

Will the ERT Sweep Away the Municipality's Argument?

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Are street sweepings waste? The Environmental Review Tribunal (“ERT”) may soon decide.

Background

Each year the City of Mississauga (“City”) has offered street cleaning services as part of its routine winter road maintenance. From 2004-2011, the City accumulated “street sweepings” (the materials it collected during street cleaning) at a City Works Yard.¹ The City eventually deposited the street sweepings on several private properties throughout the City. The City has not identified the municipal addresses for all of the private properties where the street sweepings were deposited.²

The Ministry of Environment, Conservation and Parks considers street sweepings to be a waste under Ontario’s *Environmental Protection Act* (“EPA”) and O. Reg. 347.³ According to the Ministry, street sweepings commonly contain traces of glass, metal, and plastic, and may also include contaminants.⁴

Ministry’s Position

The Ministry contends that the City unlawfully deposited waste on the receiving properties and issued a Director’s Order requiring the City to:⁵

- ◆ share information in the City’s possession that relates to the street sweepings
- ◆ retain one or more Qualified Persons to complete work related to the street sweepings at sites where the street sweepings were deposited, and
- ◆ complete a “forensic audit” on other possible deposit sites and prepare a report to submit to the Director and Public Health Officials.

The Ministry argues that the City has failed to demonstrate that it screened or tested the street sweepings to ensure they were free of contaminants in unsafe amounts. The Ministry further

¹ *Mississauga (City) v Ontario (Environment and Climate Change)*, 2017 CanLII 11501 at para 1, 12 [*Mississauga v Ontario*].

² *Ibid* at para 7.

³ RSO 1990, c. E. 19 [EPA]; RRO 1990 [O. Reg. 347].

⁴ *Mississauga v Ontario*, *supra* note 1 at para 13.

⁵ *Ibid* at para 2.

argues that the City did not properly inform the receivers about the origins and contents of the street sweepings.⁶

City's Position

The City claims that it adequately screened and tested the street sweepings to remove debris, and informed receivers about the origins of the street sweepings.⁷ The City maintains that the street sweepings are not a waste and that the Director has not established that there are potential adverse effects associated with the street sweepings.

The City contends that in the alternative, the Director has not demonstrated sufficient potential adverse effects to justify the work in the Director's Order. The City argues that even if the ERT finds that street sweepings are a waste under the *EPA*, or that potential adverse effects do derive from the street sweepings, the work ordered is excessive and unnecessary.⁸

Stay

In December, 2016, the City filed a Notice of Appeal of the Director's Order with the ERT, and requested that the ERT grant a stay of the work ordered pending the appeal.⁹

Prior to the stay hearing, the Director consented to stay all but two of the items in the Director's Order. Namely, the Director maintained that the City must still share any information in the City's possession relating to the street sweepings, and complete a forensic audit report about other possible receiving sites.¹⁰

At the stay hearing, the City argued that if the ERT did not stay the remaining two work items in the Director's Order, the City would suffer irreparable harm. Specifically, the City argued it would suffer financial loss, lose its reputation for environmental excellence, and face a threat of litigation in relation to the street sweepings.¹¹

Respecting the balance of convenience and public interest considerations that are pertinent to the granting of a stay, the City argued that there was no evidence to suggest that human health or ecological life was at risk due to the deposited street sweepings.¹² The City also argued that absent a stay, the Director's Order would compel the City to produce possibly prejudicial documentation, before a finding of any obligation to do so.¹³

⁶ *Ibid* at para 13.

⁷ *Ibid* at para 12.

⁸ *Ibid* at para 3.

⁹ *Ibid* at paras 3-4.

¹⁰ *Ibid* at paras 5-6.

¹¹ *Ibid* at paras 25, 27, 30.

¹² *Ibid* at para 45.

¹³ *Ibid* at para 49.

The ERT dismissed the City's request to stay the remaining two items in the Director's Order. The ERT found that the City did not sufficiently prove it would face irreparable harm if the ERT did not grant a stay, or that the balance of convenience supported granting a stay.¹⁴

Appeal

The City's appeal is scheduled to be heard at the ERT in November and early December of 2018. The appeal decision will provide direction on whether street sweepings are waste under the *EPA*. We look forward to discussing the ERT's findings in our next article.

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¹⁴ *Ibid* at paras 61-62.