

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: February 06, 2020

CASE NO.:

19-035

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: Pamela Poulin (File No. 19-035)
Appellant: Harold Westendorp (File No. 19-036)
Appellant: 2057183 Ontario Limited (File No. 19-037)
Respondent: Director, Ministry of the Environment, Conservation and Parks
Subject of appeal: Order to provide written confirmation that all liquid industrial and hazardous wastes have been removed from the Site by an Approved Waste Hauler, and to prepare and implement a Phase Two Environmental Site Assessment Action Plan and to submit a Final Report
Reference No.: 5200-BB2KYP-1
Property Address/Description: 7811 County Road 6
Municipality: Elizabethtown-Kitley
Upper Tier: United Counties of Leeds and Grenville
ERT Case No.: 19-035
ERT Case Name: Poulin v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

Pamela Poulin, Harold Westendorp, and 2057183 Ontario Ltd.

Director, Ministry of the Environment, Conservation and Parks

Counsel

D. Grenkie

J. Bradbury

Presenters

John and Dorothy Lapierre Self-represented (on September 27, 2019 only)

Brenda Fisk Self-represented

HEARD: January 30, 2020 In writing
ADJUDICATOR: Maureen Helt, Acting Associate Chair

MOTION DECISION AND ORDER

Overview

[1] This motion relates to various appeals brought to the Environmental Review Tribunal (“Tribunal”) by Pamela Poulin, Harold Westendorp, 2057183 Ontario Limited, (“appellants”) from Director’s Order No. 5200-BB2KYP-1 (“Director’s Order”). The Director’s Order was issued on May 9, 2019 under s. 157.3(5) of the *Environmental Protection Act* (“EPA”) for a site located at 7811 County Road 6, in Elizabethtown-Kitley (“Site”).

[2] The appeals have been the subject of various teleconferences. On consent, the delivery of the parties’ disclosure was scheduled for January 3, 2020 and the hearing was scheduled to start on March 25, 2020 for three days.

[3] The appellants request an extension of time to file their disclosure from January 3, 2020 to a date after March 13, 2020. The appellants also request that the hearing be adjourned from March 25, 2020 until a date after the conclusion of a Provincial Offences (“POA”) trial in which two of the appellants are charged with offences under the *EPA*. The appellants request that the hearing dates be vacated and that a date for mediation be set instead.

[4] The Director opposes the request for an adjournment and asks that the appellants be ordered to provide full disclosure by February 15, 2020.

Issue

[5] The issues to be determined on this motion are:

- i. Whether to adjourn this proceeding; and
- ii. Whether to extend the disclosure date from January 3, 2020 to a date after March 13, 2020.

Result

[6] The appellants' request for an adjournment of the hearing is denied. The appellants are ordered to provide disclosure as set out in the order below by February 19, 2020. The Tribunal, if requested, will provide Tribunal assisted mediation by March 3, 2020.

Background

[7] The Tribunal originally scheduled November 29, 2019 as the disclosure date.

[8] The Tribunal then extended the disclosure date to January 3, 2020 at the request of the appellants, which the Director consented to. The reason for the appellants' requested delay was that certain witness statements could not be provided until those witnesses testified at the POA trial. The appellants requested that the witness statements not be filed until two days after the completion of the trial which was set to finish on December 17, 2019.

[9] On December 19, 2019, the appellants wrote to the Tribunal and the Director advising that the POA trial completed four days of evidence and would continue on January 13, 2020 with a final date for submissions scheduled for March 13, 2020.

[10] That same day, the Tribunal inquired about the intent of the appellants' email. The Tribunal reiterated that the hearing was scheduled to start on March 25, 2020. In response, counsel for the appellants stated that the purpose of his email was "simply to give you an update."

[11] The appellants delivered disclosure to the Director and the Tribunal on January 3, 2020 and stated that they will only provide additional disclosure after the trial is complete. The appellants stated that rather than providing the outstanding disclosure piecemeal, they would do as a whole after completion of the POA trial, namely around March 15, 2020. The additional disclosure includes the exhibits, transcripts and witness statements from the POA proceedings.

[12] In response, the Director strongly opposed this request and submitted that the disclosure provided by the appellants on January 3, 2020 was deficient.

[13] The appellants filed a brief submission on January 17, 2020 and requested that the hearing scheduled to start on March 25, 2020 be adjourned and that a date for mediation be set.

[14] The Director, in its responding submission, opposed the request for an adjournment noting that the hearing dates were scheduled on consent in October 2019, and further adjournments are unwarranted. The Director also submitted that the POA trial may be extended again, the issues in the POA proceeding are not identical to the issues in this appeal and further, that if the Tribunal denies the adjournment request, then the request for late delivery of disclosure should also be denied.

Analysis

[15] In considering the appellants' requests, the Tribunal notes that it has an obligation to ensure an efficient, proportional and timely resolution of the merits of the proceeding. The appellants have not provided a valid reason to delay the hearing before the Tribunal other than pointing to the ongoing POA trial.

Adjournment Request

[16] In considering the request for an adjournment, the Tribunal considers the factors set out in Rule 105 which includes the interests of the parties in a full and fair hearing, integrity of the Tribunal's process, circumstances giving rise to the request, timeliness of request, if there is consent, consequences of an adjournment and the public interest in the deflivery of a just, timely and cost effective hearing.

[17] In their very brief submission in support of their motion request, the appellants appear to rely almost exclusively on the schedule of the POA proceeding as justification for failing to provide timely disclosure and their request for an adjournment of the hearing for which dates were set on consent in October 2019.

[18] The Director notes that the issues in the POA prosecution are not identical to the issues to be decided in this appeal, and the outcome of that proceeding does not necessarily impact the hearing of this appeal. The Director refers to a Tribunal decision on a motion for an adjournment in *wpd White Pines Wind Inc. v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 51. In that case, the Tribunal refused to adjourn the hearing pending the outcome of a regulatory prosecution.

[19] In considering the request for an adjournment, the Tribunal must balance the interests of fairness and expediency. As submitted by the Director at paragraph 20 of its submissions, "there is no apparent efficiency to be gained by waiting for the outcome of the POA trial because the issues in each proceeding are distinct. Put simply, the

POA trial is about accountability for specific alleged offences that happened in the past. The appeal proceeding is about whether actions should be taken in order to assess the risk for potential environmental harms at the Site in the present and future.”

[20] It is not fair or practical to delay Tribunal proceedings to await potential outcomes in other regulatory proceedings.

[21] For this reason, there is no basis for adjourning the hearing of this appeal.

Request to Extend Disclosure Date

[22] The appellants were ordered to provide disclosure by January 3, 2020 after an initial extension from November 29, 2019 on consent. The disclosure that was provided on January 3, 2020 was incomplete. The appellants unilaterally decided that they would not be providing full disclosure on January 3, 2020 and advised the Director and the Tribunal that their full disclosure would likely not be available until about ten days before the hearing scheduled to start on March 25, 2020.

[23] The dates established by the Tribunal are expected to be followed and it is not up to a party to unilaterally change these dates. It is essential that parties exchange all relevant evidence and information in a timely manner to be fully prepared for the hearing.

[24] The Director submits that to “permit last minute disclosure by the Appellants would undermine the purposes of the Tribunal’s directions and rules – to encourage co-operation among the parties; to assure the efficiency and timeliness of proceedings, and to assist the Tribunal in fulfilling its statutory mandate...”

[25] The appellants have failed to provide the Tribunal with any compelling reason why they are not able to provide complete disclosure at this time.

[26] All of the documentary exhibits, and I note there are only about 38 such documents listed on the Exhibit List provided in the disclosure to date, should be in the possession, control or power of the appellants.

[27] Further, the appellants' submission that they cannot provide "proper and accurate" witness statements until after they have testified at the POA trial falls short of satisfying the Tribunal that they cannot be provided at this time. It is clear from paragraph two of the appellants' submission that the witnesses have testified in the POA trial and what is going to be completed on January 13, 2020 is the cross examination of Harold Westendorp, "but time for re-examination will be required together with Crown Reply; evidence is anticipated to take 2 additional full days which are in the process of being set before March 13, 2020." Therefore I find that there is no justification for not providing the witness statements.

[28] With respect to the appellants' submission that the evidence for the Tribunal to consider will be found in the transcripts from the POA trial, the Tribunal does not find this argument compelling. The appellants have failed to put forward any argument as to why the evidence at the POA trial is relevant to the hearing of this appeal or why the POA transcript is necessary if the same witnesses will be testifying before the Tribunal.

[29] The Tribunal is not satisfied that the appellants' request to extend the disclosure date until after March 13, 2020 is warranted. The Tribunal gives the appellants until February 19, 2019 to provide their disclosure. This date is over a month and a half past the previous January 3, 2020 deadline which was already extended from the initial disclosure date on November 29, 2019.

ORDER

[30] The Tribunal orders that:

- i. The appellants' request for an adjournment of the hearing is denied. The hearing of this matter is to proceed as scheduled on March 25, 26 and 27, 2020;
- ii. The appellants must provide full disclosure to the Director and file same with the Tribunal, including witness statements and all documents relevant to this proceeding that are in the appellants' possession, control or power, by February 19, 2019. Failure to do so may result in the appellants not being able call those witnesses and/or not being able to rely on such documents at the hearing.

Motion Dismissed

"Maureen Helt"

MAUREEN HELT
ACTING ASSOCIATE CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

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