly named the persons responsible in the EPO. According to the Director, the key requirement for a person to be a person responsible is that they must be the "owner or previous owner of the substance," or "have or have had charge, management, or control of the substance."[78]

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[76] *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment)*, 2003 ABQB 303 and *Imperial Oil Limited* v. *Alberta (Minister of Environment)*, 2003 ABQB 388.

[77] *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment)*, 2003 ABQB 303, at paragraph 87.

[78] Section 1(tt) of *EPEA* defines a "person responsible" when used with reference to a substance as

[246] The Director initially named Sears and Concord as persons responsible in the EPO. According to the Director, Sears owned and operated the Service Station on the Site when the Substances were released. As a result, Sears owned the Substances and also had charge, management, and control of the Substances. In terms of the polluter pays principle stated in EPEA, the Director says Sears was the main polluter.

[247] Further, according to the Director, Concord was named as a person responsible because it currently owns the Site and therefore owns the Substances and has charge, management, or control of the Substances. The basis for this idea is that the owner of land owns everything in, on, or under the land (subject to certain exceptions like mineral rights).[79]

[248] Subsequently, the Director amended the EPO and added Suncor as a person responsible. According to the Director, Suncor operated the Service Station on the Site and, as a result, had charge, management, or control of the Substances. In particular, the Director argued Suncor had charge, management, and control of the Substances that had already been released. For example, Suncor took active steps to remediate the release of the Substances on the Site.

[249] Concord and Suncor have argued they should not be named as persons responsible. Further, Concord has argued that if it is a person responsible, then the Mall Owners should also be named a person responsible. The Board will address each of these parties in turn.

A. Sears

[250] All of the participants in the hearing, including Sears, accept that Sears is a person responsible. The Board agrees; Sears is properly a person responsible under the EPO. The evidence before the Board is clear. While Sears operated the Service Station, there were one or

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> "(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, …."

[79] See Kaplinsky, E. and Percy D., "A Guide to Property Rights in Alberta," University of Alberta – Alberta Land Institute where, at page 10, it states:

> "When we talk about property rights to land, we usually think about the ownership of the surface of the land. At common law, however, ownership of the surface extends to the airspace above and to the subsurface below. Ownership of land even includes the mines and minerals beneath the land with the exception of gold, silver, and any other resource reserved by the Crown."

more releases of Substances, specifically liquid petroleum hydrocarbons, on the Site. All of the participants, including Sears, also agree that over time these Substances have migrated west and south, off the Site, and now a Plume extends from the Site, west into the Mall Lands and south into Lions Park and the Hounsfield Heights neighbourhood, the current known extent of which is to just north of 10th Avenue NW.

[251] Based on the evidence before the Board, the Board is recommending to the Minister that he confirm the Director's decision to name Sears as a person responsible and, therefore, a Party to the EPO.

B. Suncor

[252] Suncor's core argument is that it is not the polluter, and therefore, it should not be found to be a person responsible. Suncor based this argument on its view that the Substances were released before it took control of the Service Station in March 1985. Further, Suncor argued that no releases occurred on the Site during its tenure as the operator of the Service Station, which lasted until June 1994.

[253] As previously stated, the participants all accept that there have been one or more releases of Substances on the Site. What some of the participants dispute is when these releases occurred.

[254] Suncor argues all of the releases of the Substances occurred prior to it taking control of the Service Station in March 1985. The Board does not accept this to be the case. The Board finds it is highly probable that additional releases of Substances occurred on the Site after 1985. Further, the Board finds that Suncor also took charge, management, and control of Substances that had been released on the Site prior to 1985, when it took charge, management, and control of the Service Station.

[255] Specifically, the evidence before the Board is that Suncor entered into a Management Agreement with Sears to manage and operate the Service Station in 1984[80] and that Suncor operated the Service Station – which was engaged in the retail sale of gasoline – from

[80] A portion of the Simpsons-Sears Limited and Sunoco Inc., Management Agreement, undated, was filed as Hearing Exhibit #8.

April 1984 to June 1994. Until 1989, Suncor used steel underground storage tanks as part of its business of operating the Service Station. In June 1989, Suncor undertook a tank replacement program and replaced the steel underground storage tanks with fibreglass tanks. In the Board's view, it is highly probable that a release of Substances occurred on the Site between 1984 and 1989 when the steel underground storage tanks were in use.

[256] The evidence before the Board is that during the work to replace the tanks, Suncor discovered the released Substances on the Site. In the Board's view, at this point in time, Suncor had charge, management, and control of the Site. In particular, Suncor oversaw the removal of 1,075 tonnes of contaminated soil from the Site. Further, Suncor installed a soil vapour extraction system at the Site to remediate the Substances that remained on the Site.

[257] The Board notes Suncor's suggestion that the work it undertook to deal with the release of Substances falls under the exception to a person responsible under section 1(tt)(vi) of EPEA which provides:

> "1(1) In this Act … (tt) '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, …
>
> but does not include …
>
> (vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, …." [Emphasis added.]

Respectfully, this provision does not apply to Suncor. Suncor was not investigating or testing the Site for the purpose of determining its environmental condition. Rather, Suncor was undertaking work associated with the operation and management of the Service Station, which had the effect of taking charge, management, and control of the Substances.

[258] Evidence was presented that confirmed that during the time Suncor operated the Site, Suncor arranged for suppliers to deliver the product to the Site, and all of the gasoline sold at the Site was purchased from Suncor. Suncor explained that according to the Management Agreement between Suncor and Sears, the ownership of the fuel changed from Suncor to Sears at the point of entry into the underground storage tanks. Notwithstanding this Management Agreement, in the Board's view, Suncor was responsible for the fuel that eventually leaked and contributed to the Substances release.

[259] Suncor presented several witnesses in support of its view that no Substances were released while it was in charge of the Service Station.

[260] Mr. Les Wojtanowski[81] worked for the predecessor company to Suncor from 1984 to 2003 and explained that they installed new galvanized steel piping in 1985, and the underground storage tanks were replaced in 1989 with single-walled fibreglass tanks. Mr. Wojtanowski also explained that the fibreglass tanks usually only leak if they are damaged during installation or during use. Upon questioning, the Board heard that there were no records of pressure testing to prove the initial tank and piping integrity at the time of installation. In addition, the Board heard that the fibreglass tanks were able to be removed with very little ground disturbance, and as such, Suncor representatives were not able to observe if there was evidence of leaks into the surrounding material. Upon questioning, the Board notes that at the time Suncor took over operation of the Site, there was no baseline or environmental site assessment conducted, nor was any environmental site assessment conducted between 1989 and 1998. With respect, the Board does not accept that Mr. Wojtanowksi's evidence supports that there were no releases of Substances on the Site during the time Suncor operated the Service Station.

[261] Ms. Beatrice Weller[82] was employed by the predecessor company for Suncor from 1981 to 2010, including during the period Suncor was responsible for the Service Station. Ms. Weller testified she was responsible for evaluating compliance and reviewing records to

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[81] Mr. Les Wojtanowski was the Manager, Operations & Engineering, Environment, Health and Safety, Sun-Canadian Pipeline Inc., a predecessor of Suncor. Mr. Wojtanowski is now retired.

[82] Ms. Beatrice Weller was the Dealer Sales Representative and Market Manager, Business Development Advisor and Retail Territory Manager, Sunoco Inc., a predecessor of Suncor. Ms. Weller is now retired.

ensure appropriate risk management occurred at the service stations operated by Suncor in Ontario and Alberta. Ms. Weller explained that she evaluated the record books kept by the service station operators and looked for trends that would indicate whether there were leaks in the underground storage tank systems, by reconciling the level of gasoline in the underground storage tanks with the gasoline sales records. When visiting service station sites, Ms. Weller would personally conduct "dip" tank measurements. Ms. Weller explained that she was responsible for numerous locations in Ontario and across western Canada, and first visited this particular site in about 1988, and thereafter, about 2 to 3 times per year. With the greatest of respect to Ms. Weller, the Board places little weight on her evidence as proof that there were no leaks of the underground storage tanks or the distribution system at the Service Station. The Board acknowledges Ms. Weller's passion for excellence in her role, as well as the significant amount of time that has passed since her involvement with the Site. With no actual monitoring or inventory records available, the Board questions how frequently or diligently the service station operators conducted the tank measurements and how accurately they completed the associated documentation, which Ms. Weller then used in her reviews.

[262] Given the Board's view that Suncor took charge, management, and control of the Substances that had been released prior to Suncor operating the Service Station, and the Board's view that the release of Substances likely continued to occur during the operation of the Service Station by Suncor, the Board is recommending to the Minister that the EPO be confirmed with respect to Suncor being a person responsible for the release of the Substances and therefore, a Party to the EPO. To be clear, this is for both the Site and the Off-Site Areas, as the Board is of the view the Substances migrated off the Site and into the Off-Site Areas during the time that Suncor operated the Service Station.

C. Concord

[263] Concord is the current owner of the Site. According to the Director, Concord is a person responsible because, by owning the Site, Concord also owns the Substances that are found in the soils and groundwater on and under the Site, and it has the ability to take charge, management, or control of the Substances on the Site. However, other than purchasing the Site from Sears, the Board heard that Concord has taken no active steps to assume charge,

management, or control of the Substances. The evidence before the Board is that Concord has only operated the buildings on the property as a landlord to commercial businesses, none of which appear to be in a business similar to a service station. However, the Board notes that Concord did retain an environmental consultant to conduct a limited Phase 2 Environmental Assessment as due diligence prior to purchasing the Site.

[264] While the Board understands the Director's interpretation, the Board has two major difficulties with this approach. First, under the Director's interpretation, the owners of the individual properties in the Hounsfield Heights neighbourhood that are affected by the Plume could also be persons responsible. The Board does not believe that including the owners of the individual properties in the Hounsfield Heights neighbourhood is appropriate without, in the words of counsel for the Director at the hearing, "something more being required."

[265] Second, the Director's interpretation does not accord with the Board's findings in *McColl* or *Imperial*. Based on *McColl* and *Imperial*, the Board agrees with counsel for the Director that "something more is required." In the circumstance of this case, the Board does not believe that this "something more" is present with respect to Concord, or with respect to the owners of the individual properties in the Hounsfield Heights neighbourhood.

[266] In *McColl*, a service station operated on the property from 1956 to approximately 1980. Although there were at least three operators during this time,[83] McColl-Frontenac was responsible for storing the gasoline on the site during this entire time. In approximately 1982, Al's Equipment Rentals (1978) Ltd. ("Al's Rentals") leased the property from McColl-Frontenac, and then in 1986 purchased the property outright from McColl-Frontenac. Al's Rentals purchased the property from McColl-Frontenac on an "as it stands" basis. In 1998, Al's Rentals sold the property to 810546 Alberta Ltd. (operating as "United Rentals"). It was in the course of this 1998 sale that the hydrocarbon contamination on the property came to the attention of Al's Rentals and United Rentals, and eventually, what is now AEP. The more significant environmental concerns were found near the service station facilities run by McColl-Frontenac

[83] The three companies were McColl-Frontenac Oil Company, Texaco Canada Inc., and Highway Realties Ltd. However, all of these companies were predecessors or successors to McColl-Frontenac Inc. ("McColl-Frontenac").

and its predecessors, and not near the location of Al's Rentals above-ground fuel storage containers.

[267] AEP eventually issued an environmental protection order to McColl-Frontenac, requiring McColl-Frontenac to remediate the property. McColl-Frontenac appealed the environmental protection order, and among other arguments, McColl-Frontenac argued that Al's Rentals should have also been named a person responsible. The evidence before the Board was, while there was some surficial contamination of the property caused by Al's Rentals, the substances causing the adverse effect were the result of historic releases by McColl-Frontenac and its predecessors.

[268] As a basis for finding Al's Rentals a person responsible, McColl-Frontenac relied on the "as it stands" provisions of the agreement. This is a similar argument being advanced by Suncor in the case currently before the Board in support of its view that Concord should be held as a person responsible. The sales agreement between Sears and Concord contains provisions regarding responsibility for the Substances on the Site. As in the *McColl* case, the law is clear that private contractual agreements cannot absolve a party from its environmental obligations under EPEA.

[269] In the *McColl* case, the Board held that Al's Rentals was not a person responsible. The Board noted,

> "… [Section 1(tt)] of EPEA defines 'person responsible' for a substance to include the owner and a previous owner of the substance and '…every person who ... has had charge, management or control of the substance....' The Legislature defined these categories in relation to the pollution, not the overall property where the pollution is located. The Board finds it difficult to equate the two, especially when that definition is read in light of the section [107] definition of 'person responsible for a contaminated site' for purposes of section [129] orders. The latter definition consists of persons responsible for the substance causing the contamination (i.e. the categories of 'persons responsible' in section [1(tt)] for purposes of section [113] orders) as well as the contaminated site owner and any prior site owner who owned the site when the pollution occurred. If the Legislature had intended that these site owners were already subsumed within the definition of 'persons responsible' for the substance, in section [1(tt)], the

> Legislature have had no need to list those owners as additional categories of 'persons responsible' in section [107]."[84]

In the Board's view, there is a crucial difference in the definition of a person responsible under section 113 and section 129. Specifically, section 129 expressly includes the owner of the property. Given that section 129 includes the owner of the property, the Board believes that section 113 is not intended – without more – to include the owner of the contaminated property. Section 129 provides additional protections that address the Board's concern about naming the owner of a parcel of land who had not directly contributed to the contamination as a person responsible. Most significantly, the Director can only name such a landowner where there is a significant adverse effect as opposed to merely an adverse effect.[85] In the Board's view, these

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[84] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.) at paragraph 107. Section 1(tt) of *EPEA* provides:

> "In this Act, … 'person responsible', when used with reference to a substance or a thing containing a substance, means
>
> (i) the owner and an 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,…."

Section 107(1)(c) of *EPEA* provides:

> "In this Part, …
>
> (c) 'person responsible for the contaminated site' means
>
> (i) a person responsible for the substance that is in, on or under the contaminated site,
>
> (ii) any other person who the Director considers caused or contributed to the release of the substance into the environment,
>
> (iii) the owner of the contaminated site,
>
> (iv) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site, ….." (Emphasis added.)

[85] In comparing the regular EPO provisions of section 113 and the contaminated site EPO provisions of section 129, section 113 allows for an EPO to be issued where there is an adverse effect, where as section 129 only allows for an EPO to be issued where there is a significant adverse effect, and also requires the site to be designated a contaminated site before the Section 129 EPO is iued. See:

> 113(1) 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.

additional protections are necessary where the Director is going to require a person who is not the polluter to take steps to remediate the contamination merely because they own the land.

[270] In the *Imperial* case, the Board also refused to find that a party was responsible simply because they owned the property. This party was Calhome Property Ltd., the social housing subsidiary of the City of Calgary.

[271] The *Imperial* case dealt with a refinery site that Imperial Oil Ltd. operated in the City of Calgary from about 1920 to 1970. Imperial Oil Ltd. closed the refinery and remediated the land to the standard of the day, and then redeveloped the site into what is now the Lynnview Ridge residential neighbourhood. In approximately 2000, hydrocarbons and lead concentrations were found on the site in excess of acceptable limits. As a result, AEP issued an environmental protection order naming Imperial Oil Ltd., and its real estate subsidiary Devon Estates Ltd., as persons responsible. In its Notice of Appeal, Imperial Oil Ltd. argued that other parties should also be named as persons responsible, including Calhome. In the hearing, Imperial Oil Ltd. argued that Calhome was in a unique position because it knew of the contamination when it purchased the land.[86] According to Imperial Oil Ltd., "…it would be unfair for a party with knowledge of contamination to purchase property at a reduced price, only to re-zone and develop that land."[87] This is a similar argument being advanced with respect to Concord.

[272] The Board held that it was

> "… satisfied that Calhome did not purchase the townhouses at a reduced price but, rather, paid fair market value. This fact, in itself, indicates that even if the City of Calgary's knowledge of hydrocarbons in the Subdivision Lands before

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See also:

> 125(1) Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.
>
> 129(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.

[86] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 241.

[87] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 241.

> they were developed could be attributed to Calhome, Calhome logically assumed that the problem had been resolved before it purchased the lands." [88]

[273] The Board went on to discuss that the "…definition of a 'person responsible' for the purposes of an [environmental protection order] issued under section [113] of EPEA, focuses on ownership of the substance rather than the owner of the land and does not consider the purchase price of land." [89] The Board then discussed how section 113 focuses on ownership of the substance or charge, management, or control of the substance, compared to section 129, which focuses on ownership of the property. The Board held:

> "Although Calhome may have assumed ownership of the [s]ubstances when it bought the townhouses, in the Board's view it would have been unfair if the Director had named Calhome as a person responsible in the [environmental protection order]….
>
> To us, the convincing argument is that, in a similar manner to all other landowners in the Subdivision Lands, Calhome did not manufacture the [s]ubstances, manage, or deposit the [s]ubstances on the Subdivision Lands: Calhome was not the polluter. Although Calhome assumed the ability to exercise charge, management, or control over the substances in the land that it purchased, the Board would consider it unreasonable on these facts if the Director had named Calhome a person responsible under the [environmental protection order]."[90] [Emphasis added.]

[274] In the Board's view, the *Imperial* decision also supports the view that Concord is not a person responsible for the release of the Substances. While Concord owns the Site, it has not taken charge, management, or control of the Substances at this point in time, and as such, falls into the same position as Calhome. It may be that, at some point in the future, if Concord decides to redevelop the Site, that it will take charge, management, or control of the Substances. It could do this by excavating the Site and removing the Substances from the Site in a similar manner to Suncor when it operated the Service Station. But for now, the Board does not believe

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[88] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 242.

[89] *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraph 243.

Concord is properly a person responsible for the Substances. Therefore, the Board is recommending to the Minister that he order the EPO be varied to remove Concord as a person responsible for the release of the Substances, and therefore, a Party to the EPO.

D. Mall Owners

[275] Based on the discussion regarding Concord, and the *McColl* and *Imperial* decisions, the Board is also of the view that the Mall Owners are not persons responsible for the release of Substances under the EPO. Like Concord, the Mall Owners have never been in the business of operating a retail service station, and while the Substances are on their land, they have not taken charge, management, or control of the Substances.

[276] Like Concord, it is possible that if the Mall Owners redevelop their land, they could take charge, management, and control of the Substances and become persons responsible. However, until that occurs, in the Board's view, the Mall Owners are not persons responsible. Therefore, the Board is recommending to the Minister that he order the EPO be confirmed, without naming the Mall Owners as persons responsible.

VII. THE TERMS AND CONDITIONS OF THE EPO

[277] The main objection to the terms and conditions of the EPO concerned the timelines. In its Notice of Appeal, Sears argued the timelines prescribed in the EPO to complete certain activities were "…arbitrary and unreasonable and the Director has provided no rationale or reasons for the timelines required."[91] According to Sears, the "…timelines for completion of certain activities ordered by the Director in the EPO do not provide the Appellant with its rights to procedural fairness and are contrary to principles of fundamental justice…."[92]

[278] The Board understands Sears has completed many of the requirements of the EPO, other than the implementation of the Revised Remediation Plan, which has been subject to

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90 *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.) at paragraphs 244 and 245.

91 Sears' Notice of Appeal, dated March 6, 2018, at paragraph 30.

92 Sears' Notice of Appeal, dated March 6, 2018, at paragraph 31.

a Stay issued by the Board.[93] The Director's decision to amend the EPO on November 15, 2019, shortly before the hearing started, is evidence that many of the requirements of the EPO have been met. Specifically, in Amendment No. 3 to the EPO, the Director deleted sections 3 to 6 and sections 10 and 11. The Board understands the Director made this decision because he was satisfied with the Revised Remediation Plan produced as a result of the EPO. Therefore, the Board is of the understanding the concerns of Sears, and the other Appellants about the timelines in the EPO have been substantially addressed.

[279] However, the HHLG and Ms. Barron are not satisfied with the terms and conditions of the EPO concerning the timelines. Both the HHLG and Ms. Barron want an expedited timeline imposed in the EPO to ensure the remediation of Lions Park and the Hounsfield Heights neighbourhood are completed in a timely manner. The HHLG and Ms. Barron point to the fact the contamination was discovered on the Site in 1989 when Suncor removed the steel underground storage tanks and replaced them with fibreglass tanks. The HHLG and Ms. Barron note this was 30 years ago, and the contamination has still not been remediated. Their concern, from reading the Revised Remediation Plan accepted by the Director, is that it appears it will take an additional 15 or more years to complete the remediation work. They also note the Wyndham Report states that remediation could take upwards of 75 years with the current proposed remedial and risk management methods.

[280] The HHLG and Ms. Barron have argued that Sears has not been actively pursuing the remediation efforts, and in particular, are "hiding behind" the hesitancy of landowners in the Hounsfield Heights neighbourhood to provide access to their land as the reason for the delay in the remediation efforts. There were suggestions at the hearing that there is no evidence that Sears has been actively engaging landowners to gain access to their lands. This suggestion is concerning to the Board. In the Board's view, to better ensure the delineation and remediation work proceeds in a timely fashion, the Board is recommending to the Minister that the EPO be varied to include a requirement in the Revised Remediation Plan that annual reports be provided to the Director regarding efforts to contact landowners to gain access to properties in the Hounsfield Heights neighbourhood, as needed for the effective delineation and remediation of

93 See Board's Letter, dated January 24, 2019.

the Substances. This information should not contain the personal information of the individual landowners to protect their privacy.

[281] The Board notes that where the remedial efforts require access to a landowner's property, and the landowner is not willing to grant access to the land, there are provisions in EPEA to address this issue. Specifically, section 250 of EPEA allows the Director to make an application to the Provincial Court to assist the persons to whom an EPO has been issued to gain access to the land to carry out the work under the EPO.[94] While the Board recognizes that this is an extreme remedy, where appropriate to benefit the Hounsfield Heights neighbourhood as a whole, the Board encourages the Director to consider this option. The Board notes that this approach does not require an EPO to be issued to the landowners.

[282] Further, with respect to the remediation efforts, both the HHLG and Ms. Barron urged the Board to place more stringent timelines on the remediation work. They argued that the anticipated medium to long-term time frame of 15 years to complete the work described in the Revised Remediation Plan was unacceptable. Instead, they say setting a 5 to 10-year time limit would be more appropriate. The members of the HHLG and Ms. Barron pointed to repeatedly broken promises by Sears about when the remediation would be completed. The first promise was 10 years, and then when the 10 years passed, the promise was an additional 10 years.

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[94] Section 250 of EPEA provides:

"250(1) The powers in this section are in addition to any power to enter under Part 10. …

(4) Where an environmental protection order or an enforcement order orders the person to whom it is directed to carry out any work or do any thing in respect of a place, that person and any other person carrying out the work or doing the thing on that person's behalf may, without incurring liability for doing so, enter the place for the purpose of carrying out the work or doing the thing required by the order.

(5) Where a judge of the Provincial Court is satisfied on evidence under oath that a person has been prevented from entering a place or has been denied access to a place that person is authorized to enter under this section, the judge may issue an order authorizing that person to enter the place for the purpose of carrying out any work or doing any thing that the person is authorized to carry out or do.

(6) An application under subsection (5) must be made by … (b) the Director, in a case referred to in subsection (4).

(7) A person entering any place under the authority of this section

(a) shall do so at a reasonable time unless authorized otherwise in an order, and

(b) shall give reasonable prior notice of intention to enter the place to the occupant of the place or, if there is no occupant, to the owner if it is practicable in the circumstances to do so."

[283] The Board has reviewed the Revised Remediation Plan, and like the Director, has determined that the Revised Remediation Plan is reasonable. While the Board appreciates the desire of the members of the HHLG and Ms. Barron to have the remediation completed as soon as possible, the Board is of the view that based on the work completed to date and the current data gaps that still exist, there are no reasonable ways to expedite the work that would ensure it would be completed in a 5 to 10-year time horizon. Regrettably, the Board is of the view that the 15-year time horizon discussed in the Revised Remediation Plan is the most reasonable expectation of when the remediation work can be completed given the existing data gaps.

[284] Having said the 15-year time horizon is reasonable, and that all the remaining contamination on or under the Site and the Mall Lands will be risk-managed through monitored natural attenuation, the Board is of the view that the primary focus of any active remediation efforts should be on Lions Park and the Hounsfield Heights neighbourhood. The basis for this view is that Lions Park and the north end of the Hounsfield Heights neighbourhood appear to be the primary locations of the LPH. The LPH is the source of the hydrocarbon vapour, which in turn, is the source of potential adverse health impacts to the residents in the Hounsfield Heights neighbourhood. This potential adverse health impact is not a concern at the Site or the Mall Lands based on their current land-use and level of development.

[285] Further, the mere presence of the Substances under the Hounsfield Heights neighbourhood is having emotional and psychological impacts on the residents, as evidenced by the testimony at the hearing of Ms. Barron, Ms. Houle, and Dr. Legge. Therefore, the Board is recommending to the Minister that the terms and conditions of the EPO be varied to require the Revised Remediation Plan to make the remediation of the Hounsfield Heights neighbourhood and Lions Park,[95] the primary focus of the remedial work.

[286] The Board heard from several witnesses that significant data gaps exist. The Board is of the view that the main impediment to moving forward in a timely manner is the lack of complete delineation of the presence of LPH in the Hounsfield Heights neighbourhood. In the

[95] Lions Park needs to be included in the primary focus of the remediation work because the Board heard evidence there are pockets of LPH detected by the boreholes located in Lions Park, which is one of the reasons for the location of the dual phase vapour extraction system.

Board's view, it is necessary to address these data gaps to ensure the remediation can move forward as quickly and efficiently as possible. The continuation of Clifton's plan to delineate the locations of the LPH in a systematic, iterative fashion, from the north end of the Hounsfield Heights neighbourhood towards the south end, will effectively address the data gaps.

[287] The Board heard that the residents of Hounsfield Heights are frustrated by what they consider to be a lack of active remediation efforts taking place in their neighbourhood. However, the evidence before the Board is that active remediation activities are currently taking place, specifically the dual-phase vapour extraction system and the Plume Stop, a permeable reactive barrier, installed along 11th Avenue NW, both of which are intended to reduce and prevent migration of the Substances toward the southern end of the Hounsfield Heights neighbourhood where there is a greater risk of vapours coming into closer proximity of homes. While these efforts may not appear to be "active" to the residents, in the Board's view, they are currently the most effective approaches to remediating the neighbourhood.

[288] Regarding the need for continued progress, the Board heard evidence that the residents in the Hounsfield Heights neighbourhood are concerned and frustrated by the protracted length of time that has elapsed in addressing the migration of the Substances into their neighbourhood. The Board understands their hopes are for remedial efforts that keep moving forward in a productive, effective manner. To that end, the Board is recommending to the Minister that the terms and conditions of the EPO be varied to require completion of the delineation of the LPH in the Hounsfield Heights neighbourhood, as outlined in the Clifton Report and as detailed in the Revised Remediation Plan, within 18 months of the Minister's decision in these appeals. The Board is of the view there should be deadlines in the Revised Remediation Plan to complete the delineation work. However, the Board recognizes that if there are difficulties in gaining access to private property, then this deadline may need to be extended. Therefore, the Board is including in its recommendation to the Minister that the Director should be able to extend this deadline if necessary, but the intent of the deadline should remain.

[289] Additionally, the Board will recommend to the Minister that the EPO be varied to require the Parties to the EPO to update and revise the Revised Remediation Plan, including the reporting of groundwater and soil vapour monitoring, for submission to and approval by the

Director on an annual basis, or other frequency determined by the Director. With respect to updating and reviewing the Revised Remediation Plan, the Board believes it is appropriate to require that the recommendations from the Wyndham Report should be considered.[96] The Board will include this in its recommendations to the Minister.

[290] Regarding improved communications, the Board heard evidence at the hearing that there are multiple groups and individual residents within broader Hounsfield Heights-Briar Hill Community who have varying interests and degrees of involvement with the migration of the Substances into the Off-Site areas. As explained previously, the Hounsfield Heights neighbourhood is part of the Hounsfield Heights – Briar Hill Community. The Board also heard from the HHLG representatives that, although they are landowners within the Hounsfield Heights neighbourhood, they are not affiliated with the Hounsfield Heights – Briar Hill Community Association. While the Board notes the desire of many Hounsfield Heights residents, including the directly impacted landowners, for more effective communication regarding the remedial activities in their community, the Board notes that the residents within the Hounsfield Heights neighbourhood, as well as interested residents in the broader community, could assist in improving the communication by reaching a consensus on how they wish to receive information and updates from the Parties to the EPO. That could include: what type of information they want to receive, the frequency at which information should be distributed, and to whom that information would be sent. In the Board's experience, effective two-way communication involves parties who are willing to engage collaboratively, and as such, the Board calls upon the residents in the Hounsfield Heights neighbourhood and the Parties to the EPO to work together to implement an effective communication strategy. The Board suggests that utilizing the Hounsfield Heights – Briar Hill Community Association as a central "one-window" may be an effective and efficient vehicle for relaying information between the Parties to the EPO and interested parties.

[291] To assist with more effective communication, the Board is recommending to the Minister to vary the EPO to require annual reporting to the Director and the community

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[96] *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment*, November 4, 2019, Wyndham Environmental Ltd.

regarding the work done in the Hounsfield Heights neighbourhood during the previous year, the results, and the plans for the following year.

[292] To assist further with more effective communication, the Board is also recommending to the Minister to vary the terms and conditions of the EPO to require the Parties to the EPO to assign a key contact person to respond to questions from community residents within 5 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.

[293] Finally, the Board notes a desire by the Hounsfield Heights residents to have a trusted, impartial third-party involved in the communications. The Board is of the view that it is incumbent on AEP to assist in facilitating the discussions necessary to develop this effective communication strategy. The Board suggests that, as a starting point, it would be helpful for AEP to meet with impacted residents after the Minister has issued his decision in these appeals to explain the outcome of the appeal process, what the Minister has decided, and what the next steps will be.

VIII. RECOMMENDATIONS

[294] The Board recommends the Minister confirm the EPO with respect to naming Sears and Suncor as Parties to the EPO. In the Board's view, Sears and Suncor are properly persons responsible under the EPO and, therefore, should be named as Parties to the EPO. Further, in the Board's view, Suncor does not fall within the exemption to the definition of a person responsible in section 1(tt)(vi) of EPEA.

[295] The Board recommends the Minister vary the EPO with respect to naming Concord as a Party to the EPO. In the Board's view, Concord is not properly a person responsible and, therefore, should not be named as a Party to the EPO. Likewise, in the Board's view, the Mall Owners are not properly persons responsible and, therefore, should not be named as Parties to the EPO.

[296] The Board recommends the Minister vary the terms and conditions of the EPO to make the remediation in the Hounsfield Heights neighbourhood and Lions Park the first priority.

This should include a requirement to review and revise the Revised Remediation Plan to ensure the Hounsfield Heights neighbourhood and Lions Park, are the first priority for any active remediation.

[297] The Board recommends the Minister vary the terms and conditions of the EPO to require the completion of the delineation of the presence of LPH in the Hounsfield Heights neighbourhood, as outlined in the Clifton Report and in accordance with the Revised Remediation Plan, within 18 months of the issuance of the Minister's decision. The Board recommends that the Director be able to extend this deadline if there are difficulties obtaining access to private property, but the intent of the deadline, which is to complete the delineation in a timely manner, should remain.

[298] The Board recommends the Minister vary the terms and conditions of the EPO to require the Parties to the EPO to submit annual reports to the Director outlining their attempts to gain access to the properties in the Hounsfield Heights neighbourhood, as needed for the effective delineation and remediation of the Substances. The annual reports should not contain personal information about any individual landowners.

[299] The Board recommends the Minister vary the terms and conditions of the EPO to require the Parties to the EPO 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. The updated Revised Remediation Plan should be made available to the residents of the Hounsfield Heights neighbourhood on a timely basis, after being approved by the Director. In updating the Revised Remediation Plan, particularly as more data becomes available, the Parties to the EPO should consider the recommendations made in the Wyndham Report.[97]

[300] The Board recommends the Minister vary the terms and conditions of the EPO to require the Parties to the EPO to 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 the plans for the following year.

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[97] *Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment*, November 4, 2019, Wyndham Environmental Ltd.

[301] Finally, the Board recommends the Minister vary the terms and conditions of the EPO to require the Parties to the EPO to assign a key contact person to respond to questions from the community within 5 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.

[302] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and the decision of the Minister, be sent to the following:

- Mr. Alan Merskey and Ms. Kellie Johnston, Norton Rose Fulbright Canada, representing Sears Canada Inc. and FTI Consulting Canada Inc. (the Court Appointed Monitor);
- Mr. Daniel Collins, Dentons Canada LLP, representing Concord North Hill GP Ltd.;
- Mr. Paul Cassidy and Ms. Kimberly Howard, McCarthy Tetrault LLP, representing Suncor Energy Inc.;
- Ms. Vivienne Ball and Mr. Lee Plumb, Alberta Justice and Solicitor General, representing Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks;
- Mr. Dufferin Harper, Blake, Cassels & Graydon LLP, representing BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd.;
- Mr. Gavin Fitch, McLennan Ross LLP, representing the Hounsfield Heights Landowners Group; and
- Ms. Linda Barron.

[303] Finally, with respect to the stay issued by the Board respecting the implementation of the Revised Remediation Plan, the stay is lifted in its entirety upon the Minister issuing his decision in this matter.

[304] The Board will establish a process for costs applications after the Minister makes his decision.[98]

[98] The HHLG reserved their right to costs in the initial hearing submission dated November 12, 2019, and at the hearing. Ms. Barron initially decided not to claim costs at the hearing, but advised the Board in a letter dated December 9, 2019, that she was reserving her right to claim costs. The Board responded to Ms. Barron on December 9, 2019, stating the Board will address her cost claim once the Board's Report and Recommendations and

Dated on February 3, 2020, at Edmonton, Alberta.

- original signed -

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Meg Barker
Panel Chair

- original signed -

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Anjum Mullick
Board Member

- original signed -

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Chris Powter
Board Member

the Minister's Order were issued. The Mall Owners reserved their right to claim costs against Concord and Suncor only. Sears made no comments on costs. Concord and Suncor reserved their right to claim costs at the hearing. The Director stated in their hearing submission that he takes no position on costs.

Legislation

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.

Section 1(tt) provides:

1 In this Act, …

(tt) "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

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),

but does not include

(v) a municipality in respect of

(A) a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the Municipal Government Act or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or

(B) a parcel of land acquired by it by dedication or gift of an environmental reserve, municipal reserve, school reserve, road, utility lot or right of way under Part 17 of the Municipal Government Act, unless after the date on which the land is acquired the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel,

(vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or

(vii) the Minister responsible for the Unclaimed Personal Property and Vested Property Act, with respect to a parcel of land to which that Act applies, unless after the date on which the Minister takes possession of the parcel of land the actions of the Minister or persons under the control of the Minister release on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel;….

Section 113 provides:

113(1) 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) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval, code of practice or registration or the regulations, the Director may not issue an environmental protection order under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued, the code of practice was adopted or the regulations were made, as the case may be.

(3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order.

(4) An environmental protection order may be issued under this section in respect of a substance released before, on or after September 1, 1993.

(5) Where

(a) a substance was released into the environment before September 1, 1993, and

(b) the activity that resulted in the release was permanently discontinued before that date,

the Director may issue an environmental protection order to the person responsible for the substance only if an adverse effect has occurred or is occurring.

Section 129 provides:

129(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.

(2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following, where the information is available:

(a) when the substance became present in, on or under the site;

(b) in the case of an owner or previous owner of the site,

(i) whether the substance was present in, on or under the site at the time that person became an owner;

(ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time that person became an owner;

(iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before the owner became an owner, and whether the owner exercised such due diligence;

(iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship;

(v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it;

(c) in the case of a previous owner, whether that owner disposed of the owner's interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;

(d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;

(e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;

(f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;

(g) what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site;

(h) any other criteria the Director considers to be relevant.

(3) In issuing an environmental protection order under subsection (1), the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 124.

(4) An environmental protection order made under subsection (1) may

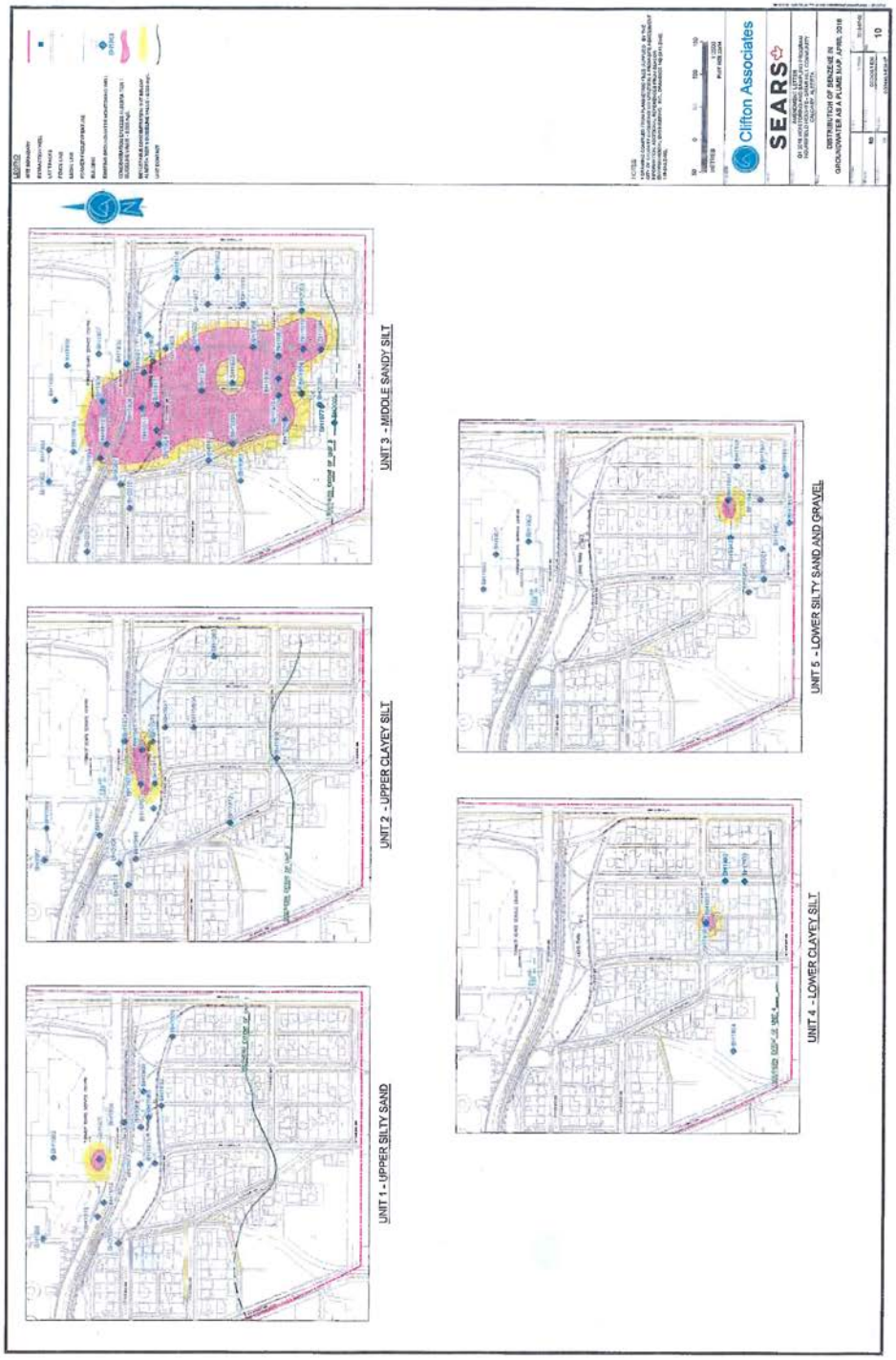
(a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 113,

(b) contain provisions providing for the apportionment of the cost of doing any of the work or carrying out any of the measures referred to in clause (a), and

(c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.

Appendix A
Area Map
Hearing Exhibit #4 – Annotated by the Board

Appendix B
Known Extent of the Contaminant Plume
Director's Supplemental Record (October 21, 2019), Tab 8.57


UNIT 1 - UPPER SILTY SAND
UNIT 2 - UPPER CLAYEY SILT
UNIT 3 - MIDDLE SANDY SILT
UNIT 4 - LOWER CLAYEY SILT
UNIT 5 - LOWER SILTY SAND AND GRAVEL
Clifton Associates
SEARS
DISTRIBUTION OF BENZENE IN GROUNDWATER AS A PLUME EXP. APRIL 2018

ALBERTA
ENVIRONMENT AND PARKS

Office of the Minister
Government House Leader
MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order
09/2020

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12

Order Respecting Environmental Appeals Board Appeal Nos. 17-069-070 and 18-013

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 17-069-070 and 18-013.

Dated at the City of Edmonton, in the Province of Alberta, this 5 day of Feb., 2020.

-original signed by-

Jason Nixon
Minister

Appendix
Order Respecting Environmental Appeals Board
Appeal Nos. 17-069-070 and 18-013

With respect to the decision of the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the "Director"), to issue Enforcement Order No. EPO-2018/01-SSR (the "EPO") and Amendment No. 2 to EPO-2018/01-SSR, I, Jason Nixon, Minister of Environment and Parks, order that:

1. The decision of the Director to name Sears Canada Inc. and Suncor Energy Inc. as parties to the EPO and the amendments thereto is confirmed.

2. The decision of the Director to name Concord North Hill GP Ltd. as a party to the EPO and the amendments thereto is reversed, such that Concord North Hill GP Ltd. is not a party to the EPO and amendments thereto.

3. The decision of the Director not to name BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd. as parties to the EPO and the amendments thereto is confirmed.

4. Amendment No. 3 to EPO-2018/01-SSR dated the 15th day of November 2019, which is a consolidation of the EPO, Amendment No. 1 to EPO-2018/01-SSR, and Amendment No. 2 to EPO-2018/01-SSR, is amended by deleting the portion of the order that reads:

   "1. The Parties shall immediately recommence the semi-annual soil vapour monitoring…"

   to and including

   "12. The Parties shall post on the communications website:
   a. regular status updates
   b. copies of all finalized and stamped sampling and monitoring reports
   c. a summary of the results of the posted finalized and stamped reports"

   and replacing it as follows:

   "1. The Parties shall immediately recommence the semi-annual soil vapour monitoring (high and low water table events) as described in the Soil Vapour Monitoring Program, (including a sampling event prior to April 30, 2018).

   2. The Parties shall immediately recommence the Groundwater Sampling and Monitoring Program, as described in the most recent program demonstrated in the 2017 Second Quarter Groundwater Monitoring and Sampling Report, July 14, 2017.

   3. The Parties shall complete the delineation of the presence of liquid petroleum hydrocarbons in the Hounsfield Heights neighbourhood, as outlined in the Clifton

Report and in accordance with the Remediation Plan approved by the Director, within 18 months of the date of the Ministerial Order issued in EAB Appeals 17-069-070 and 18-013.

4. The Director may extend the 18-month deadline specified in condition 3 if the Parties have difficulty obtaining access to private property, but the intent of the deadline, which is to complete the delineation in a timely manner, should remain.

5. The Parties shall implement the work set out in the Remediation Plan in accordance with the schedule of implementation that is approved by the Director.

6. Within 3 months of the date of the Ministerial Order issued in EAB Appeals 17-069-070 and 18-013, the Parties shall file an amended Remediation Plan for review and approval with the Director. The amended Remediation Plan shall make the remediation in the Hounsfield Heights neighbourhood and Lions Park the first priority for any active remediation. The amended Remediation Plan shall include a schedule of implementation.

7. On or before March 31 of each year, starting in 2021, or on such other frequency specified by the Director in writing, the Parties shall update and revise the Remediation Plan for submission to and approval by the Director. The Remediation Plan shall include a schedule of implementation. The updates and revisions to the Remediation Plan shall consider the report entitled “Review of the Contaminant Situation Associated with the Sears Property and Remedial Approach Assessment,” November 4, 2019, Wyndham Environmental Ltd. filed in EAB Appeal Nos. 17-069-070 and 18-013.

8. The Remediation Plan, including each update and revision, should be made available to the residents of the Hounsfield Heights neighbourhood on a timely basis, after being approved by the Director.

9. The Parties shall submit written status reports to the Director as follows:

    a. Final, stamped versions of sampling and monitoring reports (for any media - soil, vapour, groundwater) are to be submitted to the Director by the end of the 2nd month following the month the sampling and/or monitoring event occurred.

    b. Annual Reports are required to be submitted to the Director by March 31 of each year for the previous January 1st to December 31st time period, with the first submission due March 31, 2019.

(i) At a minimum, each Annual Report shall contain all of the following:

- Summary of the communications with the affected landowners that occurred during the year;
- List of any concerns that arose from other parties;
- An explanation of how these concerns were addressed;
- Any recommended changes to improve communication;
- A summary description of all assessment, remediation, and monitoring work undertaken;
- A summary of the results obtained within the year;
- Details on the operation of the Soil Vapour Extraction System and an evaluation of the effectiveness of the system;
- Identification of data gaps with recommendations to address them; and
- Recommendations and commitments for future assessment, monitoring, and remediation work.

(ii) Each Annual Report shall also outline the attempts by the Parties to gain access to the properties in the Hounsfield Heights neighbourhood, as needed for the effective delineation and remediation. The Annual Reports should not contain personal information about any individual landowners.

(iii) The Annual Reports shall include a detailed summary of the work done in the Hounsfield Heights neighbourhood during the previous year, the results of that work, and the plans for work for the following year.

(iv) The Annual Reports shall be made available to the community, including the residents of the Hounsfield Heights neighbourhood.

10. The Parties to the EPO shall assign a key contact person to respond to questions or inquiries from the community, including the residents of the Hounsfield Heights neighbourhood, within 5 business days of the question or inquiry being received by the Parties individually or collectively.

11. The Parties to the EPO shall assign a key contact person to work collaboratively with the residents of the Hounsfield Heights neighbourhood and the Parties to develop and implement an effective two-way communication strategy.

12. The Parties shall post on the communications website:

a. regular status updates;

b. copies of all finalized and stamped sampling and monitoring reports; and

c. a summary of the results of the posted finalized and stamped reports."