

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE FIRE SAFETY ACT

- and -

IN THE MATTER OF AN APPEAL by **HALIFAX ART AND PERFORMANCE ASSOCIATION** from a decision of the Office of the Fire Marshal dated August 14, 2025, in respect of a property located at 100 Ochterloney Street, Dartmouth, Nova Scotia

BEFORE: M. Kathleen McManus, K.C., Ph.D., Panel Chair
Bruce H. Fisher, MPA, CPA, Member
Marc L. Dunning, P.Eng., LL.B., Member

APPELANTS: **HALIFAX ART AND PERFORMANCE ASSOCIATION**
Blair Mitchell, Counsel

RESPONDENTS: **OFFICE OF THE FIRE MARSHAL**
Myles Thompson, Counsel

HALIFAX REGIONAL MUNICIPALITY
Joshua Judah, K.C.
Jim Janson, Counsel

FINAL SUBMISSIONS: July 17, 2026

DECISION DATE: **September 29, 2026**

DECISION: **Each party will bear their own costs.**

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1.0 INTRODUCTION

[1] In its written closing submissions, Halifax Regional Municipality (HRM) requested costs against the Appellant, Halifax Art and Performance Association (HAPA). In its decision on the merits of the appeal [2026 NSRAB 89], the Board directed all parties to file submissions on costs. This is the Board's decision on costs following those submissions. The Board has decided that each party should bear its own costs.

2.0 POSITIONS OF THE PARTIES

2.1 Halifax Regional Municipality

[2] HRM says costs should be ordered against HAPA for two reasons. First, HAPA initially appealed the HRM Fire Inspector Order and maintained its position throughout the hearing that the Order should be revoked. Then, in its final written submissions, HAPA changed that position and supported the Order. HRM says it would not have had to participate in the proceeding if HAPA clarified its position earlier. Second, HRM says HAPA gave notice of its intention to call two experts and HRM spent time preparing for those witnesses, only for HAPA to decide during the hearing not to call any experts. HRM seeks costs based on the *Nova Scotia Civil Procedure Rules* tariff but did not indicate an amount.

2.2 Halifax Art and Performance Association

[3] HAPA says it should not be ordered to pay any costs to HRM, but if the Board awards costs to HRM those costs should be paid by the Office of the Fire Marshal (OFM). It also asks the Board to order the OFM to pay costs to HAPA.

[4] HAPA says it was reasonable to involve HRM in the appeal because this was the first appeal to the Board from a decision of the Fire Marshal. HAPA submits the *Fire Safety Act* indicates that, on an appeal to the Fire Marshal, the Fire Marshal may consult with and obtain information from HRM fire officials, and it did not know the Fire Marshal did not do that until Deputy Fire Marshal Lynelle Vetsch testified at the hearing. It also says the decision to withdraw its expert evidence was only made after Fire Inspector Dustin Garnett testified that fire separation, which was a corrective action in the HRM Fire Inspector Order, continued to be a live issue. HAPA says that HRM's participation in the appeal was substantive.

[5] HAPA claims costs against the OFM for unreasonably prolonging the hearing because of its alleged failure to access the expertise and work product of HRM fire officials, disclose information on the interpretation of the *National Building Code of Canada*, and consider the issue of the "stage" in determining the use of the premises. It seeks \$9,000 in costs from the OFM based on the appeal involving slightly more than six days of hearing time at \$1,500 per day. HAPA says this amount represents a small portion of its actual legal expenses.

2.3 Office of the Fire Marshal

[6] The OFM says the parties should bear their own costs. It says the Board can only consider costs when requested by a party, or on its own motion, and HAPA's request for costs does not comply with these requirements. Only HRM requested costs in its closing submissions. HAPA only did so in response to the Board's request to provide its position on costs.

[7] The OFM says that during HAPA's appeal to the Fire Marshal, the Fire Marshal was carrying out a quasi-judicial function similar to that of a tribunal of first instance. It argued it had a statutory duty to act and that there is a "principle of not awarding costs against an administrative tribunal". It also says that awarding costs against it in those circumstances "would risk creating a chilling effect on the exercise of the Fire Marshal's quasi-judicial appeal responsibilities under the Act" and could result in the Fire Marshal refusing to decide appeals and referring them to the Board to avoid the risk of costs (which it has the authority to do under s. 39(6)(d) of the *Fire Safety Act*). The OFM says costs should only be awarded against the Fire Marshal in the exceptional circumstances contemplated by the Board's *Costs Rules*, NS Reg 260/2025 (*Cost Rules*), and those circumstances do not exist.

3.0 LAW

[8] For most proceedings before the Board, costs are in the discretion of the Board. Section 34(1) of the *Energy and Regulatory Boards Act*, SNS 2024, c 2, states:

Costs and fees

34 (1) Except in respect of a proceeding pursuant to the *Municipal Government Act* or the *Halifax Regional Municipality Charter*, costs of and incidental to a proceeding before a Board, are in the discretion of the Board and may be fixed at a sum certain or may be taxed. [Emphasis added]

[9] This provision is nearly identical to s. 28(1) of the former *Utility and Review Board Act*, SNS 1992, c 11, which applied to the Board's predecessor, the Nova Scotia Utility and Review Board.

[10] The *Costs Rules* are also relevant. They allow the Board to consider an award of costs when requested by a party and, in certain circumstances, on its own

motion (s. 4). They also give the Board specific authority to award costs against a party whose conduct is “clearly unreasonable, frivolous or vexatious”:

Costs for unreasonable, frivolous or vexatious conduct

16 (1) If the Board finds a party’s conduct or course of conduct to be clearly unreasonable, frivolous or vexatious, having regard to all the circumstances, the Board may, at the request of a party or on its own motion

- (a) award costs against the party;
 - (b) disallow all or part of an award of costs to the party.
- (2)** For the purposes of subsection (1), the following are examples of conduct that the Board may determine to be clearly unreasonable, frivolous or vexatious:
- (a) the actions or failure of a party to act in a timely manner that results in prejudice to another party;
 - (b) an applicant or appellant who, without notice, fails to do either of the following:
 - (i) attend a hearing,
 - (ii) send a representative to a hearing;
 - (c) a party who fails to reasonably co-operate with other parties during any proceedings before the Board;
 - (d) a party’s conduct that unnecessarily lengthens or delays proceedings;
 - (e) a party’s failure to comply with a procedural order or direction of the Board that results in prejudice to another party;
 - (f) a party continues to deal with issues the Board has advised are not relevant.

[11] These provisions are nearly identical to s. 5 of the former costs rules (*Costs Rules*, NS Reg 131/96).

[12] Section 6 of the current *Costs Rules* states that the burden of proof for establishing eligibility for costs is on the party requesting costs.

[13] In *Black River Wind Ltd., Re*, 2006 NSUARB 101 (*Black River Wind*), the Board found that the former *Costs Rules* did not limit its overarching discretion to award costs under s. 28(1) of the former *Utility and Review Board Act*:

XII. As procedural rules adopted by the Board, these rules do not limit the authority of the Board to exercise its discretion to grant costs, and therefore, are not an exhaustive list of when the Board may order costs. They do, however, reflect the Board's recognition of the difference in its role as a publicly accessible administrative board and that of the Courts. [Emphasis added]

[14] In past decisions the Board has stated that its practice has generally been not to award costs except in exceptional circumstances. In *Cape Breton (Regional Municipality), (Re)*, 2001 NSUARB 35, involving an application under the former *Municipal Boundaries and Representation Act*, the Board held:

[19] Section 28(1) of the Utility and Review Board Act provides that the Board has discretion to award costs in all its proceedings, except for planning appeals. The Board's practice has generally been not to award costs, except in exceptional circumstances. The Board adopted the Costs Rules in 1996. The Cost Rules set out certain criteria to be considered before awarding costs. While the Cost Rules are not intended to restrict the Board's general discretion to award costs under s. 28, they do serve as guidelines. [Emphasis added]

[15] Also see *Associated Freezers of Canada Ltd. v Dartmouth City Regional Assessment Appeal Court (Director of Assessment)*, 1996 NSUARB 85:

[20] There have only been a few cases since the boards were consolidated where costs have been awarded by the Board other than with respect to matters under the Expropriation Act. In general the Board has followed a practice where costs have only been awarded in exceptional circumstances. The Cost Rules codify this approach. [Emphasis added]

[16] In *Homco v Director of Assessment*, 2005 NSUARB 108, the Board addressed costs in property assessment appeals. The Board found that routinely awarding costs in these appeals should be avoided because it may result in fewer appeals being filed and prevent the Board from addressing important assessment issues that may have consequences for those beyond the immediate parties to the dispute:

[22] [...] it is the view of the Board that appeals of assessments do not involve simply the resolution of a dispute between two parties, as commonly occurs in matters before the courts, but rather involve determination of matters which can have effect upon other property owners who are not themselves parties, and upon governments (provincial and municipal) as a whole. The Board considers that the routine imposition of costs might reduce the free exploration, through appeals to the Board, of matters of general interest relating to assessment, and is, for this reason as well, to be avoided. In short, the awarding of costs on a routine basis, as is commonly done in the courts, would, in the Board's judgment defeat, at least in part, the legislative purpose which the Board perceives in the legislation under which the Board conducts these appeals. [Emphasis added]

4.0 FINDINGS

[17] The Board finds that it can consider all parties' submissions on costs including HAPA's request for costs against the OFM. The Board's request for submissions on costs was intended to request submissions from any party who wanted to take any position on costs, not just respond to HRM's request for costs.

[18] Section 34(1) of the *Energy and Regulatory Boards Act* makes it clear that costs for appeals under the *Fire Safety Act* are in the discretion of the Board. In addition to this general discretion, the Board also has specific authority under the *Costs Rules* to award costs against a party whose conduct is "clearly unreasonable, frivolous or vexatious". The Board's findings in *Black River Wind* about the interaction between the former *Costs Rules* and s. 28(1) of the former *Nova Scotia Utility and Review Board Act* are equally applicable to the current *Costs Rules* and s. 34(1) of the *Energy and Regulatory Boards Act*. The *Costs Rules* do not limit the Board's general discretion on costs under the *Act*. In considering whether to exercise that discretion, the Board's practice has generally been to not award costs except in exceptional circumstances. Exceptional circumstances mean circumstances that are unusual, serious, or outside the normal course of a proceeding, where fairness, the integrity of the Board's process, or the proper administration of justice requires the Board to depart from its usual practice and award costs. Being successful on the merits, or where the Board rejects a party's evidence, will not be enough.

[19] In the Board's view, exceptional circumstances include conduct that causes unnecessary and substantial delay and expense, conduct that causes significant prejudice to a party, bad faith participation, or conduct resulting in a significant misuse of the Board's process. It includes the examples of unreasonable, frivolous or vexatious

conduct set out in s. 16(2) of the *Costs Rules*. It also includes deliberately misleading the Board, obstructionist conduct, and failing to show appropriate respect to a party, counsel, witness, or the Board. This is not intended to be a closed list.

[20] In this appeal, the Board finds no reason to depart from its practice of not awarding costs except in exceptional circumstances. This finding is consistent with the Board's role as an accessible administrative tribunal and will encourage participation in the appeal process by ensuring that costs do not penalize a party for merely losing a *bona fide* appeal. Routinely awarding costs in *Fire Safety Act* appeals should be avoided because it may discourage appeals and prevent the Board from addressing important public safety and fire prevention issues that can have implications for other buildings and properties, as well as inform how municipal and provincial fire officials carry out their work.

[21] In a *Fire Safety Act* appeal, the starting presumption on costs is that parties bear their own costs. The burden is on the party seeking costs to prove, on a balance of probabilities, that there are exceptional circumstances.

[22] After considering the parties' respective submissions and the circumstances of this appeal, the Board finds there are no exceptional circumstances which warrant an award of costs.

[23] The Board does not accept HRM's argument that HAPA caused unnecessary delay. The Board finds that it would likely have been difficult for HAPA to decide to withdraw its expert reports until after Fire Inspector Garnett testified. HAPA's decision to do so reduced the length of the hearing. The Board commends HAPA for ultimately deciding to discontinue its challenge to the HRM Fire Inspector Order. This decision was made before the other parties' closing submissions were due and likely

reduced the amount of time that would otherwise be spent on those submissions. It also reduced the Board's time on the number of issues the panel had to deliberate and address in the decision.

[24] The Board finds no merit in HAPA's argument that costs be awarded against the OFM based on its alleged failure to access the expertise and work product of HRM fire officials, disclose information on the interpretation of the *National Building Code of Canada*, and consider the issue of the "stage". Section 39(5) of the *Fire Safety Act* gives the OFM the authority to access the expertise and work product of HRM fire officials but does not compel it to do so. The fact that the Board ultimately rejected parts of the OFM's interpretation of the *National Building Code of Canada* and the definition of "stage" is a question of success on the argument, and does not suggest "exceptional circumstances".

[25] The Board finds the conduct of the parties in this appeal to be typical of many proceedings before the Board and not exceptional.

[26] In the circumstances the Board finds it appropriate for each party to bear its own costs.

[27] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 29th day of September 2026.

M. Kathleen McManus

Bruce H. Fisher

Marc L. Dunning