R. *v.* Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706

**Consolidated Maybrun Mines Limited and J. Patrick Sheridan** *Appellants*

*v.*

**Her Majesty The Queen** *Respondent*

**Indexed as: R. *v.* Consolidated Maybrun Mines Ltd.**

File No.: 25326.

1998: January 29; 1998: April 30.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.

on appeal from the court of appeal for ontario

*Administrative law -- Validity of order -- Collateral attack on administrative order in penal proceedings -- Circumstances in which person charged with failing to comply with administrative order can collaterally attack validity of order -- Applicable principles.*

*Environmental law -- Offences -- Defences -- Validity of administrative order -- Order made under provincial environmental protection statute to prevent risk of contamination -- Persons to whom order directed not availing themselves of right to appeal under statute and ignoring order -- Persons charged with failing to comply with*

*order -- Whether these persons can raise validity of order by way of defence -- Environmental Protection Act, R.S.O. 1980, c. 141, ss. 17, 146(1a).*

The appellant company owns a gold and copper mine and the appellant P.S. is the guiding mind of the company. After inspecting the mine, employees of the Ontario Ministry of the Environment concluded that it was abandoned and that transformers containing PCBs presented a risk of environmental contamination. Despite numerous efforts to have the company take corrective action, the condition of the site did not change. In 1987, the Ministry's Regional Director issued an order, under s. 17 of the *Environmental Protection Act*, and required the appellants, *inter alia*, to construct a storage area for the transformers, to clean the concrete stained by spillage of contaminated oil, and to drum the contaminated material. The appellants did not appeal to the Environmental Appeal Board and basically elected to disregard the order. When charged by the Ministry with failing to comply with the order, the appellants submitted by way of defence that the order was invalid. They argued that there were no reasonable and probable grounds, as required by s. 17(2) of the Act, to believe that the situation at the mine constituted an environmental risk. After examining the evidence, the trial judge concluded that only the order to drum and store the contaminated material was valid and ordered the appellants to pay a fine. The Ontario Court (General Division) allowed the respondent's appeal with respect to the counts relating to the failure to construct a storage area and to clean, and dismissed the appellants' appeal of the conviction. The court held that by reviewing the validity of the order, the trial judge had exceeded his jurisdiction under the *Environmental Protection Act* and encroached on the Environmental Appeal Board's functions. The Court of Appeal affirmed that judgment.

*Held*: The appeal should be dismissed.

The question of whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made. The best way to decide this question, taking both the integrity of the administrative process and the interests of litigants into account, is to focus the analysis on the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. The wording of the statute from which the power to issue the order derives, the purpose of the legislation, the availability of an appeal, the nature of the collateral attack taking into account the appeal tribunal's expertise and *raison d'être*, and the penalty on a conviction for failing to comply with the order are all important, but not exhaustive, factors for determining the legislature's intention. In this case, a review of the *Environmental Protection Act* leads to the conclusion that the trial judge lacked jurisdiction to rule on the validity of the order. Persons charged with failing to comply with an order made under this legislation may not collaterally attack the validity of the order after failing to avail themselves of the appeal mechanisms provided by the Act.

The purpose of the Act is primarily to prevent contamination of the province's environment. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal board designed to counterbalance those powers by affording affected individuals an opportunity to present their points of view and to assert their rights as quickly as possible. Permitting a person to whom an order is directed to collaterally attack the order at the stage of penal proceedings would encourage conduct contrary to the Act's

objectives and would tend to undermine its effectiveness. In this connection, the appellants cannot raise their right to make full answer and defence since there is no indication that the Act's appeal process is inadequate or that the Board was powerless to remedy the deficiency that they raise against the order.

With respect to the factor regarding the nature of collateral attack, whether the issue is lack of jurisdiction *ab initio* or loss of jurisdiction is irrelevant. What is important is on whom the legislature intended to confer jurisdiction to hear and determine the question raised. Since in this case the legislature set up a specialized tribunal to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated, permitting a penal court to answer such questions in lieu of the Environmental Appeal Board, which was established precisely for this purpose, would undermine the scheme set up by the Act. Lastly, the penal consequences provided by the Act -- fines -- do not justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction.

**Cases Cited**

**Distinguished:** *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9; **referred to:** *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Domm* (1996), 31 O.R. (3d) 540, leave to appeal refused, [1997] 2 S.C.R. viii; *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273; *McGee v. United States*, 402 U.S. 479 (1971); *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Commission des accidents du travail du Québec v. Valade*, [1982] 1 S.C.R. 1103; *Abel Skiver Farm Corp. v. Town of Sainte-*

*Foy*, [1983] 1 S.C.R. 403; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna v. Procureur général du Québec* (1984), 10 Admin. L.R. 210; *R. v. Rice*, [1980] C.A. 310; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25; *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237; *R. v. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225; *Yakus v. United States*, 321 U.S. 414 (1944); *McKart v. United States*, 395 U.S. 185 (1969); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *R. v. Wicks*, [1997] 2 W.L.R. 876; *Director of Public Prosecutions v. Head*, [1959] A.C. 83; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

**Statutes and Regulations Cited**

*Environmental Protection Act*, R.S.O. 1980, c. 141, ss. 1(1)(c) "contaminant" [am. 1983, c. 52, s. 1(1)], 2, 7, 8, 16, 17 [rep. & sub. *idem*, s. 6], 120 *et seq.*, 122(1), 123 [am. 1981, c. 49, s. 3], 143, 146(1a) [en. 1986, c. 68, s. 14], (3) [*idem*], (4) [*idem*].

*Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 17, 186(2).

**Authors Cited**

Mullan, David J. *Administrative Law*, 3rd ed. Scarborough, Ont.: Carswell, 1996.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 28 O.R. (3d) 161, 89 O.A.C. 199, 133 D.L.R. (4th) 513, 105 C.C.C. (3d) 388, 19 C.E.L.R. (N.S.) 75, [1996] O.J. No. 881 (QL), affirming a judgment of the Ontario Court (General Division) (1993), 86 C.C.C. (3d) 317, 12 C.E.L.R. (N.S.) 171, [1993] O.J. No. 2935 (QL), which had allowed the respondent's appeal and dismissed the

appellants' appeal from a judgment of the Ontario Court (Provincial Division) (1992), 73 C.C.C. (3d) 268 and 76 C.C.C. (3d) 94. Appeal dismissed.

*Edward L. Greenspan, Q.C.*, and *Marie Henein*, for the appellants.

*Lori Sterling* and *Jerry Herlihy*, for the respondent.

English version of the judgment of the Court delivered by

//*L'Heureux-Dubé J.*//

1. L'HEUREUX-DUBÉ J. -- This case raises the question whether and, if so, in what circumstances a person charged with failing to comply with an administrative order can collaterally attack the validity of the order. Although this is an important question, Canadian courts have, until now, had very few opportunities to pronounce upon it.

2. It should be noted at the outset that this Court has already spoken on the possibility of collateral attacks on the validity of court orders (*Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223). In *Litchfield*, at p. 349, Iacobucci J. stated the basis of the rule against collateral attacks on court orders as follows:

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro* [(1988), 42 C.C.C. (3d) 485 (Sask. C.A.)], at p. 497).

3. For this reason, it is also settled that, as a general rule, a superior court will not be justified in reviewing the validity of a court order in respect of which a contempt charge has been laid -- see, *inter alia*: *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), leave to appeal refused, [1997] 2 S.C.R. viii; *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.).

4. The question raised by the case at bar is whether this same immunity should be conferred on administrative orders in light of the major differences that can exist between these two types of orders in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them.

I. Facts

5. The appellant Patrick Sheridan is the guiding mind of the Consolidated Maybrun company, which owns a gold and copper mine in Northern Ontario. After operating for a few years in the early 1970s, the mine was shut down until 1975 due to low ore prices. It was then reopened for 18 months before being shut down once again. Operations at the mine have not been resumed since that time.

6. In 1985, employees of the Ontario Ministry of the Environment inspected the mine. They found that the facilities had been vandalized, windows broken, chemicals strewn about inside the laboratory, water had penetrated and was obstructing the mine, and access to the facilities was not controlled. They also observed traces of oil contaminated with polychlorinated biphenyls ("PCBs") from a number of electrical transformers located both outside and inside the buildings. Based on these observations, they concluded that the mine was abandoned and that the transformers presented a risk of environmental contamination.

7. The Ministry of the Environment accordingly contacted the appellant company to have it take corrective action. Despite a meeting with the appellant's electrician, Mr. Vernon, an inspection by Ministry employees in 1986 revealed that the condition of the site had not changed. Subsequent attempts by the Ministry to communicate with the appellant in writing and by telephone were also fruitless. In these circumstances, the Ministry's Regional Director gave the appellants notice on April 22, 1987 of his intention to issue an order requiring that the contaminated oil stains be cleaned up, that the transformers be stored in a secure building constructed for that purpose and undergo a triple rinse procedure, and finally that access to the site be secured. The notice also invited the appellants to respond to the Director's intention and make submissions concerning the proposed order within 15 days. As with the earlier letters, the notice went unanswered, and an inspection of the mine on May 7, 1987 confirmed that no action had been taken. The appellant did not respond until May 11; it did so through Mr. Sheridan, who expressed the opinion that the measures proposed by the Ministry were "ridiculous" and that it was up to the Ministry to clean up the PCBs.

8. On June 2, 1987, the Director issued an order under s. 17 of the *Environmental Protection Act*, R.S.O. 1980, c. 141 (now R.S.O. 1990, c. E.19). At the same time, he informed the appellants of their right under s. 122 of the *Environmental Protection Act* to appeal to the Environmental Appeal Board within 15 days of receiving the order, which required the appellants Sheridan and Consolidated Maybrun to take measures that can be summarized as follows:

> 1 -- Construct a storage area for the contaminated transformers in accordance with specifications set out in the order;

> 2 -- Clean or chip out the concrete surfaces where there is evidence of spillage of liquids contaminated with PCBs;
>
> 3 -- Bag and drum the contaminated material (soil, wood and metal) and place the drums in a storage area on the property;
>
> 4 -- Secure and prevent entry to the areas where the transformers are located, within seven days; and
>
> 5 -- Upon completion of the storage area, carry out the triple rinse procedure on the transformers.

9. The appellants basically elected to disregard the order. The only action they took was to secure the areas where the transformers were located and put up signs indicating that access to the site was prohibited, although this was not done within the prescribed time. None of the other requirements of the order were met, no appeal was filed with the Board and no application was made for judicial review of the order.

10. After the appellants failed to act, the Ministry had the site cleaned up and a storage area constructed for the transformers, at a cost of $131,000. The Ministry also decided to lay charges under s. 146(1a) of the *Environmental Protection Act*, as amended by S.O. 1986, c. 68, s. 14(1) (now s. 186(2)). These charges comprised four separate counts: failure to construct a storage area for the transformers, failure to drum the PCB-contaminated material, failure to clean and chip out areas of the concrete floor stained by spillage of contaminated oil and, lastly, failure to prevent entry to the areas where the transformers were located. No charge was laid for the failure to rinse the transformers, as the Ministry of the Environment now considered this procedure inadequate.

II. Judgments

1. *Ontario Court (Provincial Division)* (1992), 73 C.C.C. (3d) 268 and 76 C.C.C. (3d) 94

11. At trial, the appellants submitted by way of defence that the order of June 2, 1987 was invalid. In support of their position, they argued that there were no reasonable and probable grounds, as required by s. 17(2) of the *Environmental Protection Act*, to believe that the situation constituted an environmental risk. On this point, the trial judge was of the opinion that the validity of the order could be challenged, but only for lack of jurisdiction. Since the appellants had elected not to appeal the order to the Board, he could not rule on the merits of the order.

12. Nonetheless, the trial judge admitted extensive scientific evidence on the environmental risk presented by PCBs and the appropriate means for preventing those risks. He concluded that the order to construct a storage area could be justified only in light of the triple rinse procedure. However, since the Ministry now considered that procedure inadequate and had abandoned it, the judge concluded that there could be no reasonable and probable grounds to justify construction of the storage area. As for the order to clean and chip out the concrete surfaces, he also concluded that the scientific evidence did not support the order and that the order was neither necessary nor even desirable. Regarding the order to secure the site within seven days, he found it unreasonable in that it did not take the nature of the risk and the characteristics of the site into account.

13. The only order the trial judge considered valid and a possible ground for convicting the appellants was the order to drum and store the contaminated material.

However, he felt that it was open to the appellants to raise a defence of due diligence in respect of this order by showing that compliance with it would entail a greater environmental risk than non-compliance. Since they had failed to show this, the appellants were convicted on this count alone. Consolidated Maybrun and Mr. Sheridan were accordingly ordered to pay fines of $5,000 and $500, respectively.

2. *Ontario Court (General Division)* (1993), 86 C.C.C. (3d) 317

14. Kurisko J. allowed the respondent's appeal with respect to the orders to construct a storage area and clean the concrete surfaces, and dismissed the appellants' cross-appeal. In his view, the trial judge had exceeded his jurisdiction under the *Environmental Protection Act* by reviewing the validity of the order on which the charges were based. Kurisko J.'s decision was based on his understanding of the legislature's intention in enacting the *Environmental Protection Act* in the context of a modern industrial society concerned with protecting the environment. In his view, the entire procedural scheme set up by the Act shows that the legislature did not intend to allow an accused to circumvent the Act's appeal mechanisms and ignore an order with impunity. These appeal mechanisms would be unnecessary if a person charged with failing to comply with an order could collaterally attack its validity in a penal court without appealing it in accordance with the prescribed procedure. Kurisko J. concluded that in ruling on the validity of the order, the trial judge had encroached on the Environmental Appeal Board's functions.

3. *Court of Appeal* (1996), 105 C.C.C. (3d) 388

15. Laskin J.A., writing for the Court of Appeal, dismissed the appeal. In his view, the rule laid down in *Litchfield, supra*, must apply, with certain restrictions, to an

administrative order. He held that the following five factors should be considered in determining whether a collateral attack is permissible: (1) the wording of the statute; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the kind of collateral attack; and (5) the penalty on a conviction for failing to comply with the order.

16. In the case at bar, the wording of the Act neither permits nor forbids a collateral attack on the validity of the order. An attempt must, therefore, be made to ascertain the legislature's intention in this respect. In his view, the objective of environmental protection would be undermined if a court were permitted, in a trial on a charge of non-compliance with an order issued by the Director, to rule on the existence of reasonable and probable grounds for making the order. The purpose of the Act is to protect public and societal interests by creating regulatory, rather than criminal, offences. These provisions are intended to encourage compliance with orders for the general welfare of society. Furthermore, the Act balances these interests with the interests of those to whom an order is directed by providing for the possibility of an appeal within 15 days entailing a *de novo* hearing by the Board.

17. As to the nature of the collateral attack, Laskin J.A. distinguished between lack of jurisdiction *ab initio*, which can result in a collateral attack on an order, and an error, even if unreasonable, committed by a director in exercising his or her jurisdiction, which is not open to such an attack. He concluded that in the case at bar the Director did have jurisdiction to make the order. On the final factor, Laskin J.A. noted that the penalty is a fine rather than imprisonment.

18. Concerning the due diligence defence raised by the appellants, Laskin J.A. concluded that accused persons cannot argue that an order was unreasonable or

unfounded so as to avoid performing the obligations imposed on them by the order. That would amount to authorizing a disguised collateral attack.

III. Issues

19. The main issue concerns the appropriate forum for determining the validity of an administrative order. More specifically, the appeal raises two questions:

> 1. May persons charged with failing to comply with an order issued under the *Environmental Protection Act* collaterally attack the validity of the order by way of defence after failing to avail themselves of the appeal mechanisms provided by the Act?
>
> 2. If so, was the order issued against the appellants invalid in whole or in part?

IV. Relevant Statutory Provisions

20. *Environmental Protection Act*, R.S.O. 1980, c. 141

> **1.**--(1) In this Act,
>
> . . .
>
> (c) "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,
>
> (i) impair the quality of the natural environment for any use that can be made of it,
>
> (ii) cause injury or damage to property or to plant or animal life,
>
> (iii) cause harm or material discomfort to any person,

(iv) adversely affect the health or impair the safety of any person,

(v) render any property or plant or animal life unfit for use by man,

(vi) cause loss of enjoyment of normal use of property, or

(vii) interfere with the normal conduct of business.

**16.** Where any person causes or permits the deposit, addition, emission or discharge into the natural environment of a contaminant that injures or damages land, water, property or plant life, the Minister, where he is of the opinion that it is in the public interest so to do, may order such person to do all things and take all steps necessary to repair the injury or damage.

**17.**--(1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or who has management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.

2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.

3. To implement procedures specified in the order.

4. To take all steps necessary in order that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.

(2) The Director may make an order under this section where the Director is of the opinion, upon reasonable and probable grounds,

(a) that the nature of the undertaking or of anything on or in the property is such that if a contaminant is discharged into the natural environment from the undertaking or from or on the property, the contaminant will result or is likely to result in an effect mentioned in clause 1 (1) (c); and

(b) that the requirements specified in the order are necessary or advisable in order,

(i) to prevent or reduce the risk of the discharge of the contaminant into the natural environment from the undertaking or from or on the property, or

(ii) to prevent, decrease or eliminate an effect mentioned in clause 1 (1) (c) that will result or that is likely to result from the discharge of the contaminant into the natural environment from the undertaking or from or on the property.

**122.**--(1) A person to whom an order of the Director is directed may, by written notice served upon the Director and the Board within fifteen days after service upon him of a copy of the order, require a hearing by the Board.

**123.**--(1) A hearing by the Board shall be a new hearing and the Board may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Board considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Board may substitute its opinion for that of the Director.

(2) Any party to a hearing before the Board under this section may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court.

(3) A party to a hearing before the Board may, within thirty days after receipt of the decision of the Board or within thirty days after final disposition of an appeal, if any, under subsection (2), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Board as to the matter in appeal as he considers in the public interest.

**146.** . . .

(1a) Every person who fails to comply with an order under this Act is guilty of an offence.

. . .

(3) Every person who is guilty of an offence under subsection (1), (1a) or (1b) or section 147a is liable on conviction for each day or part of a day on which the offence occurs or continues to a fine of not more than $5,000 on a first conviction and not more than $10,000 on each subsequent conviction.

(4) Where a corporation is convicted of an offence under subsection (1), (1a) or (1b), the maximum fine that may be imposed for each day or part of a day on which the offence occurs or continues is $25,000 on a first conviction and $50,000 on each subsequent conviction and not as provided in subsection (3).

## V. Analysis

### 1. *General Comments*

21. Before trying to answer the question raised by this appeal, it may be helpful to define its parameters somewhat and review the context in which this question arises.

22. It must be mentioned at the outset that the issues involved in the question of "collateral attacks" on administrative orders are different from those traditionally encountered in the judicial review context. Cases involving the superintending and reforming power of the superior courts are generally concerned with determining whether courts must show deference in reviewing a decision by an administrative tribunal. Although administrative orders like the one in the case at bar can be subject to judicial review by the superior courts, the problem before us presupposes, *inter alia*, that the affected party did not apply for review. Thus, the question that arises is, instead, whether a penal court, which is not necessarily a superior court, can determine the validity of an administrative order when the case before it concerns primarily a charge of a penal nature.

23. Admittedly, the issue before this Court involves considerations that are not entirely foreign to those which inform the superintending and reforming power of the superior courts. In both cases, the lawfulness of government actions is at issue. In the United States, the question of collateral attacks in penal proceedings has been resolved by means of the "exhaustion doctrine", which is intended primarily to protect the integrity of administrative mechanisms set up by law. See, in particular, *McGee v. United States*, 402 U.S. 479 (1971). Our own administrative law recognizes a similar doctrine relating to the discretion enjoyed by the superior courts in exercising their superintending and reforming power. See: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Commission des accidents du travail du Québec v. Valade*, [1982] 1 S.C.R. 1103; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. Although I will be discussing

the American case law on collateral attacks below, I simply point out here that it would be wrong to think that the considerations underlying the exhaustion doctrine in the judicial review context are irrelevant to the issue before this Court. However, this is insufficient to deprive the problem submitted to the Court of its inherent originality and permit it to be resolved by directly transposing principles developed in another context, i.e. the superintending and reviewing power of superior courts.

24. On the other hand, while it is true that the instant case does not arise in a judicial review context, it does not involve a court sitting on appeal from an administrative decision either. Indeed, the question of collateral attacks clearly arises precisely when the relevant statute provides for no right of appeal to the court responsible for trying the charge. As will be seen below, this does not necessarily mean that no appeal otherwise lies to another forum or that the existence of such a right of appeal is not a relevant factor. However, the problem raised by collateral attacks requires us, at the outset, to take into account the legislature's decision not to confer the power to hear an appeal from the administrative order on the court responsible for hearing the charge. From this perspective, the question is, accordingly, the extent to which, where no right of appeal confers express jurisdiction on the trial judge, the rule of law enables a penal court, here a provincial court, to consider the validity of an administrative order where a person is charged with failing to comply with such order.

25. The rule of law viewed, in particular, as the submission of the executive branch to the authority of the law, is clearly an essential component of our constitutional structure. This principle requires that it be open to concerned citizens to bring the excesses of government to the attention of the courts, especially where penal sanctions are involved. It explains *inter alia* why a party against whom a regulatory provision is raised may collaterally attack the validity of the provision, as is generally the case, for

example, with municipal by-laws -- see *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Khanna v. Procureur général du Québec* (1984), 10 Admin. L.R. 210 (Que. C.A.); as well as *R. v. Rice*, [1980] C.A. 310, concerning a regulation enacted by a band council. However, the rule of law does not imply that the procedures for achieving it can be disregarded, nor does it necessarily empower an individual to apply to whatever forum he or she wishes in order to enforce compliance with it.

26. Finally, in resolving the problem of collateral attacks on administrative orders, it is necessary to bear in mind the role and importance of administrative structures in the organization of the various sectors of activity characteristic of contemporary society. The growing number of regulatory mechanisms and the corresponding administrative structures are a reflection of the state's will to intervene in spheres of activity, such as economics, communications media, health technology or the environment, whose growing complexity requires constantly evolving expertise and normative instruments permitting a pointed and rapid intervention consistent with the specific circumstances of the situation. The effectiveness of these instruments depends to a large extent on the penal sanctions that ensure their authority. As Cory J. wrote in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 233:

> The realities and complexities of a modern industrial society coupled with the very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation.

27. In order to ensure the integrity of these administrative structures, while at the same time seeking to protect the rights of individuals affected by government actions, the legislature is free to set up internal mechanisms and establish appropriate forums to

enable such individuals to assert their rights. In considering the requirements resulting from the rule of law and the rights of a person accused of non-compliance with an administrative order, it is important not to isolate the penal proceedings from the whole of the process established by the legislature.

2. *Applicable Principles*

(a) The Case Law

28. As Laskin J.A. pointed out, the Canadian case law relating to collateral attacks on administrative orders is surprisingly sparse. It does, however, contain some principles for determining the appropriate response to the problem at issue here.

29. In *R. v. Campbell Chevrolet Ltd.* (1984), 14 C.E.L.R. 25 (Ont. Prov. Ct.), Geiger Prov. Ct. J. held that a person charged with failing to comply with an order issued under s. 6 of the *Environmental Protection Act* cannot raise the validity of the order by way of defence. In his view, persons to whom such an order is directed should instead avail themselves of their right under the Act to appeal to the Board, and then to the Divisional Court.

30. The decision in *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.), also appears to be unfavourable to collateral attacks in penal proceedings for failing to comply with an administrative order. Although the decision is not explicit on this point, it should be noted that the *Environmental Protection Act*, S.N.S. 1973, c. 6, which was at issue in that case, provided, in s. 53, for a right to appeal the administrative order. According to the section in question, a judge sitting on appeal and whose decision was

final, could rule on any question of law or fact, including whether or not the order was necessary to protect the environment.

31. The appellants refer to the comments of Saunders J. in *Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario* (1984), 48 O.R. (2d) 9 (Div. Ct.). Saunders J. wrote the following about the power under s. 16 of the *Environmental Protection Act* to order the clean-up of contaminated soil, at p. 13:

> If the Minister has the work done, he may only recover his costs in a court of competent jurisdiction if he has made a s. 143 order. In this case, the power to make a s. 143 order is based on the Minister having "authority" to make the s. 16 order. In an action by the Minister to recover his costs, it would be open to the applicants to assert that they had not caused or permitted the emission and that the s. 16 order was therefore made without authority. Similarly, it would be my opinion, having regard to the subject matter and the pattern of the legislation, that a person prosecuted for failure to comply with the s. 16 order could defend on the ground that the pollution was not caused or permitted by him. [Emphasis added.]

32. In the instant case, Laskin J.A. dismissed this passage as mere *obiter*. He also distinguished the case at bar on the basis that, at the time the decision in *Re Mac's Convenience Stores* was rendered, there was no right to appeal an order issued under s. 16, which is not the case here. This is, indeed, a significant difference.

33. Finally, there is the decision of the Alberta Court of Appeal in *R. v. Al Klippert Ltd.* (1996), 43 Alta. L.R. (3d) 225, rendered shortly after the Ontario Court of Appeal's decision in the case at bar. Given that the case in question has also been appealed to this Court, I will, of course, limit my comments on the decision, in which Conrad J.A., speaking for the majority, authorized a collateral attack on an order issued pursuant to the Alberta *Planning Act*. Although she did not dismiss Laskin J.A.'s analysis in the instant case, Conrad J.A. concluded that the *Planning Act* should not be

interpreted as conferring any immunity whatsoever from a development officer's order. She relied, in particular, on the fact that the Act did not declare such an order to be final and that, in her view, a judge responsible for trying a charge of non-compliance is, at any rate, called upon to rule on issues relating to land-use planning at the sentencing stage.

34. It can be seen from this survey of the Canadian case law that, in most of the cases, the existence of a right to appeal the order on which the penal charges were based appears to have been an important, if not decisive, factor. As will be seen below, while this factor cannot be decisive in itself, it is nonetheless a key element of the analysis. This factor is also central to the American case law, which, as already mentioned, is based on the exhaustion doctrine. It is, therefore, appropriate to take a brief look at it.

35. In *Yakus v. United States*, 321 U.S. 414 (1944), the appellant was charged with violating an order fixing wartime meat prices and sought to challenge the validity of the order by way of defence. Since the statute expressly established an appeal mechanism for challenging the order, the Supreme Court held that a person could not disregard this procedure and elect instead to attack the order in a trial for non-compliance. It wrote in this respect that a prohibition on attacking the order "is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity" (p. 446).

36. The rule against collateral attacks was tempered somewhat in *McKart v. United States*, 395 U.S. 185 (1969), which concerned a charge of failing to report for military service. The appellant wished to benefit from an exemption then conferred on a family's sole surviving son and challenged the validity of the military order on this basis. In light, in particular, of the fact that the appellant was liable to imprisonment, the court authorized the collateral attack on the basis that it would not jeopardize the

integrity of the administrative process. However, it was careful to reiterate the general rule against such attacks on the basis of the exhaustion doctrine, as follows, at p. 195:

> A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

37. The later cases confirmed the great reluctance of the United States Supreme Court to permit the invalidity of an administrative order to be raised by way of defence to a charge of violating the order. See, in particular, *McGee v. United States*, *supra*, and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

38. As can be seen from the above passage, the exhaustion doctrine is based on a set of considerations, including the efficient use of judicial resources and preservation of the integrity of the administrative process. On the latter factor, it is impossible to fully dissociate the exhaustion doctrine from the concern to respect the legislature's intention in the establishing of the administrative structure and the appeal mechanisms it comprises. Although it is inappropriate, for the reasons set out above (para. 23), to apply the exhaustion doctrine to settle the collateral attack issue in Canada, it is, on the other hand, entirely appropriate to inquire into the legislature's intention for the purpose of determining the appropriate forum to decide whether an administrative order is valid.

39. Furthermore, this is the approach that was adopted quite recently in the United Kingdom by the House of Lords in *R. v. Wicks*, [1997] 2 W.L.R. 876. The respondent was charged with failing to comply with a demolition order issued under the *Town and Country Planning Act 1990* and later upheld on appeal by the Secretary of

State. In a penal court, he argued by way of defence that the order was invalid. The House of Lords held that, in light of the full appeal mechanism provided for in the *Town and Country Planning Act 1990*, Parliament's intention was to bar courts hearing penal matters from reviewing the validity of the order. Lord Hoffmann wrote the following on this subject: "The question must depend entirely upon the construction of the statute under which the prosecution is brought" (p. 891). I am proposing a similar approach.

40. It should also be noted that, in concurring reasons, Lord Nicholls of Birkenhead expressed doubt, at p. 884, as to the wisdom of distinguishing "patent" invalidity from "latent" invalidity. In so doing, he seems to have implicitly rejected the reasoning previously adopted by the House of Lords in *Director of Public Prosecutions v. Head*, [1959] A.C. 83, which the appellants relied on in this Court.

(b) Determining the Legislature's Intention as to the Appropriate Forum

41. In his treatise on administrative law (*Administrative Law* (3rd ed. 1996)), Professor David Mullan suggests that the validity of government acts can just as well be raised directly as collaterally. He wrote the following, *inter alia*, at p. 490:

> The essence of collateral attack is invalidity or an absence of jurisdiction. Decisions or orders made or actions taken without jurisdiction or in excess of jurisdiction are nullities which cannot be relied upon as a justification; they have no legally recognized existence.

42. Although this proposition is sound, as is usually the case in regulatory matters, it is far too general in scope to be applied in all circumstances. Taken literally, it would imply that a person to whom an order is directed is entirely free, rather than having recourse to the established procedures for challenging the order, to wait for penal

charges to be laid before challenging its validity. Such a solution would obviously have serious ramifications for both the government and society in general. Aside from the danger that administrative tribunals would be discredited, increasing recourse to penal sanctions would result. Rather than promoting co-operation and conciliation, which are among the basic objectives of such administrative mechanisms, this would result in a hardening of relations between governments and citizens. In many cases, this would seriously undermine the effectiveness of administrative schemes designed to respond to situations requiring immediate remedial action, as is often the case, for example, in environmental matters.

43. Nor should it be forgotten that the goal of many such administrative structures is to draw on expert knowledge by creating specialized tribunals. Permitting citizens to circumvent these tribunals and transfer the debate to the judicial arena could lead the courts to rule on matters that they are not best suited to decide. Due to the importance of administrative structures for the organization of the activities of a society such as ours, the scope of Professor Mullan's statement must, therefore, be tempered considerably, especially where a structure with a full appeal mechanism is involved.

44. These comments should in no way be interpreted as minimizing the importance of ensuring that the government exercises its powers within the limits prescribed by law or that appropriate remedies are available for citizens to assert their rights. However, they imply that one must show caution and judgment in order to take into account the legislator's intention as to the appropriate forum. In considering the importance of ensuring that the government stays within the limits fixed by law and the need to permit citizens affected by a government action to fully assert their rights, it is important not to isolate the penal process from the overall process established by the legislature. Based on commentators and case law, I am satisfied that the best way to

decide the question, taking both the integrity of the administrative process and the interests of litigants into account, is to focus the analysis on the legislature's intention.

45. Laskin J.A., writing for the Court of Appeal, proposed five factors to be considered in determining whether a court can rule on the validity of an administrative order collaterally attacked in penal proceedings: (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of collateral attack; and (5) the penalty on a conviction for failing to comply with the order.

46. Subject to the comments below on the fourth factor, this approach seems to me to be satisfactory, provided, however, that it reflects a general approach aimed at determining the legislature's intention as to the appropriate forum. From this perspective, the factors set out above are not independent and absolute criteria, but important clues, among others, for determining the legislature's intention. In doing this, it must, *inter alia*, be presumed that the legislature did not intend to deprive citizens affected by government actions of an adequate opportunity to raise the validity of the order. The interpretation process must, therefore, determine not whether a person can challenge the validity of an order that affects his or her rights, but whether the law prescribes a specific forum for doing so.

47. The basis for my reservation concerning the fourth factor is that the Court of Appeal, in answering the question as to the nature of the collateral attack, suggests that a distinction be drawn between invalidity for lack of jurisdiction *ab initio* and invalidity resulting from loss of jurisdiction, which is not open to a collateral attack. However, it is not clear that this distinction can always be drawn in practice, nor is it

clear how it really makes it possible to determine the legislature's intention as to the appropriate forum.

48. As regards the problems raised by the dichotomy between lack of jurisdiction and loss of jurisdiction, it must be recognized that the distinction between an order in respect of which an agent of the state lacks jurisdiction from the outset and an order that is so unreasonable as to result in a loss of jurisdiction, is not the easiest one to draw. Since *U.E.S., Local 298 v. Bibeault,* [1988] 2 S.C.R. 1048, the judgments of this Court have shown the clearest possible determination to avoid the problems connected with this type of distinction.

49. However, Laskin J.A.'s approach to the nature of the collateral attack has an even more fundamental flaw. The distinction he proposes implies an approach that focuses exclusively on the jurisdiction of the authority that issued the order and disregards any relationship between the kind of collateral attack and the jurisdiction or *raison d'être* of the appeal tribunal. The jurisdiction of the authority that issued the order is, of course, relevant to the case, since it is the subject of the attack. However, what this Court must do is determine the forum in which the attack should be made, assuming for discussion purposes that the order does in fact contain a jurisdictional defect. Where the legislature has established an administrative appeal tribunal, it must be asked whether it intended that tribunal to have jurisdiction, to the exclusion of a penal court, to determine the validity of the impugned order. For this purpose, the nature of the collateral attack is, of course, relevant to determine not whether it raises an excess or lack of jurisdiction on the part of the agent or official who issued the administrative order, but rather to determine whether the attack involves considerations that fall within the jurisdiction conferred by statute on the appeal tribunal. Where the appropriate forum must be determined, it is, indeed, the jurisdiction of the appeal tribunal that is at issue

rather than that of the Director, even though it is the Director's jurisdiction that is attacked.

50. Thus, where an attack on an order requires the consideration of factors that fall within the specific expertise of an administrative appeal tribunal, this is a strong indication that the legislature wanted that tribunal to decide the question rather than a court of penal jurisdiction. Conversely, where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal. This analysis must be conducted in light of the specific characteristics of each administrative scheme. An approach, such as the one suggested by the Court of Appeal, aimed at establishing a general rule relating to the nature of the attack does not recognize the importance that must be given to the legislature's intention.

51. I would, accordingly reformulate the fourth factor suggested by the Court of Appeal to take into account the nature of the collateral attack in light of the appeal tribunal's expertise and *raison d'être*.

(c) Conclusion

52. In summary, the question whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made and must be answered in light of the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. For this purpose, the five factors suggested by the Court of Appeal, as

reformulated here, constitute important clues for determining the legislature's intention as to the appropriate forum for raising the validity of an administrative order.

3. *Application of the Principles to the Case at Bar*

53. The purpose of the *Environmental Protection Act* is "to provide for the protection and conservation of the natural environment" (s. 2). It accordingly confers on the directors appointed by the Minister under the Act a certain number of powers of a considerable scope which are essentially preventive in nature. Thus, under s. 7, the Director is authorized to issue a stop order requiring the cessation of any activity resulting in the discharge of contaminants that constitute, or the level of which constitutes, a danger to human life or health. Furthermore, the construction or alteration of any plant, structure or apparatus that may discharge a contaminant into the environment, or any alteration of a process or rate of production entailing the discharge of contaminants into the environment, is subject to prior approval by the Director by means of a certificate (s. 8). Finally, s. 17 authorizes the Director to order the owner of, or person who controls, an undertaking or property to take steps to prevent or reduce the risk of environmental contamination. These are clearly broad powers that are, where ss. 7 and 17 are concerned, subject only to the condition that the Director base such a decision on reasonable and probable grounds that there is a risk of contamination based on the definition of the word "contaminant" in s. 1 of the Act.

54. The very fact that the Act gives the Director a certain number of powers of a preventive nature, including those set out in s. 17, which are at issue here, is a clear indication that the purpose of the Act is not just to remedy environmental contamination, but also to prevent it. This purpose must, therefore, be borne in mind in interpreting the scheme and procedures established by the Act.

55. It is true that the Act also has a remedial dimension. Thus, it confers on the Minister a power, now exercised by the Director under the present s. 17 (R.S.O. 1990, c. E.19), to order repairs where a contaminant is emitted or discharged into the environment (s. 16). This power to order repairs, like the fact that s. 143 authorizes the government, as it did in the case at bar, to take any necessary action to protect the environment and bring proceedings to recover any amounts disbursed, cannot be read as reducing the importance of the Act's preventive purpose. On the contrary, it is my view that s. 143 shows the concern of the legislature with giving the government the tools needed to guarantee prompt compliance with orders issued under the Act, since a person to whom an order is directed could be required to bear the cost of any steps he or she neglects or refuses to take.

56. However, a person affected by a decision of the Director is not without recourse under the Act. On the contrary, ss. 120 *et seq.* of the Act provide for the creation of an Environmental Appeal Board, whose sole function is to hear appeals from decisions of the Director. In particular, s. 122 authorizes a person to whom an order is directed to appeal to the Board within 15 days after service of the order. Sitting as a panel of three, the Board has full power to review the Director's decision and take any action it deems necessary and may substitute its own opinion for that of the Director (s. 123). It is, therefore, a *de novo* process whose purpose is to permit the Director's decision to be reviewed in light of submissions by the affected party. Furthermore, should this party not be satisfied with the outcome, he or she has a right of appeal to the Divisional Court on a question of law, and a right of appeal to the Minister on any other matter.

57. In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection.

58. Finally, the Act establishes a penal remedy for failing to comply with an order issued by the Director (s. 146(1a)). The question in the case at bar is whether a person who has not challenged an order through the Board's appeal process may, once charged, raise the validity of the order by way of defence.

59. Since the legislation does not give an express answer to this question, it is necessary to look for a solution that appears most consistent with the legislature's intention. It is clear from a review of the *Environmental Protection Act* that its purpose is not simply to repair damage to the environment resulting from human activity, even if we assume that repairs will always be possible, but primarily to prevent contamination of the province's environment. Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible. As Kurisko J. stated in this case (at p. 341):

> It is vital that enforcement of the director's orders under s. 17 be addressed speedily, expertly and effectively while at the same time respecting the private rights and interests of the individuals to whom such orders apply. This has been achieved by the enactment of the three-tier appeal structure set out in s. 123.

60. In the case at bar, the appellants elected to disregard not only the order, but also the appeal mechanism, preferring to wait until charges had been laid before asserting their position. Eleven years later, these proceedings are still in progress, and the appellants are still arguing that the order ought never to have been issued. It seems clear to me that the Board could have dealt with this entire matter more rapidly and more sensibly. The appellants' attitude forced the government to undertake the necessary measures to prevent a PCB spill. While the Act does contemplate such course of action, it cannot be said to encourage it. I agree with Laskin J.A. of the Ontario Court of Appeal that to permit the appellants to collaterally attack the order at the stage of penal proceedings would encourage conduct contrary to the Act's objectives and would tend to undermine its effectiveness.

61. Furthermore, in this connection, the appellants cannot raise their right to make full answer and defence without showing that the Act is deficient in this respect or that the government's actions had the effect, in practice, of depriving them of this right. Yet, there is no indication that the Act's appeal process was inadequate or that the Board was powerless to remedy the deficiency that they now raise against the order.

62. This leads me to the factor regarding the nature of collateral attack, which I discussed above. At trial, the appellants sought to show that the order was invalid because it could not be based on reasonable and probable grounds to believe, as required by s. 17, that there was a danger of environmental contamination. In accepting this submission, the trial judge reviewed the expert evidence on the dangers of PCBs and on

the best way to prevent those dangers. On the basis of this evidence, he found that the order to construct a storage area for the transformers was unfounded, as was the order to clean the concrete surfaces stained with contaminated oil. In his opinion, the cleaning and chipping could cause the release of contaminated particles and would therefore constitute a more serious environmental risk. However, in my view, there is no doubt that this is the very type of question the Board was established to answer. As mentioned above, whether the issue is lack of jurisdiction *ab initio* or loss of jurisdiction is irrelevant. What is important is on whom the legislature intended to confer jurisdiction to hear and determine the question raised. In the case at bar, the answer to this question is not in doubt. The legislature set up a specialized tribunal to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated. I do not see how a penal court could be permitted to answer such questions in lieu of the Environmental Appeal Board, which was established precisely for this purpose, without undermining the scheme set up by the Act.

63. All that remains to be considered is the final factor suggested by Laskin J.A.: the penal consequences for the accused. Here, the Act provides for a fine of not more than $5,000 for an individual and of not more than $25,000 for a corporation. This maximum amount for a first offence is doubled in the event of a subsequent offence. Although these amounts are not insignificant, no minimum fine is prescribed and imprisonment is not an option, at least as a direct sanction for violating the *Environmental Protection Act*. However harsh these measures might be considered to be, they are not sufficient to justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction.

64. In concluding, I cannot refrain from pointing out that the appellants, by systematically refusing to co-operate with the Ministry of the Environment and to participate in any dialogue, have shown an inflexible attitude for which they must now bear the consequences. Such an attitude serves neither the interests of society in environmental protection nor the interests of those who are subject to administrative orders. While penal sanctions will, perhaps, always be a necessary component of any regulatory scheme, they must not become the principal or a customary instrument for relations between the government and its citizens.

VI. Disposition

65. Considering the purpose of the *Environmental Protection Act* and the procedural mechanisms established to guarantee that a person to whom an order is directed can assert his or her rights, I conclude that persons charged with failing to comply with an order issued under the Act cannot attack the validity of the order by way of defence after failing to avail themselves of the appeal mechanisms available under the Act. The trial judge accordingly lacked jurisdiction to rule on the validity of the order.

66. For these reasons, I would uphold the Court of Appeal's decision and dismiss the appeal.

*Appeal dismissed.*

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