

## Divisional Court Upholds Tribunal Decision that the Ministry May Order Current and Former Owners and Tenants to Delineate Contamination that Has Migrated Off-site

by Stanley Berger and Albert Engel, Fogler, Rubinoff LLP

On September 4, 2018, Ontario's Divisional Court released its decision in *Hamilton Beach Brands Canada, Inc. v. Ministry of the Environment and Climate Change*, 2018 ONSC 5010, dismissing an appeal of a September 1, 2017 decision of Ontario's Environmental Review Tribunal (*Hamilton Beach Brands Canada Inc. v Ontario (Environment and Climate Change)*, 2017 CanLII 57415 (ON ERT)), in which the Tribunal upheld the Ministry's jurisdiction under s. 18 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19 ("EPA") to order current and former owners and tenants of a contaminated property to delineate contamination that has migrated to off-site properties. The Tribunal's decision also found that the Ministry had jurisdiction to make an order regarding existing, ongoing and future adverse effects, that the adverse effects do not have to be related to the potential off-site migration of a contaminant nor must the contaminant be on an orderee's property at the time the order is made, and that the order may require work on-site and off-site to address an adverse effect.

In upholding the Tribunal's decision, the Divisional Court held that the Tribunal, in accordance with the principles of modern statutory interpretation requiring a contextual interpretation informed at the outset by the purpose of the legislative scheme rather than an interpretation based merely on literal meaning, was reasonable and correct in its determination that s. 18 is not limited to future events:

*A broad interpretation of the wording of s. 18(2)(b) in the context of s. 18 as a whole, such that it deals with existing, ongoing and future adverse effects, is harmonious with the scheme and object of the EPA and the intention of Parliament. The Orderees seek an interpretation that is narrow and restricted in time. The adverse effects of contamination are, generally, ongoing and of both immediate and future concern. Interpreting s. 18(2)(b) to include existing, ongoing and future adverse effects is consistent with the attributes of contamination, the scheme of the EPA, the legislative history of broadening the ambit of s. 18, and the purpose of protection and conservation of the natural environment (ERT Decision at para 82). (Divisional Court Decision at para 40)*

The Divisional Court also held that the Tribunal was reasonable and correct in its determination that there is no geographical constraint limiting orders to the source property of the contamination and quoted the Tribunal's observation that "contamination and adverse effects are not constrained by the boundaries of a property, either in initial discharge or because of migration".

Additionally, the Divisional Court found that the Tribunal's interpretation of the Ministry's order-making jurisdiction is consistent with the Brownfields regime since protection from orders is extinguished under the regime when contaminants migrate from a property that was subject to that regime:

*[66] Under s. 168.7(3) of the EPA, if a contamination on the property migrates to another after a specified date, the protection afforded under (1) is extinguished. The Director can issue an order under s. 18 (amongst other sections of the EPA) to the owner or person with management and control of the property. Such protection would be unnecessary pursuant to the interpretation of s. 18 as propounded by the Appellants. In addition, s. 18 is specifically referenced in s. 168.7(3). This is further evidence that in enacting s. 18, the legislature intended that the Director be authorized to issue off-site orders.*

*[67] While the Brownfield regime was not explicitly examined by the Tribunal, reading the words of s. 18 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, the above interpretation fits comfortably with the Tribunal's decision and the principles of justification, transparency and intelligibility. (Divisional Court Decision at paras 66 and 67)*

This is the first Divisional Court decision interpreting the geographic extent of the powers set out in s. 18(2) of the *EPA*. The decision confirms that the powers are expansive and should be considered by any current, former or prospective owner or tenant of a contaminated property. We will continue to monitor this case should it be appealed further.