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**** HIGHLIGHTS ****

- * A Justice of the Manitoba Court of Queen's Bench has held that one cannot bring an action for damages to challenge the validity of clean-up and remediation orders made under the Manitoba Dangerous Goods Handling & Transportation Act, without first appealing to the Minister of Conservation under the Act. A damage action by an Ontario grain farmer who alleged three orders to destroy 6 bins of grain which the farmer believed had not been contaminated, but which the Director believed had been exposed to fuel or gasoline, was dismissed as an abuse of process. (*Michaud v. Manitoba*, [CALN/2011-008](#), [\[2011\] M.J. No. 60](#), Manitoba Court of Queen's Bench)

**** NEW CASE LAW ****

Michaud v. Manitoba; [CALN/2011-008](#), Full text: [\[2011\] M.J. No. 60](#); [2011 MBQB 34](#), Manitoba Court of Queen's Bench, L.T. Spivak J., February 23, 2011.

Administrative Law -- Provincial Agencies -- Ministerial Appeal -- Collateral Attack.

The Plaintiff, Raymond Michaud ("Michaud") brought an action against the Government of Manitoba (the "Province") for the value of 6 bins of Michaud's grain, which had been destroyed at the direction of the Director appointed under the Dangerous Goods Handling & Transportation Act, [C.C.S.M. c. D12](#) (the "Act").

The Province filed a motion to strike Michaud's action as being an abuse of process because Michaud had not availed himself of the appeal procedure under the Act to the Minister of Conservation, with respect to the orders made by the Director.

Michaud also sought declarations that the orders were made without jurisdiction.

Following a fire which occurred on Michaud's farm, an environmental officer with the Department of Conservation attended the farm and observed that the grain silos situated on the land contained combustible fuels. The Director issued a clean-up order requiring

Michaud to destroy or decontaminate the grain contained in the grain bins. Michaud was in hospital and advised the Director that he was unable to conduct the clean up but understood that it would be arranged by Director. The grain was removed and destroyed.

Following the clean up order the Director determined that Michaud's land, including the soil and ground-water, had also been contaminated and issued a remedial order requiring the Plaintiff to conduct an environmental investigation within 30 days. Michaud did not comply and the remedial work was performed by the Director.

The Director then issued a cost order requiring the Plaintiff to pay \$24,699.46 for the expenses incurred in carrying out both the clean-up and remedial orders. The Plaintiff only appealed the cost order to the Minister of Conservation.

Section 13(c) authorized the Director to issue clean-up orders. Section 16(1) of the Act authorized the Director to issue remedial orders. Section 25 of the Act provides that a person aggrieved by an order issued by the Director, could appeal to the Minister of Conservation within 30 days. Section 26(1)(c) provided that the Minister's decision is final. This section provides:

"Where an appeal is made to the minister under section 25, the minister on such considerations as he deems advisable, may, .

- (c) where the appeal is against an order, decision, instruction or directive, vary the order, decision, instruction or directive; .

and the decision of the minister, subject to section 27, is final and not subject to any further appeal."

Michaud's position was that the Province destroyed grain that was marketable, and that the orders fell outside of the jurisdiction granted to the Director under the Act, which is limited to crops which have been "exposed to dangerous goods or contaminants". Michaud also argued that even if the Director had jurisdiction to grant the clean-up order, the orders were unreasonably implemented as the grain did not all have to be destroyed.

Decision: Spivak, J. granted the Province's application and struck Michaud's claim on the grounds that it constituted an abuse of process [at para. 28].

Spivak, J. relied on the decision of *Toronto (City) v. Canadian Union of Public Employee (C.U.P.E.), Local 29*, [2003 SCC 63](#), [\[2003\] 3 S.C.R. 77](#), in which the Supreme Court held that prohibited collateral attacks on the decision of an administrative tribunal, by way of initiating civil proceedings, are a particular application of the doctrine of abuse of process [para. 11]. Spivak, J. observed that the doctrine of collateral attack will prevent a party from undermining previous orders issued by an administrative tribunal, and is invoked where a party does not use the available statutory procedures to review an administrative order [para 11].

Spivak, J. held at para. 20 and 21:

[20] I think this action is an impermissible collateral attack on the Director's orders and an abuse of process.

[21] The Act establishes a specific appeal process - a procedure to resolve disputes that might arise between the director and persons to whom an order is directed. That appeal is to the Minister of Conservation who has particular expertise.

Spivak, J. held that declaratory relief should not be granted until all administrative avenues had been exhausted, relying on *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.) [para. 27].

[Editor's Note: This decision may be difficult to distinguish from the recent decisions of the Supreme Court of Canada in *Parrish & Heimbecker Ltd. v. Canada*, in which the Court overruled a number of previous decisions from the Federal Courts, which had held that plaintiffs must seek judicial review under the Federal Court Act before commencing damage actions against Federal administrative authorities based on the allegation that orders issued by them were made without jurisdiction. The Supreme Court rejected the "collateral attack" argument insofar as it related to the alleged prerequisite of a preliminary application for judicial review. Perhaps one could argue that there is a difference between an application for judicial review and an administrative appeal of the nature referred to in this case.]

**** CREDITS ****

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