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Jurisdictional Matters Concerning Environmental Protection Orders Under the *Environmental Protection and Enhancement Act*

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Case Commented On: *Director (EAP) v Alberta (Provincial Court)*, 2017 ABQB 3 (CanLII)

During April and May of 2010 a significant gasoline spill occurred at a gas station located at 6336 Bowness Road in Calgary. The underground petroleum plume spread to adjacent properties, and in December 2010 the Director of Alberta Environment issued a remediation order under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*). The site is now an empty lot, and while remediation activities have been conducted there is disagreement on whether the property is fully cleaned up. Metaphorically speaking, this petroleum plume also spread to the Alberta legal system. A preliminary search in preparation for writing this comment revealed no less than 10 decisions concerning the spill: (1) the Director's December 2010 remediation order; (2) a December 2011 decision by the Alberta Environmental Appeals Board concerning an appeal of the December 2010 remediation order (*Gas Plus Inc and Handel Transport v Director (Alberta Environment), Appeals* No 10-034, 11-002, 008 & 023R; (3) a revised remediation order issued in January 2012 incorporating the Board's recommendations; (4) an Order of the Court of Queen's Bench issued in December 2012 concerning the January 2012 revised remediation order; (5) 2 interlocutory decisions by the Court of Queen's Bench in relation to civil proceedings concerning the spill (*Floate v Gas Plus*, 2015 ABQB 545 (CanLII) and *Floate v Gas Plus*, 2015 ABQB 725 (CanLII)); (6) a decision by the Calgary Development Authority to deny a permit to construct a new gas station on the site and a March 2015 decision by the Calgary Subdivision and Development Appeal Board dismissing an appeal of the development decision (*Re SDAB2014-0146*, 2014 CGYSDAB 146 (CanLII)); and (7) a decision issued in January 2017 by the Honourable Mr Justice P.R. Jeffrey quashing a mediation order issued by the Honourable Judge H.A. Lamoureux in relation to the dispute over remediation. This comment examines this most recent decision by Justice Jeffrey in *Director (EAP) v Alberta (Provincial Court)*, 2017 ABQB 3 (CanLII), which addresses jurisdictional matters concerning environmental protection orders under *EPEA* and the inherent authority of the court.

Background

The subject property had been the location of a gas station since the mid-1960s in the community of Bowness. Municipal planning at the time was such that gas stations and residential properties could be located next to each other. Shell owned and operated the station until the late 1990s when it was sold and became a Gas Plus station. In many respects, this is a cautionary tale about living next to a gas station.

In August 2010 Alberta Environment was contacted by the Calgary Fire Department who had responded to a gasoline odour complaint from residents adjacent to the gas station. A subsequent investigation revealed gasoline in groundwater monitoring wells on the property, and it was

determined that gasoline had been leaking since as early as April 2010. Air and water samples taken from adjacent properties between August and November 2010 revealed benzene, toluene, xylene and other toxic substances at levels far in excess of acceptable exposure levels established by provincial and federal regulations. Alberta Health Services advised nearby residents to vacate their home.

Section 112 of *EPEA* imposes a statutory obligation on Gas Plus (as the operator of the gas station) and Handel Transport (as the owner of the property) (collectively the "Respondents") to remediate the gasoline spill. The Director of Alberta Environment issued an Environmental Protection Order in December 2010 under section 113 of *EPEA* ordering the Respondents to remediate all of the contamination. The Respondents filed an appeal of the December 2010 Environmental Protection Order with the Alberta Environmental Appeals Board (the "Board") objecting to the remediation methods and timelines required in the Order. A primary point of contention at the time was whether excavation of contaminated soils was necessary for remediation or whether in-situ bioremediation would suffice.

The Board heard the appeal in November 2011, allowing interventions from affected residents, the City of Calgary, and Alberta Health Services. The Board noted that the Respondents had been reluctant to take necessary steps to remediate in a timely manner, and found that excavation would be needed to remove and dispose of the contaminated soils and groundwater. The Board ultimately recommended some variations to the Environmental Protection Order, and a copy of the revised Order as approved by the Minister in January 2012 is attached to the Board's decision in *Gas Plus Inc and Handel Transport v Director (Alberta Environment), Appeals* No 10-034, 11-002, 008 & 023R. My description of facts set out above is taken from the preamble to this revised Order.

The buildings on the site were removed sometime in 2011, and excavation presumably began sometime in 2012. A containing wall was constructed into the bedrock to prevent further delineation of the petroleum plume. The Respondents later applied to the City of Calgary for approval to develop a new gas station on the property, and that application was denied. In March 2015 the Subdivision and Development Appeal Board affirmed the City's decision not to issue a development permit in *Re SDAB2014-0146*, 2014 CGYSDAB 146 (CanLII).

The current state of proceedings indicates that the Director of Alberta Environment and the Respondents disagree on whether remediation of the site is complete. Section 117 of *EPEA* provides the Director with discretionary power to certify the completion of remediation work, and until such time the Environmental Protection Order issued in January 2012 remains in effect. *EPEA* also provides the Director and the Minister with additional powers to enforce provisions of the Order. These powers include (1) the Director may impose recordkeeping, reporting and auditing requirements on the person responsible for the cleanup (s 241); (2) the Minister may apply to the Court of Queen's Bench for a compliance order (s 244); and (3) the Director may carry out the remediation work and recover the costs of such work from the person responsible under the Environmental Protection Order (s 245). It is the exercise of this latter power by the Director that brings us to the decision of Justice Jeffrey in *Director (EAP) v Alberta (Provincial Court)* (hereinafter *Handel Transport*).

The Director is of the opinion that the Respondents have not completed the remediation work required by the Environmental Protection Order, and in November 2015 the Director applied to the Provincial Court for an order authorizing access to the property to complete the remediation. Section 250(5) of *EPEA* authorizes a judge of the Provincial Court to issue an order authorizing

access to property for the purpose of carrying out remediation work. And section 250(6) requires the Director to make the access application. Why *EPEA* directs this application to the Provincial Court rather than Justice Chambers at Queen's Bench is a mystery to me given how the legislation otherwise structures the power to enforce environmental protection orders. But then again, I have come to realize that there are lots of mysteries underlying how provisions in *EPEA* came to be in the early 1990s – but that is for another day. The Director indicated this is likely the first application of section 250(5) (*Handel Transport* at para 30).

The Respondents opposed the access application and cross applied for an order requiring the parties to submit to mediation. The Director and the Respondents appeared before Judge Lamoureux to address whether the Provincial Court could order the parties into mediation. On February 10, 2016 Judge Lamoureux concluded she had inherent authority to assist the parties in dispute resolution and thus ordered mediation to facilitate the development of a remediation protocol for the property. The Director filed for judicial review, asserting that Judge Lamoureux exceeded her jurisdiction in issuing the mediation order. The Respondents countered that judicial review was not available here, and that the mediation order was properly subject to appeal instead (see generally *Handel Transport* at paras 2 – 10).

Justice Jeffrey proceeds with judicial review and quashes the mediation order on the ground that Judge Lamoureux exceeded her jurisdiction in issuing the order. His decision addresses three legal points: (1) the relationship between statutory appeal and judicial review; (2) the standard of review; and (3) the inherent authority of the court. What follows is a summary of Justice Jeffrey's findings on each of these points along with my commentary.

Statutory Appeal and Judicial Review

Justice Jeffrey begins his analysis by observing the Provincial Court is a creature of statute and the principle that all statutory avenues for appeal must be exhausted before judicial review is available to challenge the decision of a statutory tribunal (*Handel Transport* at para 13). This principle is harder to apply in practice than it appears. A notable difficulty arises when the statutory appeal is to the court, requires leave of the court, and leave is not granted to a prospective appellant. Is judicial review still available to the prospective appellant in that circumstance? And this is complicated further when the statutory appeal is directed to the Court of Appeal, and the judicial review application goes to the Court of Queen's Bench under the *Alberta Rules of Court*, Alta Reg 124/2010. The jurisprudence is somewhat scattered here, but seems to have rested on the principle that judicial review is always potentially available - albeit only in extraordinary circumstances where there is also a statutory appeal.

Justice Jeffrey doesn't need to delve far on this here because he finds there is no operative conflict between a statutory appeal and judicial review in this case. Section 46 of the *Provincial Court Act*, RSA 2000 c P-31 provides for an appeal of a decision by the Provincial Court to the Court of Queen's Bench. Justice Jeffrey rules section 46 only applies to decisions on civil claims heard by the Provincial Court, and that the access application under *EPEA* and Judge Lamoureux's mediation order are not properly construed as a civil claim and thus there is no "decision of the Provincial Court" to appeal (*Handel Transport* at para 16). In light of the background set out above which led to the access application and given that there was no civil claim issued under section 25 of the *Provincial Court Act*, Justice Jeffrey's ruling on this point seems to be on solid footing. Justice Jeffrey also observes that the Director appeared before him to challenge the *jurisdiction* of Judge Lamoureux and not the merits of her decision per se – and

to seek *certiorari* as a remedy – which is comfortable territory for judicial review (*Handel Transport* at para 20), or so it seems.

Questions of Jurisdiction and the Standard of Review

Proceeding on the basis of judicial review, Justice Jeffrey then considers the applicable standard to review Judge Lamoureux's assertion of jurisdiction to order mediation – what Justice Jeffrey labels the Jurisdictional Question. Justice Jeffrey concludes the standard of review is correctness; in other words, no deference is owed to Judge Lamoureux's decision to issue the mediation order.

Now some readers familiar with our recent history in administrative law may recognize Justice Jeffrey's framing here as reminiscent of the old preliminary question doctrine ousted by the Supreme Court of Canada several decades ago. This doctrine of jurisdiction enabled reviewing courts to intrusively examine a tribunal decision by first questioning the authority of the tribunal to engage in the matter. A reviewing justice could look past the merits of the statutory decision – which might otherwise be entitled to deference – and simply focus on the enabling provisions to decide whether the tribunal exceeded its jurisdiction in making the decision. One can see this line of reasoning from Justice Jeffrey when he observes that the *EPEA* section 250 access application is squarely within the authority of the Provincial Court, but that "[t]he Jurisdictional Question here arises predominately from the PCJ's interpretation of her home statute." (*Handel Transport* at para 30)

Justice Jeffrey's standard of review analysis lies a bit on the fringes of the modern doctrine of administrative law which long ago ousted the use of jurisdiction in this way to intrusively engage in judicial review, and it is also an outlier for applying the jurisdictional exception to the presumption of deference established by the Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 (CanLII) and recently re-articulated by the Supreme Court in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd* 2016 SCC 47 (CanLII). Justice Jeffrey finds the Jurisdictional Question is a true question of jurisdiction (*Handel Transport* at paras 35 – 37), and thus is an exception to the presumption of deference in judicial review, leading to review on the standard of correctness. In doing so, however, Justice Jeffrey acknowledges some members of the Supreme Court have questioned whether there can be a true question of jurisdiction anymore. It would be somewhat ironic if the true question of jurisdiction only survives in relation to judicial review amongst superior and inferior courts, and not between superior courts and administrative tribunals.

While Justice Jeffrey is working at the boundaries of modern standard of review jurisprudence in Canada, I think he properly applies the true question of jurisdiction exception to deference in this case. I agree with the view that judicial review should still be available on the basis of a jurisdictional error, and this case provides a good illustration of how to apply it. Section 250 of *EPEA* provides for an application by the Director for an access order and provides the Provincial Court with the discretionary power to issue the order. Nowhere does *EPEA* or the *Provincial Court Act* provide for authority to order mediation in this case, and section 65 of the *Provincial Court Act* expressly provides for mediation only in the context of a civil claim. In light of these provisions, I think it was proper for Justice Jeffrey to frame this case as one where Judge Lamoureux had to first determine whether there was authority to order the Director and the Respondents into mediation concerning remediation, and thus the impugned decision is one which engages on a true question of jurisdiction.

Inherent Authority of the Superior Courts

This leads us to the third point in Justice Jeffrey's decision, and that is the matter of inherent authority in the courts. No doubt the Director reminded Judge Lamoureux that *EPEA* and the *Provincial Court Act* do not expressly provide for authority to issue the mediation order in this case; thus Judge Lamoureux relied on section 8 of the *Provincial Court Act*, rules 1.2 and 1.3 of the Alberta *Rules of Court* and an inherent authority to make an order to encourage the parties to resolve their dispute (*Handel Transport* at para 7).

The inherent authority of the courts is a pervasive and powerful principle in law, yet it eludes delineation (perhaps an unsurprising revelation). Much like the concept of inherent value in morality, there is really no definitive articulation of its source and most justifications are circular. Just as humans are understood to have inherent moral value because they are human and inherent value is an essential aspect of being human; the court is understood to have inherent authority because it is a court of law and inherent authority is an essential aspect of being a court of law.

The seminal literature on inherent authority is thought to be I.H. Jacobs, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23. Jacobs attempts to sketch the nature and basis of the inherent authority in the court, and makes the following 3 points which are important to this comment:

- The inherent authority of the court is just one aspect of the court's jurisdiction and exists apart from any written codification;
- Inherent authority lies with the superior courts; and
- Inherent authority is almost entirely concerned with procedural matters before the court – regulating process, punishing abuse of process, and compelling the observance of process – but also includes the power to punish for contempt.

As an illustration perhaps, the potential for judicial review at the Court of Queen's Bench in the face of a statutory appeal, as discussed above, exists because of the inherent authority of the court to decide what applications it will hear. A legislature cannot completely remove the ability of a superior court to entertain an application for judicial review.

Justice Jeffrey begins his analysis on this point by noting authorities which confirm the Provincial Court, as an inferior court, has no inherent authority and thus must source its power in legislation (at paras 40-41). Justice Jeffrey observes that the *Rules of Court* themselves do not confer inherent authority on any court (at para 44); this observation is consistent with the received view that the powers conferred on Alberta courts by the *Judicature Act*, RSA 2000 c J-2 and the *Rules of Court* supplement, or are in addition to, the inherent authority of the Court. Finally, Justice Jeffrey observes that the mediation order has a substantive goal – the development of a remediation protocol by a panel of experts other than the Director of Alberta Environment. Justice Jeffrey notes that *EPEA* provides the Director of Alberta Environment with the exclusive authority to impose remediation terms on the Respondents, and thus the mediation order is an unlawful encroachment on this statutory power or collateral attack on the existing Environmental Protection Order (at paras 54-58). Justice Jeffrey also notes that even the inherent authority of the Court of Queen's Bench does not provide for a substantive rewrite of the Environmental Protection Order (at para 56).

Based on this analysis, Justice Jeffrey quashed the mediation order issued by Judge Lamoureux on the basis that it was issued without jurisdiction.

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