

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: November 05, 2020

CASE NO(S):

19-035

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

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, 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 Limited

Director, Ministry of the
Environment, Conservation and
Parks

Counsel

J. Douglas Grenkie

Jon Bradbury

HEARD: October 26, 2020 by teleconference
ADJUDICATOR(S): Helen Jackson, Member

PROCEDURAL ORDER

[1] Pamela Poulin, Harold Westendorp and 2057183 Ontario Limited (“Appellants”) filed appeals of Director’s Order No. 5200-BB2KYP-1 (“Director’s Order”) with the Environmental Review Tribunal (“Tribunal”). 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 held by the Tribunal in an attempt to narrow the issues in dispute and deal with pre-hearing procedural matters. A hearing was previously scheduled to start on March 25, 2020 for three consecutive days. Those dates were abandoned as a result of a number of factors, most notably the cancellation of all in person hearings due to COVID-19 concerns. A teleconference was held May 6, 2020 to address issues of disclosure. Separately, Tribunal-assisted mediation was held on June 15, 2020; however, the parties were unable to reach a resolution.

[3] The Tribunal held a further teleconference on August 19, 2020 to address the format and scheduling of the hearing. Counsel for the Appellants preferred an in person hearing; whereas counsel for the Director was of the view that the hearing could proceed by way of video format. The Tribunal scheduled a further teleconference to address the schedule and format of the hearing, and directed the parties prepare a joint work plan to assist. The work plan was to include a list of the issues in dispute, the witnesses for each party, a short description of the evidence of each witness, and an estimate of time required for each witness in preparation for the teleconference.

[4] Prior to the COVID-19 pandemic, hearings were normally held in person, near to or in the locality of the lands subject to the appeal. However, this approach has

changed due to the COVID-19 pandemic and the emergency measures that were instituted when the pandemic was declared. Since the pandemic was declared, all events by the Tribunal have been held either by teleconference or by video.

Teleconference of October 26, 2020

[5] In advance of the teleconference of October 26, 2020, the parties provided a joint hearing plan as requested and an Agreed Statement of Facts (“ASF”). The schedule laid out by the parties includes five days of evidence and a further half day for closing argument.

[6] Counsel for the Appellants indicated that it is the Appellants’ preference to have an in person hearing at the City Council Chambers in Brockville. The Council Chambers are able to accommodate eight to nine people with appropriate distancing to ensure the necessary safety protocols for COVID-19; however, the venue cannot provide additional space for any break-out rooms. Mr. Grenkie noted that there is an adjacent hotel that would be suitable for this need. Additionally, Tuesdays are not available as the Council Chambers are used for Council meetings.

[7] Mr. Grenkie indicated that the Appellants have a very strong preference for the hearing to be at the City Council Chambers as it is convenient for them to attend to give evidence and they feel it is safe. He also noted that he recently participated in a video hearing before the Tribunal and found the format to be different and complicated. He also expressed concern that a video hearing would not be suitable for assessing the credibility of witnesses, particularly on the basis that body language is not evident in a video format. Mr. Grenkie also noted that there may be participants who wish to attend.

[8] On behalf of the Director, Mr. Bradbury submitted that though the format of a video hearing is different than what counsel is used to, it is a format that everyone is being required to get used to under the current circumstances. He stated that the video hearing that Mr. Grenkie referred to, which is a separate matter before a different panel

of the Tribunal, has some of the same appellants and similar issues as the current matter, though the property is different.

[9] Mr. Bradbury was less concerned than Mr. Grenkie about the Tribunal's ability to assess credibility of the witnesses, given that what is before the Tribunal is more fact-driven. He also expressed concern about the safety of having people travel to Brockville and assembling together.

Analysis and Findings

[10] The Tribunal considered the submissions of the parties with respect to the format and scheduling of the hearing. In considering whether to hold the hearing either in person, or by video, the Tribunal looks to its *Rules of Practice and Practice Directions* ("Rules") Rule 189 for guidance.

WRITTEN AND ELECTRONIC PROCEEDINGS (RULE 189)

189. Where permitted by law, the Tribunal may decide to conduct any part of the proceeding in person or by way of a written or electronic Hearing, and in coming to its decision, may consider any relevant factors, including:

- (a) the suitability of a written or electronic Hearing format considering the subject matter of the Hearing;
- (b) whether the nature of evidence is appropriate for a written or electronic Hearing;
- (c) the extent to which the matters in dispute are questions of law;
- (d) the convenience of the Parties, including any anticipated prejudice to a Party;
- (e) the cost, efficiency and timeliness of the proceeding;
- (f) ensuring a fair and understandable process;
- (g) the desirability or necessity of public participation or public access to the Tribunal's process; and
- (h) the fulfillment of the Tribunal's statutory mandate.

[11] In addition to the considerations listed above, the Tribunal must also consider the health and safety of all those individuals who would participate in a hearing, either directly or indirectly. Those who participate directly include counsel, parties, witnesses

and the Tribunal Member, and those who may indirectly be affected include workers in hotels and restaurants, as well as staff at the City Council Chambers.

[12] In this matter, the Tribunal is of the view that the subject matter of the hearing can be accommodated in a video hearing. The evidence can be admitted by electronic means, and the Tribunal finds that there is no question of law that will be compromised by a video hearing. The Appellants have expressed a strong desire to have the hearing in person, and a key factor in that desire is the convenience to the Appellants. The Tribunal understands that a number of the individuals involved in this matter have previously participated in a video hearing before the Tribunal in a separate matter, including both counsel. This should offer some familiarity of the process to those individuals, along with the training session offered by the Tribunal prior to the video hearing.

[13] There is at least some inconvenience in holding the hearing in person under safety protocols required by COVID-19, given that only nine people are permitted in the room at one time, and the need for a retiring room outside of the Council Chambers. The Tribunal finds that with respect to convenience, the balance favours a video hearing where each individual, if not at their own home, would not likely need to travel beyond their municipality to participate fully in the hearing. The Tribunal sees no prejudice to either party should the hearing be held electronically. The Tribunal is not convinced that a video hearing will significantly impinge upon the convenience of the Appellants.

[14] A video hearing can be held in an efficient and timely manner, given that no person is required to travel. The process of a video hearing will mirror an in person hearing, and on that basis, the Tribunal is satisfied that a fair and understandable process will be provided by a video hearing. The participants who were granted status in this matter will be advised of the hearing details and will have the opportunity to participate in the hearing by video, in the same manner as their participation would be permitted in person.

[15] In balancing all the considerations above, with the over-riding consideration of the health and safety of those who may be impacted by an in person hearing, the Tribunal is of the view that the most prudent approach is to hold this hearing by video format. This will eliminate risk that arises as a result of people travelling from one region of the province to another and is in line with the notion of reducing contact between people as is recommended by public health authorities. The impact to the convenience of the Appellants by holding a video hearing is outweighed by the risk that would occur with an in person hearing in which a certain number of people would need to travel outside their region for at least one week, and the risk to all of congregating indoors for a prolonged period of time during the hearing.

[16] In this matter, the Tribunal finds that its statutory mandate can best be met by way of a video hearing, as a fair and understandable process can be maintained in a hearing by video format, without undue prejudice to any party. The video hearing format avoids the risk to the health and safety of individuals that would arise due to an in person hearing during the current COVID-19 pandemic.

[17] The parties also provided submissions on the scheduling of the hearing. It was agreed between the parties that the hearing could be scheduled for the week of **December 7 to 11, 2020**; and whether the Tribunal sits on the Tuesday would be determined on the basis of the Tribunal's findings on the format of the hearing. Should the hearing be held in person, there would be no sitting on Tuesday; however, if the hearing is by video, it would be held on the Tuesday. Additional days of December 15 and 16 were set aside for either hearing days or for final argument.

[18] Based on the Tribunal's finding that a video hearing is appropriate in this matter, the Tribunal directs that the hearing will be held by video, to commence **Monday, December 7, 2020**, at **10 a.m.**, and will continue daily through to **Friday, December 11, 2020**. The final argument will be held **Wednesday, December 16, 2020**, to commence at **1 p.m.**

ORDER

[19] The Tribunal orders that:

- i. The hearing in this matter will be held by video format. The Tribunal's Case Coordinator will provide login details separately by email.
- ii. The hearing is scheduled to commence on **Monday, December 7, 2020** at **10 a.m.** and continue daily through to **Friday, December 11, 2020**; and reconvene for final argument on **Wednesday, December 16, 2020**, at **1 p.m.**

*Video Hearing Format Ordered
Hearing Dates Scheduled*

"Helen Jackson"

HELEN JACKSON
MEMBER

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Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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