

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: May 17, 2021

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, Elizabeth Chan (articling student)

HEARD: February 8 to 12 and February 16, 2021, by
videoconference
ADJUDICATOR(S): Helen Jackson, Member

DECISION

Background

[1] On May 24, 2019, Pamela Poulin, Harold Westendorp, and 2057183 Ontario Limited (“Appellants”) filed an appeal with the Environmental Review Tribunal (“Tribunal”) regarding the Director’s Order No. 5200-BB2KYP-1 (“Director’s Order”) issued on May 9, 2019 by Trevor Dagilis, Kingston District Office, Ministry of the Environment, Conservation and Parks (“MECP”) under s. 157.3(5) of the *Environmental Protection Act* (“EPA”) for a site located at 7811 County Road 6, in Elizabethtown-Kitley (“Site” or “farm property”).

[2] The Director’s Order was issued following a request to review Provincial Officer’s Order No. 5200-BB2KYP (“POO”), issued by Officer Chris Raffael on April 24, 2019, for the Site under s. 157.1 of the *EPA*.

[3] The Director’s Order amended the preceding POO. The Director’s Order is a preventative measures order, as described under s. 18 (1) of the *EPA*. It requires the Appellants to undertake the following work items at the Site by specified dates:

1. provide written confirmation to the Director that all liquid industrial and hazardous wastes have been removed from the Site by a MECP approved waste hauler;
2. retain the services of a Qualified Person (“QP”) to prepare and implement a Phase 2 Environmental Site Assessment Action Plan and prepare a Phase 2 Environmental Site Assessment Final Report (“Phase 2”);

3. provide written confirmation to the Director from the QP that he or she has received a copy of the Director's Order, has been retained to carry out the specified work, and has the experience and qualifications to carry out the work;
4. submit the Phase 2 Environmental Site Assessment Action Plan to the Director; and,
5. complete all required work identified in the Phase 2 Environmental Site Assessment Action Plan and submit to the Director a copy of the Phase 2 Environmental Site Assessment Final Report.

[4] The parties agreed to a stay of Items 2 to 5 of the Director's Order upon confirmation that Item 1 had been complied with. A pre-hearing conference ("PHC") was held in Brockville on September 27, 2019 and continued on November 6, 2019. At the continuation of the PHC, the Director confirmed that the requisite steps had been taken by the Appellants in relation to Item 1. The Tribunal granted the stay of Items 2 to 5 of the Director's Order, pending the outcome of the hearing.

[5] The Tribunal scheduled an in-person hearing that was postponed due to the COVID-19 Pandemic. Further telephone conference calls ("TCC") were held to address procedural matters, and a video hearing was ultimately held February 8 to 12, and February 16, 2021.

[6] At the hearing, the Appellants were represented by Douglas Grenkie. Mr. Westendorp attended the hearing and gave evidence, however, Ms. Poulin did not attend. Mr. Westendorp stated that he was authorized to speak for Ms. Poulin and 2057183 Ontario Limited. The Appellants' position was that it is not reasonable to suspect that there might be contaminants or wastes at the Site in light of the evidence, particularly, since the MECP staff did not take any samples to confirm their concerns, and the letter which initiated the inspection at the Site was "bogus". The Appellants

requested that the Director's Order be revoked. Mr. Westendorp also alleged that he is improperly named in the Director's Order.

[7] In preparation for the hearing, the parties jointly prepared an Agreed Statement of Facts, which is appended to this Decision as Appendix 1. At the hearing, the parties agreed that Item 1 of the Director's Order has been complied with.

[8] This Decision provides the Tribunal's findings arising from the hearing in this matter.

The Site

[9] The Site is a large rural property in excess of 300 acres. The property was purchased by 2057183 Ontario Limited in 2005, and at the time of purchase, the Site had no residential buildings. Since the purchase, clearing of the land has brought fields into farm production. A local farmer rents the lands for cash crops.

[10] An older house was relocated to the Site in the spring of 2006 under Mr. Westendorp's direction. The house fronts onto County Road 6 at the southern portion of the lands. Mr. Westendorp indicated that he slowly renovated the house by removing floor tiles and the like. Ms. Poulin moved into the house in about 2013, and Mr. Westendorp moved into the residence fulltime in May 2020.

[11] There is an unopened road allowance along the southern boundary of the property with a farm gate to allow entry to farm vehicles and heavy machinery. This road allowance is named Seeker Road. Entrances to the Site are at the house on County Road 6 and from Seeker Road. Both entrances have locked gates.

Operations and Ownership

[12] Ms. Poulin is the sole director, officer, and shareholder of 2057183 Ontario Limited, which owns the farm property. This company has been in existence since 2004. Ms. Poulin is also the sole shareholder of 1248833 Ontario Inc., known as Harold's Demolition, which has been in existence since 1997. Harold's Demolition operates out of 36 Georgina Street in Brockville.

[13] Mr. Westendorp was the sole director and officer of these two companies from their incorporation. However, he explained that he gave up the directorship of the two companies in January 2013, as he perceived he would be a liability to the two companies. He stated that he helped Ms. Poulin with the purchase of Harold's Demolition and the purchase of the farm property. He says he now only acts as an advisor, and it is Ms. Poulin who is responsible for the direction and operations of both companies.

[14] Mr. Westendorp stated that he advises Ms. Poulin what to keep from Harold's Demolition projects for the future use of the farm. He also provides her with advice on how to manage the farm property in terms of clearing the land and putting structures on the farm property. She intends to erect a large farm building, described as being about 150 feet ("ft") long by about 60 ft wide, and an additional residential home. The material stored at the farm is for building these future structures as well as to make roadways throughout the farm. He also commented on his personal philosophy of recovering as much as possible from his demolition contracts, which fits into his philosophy of reuse.

[15] Mr. Westendorp explained that Harold's Demolition stores heavy equipment for its demolition contracts at the farm property because of vandalism at the Brockville location. He testified that maintenance of the vehicles occurs at the farm property. Mr. Westendorp testified that he is responsible for Abatement Solutions Inc., which operates out of the 36 Georgina Street location. This company offers designated substance

surveys and asbestos removal. He testified that he parks the Abatement Solutions Inc. cube van at the farm property.

EVIDENCE

[16] Nicole Woods provided evidence on behalf of the Appellants. Ms. Woods does bookkeeping and other administrative work for 2057183 Ontario Limited and for Harold's Demolition and as such is somewhat familiar with the activities at the Site. She is Ms. Poulin's daughter. Ms. Woods described the origins of a letter that initiated the MECP's investigation of the Site. The letter alleged illegal dumping at the Site, as well as at the property of Harold's Demolition. She explained the letter arose from harassment that she was the victim of from a previous partner.

[17] In response to the letter, a site inspection was undertaken on October 3, 2017, led by Chris Raffael, Senior Environmental Officer with the MECP. In preparation for the site inspection, a series of air photographs were compiled by MECP staff to review site conditions and the layout of the farm. The air photographs show the accumulation of materials from the years 2005 to 2018 in two areas; a larger area located further from the house, and a smaller area, located closer to the house. Mr. Raffael testified that a review of these air photographs would have acted as a driver to visit the Site for an inspection.

[18] At the site inspection, Mr. Raffael was accompanied by Natalie Matthews, another MECP Officer, and Thomas Guo, regional hydrogeologist with the MECP. Mr. Guo is a licensed geoscientist in the province of Ontario and was qualified by the Tribunal to provide expert evidence as a hydrogeologist with expertise in identifying and assessing risks of contamination to groundwater.

[19] Numerous photographs were taken during the first and subsequent site visits. The air photographs and site photographs were provided in a joint document book

entered into evidence as Exhibit 1. The parties agreed that the evidence provided in Exhibit 1 did not require authentication for the veracity of its contents.

[20] Mr. Raffael testified that upon his inspection of the Site, he had numerous concerns. This was based on his observation of what appeared to be bags of asbestos waste; two 45 gallon drums; one of which contained a lighter hydrocarbon liquid and the other, which contained a darker hydrocarbon liquid; shallow pans with oily water; and a large amount of other materials stored on site that appeared to be waste. This comprised asphalt, concrete, wood, and old windows. Much of the material is mixed together. He said the concrete and cinder blocks he observed are a concern because they have a coating on them, and therefore, are considered a solid non-hazardous waste. He stated that clean fill cannot contain foreign objects such as styrofoam or other such materials. Electronic equipment was also present, there were two batteries sitting on the ground, and white material on the ground that may be drywall.

[21] Mr. Raffael stated that the vintage of some of the material indicates the possibility of lead in paint and caulking and asbestos in the building material. Electronics could contain oil or heavy metals; and batteries could leak acid and metal. Drywall is not considered inert, and could contain asbestos and other chemicals.

[22] Mr. Raffael stated that the materials stored have been exposed to the elements for a long time and these materials have glue, paint, are stained or treated, and would be considered waste material. The material by visual inspection looked unusable due to its age and condition. Some material is recyclable, but some would require disposal in a landfill. His concern was that all these materials could have led to contamination of the soil and groundwater. Due to his concerns, Mr. Raffael asked Mr. Guo for his recommendations with respect to the Site from his perspective as a hydrogeological technical expert.

[23] In May 2019, Mr. Raffael revisited the Site. He testified that some of the same material remained on site and some had been removed. He confirmed that the material

that was required to be removed in accordance with Item 1 of the Director's Order had been removed. His view was that even though Item 1 of the Director's Order had been complied with, a Phase 2 was still required because of concerns related to:

- a. An area of stained soil beside the two 45 gallon drums containing hydrocarbon; and concern regarding the structural integrity of the drums given their age and condition;
- b. A large pile of waste wood described as the "burn pile";
- c. Two pans of waste oil;
- d. The ground beneath the asbestos pile (though the pile has been removed);
- e. Other miscellaneous piles of material – the source has been removed but there may be some contamination remaining in the soil; and,
- f. The new roads built with materials from the site, some materials of which are considered to be waste (the new roadway construction was made known through this hearing).

[24] Mr. Guo provided evidence at the Hearing from his perspective as a technical expert with respect to the potential for contamination. He described the physical setting of the site as consisting of shallow overburden (unconsolidated soil) over fractured limestone bedrock. He testified that this setting provides a limited degree of attenuation or retardation of contaminant flow to the bedrock and underlying groundwater, leading to his concern regarding the potential for contamination to the subsurface from the observed outdoor storage of a large mix and range of types of materials at the Site.

[25] Mr. Guo reiterated the concerns identified by Mr. Raffael and also stated that he was specifically concerned regarding the potential for contamination from:

- a. Scrap metal stored in the open, given that metals can be oxidized and dissolved by water and infiltrate into the soil and groundwater;
- b. Wood debris in the open air, from a hydrogeological perspective, is considered a potential for contamination because dissolved organic carbon and other compounds can infiltrate into the groundwater and affect the taste and colour of the groundwater;
- c. The presence of asphalt waste stored in the open, as water can dissolve hydrocarbons and infiltrate into the groundwater;
- d. Material that appeared to potentially be asbestos mixed in with construction waste in a large pile may contaminate the soil beneath; and,
- e. The presence of processed wood that may contain chromated copper arsenate can contribute to groundwater contamination.

[26] Mr. Guo testified that Ontario Regulation 347 ("O.Reg. 347") notes that asphalt can be recycled, but it is subject to certain conditions as set out in the regulation. At this Site, the materials are laid out on the soil, without a cover or engineered base, and therefore can easily be dissolved by water and result in contaminants infiltrating into the groundwater. He also noted that clean concrete can be recycled, but much of the concrete stored here has paint attached and therefore is waste and can result in contamination to the soil or groundwater.

[27] Mr. Guo was clear that his concern is not whether the materials stored at the Site are recyclable or not, his concern is whether their presence has the potential to contaminate the soil and groundwater. That was the lens that Mr. Guo applied to his assessment of the materials at the Site and his subsequent recommendation for a Phase 2 intrusive investigation.

[28] Mr. Guo explained a Phase 2 investigation as described in Ontario Regulation 153/04 (“O. Reg. 153/04”) consists of soil and groundwater sampling in order to identify whether contamination occurs; and identifies groundwater flow directions to assess whether contamination is potentially migrating offsite. Mr. Guo noted that even with the knowledge that hazardous wastes have been removed, the Phase 2 investigation is still necessary to determine whether contamination has occurred from those materials.

[29] Mr. Raffael testified that Mr. Guo’s opinion confirmed to him that a Phase 2 investigation was required. He noted it is not necessary to have analytical results that prove contamination is present for a Phase 2 to be ordered. Rather, the order is a preventative measures order, and is based on whether there are reasonable grounds to suspect contamination. The Phase 2 will determine if there is contamination, and will define the horizontal and vertical extent of the contamination. The QP would be able to advise if clean up of soil is required. Mr. Raffael also was of the view that because there was disagreement about what was waste on the site from Mr. Westendorp’s perspective, a QP was necessary to decide what material was waste.

[30] Mr. Dagilis provided evidence on his role in this matter. As Director, he reviewed the Appellants’ Request for Review of the POO, the memo prepared by Mr. Guo, and photographs of the Site. He testified that seeing the amount of what appeared to be waste at the Site caused him concern as the materials are in open air and there are no engineering controls to protect against runoff and environmental impact. He noted that if waste is comingled with other material, such as soil, the entire pile is considered waste. His view was that it appeared as though the Site was being run as a waste transfer station, without the appropriate approvals for such activity.

[31] Mr. Dagilis testified that the MECP’s Statement of Environmental Values and the Precautionary Principle underlie all the work that the MECP does. In his review of the POO, his role is to evaluate whether the POO is appropriate. In this case, he added Ms. Poulin to the Director’s Order, as she is the director of the company that owns the farm property. He did not remove Mr. Westendorp as an Orderee because, on the basis of

all the information before him, it was his view that Mr. Westendorp clearly had a substantial role in the care and control of the management activities at this Site. This assessment was based partly on the fact that it was Mr. Westendorp who was the person familiar with the materials at the Site and it was Mr. Westendorp who had the key to the Site.

[32] Mr. Dagilis testified that he made an error in the items that were included in the Director's Order following his review of the POO. He testified that Item 3 in the POO said all wastes should be identified and a plan for their removal was required. He testified that he should have directed that all waste be removed from the Site, on the basis that the property is not approved as a waste transfer station. That was not included in the Director's Order. Rather, in Item 1 of the Director's Order, he stated that all liquid and hazardous waste should be removed and neglected to include an order that all wastes must be removed.

[33] The remainder of Items 2, 3, 4 and 5 of the Director's Order relate to undertaking a Phase 2. Mr. Dagilis is of the view that the evidence of potential contamination at the Site is clear, and it is clear a Phase 2 needs to be done.

[34] Mr. Dagilis testified that considering the evidence he has heard at the hearing, including the evidence that materials from Harold's Demolition and Abatement Solutions Inc. are brought (transferred) to this Site without proper approvals, he would issue an order that waste processing and waste transfer activities cease immediately, and order that all waste remaining at the Site should be removed, as the Site is not licenced as a waste transfer site.

[35] On behalf of the Appellants, Mr. Westendorp testified that the materials that are at the Site are clearly for farm purposes. Through the photographs, Mr. Westendorp described the provenance of the materials stored at the Site, and what they are intended for in the future. The bulk of the materials were collected from demolition projects he

was involved in and are intended to be used for future construction of a large farm building, a new house, or for the base of roadways throughout the farm.

[36] For example, Mr. Westendorp collected trusses and lumber from the demolition of a flea market in Stittsville. These trusses are visible on the air photographs from 2008. He contends that they are useable for building construction. Mr. Westendorp states the piles of concrete and asphalt are intended for future road construction; the piles of styrofoam are useful for insulating foundations; the old windows are still useable; as are the piles of cut stone and piles of timbers.

[37] Other materials at the Site include plaster material from a demolition project at the Fulford Academy from about 2017, two batteries stored outdoors, which Mr. Westendorp testified needed to be charged, and two barrels, which reportedly contained a mix of hydrocarbon and water. There was a dispute about whether the ground was stained with oily material at the base of these barrels.

[38] Mr. Westendorp testified that the trailers are for the storage of equipment and materials for future structures. There were also a number of items such as a boat, vehicles, old tractors, and items that Mr. Westendorp described as antiques. Mr. Westendorp stated that the scrap metal stored at the Site was intended for providing an income stream for the farm, however, he said this practice does not occur any longer, though metal is still present at the Site.

[39] Mr. Westendorp contends that the metal materials stored on the farm are stable, and outdoor storage like this is done everywhere in Ontario in scrap yards. He stated that he has gone out of his way to protect the environment and promote the 3R's. He bases his view on common sense and 59 years of experience.

[40] Mr. Westendorp alleges that it is not up to the MECP officer, or other staff, to determine whether the material stored at the Site is useable for future construction, rather it is up to the Township's building inspector who ultimately is responsible for

determining whether the material can be used in the construction of the future agricultural building or future house. Mr. Westendorp contends that if the building inspector advises that any particular material is not useable, it would not be used.

[41] There was a great deal of evidence at the hearing in relation to material stored in bags at the Site that originated from the renovation of the house that was suspected to be asbestos. Based on the extensive evidence provided at the hearing on this point, the Tribunal is satisfied that the material was removed and disposed of appropriately, along with other hazardous liquids, as required to meet Item 1 of the Director's Order. The evidence in support of this included bills of lading showing the transportation and disposal of the materials, as well as Mr. Raffael's testimony that the material was removed and the Director's concurrence that Item 1 had been complied with.

[42] Richard VanVeldheisen attended in support of the Appellants. He is a retired civil engineer who was licensed to practice in New Jersey and Ontario. He was also previously licensed as a professional planner in Ontario. Mr. Grenkie sought to have Mr. VanVeldheisen qualified as an expert capable of providing the Tribunal an opinion based on his observations from a site inspection in May 2019 of the property and his education and training as a retired engineer. Mr. Bradbury objected and contends that Mr. VanVeldheisen does not meet the qualifications required by an expert witness as set out in Rule 170 of the Tribunal's *Rules of Practice and Practice Directions* for opinion evidence. The Tribunal permitted Mr. VanVeldheisen to provide his evidence and indicated that it would determine whether the evidence rises to that of expert opinion evidence and what weight should be attached to the evidence after hearing the evidence.

[43] Mr. VanVeldheisen testified that the materials stored at the Site are either inert (cement, aggregate, metal, old vehicles) or were natural wood products. He noted that construction equipment stored on the Site was for clearing the land. In his view, none of the materials on the Site were harmful to the environment. He testified that he did not see any staining associated with the barrels that were alleged to contain hydrocarbon

residue. In his view, it is an unreasonable request to undertake a Phase 2 investigation at the Site.

[44] The Tribunal notes that Mr. VanVeldheisen's evidence and written report is based on information told to him by others, without elaboration on the basis for his opinion that the materials at the Site are inert and will not cause harm. The Tribunal finds that the evidence and commentary provided by Mr. VanVeldheisen are simply observations, and do not rise to the level of expert opinion.

ISSUES

[45] The issues before the Tribunal are summarized as follows:

- a. Is Mr. Westendorp a person in management and control of the Site within the meaning of s. 157.1 of the *EPA*? As well, are 2057183 Ontario Limited and Pamela Poulin in management and control of the Site within the meaning of s. 157.1 of the *EPA*?
- b. Are the requirements specified in the Order necessary or advisable within the meaning of s. 157.1 of the *EPA*?

LEGISLATION

[46] Section 3(1) of the *EPA* states that the "purpose of this Act is to provide for the protection and conservation of the natural environment."

[47] Section 157.1(1) of the *EPA* provides that a provincial officer may issue an order to any person who owns or has management or control of an undertaking or property so as:

- a) To prevent or reduce the discharge of a contaminant into the natural environment from the undertaking or property; or
- b) To prevent, decrease or eliminate an adverse effect that may result from
 - i. the discharge of a contaminant from the undertaking, or
 - ii. the presence or discharge of a contaminant in, on or under the property.

[48] The Director submits that the Tribunal must undertake a two-stage analysis under s. 157.1(1) of the *EPA* that corresponds to the issues to be decided in this hearing:

- a. At the first stage, the Tribunal must determine if the Director had the jurisdiction to make this order. This includes jurisdiction over the person, i.e., whether the person named in the order has management and control, and jurisdiction over the subject matter, i.e., the undertaking or property at issue; and,
- b. At the second stage, the Tribunal must determine whether the requirements of the order are necessary or advisable within the meaning of s. 157.1 of the *EPA*.

ANALYSIS AND FINDINGS

Issue 1: Is Mr. Westendorp a person in management and control of the Site within the meaning of s. 157.1 of the *EPA*? As well, are 2057183 Ontario Limited and Pamela Poulin in management and control of the Site within the meaning of s. 157.1 of the *EPA*?

[49] In his closing submissions, Mr. Bradbury states that “[j]urisdiction over the person(s) named in an order can be established by proving, on a balance of

probabilities, that the person had ‘management or control’ of the undertaking or property”. The analysis is fact-driven but general guiding principles were referenced by Mr. Bradbury for establishing whether a person has or had management or control.

These include:

- a. A person who is not the directing mind of a company can still be a person in management and control (*Montague v. Ontario (Director, Ministry of the Environment)*, 2005 CarswellOnt 971 (Div. Ct) at para. 41), and *Rocha v. Ontario (Environment and Climate Change)*, 2015 CanLII 43581 at para. 123 (“*Rocha*”);
- b. More than one person may have management or control of an undertaking or property and it is not necessary for a person to have “absolute management and control” (*Grant v. Ontario (Director, Ministry of the Environment)*, 2009 CarswellOnt 5963 at para. 67), and *P&L Tire Recycling Inc. v. Director, Ministry of the Environment*, 1992 CarswellOnt 5001 (O.E.A.B. No. 21), (“*P&L Tire Recycling*”) at para. 73;
- c. Control does not only encompass the formal legal control available to officers and directors, but also *de facto* control by others in a position to significantly influence the management of the undertaking or property ((*P&L Tire Recycling Inc.*, *supra*, at para. 72) and *Rocha*, *supra*, at para. 118));
- d. The Tribunal may infer from a person’s conduct, their close relationship to the owners of the property, and the extent of their knowledge of the issues that a person is in a strong position to influence the use of the property (*P&L Tire Recycling Inc.*, *supra*, at para. 77 and *Rocha*, *supra*, at para. 120);
- e. Indicia of legal liability by way of corporate directorship or registered documents create a presumption that the reality is in conformity with the legal descriptions. The presumption can only be rebutted in a “very

convincing case” and the onus is on the appellant (*Caltex Petroleum Inc. v. Ontario (Ministry of Environment and Energy)*, 1995 CarswellOnt 5348 (OEAB) at paras. 50-53; affirmed in *Caltex Petroleum Inc. v. Ontario (Ministry of Environment and Energy)*, [1998] OJ No 825 (Div. Ct.)); see also *Currie v. Ontario (Ministry of the Environment)*, 2011 CarswellOnt, 5580 OERT at para. 77.

[50] Mr. Westendorp acknowledged he was a director and officer of 2057183 Ontario Limited up until January 10, 2013, when Ms. Poulin became the sole officer, director and shareholder. He contends that currently, he simply acts as an advisor to Ms. Poulin, and that it is she who operates the business and who has management and control over the company. He said that he lives at the house in turn for advising Ms. Poulin on how to operate the farm and Harold’s Demolition, and on the basis of their friendship. He states he provides benefit to the farm by bringing items to the farm that could be reused at the farm.

[51] The Tribunal finds that the facts of this case support a finding that Mr. Westendorp has management and control of the Site. The evidence provided in this hearing, including the evidence of Mr. Westendorp, is that he clearly directs what is to occur at this Site, including the management of the Site, and the materials that are brought to this Site. By his own admissions, Mr. Westendorp testified as follows:

- i. That he provided advice to Ms. Poulin regarding the handling of the [suspected] asbestos tiles that were removed from the house; he determined that they were not worth sampling, because a large number of samples would need to be taken;
- ii. He said, “I told Ms. Poulin to get a bladder and said to store the material [suspected asbestos] and you can check it later to see if it is asbestos.”

- iii. He is the one who arranged for the relocation of the residence from a demolition site to the farm property. The house was put on Site in the spring of 2006 and was livable in about 2012 – 2013, following his renovations of the house.
- iv. He stated that he is the only one that operates the ‘shovel’ at the Site.
- v. He provided detailed information about the future intent for all of the materials stored at the Site.
- vi. Mr. Westendorp was the only person who dealt with the MECP officials with respect to the Site. He never directed the MECP officials to deal with Ms. Poulin when they were requesting access to the Site.
- vii. He arranged for all of the work necessary to meet Item 1 in the Director’s Order. His signature was on the documents for the removal of the materials.

[52] Mr. Westendorp’s familiarity with the property and the materials stored on Site was evident as he described all the material in the photographs during the Hearing. This level of involvement is in line with managing of the farm property, and indicates care and control.

[53] The Tribunal finds from Mr. Westendorp’s evidence and his knowledge of the operation that he is in a strong position to influence the use of the farm property. By the evidence presented at the Hearing, the Tribunal finds he has significant influence over the operation at the farm property. Further, since he was a director and owner up until 2013, some materials currently at the Site were brought to the farm property when he was in this role. The Tribunal finds that Mr. Westendorp is in management and control of the Site within the meaning of s. 157.1 of the *EPA*. The Tribunal finds that Mr. Westendorp is properly named in the Director’s Order. Further, the Tribunal confirms

that 2057183 Ontario Limited, the property owner, and Ms. Poulin, the officer, director and shareholder of 2057183 Ontario Limited are also in management and control of the Site and are properly named in the Order.

[54] Mr. Bradbury submits that jurisdiction over the subject matter is assessed first “because there has to be an ‘undertaking or property’ to manage or control” and there must be a risk of discharge from the undertaking or property (see *Rocha, supra*, para 109). The Director’s position is that the Site is a “property” within the province of Ontario and therefore subject to the provisions of the *EPA*, including s. 157.1; and that the long term, unprotected storage of materials constitutes an undertaking that creates a risk of discharge for the purposes of a preventative measures order under s. 157.1 of the *EPA*.

[55] The Tribunal is satisfied that the Director has established his jurisdiction over the subject matter in these appeals. The Tribunal acknowledges that the Site is a property in the province of Ontario, and is subject to s. 157.1 of the *EPA*. As well, on the basis of the extensive evidence at this Hearing in relation to the materials stored at the Site and their potential to result in contamination, the Tribunal is satisfied that the Site is a property where there is a risk of discharge.

Issue 2: Are the requirements specified in the Order requiring a Phase 2 necessary or advisable within the meaning of s. 157.1 of the *EPA*?

[56] The Appellants allege that there is no reasonable belief that leachate would be generated over the time period in question, and there has been no evidence provided as to how leachate contamination could have occurred. All the potential sources of contamination are very small amounts, and have been dealt with and removed. On that basis, there is no reasonable belief of a risk of subsurface contamination to support this Order.

[57] Mr. Grenkie drew the Tribunal’s attention to *Philip Enterprises Inc. v. Ontario (Ministry of Environment & Energy)*, 1997 CarswellOnt 3174, [1997] (“*Philip*”). He states

that *Philip* is directly analogous to what is occurring at this Site. He said that paragraph two of O.Reg. 347 identifies that designated substances such as brick, concrete, drywall, and wood are not wastes if they are delivered directly to a site to be used, which he alleges is what is occurring in the current situation.

[58] Mr. Grenkie submits that the evidence by Mr. VanVeldheisen that both asphalt and concrete can be recycled should be considered by the Tribunal. Regulations indicate that both materials can be recycled and that is the intention here. Specifically, these materials are being used to assist in the construction of roadways. In contrast with the MECP's allegations, he submits there is no further recycling of materials at this Site. This is a farm in a rural area, and the significant amounts of material that have been described to be stored on site are intended to be used for the construction of either the new house or the new agricultural building. It is up to the Township's inspector to determine whether this material can be reused, it is not up to the MECP to guess about what is usable and what is not.

[59] The Appellants' claim that to meet the requirements of this order would entail significant financial hardship and state that if it is required here, it should be required at all other rural properties.

[60] Mr. Bradbury submits that the Director's Order is a preventative measures order tied to s. 18 of the *EPA*. He submits that the requirements of the order are scaled to the situation at the Site, and that there are only two portions of the farm property that are areas of concern, as is described in the evidence. He states that when MECP staff first visited the Site in October 2017, it appeared to be an operation that should have approval as a waste disposal or transfer site, due to the presence of a wide range of materials stored at the Site. The Director submits that a Phase 2 study is required to determine whether any soil or groundwater contamination has occurred as a result of the storage of these materials in the open for an extended period of time.

[61] The key issue for the Tribunal to determine is whether the requirement for a Phase 2 is reasonable.

[62] The evidence provided at this Hearing was that there was and still is a wide range of materials stored in significant quantities in the open at the Site, on and off since about 2006. The Tribunal is of the view that the quantity and types of materials stored at the farm property are in excess of what is normally present at a farm property. This determination is made on the basis of the evidence of Mr. Raffael and Mr. Dagilis who both characterized the Site as akin to a waste transfer station; and the photographs provided in evidence showing extensive piles of material at two distinct locations within the Site. Mr. Westendorp has explained that all the material present has an intended future purpose, however that does not negate the fact that there has been an extensive amount of material stored at the Site since its purchase in 2005.

[63] The material stored includes metals, wood debris, processed (pressure treated) wood, asphalt, concrete material with coating, drywall material, and a mix of other material, including possibly asbestos. It was Mr. Guo's opinion that the types of material present are known to generate contaminants under the appropriate conditions. The possible contaminants suspected by Mr. Guo included metals, mercury, dissolved organic carbon, hydrocarbons, chromated copper arsenate, and asbestos, as well as other potential contaminants.

[64] It was Mr. Guo's opinion as a hydrogeologist and licensed geoscientist that the extensive amounts of material of the type described, stored in the open air, over an extended period of time, has the potential to be degraded over time and potentially result in contamination, as described in his evidence. This natural degradation includes oxidation of metals and leaching of elements by water (rainfall) that can potentially contaminate the underlying soil and groundwater.

[65] The Tribunal accepts Mr. Guo's professional opinion evidence that there is a risk that contamination to the underlying soil and groundwater may have occurred, based on the evidence he has provided.

[66] The Tribunal finds that, based on the entirety of the evidence, there is a credible risk that contamination has occurred; therefore, it is reasonable to require a Phase 2 investigation to identify the presence and extent of soil and groundwater contamination in the two areas where material has been and is still stored at the Site. The Phase 2 investigation would provide the information that is factual in nature regarding the presence and extent of any contamination on the lands. The Phase 2 investigation would also help to determine the next steps in this matter.

[67] The requirement for the Phase 2 is premised on the evidence that shows that large and substantial quantities of material have been stored in a manner that may have resulted in impacts to the soil and groundwater. The key evidence that supports this requirement is Mr. Guo's opinion, as it underlies the POO and the subsequent Director's Order. The Tribunal notes that the initial POO was made by Mr. Raffael based on the recommendation of Mr. Guo that a Phase 2 investigation was required, and this position was upheld by the Director when the Director's Order was issued.

[68] Considering the evidence, the Tribunal finds that a preventative measures order is required to prevent or reduce the risk of discharge of a contaminant into the natural environment. The Tribunal finds that a Phase 2 investigation should be undertaken as provided for in s. 157.1(1) of the *EPA*: (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or (b) to prevent, decrease or eliminate an adverse effect that may result from, (i) the discharge of a contaminant from the undertaking, or (ii) the presence or discharge of a contaminant in, on or under the property.

[69] The Tribunal finds that the preventative measures order that is the subject of this Hearing aligns with the purpose and furtherance of the *EPA*, which is to protect and conserve the natural environment (see *Currie, supra*, paras. 100 and 121); and s. 3 of *EPA*. The preventative measures order is necessary to address the credible risk of contamination from the range and bulk of materials stored on the farm property, in the open air.

[70] The Appellants took the position that the materials at the Site are intended for the use of the farm, are inert, could not have resulted in subsurface contamination, and therefore, the order should be revoked. However, the Appellants' have failed to demonstrate to the Tribunal how the environmental protection objectives of the *EPA* would be met if the order was revoked. The onus lies with the Appellants to establish their grounds for appeal.

[71] In their submissions, the Appellants assert that the Director's Order constitutes financial hardship. However, the Appellants have provided no evidence to support this assertion. The Tribunal finds that the Appellants have not established that the order should be revoked on the basis of financial hardship.

[72] The Director submits that both Harold's Demolition and Abatement Solutions Inc. should be added as Orderees. The Director bases this partly on the premise that the addition of these entities will help to ensure that the Orderees, collectively, have the resources to carry out the work. However, the Director has not provided any support to the contention that the existing Orderees will not meet their obligations. The Tribunal sees no basis for adding either Harold's Demolition or Abatement Solutions Inc. as Orderees to the Director's Order.

[73] In accordance with s. 145.2 of the *EPA*, the Tribunal, on appeal of a Director's Order, may confirm, alter or revoke the action of the Director that is the subject-matter of the Hearing and may, by order, direct the Director to take such action as the Tribunal

considers the Director should take in accordance with the *EPA* and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

[74] The Tribunal heard in evidence that the original POO included a requirement for the “Identification of the amount of each type and class of wastes located at the site and a plan for the removal of all waste materials from the site.” Director Dagilis testified that based on his review of the POO, he intended to order that all wastes be removed, but neglected to include that in the Director’s Order.

[75] The Tribunal finds that it is appropriate to include a requirement that the waste at the Site be identified and a plan for its removal be provided. Therefore, in addition to the tasks required in a Phase 2 as laid out by O. Reg. 153/04, the Tribunal directs that, as an additional part of the Phase 2, a determination of waste at the Site be undertaken by the QP. This determination would assess whether materials are usable for the farm property, as is alleged by the Appellants, or whether the materials constitute waste. Any materials that are determined to be waste, as part of the Phase 2, will require removal and disposal as appropriate in accordance with Item 5 of the Director’s Order, as amended.

ORDER

[76] The Tribunal orders that the appeals of the Director’s Order are dismissed.

[77] The Director is ordered to issue an amended Director’s Order that includes the requirement that an identification of the amount of each type and class of wastes located at the Site and a plan for their removal be conducted as part of the Phase 2 Environmental Site Assessment Action Plan. The actual removal of wastes, if any, are to be reported upon in the Phase 2 Environmental Site Assessment Final Report.

[78] The Tribunal may be spoken to regarding the proposed compliance dates of the amended Director’s Order by making written submissions to the Case Coordinator within

three weeks of the date of the issuance of this Decision. The Tribunal will confirm the compliance dates on the items within the amended Director's Order following deliberations on the submissions.

*Appeals Dismissed
Director Directed to Amend Director's Order*

"Helen Jackson"

HELEN JACKSON
MEMBER

Appendix 1 – Agreed Statement of Facts

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

Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

ERT Case Nos. 19-035, 19-036 and 19-037

ENVIRONMENTAL REVIEW TRIBUNAL

Poulin et al. v. Ontario (Director, MECP)

In the matter of a request for a hearing by Pamela Poulin, Harold Westendorp and 2057183 Ontario Limited (the “Appellants”) before the Environmental Review Tribunal filed on May 24, 2019 pursuant to sections 140, 142, and 143 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, with respect to Director’s Order No. 5200-BB2KYP-1 (the “Order”), issued on May 9, 2019 by the Director, Ministry of the Environment, Conservation and Parks (“MECP”), in relation to 7811 County Road 6, Elizabethtown-Kitley, in the United Counties of Leeds and Grenville (the “Site”).

In the matter of the Hearing to be heard on February 8 – 12, and 16, 2021.

AGREED STATEMENT OF FACTS (February 5, 2021)

1. On October 26, 2004, 2057183 Ontario Limited was duly incorporated under the laws of the Province of Ontario. Harold Westendorp was the sole Director and Officer of the company between October 26, 2004 and January 10, 2013. Pamela Poulin has been the sole Director and Officer of the company since January 10, 2013. Pamela Poulin is the sole shareholder of the company.
2. On July 29, 2005, the property located at the municipal address of 7811 County Road 6, Elizabethtown-Kitley, United Counties of Leeds and Grenville (the “Site”) was purchased by 2057183 Ontario Limited. The company has been the sole owner of the Site since that date.
3. On March 3, 2016, Abatement Solutions Inc. was duly incorporated under the laws of the Province of Ontario and registered under Ontario Corporation Number

2507377. Mr. Westendorp has been the sole Director and Officer of Abatement Solutions Inc. since its date of incorporation.

4. On May 23, 2017, the Ministry received a copy of a letter authored by a person named Shawn McIntosh. The letter alleged that Mr. Westendorp and other persons had during the summer of 2013 engaged in dumping of oils, sewage, toxic wastes, contaminated soils, asbestos and other materials at Mr. Westendorp's residential property in North Augusta.
5. On August 22, 2017, Senior Environmental Officer Chris Raffael assumed responsibility for the Ministry file that included Mr. McIntosh's letter.
6. On October 3, 2017, Officer Raffael conducted an inspection of the property at the Site, accompanied by Senior Environmental Officer Nathalie Matthews and MECP Hydrogeologist Thomas Guo.
7. On October 4, 2017, Officer Raffael conducted a second inspection of the Site, accompanied by Senior Environmental Officer Chris Horne.
8. On April 24, 2019, Officer Raffael issued Provincial Officer's Order No. 5200-BB2KYP.
9. On May 6, 2019, Mr. Westendorp and 2057183 Ontario Limited submitted a formal request for review of Provincial Officer's Order No. 5200-BB2KYP to the Director, Trevor Dagilis.
10. On May 7, 2019, Officer Raffael conducted a third inspection of the Site.
11. On May 9, 2019, MECP Director Trevor Dagilis issued Director's Order No. 5200-BB2KYP-1 (the "Order").
12. On May 24, 2019, Harold Westendorp, Pamela Poulin and 2057183 Ontario Limited filed a Notice of Appeal with the Tribunal.
13. On September 27, 2019, a Pre-Hearing Conference was held in Council Chambers in the City of Brockville. Brenda Fisk and Dorothy Lapierre requested and were granted 'Presenter' status. The Appellants' requested a stay of the Order. The Director consented to an interim stay pending confirmation that the Appellants complied with Item No. 1 of the Order. The parties agreed on a timetable for exchange of documents as well as hearing dates.

14. On October 4, 2019, the Tribunal emailed counsel confirming that a 3-day hearing was scheduled for March 25, 26 and 27, 2020.
15. On October 18, 2019, the Appellants provided documents to the Director in support of their request for a stay of the Order, including:
 - a. A "Special Waste Profile" form and related invoice from Waste Connections of Canada Inc. confirming removal and disposal of asbestos materials from the Site.
 - b. Several 'Waste Material Profile Sheets' and a waste manifest form from Safety-Kleen Canada confirming the removal and disposal of used oil products from the Site.
16. On October 28, 2019, Officer Raffael conducted a fourth inspection of the Site to confirm the conditions for the Director's consent to a stay of the Order had been met.
17. On November 4, 2019, the Director provided disclosure of relevant documents to the Appellants.
18. On November 6, 2019, the Tribunal and the parties participated in a continuation of the Pre-Hearing Conference by teleconference. The Director confirmed receipt of documents from the Appellants confirming their compliance with Item No. 1 of the Order and consented to a stay of Items 2, 3, 4 and 5 of the Order pending the outcome of the hearing.
19. On November 27, 2019, counsel for the Appellants wrote to the Tribunal requesting an extension of time to provide disclosure of documents and witness statements to the Director from the original deadline of November 29, 2019 to a date in late December 2019.
20. On December 17, 2019, the Tribunal issued a procedural order confirming
 - a. Presenter status as granted at the Pre-Hearing Conference;
 - b. The terms of the Director's consent to a stay of the Order;
 - c. The timetable for exchange of documents between the parties – moving the Appellants deadline for disclosure from November 29, 2019 to January 3, 2020; and
 - d. The hearing dates in March 2020.

21. On January 3, 2020, counsel for the Appellants wrote to counsel for the Director and the Tribunal stating that the Appellants would not be in a position to complete their disclosure obligations until after March 13, 2020.
22. On January 9, 2020, having considered the Director's objection to the Appellants request to delay disclosure, the Tribunal directed to parties to provide submissions on the disclosure issue.
23. On February 6, 2020, having received written submission from the parties, the Tribunal issued a decision denying the Appellants' request to adjourn the hearing dates and ordering them to deliver documentary disclosure and witness statements by February 19, 2020.
24. On March 17, 2020, the Tribunal advised the parties that the hearing originally scheduled to take place on March 25, 26 and 27, 2020 was adjourned sine die in accordance with public health directives to limit the spread of COVID-19. The Tribunal directed the parties to provide an update on the status of disclosure.
25. On April 2, 2020, the Director filed documents that he intends to rely on at the hearing.
26. On May 6, 2020, the Tribunal and the parties participated in a status update teleconference to discuss the issue of disclosure from the Appellants.
27. On May 14, 2020, the Tribunal issued a procedural order requiring the Appellants to deliver documentary disclosure, including witness statements, by May 22, 2020.
28. On May 21, 2020, the Appellants delivered disclosure consisting of 46 documents.
29. On August 19, 2020, the Tribunal and the parties participated in a status update teleconference to discuss how best to proceed given the ongoing public health concerns related to COVID-19.
30. On August 25, 2020, the Tribunal issued a further procedural order requiring the parties to prepare a joint work plan to assist the Tribunal in determining the appropriate format and duration for a hearing of these appeals.