



*Court Upholds MECP's EPA No-Fault Order Requiring  
Off-Site Soil Vapour, Groundwater and Surface Water  
Investigation*



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SMART Remediation  
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# Court Upholds MECP's EPA No-Fault Order Requiring Off-Site Soil Vapour, Groundwater and Surface Water Investigation

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February 7, 2019 | Ottawa, Ontario

SMART Remediation Seminar Series 2019



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## Overview

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- **The Problem**
- **Ontario *EPA*, s. 18 Order-Making Powers**
- **Deadlines to Appeal EPA Orders**
- **What the Tribunal and Courts Say About *EPA*, s. 18 No-Fault Orders for Off-Site Investigation**
- **Why Consultants and Contractors Should *Care* About No-Fault Orders!**



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## The Problem

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- **What should happen when the polluter is non-existent?**
  - corporate dissolution, bankruptcy or wind-up
  - operations cease
  - no assets
  - no longer a property owner or tenant
- **MECP Director can issue orders to “innocent” owners or occupiers (current and former) of an industrial source property**
- **Is this right? Is this fair? Or, does ‘rightness’ and ‘fairness’ matter in the eyes of the law?**

## Ontario *EPA* Order Making Powers

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### Ontario’s *EPA* legislates order-making powers

- *EPA*, s. 17 – Remedial
- *EPA*, s. 18 – Preventative measures
- *EPA*, s. 44 – Removal of Waste
- *EPA*, s. 124 – Control orders and stop orders
- *EPA*, s. 150(1) – Pay costs
- Many others!

## *EPA*, s. 18 – Order by Director re Preventative Measures

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### ***EPA*, s. 18 (1) says the Director may order a person**

- Who owns or owned or who has or had management or control of an undertaking or property
  - to obtain, construct, install, or modify any device, equipment, or facility
  - to take all reasonable steps necessary to implement procedures specified in the order if a contaminant is discharged into the natural environment
  - to monitor, record, study, measure, control and report to the Director on the presence or discharge of a contaminant

## *EPA*, s. 18 – Order by Director re Preventative Measures

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### ***EPA*, s. 18 (1) says the Director may order a person**

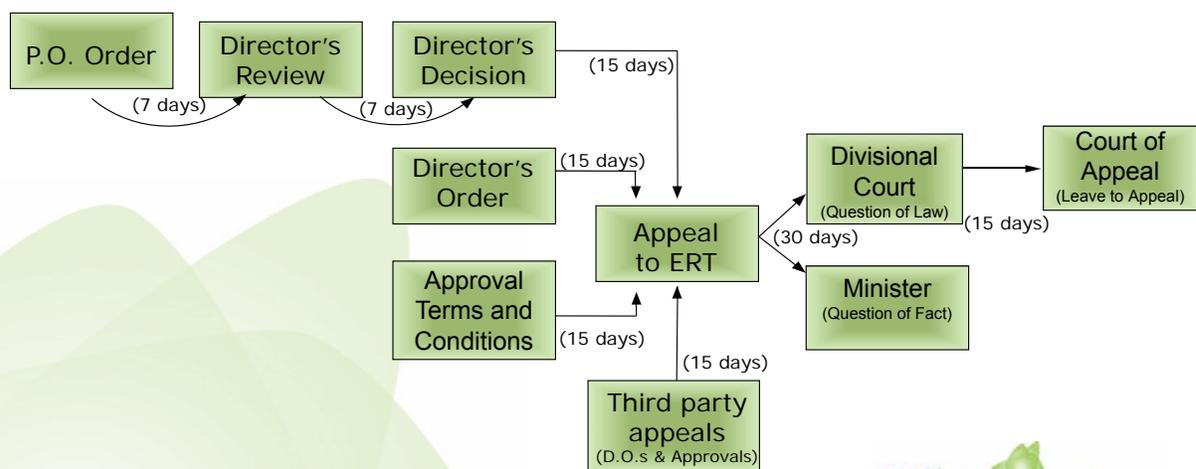
- Who owns or owned or who has or had management or control of an undertaking or property
  - to develop and implement a plan to
    - reduce the contaminant discharged,
    - reduce the risk of a spill to the natural environment
    - decrease or eliminate an adverse effect and
    - notify the MECP or another public authority or members of the public impacted by the discharge
- All in accordance with *EPA*, Part X and s. 91.1 Spills

## *EPA*, s. 18 – Order by Director re Preventative Measures

***EPA*, s. 18(2) authorizes the Director to issue an Order under *EPA*, s. 18(1) if the Director believes that the order is required to either**

- Prevent or reduce the risk resulting from a discharge of a contaminant into the natural environment
- Prevent, decrease, or eliminate an adverse effect that may result from
  - the discharge of a contaminant from an undertaking, or
  - the existence of a contaminant in, on, or under a property

## Ontario Deadlines to Appeal Regulatory Orders and Approvals



## *Hamilton Beach Brands Canada Inc. v Ministry of the Environment and Climate Change*

### **Background Facts**

- Industrial source property in Picton, Ontario has been contaminated for decades
- VOC contamination migrated to neighbouring residential, commercial, and institutional properties
- Extent of contamination on-site and off-site is not delineated
- Significant concern about vapour intrusion at nearby off-site properties



## *Hamilton Beach Brands Canada Inc. v Ministry of the Environment and Climate Change*

### **Background Facts**

- The parties are all owners/occupiers or former owners/occupiers of the industrial source property
- The former polluting tenant, Proctor-Silex Limited, occupied the industrial source property from 1962-1975
- Proctor-Silex Limited is corporately non-existent
- Proctor-Silex Limited is not available to provide a remedy

## *Hamilton Beach Brands Canada Inc. v Ministry of the Environment and Climate Change*

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### **Director's Order Issued**

- Dated April 12, 2017
- Relied on *EPA*, s. 18
- Required each Orderee to submit and implement a workplan to investigate and delineate **off-site**
  - soil vapour impacts
  - groundwater impacts, and
  - surface water impacts
- Orderes appealed the Director's Order to the Environmental Review Tribunal

## *Environmental Review Tribunal – Hamilton Beach Brands Canada Inc.*

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### **Issue on Appeal**

- Whether or not the Director has jurisdiction to issue an order under *EPA*, s. 18 to
  - compel owners, former owners, occupiers, and former occupiers to
    - investigate **off-site**
    - regardless of whether the Orderes were or are perpetrators of contamination that migrated and/or continues to migrate **off-site**

## Environmental Review Tribunal – *Hamilton Beach Brands Canada Inc.*

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### ERT Appeal Decision

- ERT confirmed the MECP's jurisdiction to issue *EPA*, s. 18 orders where
  - the Orderees did not own the source property at the time of the contaminating activity
  - the Orderees did not operate polluting activities at the source property at the time of the contaminating activity
  - the contamination migrated from the source property to down-gradient, off-site properties
  - the order requires investigation and delineation of contamination at down-gradient, off-site properties
  - an “adverse effect” as defined in the *EPA* has occurred, is occurring and/or may occur in the future

## Ontario Divisional Court – *Hamilton Beach Brands Canada Inc.*

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### Orderees’ Argued before the Divisional Court that:

- The temporal scope of *EPA*, s. 18 is limited to future events
- The geographic scope of *EPA*, s. 18(2) is limited to property where the contamination originates, not off-site properties
- The Director’s jurisdiction to order off-site delineation work is limited to *EPA*, s. 17
- The ERT’s broad interpretation of *EPA*, s. 18 renders *EPA*, s. 17 redundant

## Ontario Divisional Court – *Hamilton Beach Brands Canada Inc.*

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### The Divisional Court Held:

- *EPA*, s. 17 applies to the polluter regardless of who owns the source property
- *EPA*, s. 18 applies to owners and persons in management and/or control of the source property
- *EPA*, s. 18 can be engaged against a non-polluter when the polluter does not exist

## Ontario Divisional Court – *Hamilton Beach Brands Canada Inc.*

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### The Divisional Court dismisses Orderees' appeal:

... the [ERT] carefully considered the [Orderees'] interpretation ... It rejected their interpretation of s. 18... 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.

## Ontario Court of Appeal – *Hamilton Beach Brands Canada Inc.*

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### Leave to Appeal to the Ontario Court of Appeal Denied

- Hamilton Beach Brands Canada Inc. sought leave to appeal from the Divisional Court
- On December 12, 2018, the Ontario Court of Appeal denied leave to appeal thereby ending the legal challenge to the *EPA*, s. 18 Director's Order
- The Director's Order stands and obliges the Orderees to carry out off-site investigation pursuant to *EPA*, s. 18

## Why Should Consultants and Contractors Care About the *Hamilton Beach* Decision?

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- Regardless of fault, parties associated with the use and ownership of a contaminating property can be ordered to address off-site contamination
- Consultants carry out pre-purchase due diligence for buyers
- Buyers are exceedingly good at disregarding or discounting what they cannot see, touch or smell
- Environmental pre-purchase work focuses on on-site contamination, not off-site
- Consultants carrying out Phase 1 and Phase 2 ESAs must be 'alive' to the prospect of off-site contamination, and clearly raise the prospect for clients

## Why Should Consultants and Contractors *Care About the Hamilton Beach Decision?*

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- Consultant's and contractor's activities may cause off-site migration which can give rise to liability for themselves and also those associated with the property
- Injecting to remediate may cause contamination to move off-site
- Mobile ECAs require notice to the Ministry about the whereabouts of the contractor's work and this may trigger Ministry interest and exercise of authority
- Pre-submission discussions for RA may trigger Ministry interest about off-site impacts

## Why Should Consultants and Contractors *Care About MECP Orders?*

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### **Recently MECP have been ordering parties who are not central to the polluting activity**

- Former Corporate Directors & Officers
- Real Estate Brokerage and Individual Brokers who had keys to a listed industrial property for sale
- Accountant who was acting under a power of attorney for a non-resident with instructions to sell
- Current Owners and Tenants who did not cause historic pollution
- Are consultants and contractors next?!

## Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **17 lawyers**
  - six are certified by the Law Society of Ontario as Environmental Law Specialists
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, and Nunavut



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## Contact Information

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