

ENVIRONMENTAL REVIEW TRIBUNAL GIVES MINISTRY BROAD PREVENTATIVE POWERS OVER MIGRATING CONTAMINATION

By Stanley D. Berger

On September 1, 2017, the Ontario Environmental Review Tribunal in the matter of *Hamilton Beach Brands Canada Inc. et al. v. the Director, Ministry of the Environment and Climate Change* made a preliminary ruling that the Director had jurisdiction to make an order under s.18 of the *Environmental Protection Act* (EPA) requiring a person who owns or owned, or has or had management or control of a contaminated undertaking or property to delineate contamination that had already migrated to off-site properties. The property in question, formerly a small-appliance manufacturing business, was contaminated and the various contaminants were of concern to the Ministry, having migrated to other Picton residential, commercial and institutional properties where they might be entering nearby buildings by vapour intrusion. Section 18 of the EPA provides that the Director may make orders preventing, decreasing or eliminating an adverse effect that may result from the discharge of a contaminant from the undertaking or the presence or discharge of a contaminant in, on or under the property. The Director's Order was challenged on three grounds:

1. The adverse effect the Director could address was limited to a future event or circumstance (given that s.18 is prospective and preventative);
2. The adverse effect had to relate to the potential off-site migration of a contaminant that was on an orderee's property at the time the order was made;
3. The order could require work only on site but not off-site, to address the risk of an adverse effect.

The Tribunal rejected all three arguments, reasoning that adverse effects resulting from contamination were frequently ongoing rather than static, with no clear line between existing and future effects. The Tribunal looked to the purpose of the EPA which was to protect and conserve the natural environment and found the orderees' arguments were inconsistent with this purpose. Contamination and adverse effects were not constrained by property boundaries and therefore it was immaterial whether the contaminant was on the orderee's property at the time the order was made. Finally, the list of requirements that could be ordered under s.18(1) EPA included off-site work.



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