

Environmental No-Fault EPA Orders Compelling Off-Site Investigations are Alive and Well in Ontario

By [Marc McAree](#), Partner and Certified Environmental Law Specialist and [Anand Srivastava](#), Associate. © Willms & Shier Environmental Lawyers LLP.

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Ontario's Environmental Protection Act ("EPA"), section 18 permits the Ministry of the Environment, Conservation and Parks ("MECP") Director to issue an Order to any current or former owner or occupier of contaminated property.

Section 18 Orders are no-fault Orders. Section 18 Orders do not require the orderee to have any nexus to the polluting activity aside from the orderees' current or former ownership and/or occupation of a contaminated source property.

In *Hamilton Beach Brands Canada, Inc. v Ministry of the Environment and Climate Change*, the orderees challenged the broad scope of the Director's no-fault section 18 Order. The orderees argued, inter alia, that Section 18 orders are "absurd". This week, the Ontario Divisional Court upheld the MECP's jurisdiction to issue no-fault Orders requiring off-site soil and groundwater investigations.

The upshot in Ontario is that the MECP has jurisdiction to issue EPA, section 18 Orders to compel owners, former owners, occupiers and former occupiers to investigate off-site regardless of whether the Orderees were or are perpetrators of the contamination that migrated and/or continues to migrate off-site.

In *Hamilton Beach*,¹ the MECP issued a no-fault section 18 Order to the current owner of a contaminated property, former owners of the property, and the current tenant of the property.

First, the orderees appealed the Order to the Environmental Review Tribunal ("ERT"). For purposes of the appeal only, the parties agreed that the orderees did not cause historic contamination at the source property.

Reading the EPA, section 18 and applying principles of statutory interpretation, the ERT dismissed the orderees' appeal. The ERT confirmed that the MECP Director has jurisdiction to issue EPA, section 18 orders where:

- 1 the orderees did not own the source property at the time of the contaminating activity
- 2 the orderees did not operate at the source property at the time of the contaminating activity
- 3 the contamination migrated from the source property to down-gradient, off-site properties
- 4 the Order requires investigation and delineation of contamination at down-gradient, off-site properties, and/or

¹ 14 CELR (4th) 137 (Ont ERT) aff'd 2018 ONSC 5010 (Div Ct); Decision issued September 4, 2018

5 an “adverse effect” (as defined in the EPA) has occurred, is occurring and/or may occur in the future.

Second, the orderes appealed the ERT’s decision upholding the MECP Director’s Order to the Ontario Superior Court of Justice – Divisional Court. The orderes argued that the ERT’s decision was wrong and should be reversed on a standard of correctness.

The Divisional Court disagreed with the orderes and held that the ERT’s decision met both the standard of reasonableness (*Dunsmuir*) and the standard of correctness.

The Divisional Court concluded:

... the [ERT] carefully considered the [orderes’] interpretation ... It rejected their interpretation of s. 18. In doing so, it applied the principle of modern statutory interpretation ... The [ERT] decision is transparent, justified and intelligible and falls well within the range of possible outcomes (*Dunsmuir* at para 47). The Tribunal’s decision was reasonable and, in my view, correct and consistent with the modern principles of statutory interpretation.²

The authors do not know if the decision of the Divisional Court may be the subject of further appeal. If it is, Marc and Anand will have more to write about in the not-to-distant future. If not, the Divisional Court decision will stand as the latest pronouncement on the law.

[Marc McAree](#) is a partner at Willms & Shier Environmental Lawyers LLP and a Certified Specialist in Environmental Law. Marc may be reached at 416-862-4820 or by e-mail at mmcarea@willmsshier.com.

[Anand Srivastava](#) is an associate at Willms & Shier Environmental Lawyers LLP. Anand may be reached at 416-862-4829 or by e-mail at asrivastava@willmsshier.com.

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² 2018 ONSC 5010 at para 73.