

## 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 M. Engel

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 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 orderer'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 found 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". The Divisional Court also found that the Tribunal's interpretation of the Ministry's order-making jurisdiction is consistent with the Brownfield regime since protection from orders is extinguished under the regime when contaminants migrate from a property that was subject to that regime.

The order provisions of s.18(2) of the *Environmental Protection Act*, R.S.O. 1990, c.E.19 were at issue in this case. This is the first Divisional Court decision interpreting the geographic extent of the powers set out in s.18(2). 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.



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